NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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1. Resigned his commission as an Emergency Recall Judge for the Court of Appeals effective in January 2011.

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CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

GENERAL STATUTES CITED

UNITED STATES CONSTITUTION CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF EVIDENCE CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CAROLINA FOREST ASSOCIATION, INC., PLAINTIFF v. HOWARD WHITE AND WIFE, JUDITH WHITE, DEFENDANTS

No. COA08-1445

(Filed 7 July 2009)

1. Appeal and Error— appellate rules violations—dismissal not necessitated

A *pro se* appeal was not dismissed for appellate rules violations, even though it satisfied the *Dogwood* criteria for dismissal, where the fundamental principle of *Dogwood* did not necessitate dismissal.

2. Rules of Civil Procedure— Rule 41—two dismissal rule—no motion on that basis

It could not be concluded that plaintiff's complaint should have been dismissed under N.C.G.S. § 1A-1, Rule 41(a)(1) where there was the possibility of a "two dismissal" issue but there was also no indication that the *pro se* defendants made a dismissal motion predicated on that basis and in the absence of relevant material from the record.

3. Venue— motion to change denied—actions in two counties

The trial court did not err by denying defendants' motion for a change of venue from Mecklenburg County to Montgomery County, where a related action was pending, where the *pro se* defendants (who were retired and spent time in both places) did not explicitly deny that they were residents of Mecklenburg County, and did not offer contentions that would support a

change of venue for the convenience of the parties and witnesses or because they could not obtain a fair and impartial trial in the county where the action was pending.

4. Trials— continuance denied—no proper motion—good cause not shown

The trial court did not err by not continuing a trial where defendants did not make a proper request for a continuance and did not show good cause for the continuance.

5. Trials— request for jury trial—related action immaterial

The trial court did not err by denying defendants' request for a jury trial where defendants did not appear for trial in Mecklenburg County and did not make a proper demand for a jury trial in Mecklenburg County. The Mecklenburg County action is a new proceeding rather than a continuation of previous Montgomery County proceedings, so that the previous ruling in Montgomery County denying plaintiff's request for summary judgment has no bearing.

6. Civil Procedure— motion for new trial denied—not timely—sufficient grounds not stated

Defendants were not entitled to a new trial where they did not file a timely motion for a new trial, advance any of the statutory grounds for a new trial, or otherwise establish adequate grounds for appellate relief.

Judge STROUD dissenting.

Appeal by Defendants from judgment entered 30 September 2008 by Judge Hugh B. Campbell in Mecklenburg County District Court. Heard in the Court of Appeals 6 May 2009.

Katherine Freeman, and The Olsen Law Offices, by John Olsen, for Plaintiff.

Howard Ray White and Judith White, for Defendants, pro se.

ERVIN, Judge.

Howard White and his wife, Judith White (Defendants), appeal from a judgment entered 30 September 2008 providing that Carolina Forest Association, Inc. (Plaintiff), have and recover from Defendants the principal sum of $9,934.50; "[p]re-judgment interest at the rate of 8% per annum from March 1, 2008 to today;" "[p]ost-

judgment interest at the rate for [j]udgments from today;" and "[t]he costs of this action." After careful consideration of Defendants' arguments, we decline to disturb the trial court's judgment.

Plaintiff is an association of property owners in Carolina Forest, a community located near Lake Tillery in Montgomery County, North Carolina. As is typical of many property owners associations (POAs), Plaintiff has responsibility for maintaining the roads and common areas within Carolina Forest. According to Defendants, Carolina Forest was initially developed in 1970 and contains approximately 900 lots designated for conventional houses. Since 1970, houses have been built on approximately 70 lake-front lots and approximately 70 interior lots. Approximately 760 lots in Carolina Forest have yet to be build upon.

Defendants contend that Plaintiff's contract to provide amenities and road maintenance expired in 1990. Since that time, Plaintiff has operated under the terms of an implied contract. Under the fee arrangement which Plaintiff currently attempts to enforce, vacant lot owners are charged 30 percent less than the owners of lots upon which houses have been constructed. Defendants contend that a high percentage of the fees collected by Plaintiff benefit the owners with lots upon which houses have been built even though the owners of such lots represent a small minority of the overall body of property owners. Defendants' objections to this perceived inequity eventually resulted in the present litigation.

Defendants own five vacant lots and one lake-front lot in Carolina Forest. Defendants have built a house on their lake-front lot. Defendants have disputed the fairness of the POA fees assessed by Plaintiff since 2003 and have attempted to negotiate the payment of a full fee for their lake-front lot and a fee based on the cost of road maintenance and other select items for their vacant lots. Plaintiff has declined to accept Defendants' bifurcated fee proposal, so Defendants have declined to pay their POA fees.

On 25 March 2004, Plaintiff filed a complaint in File No. 04 CVD 168 against Defendants in the District Court of Montgomery County seeking the entry of a judgment in the amount of Defendant's unpaid POA fees. In its complaint, Plaintiff alleged that Plaintiff was "charged with the responsibility of budgeting sufficient funds for maintaining the roads, common areas, and recreational facilities and to determine dues and assessments per lot to apportion these expenses among the several property owners of Carolina Forest[.]"

Plaintiff alleged that Defendants owed $1,336.00 in dues and assessments as of 31 December 2003. The record does not disclose why Montgomery County File No. 04 CVD 168 was apparently not resolved on the merits.

On 14 March 2006, Plaintiff filed a second complaint in File No. 06 CVD 153 in the District Court of Montgomery County alleging that, as of 2 June 2005, Defendants owed $3,809.00 in unpaid dues and assessments. In their response to the complaint filed in Montgomery Country File No. 06 CVD 153, Defendants alleged that "Plaintiff has acted in bad faith toward Carolina Forest property owners and [has] not complied in good faith with either the North Carolina Planned Community Act or other laws pertaining to implied contracts." Defendants also claimed that owners of undeveloped lots in Carolina Forest are "gravely mistreated" and receive "no services in return for about 75 percent of the money paid . . . for each undeveloped lot[.]" Defendants requested the court to "instruct Plaintiff to reconstruct the spending plan for Carolina Forest so that spending beneficial to owners of undeveloped lots is in proportion to the dues collected from them[.]"

On 17 August 2006, Plaintiff filed a motion for summary judgment in Montgomery County File No. 06 CVD 153. In seeking summary judgment, Plaintiff relied upon the trial court's decision in Montgomery County File No. 98 CVS 106. In that case, the trial court entered an order requiring several property owners in Carolina Forest to pay various sums to Plaintiff on the basis of a conclusion that there was an implied contract between the POA and the property owners. In addition, Plaintiff cited the decision of this Court in *Miles v. Carolina Forest Ass'n*, 167 N.C. App. 28, 604 S.E.2d 327 (2004), which upheld the trial court's ruling in Montgomery County File No. 98 CVS 106 on the basis that there was a contract implied in fact between the parties and that there was no dispute about the value of the services provided by Plaintiff to the property owners before the Court in that case. Defendants responded to Plaintiff's motion by arguing that "Defendants' unique situation sets them apart from the issues decided in *Miles*" because Defendants owned five lots and the owners in *Miles* only owned single lots.

On 28 September 2006, the trial court entered an order denying Plaintiff's motion for summary judgment, stating that, "while an implied contract exists," there was "a genuine issue of material fact as to the terms and conditions of said contract and the amount which

may be owed to Plaintiff pursuant to said implied contract[.]" As a result, the court concluded that the issues between the parties in Montgomery County File No. 06 CVD 153 should be heard and decided before a properly-selected jury. On 26 October 2007, Plaintiff voluntarily dismissed its complaint against Defendants in Montgomery County File No. 06 CVD 153 without prejudice.

On 23 January 2008, Plaintiff filed a complaint against Defendants in File No. 08 CVD 1498 in the District Court of Mecklenburg County alleging that Defendants owed $7,422.00, plus the amount of assessments for 2008 and interest at 8% from and after 1 June 2007 due to Defendants' breach of an implied contract between the parties. Plaintiff also alleged, in the alternative, that Defendants owed the foregoing amount based on either *quantum meruit* and unjust enrichment grounds or on the basis of North Carolina's Planned Community Act, which has been codified at N.C. Gen. Stat. § 47F-1-101, *et seq.*

On 14 February 2008, Defendants responded by stating that "Defendants were surprised and mystified as they were handed a Civil Summons by [a] Mecklenburg County deputy . . . because the subject summons concerned litigation that rightfully belongs in Montgomery County District Court, where it has been in progress for the past four years." Defendants argued that the District Court of Mecklenburg County did not have "jurisdiction over the parties" and denied the validity of Plaintiff's claims under the doctrines of implied contract, *quantum meruit* and unjust enrichment, and under the North Carolina Planned Community Act. On 10 March 2008, Defendants filed a motion for change of venue seeking to have "Mecklenburg case 08 [CVD] 1498 . . . dismissed and Plaintiff . . . directed to litigate its dispute with Defendants in Montgomery County as a continuation of Montgomery case 06-CvD-153."

On 8 September 2008, Plaintiff filed a summary judgment motion Plaintiff's summary judgment motion was scheduled for hearing on 15 September 2008. At the call of the calendar on that day, Defendants were instructed to return at 2:00 p.m. on 18 September 2008, at which time a bench trial was scheduled to commence. The trial court also denied Defendants' motion for change of venue on 8 September 2008. According to their brief, Defendants subsequently telephoned the office of the Clerk of Superior Court of Mecklenburg County and stated that they could not attend the trial because they were required to attend a scheduled business meeting.

On 1 October 2008, the trial court entered a judgment against Defendants. After noting that "Defendants failed to appear," the trial court concluded that there was an implied contract between the parties and that Defendants' failure to pay $9,934.50 constituted a breach of that implied agreement. As a result, the trial court entered a judgment ordering Defendants to pay $9,934.50, plus pre-judgment and post-judgment interest, and the costs.

On 13 October 2008, Defendants filed notice of appeal, disputing the court's order in its entirety, including its "denial" of Defendants' claimed right to trial by jury. Defendants argued that they had proven the existence of a genuine issue of material fact in Montgomery County File No. 06 CVD 153 and were, for that reason, entitled to a trial by jury. On 9 March 2009, Plaintiff filed a motion seeking the dismissal of Defendants' appeal and the imposition of sanctions.

Motion to Dismiss Appeal and for Sanctions

[1] We first address Plaintiff's motion to dismiss Defendants' appeal and for sanctions. At a minimum, we agree with Plaintiff that Defendants' numerous violations of the Rules of Appellate Procedure, including important omissions from the record on appeal and apparent failures to respect Plaintiff's procedural rights, make Defendants' arguments very difficult to evaluate.[1] However, we dismiss appeals "only in the most egregious instances of nonjurisdictional default[.]" *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366 (2008) (citation omitted); *see also* 5 Am. Jur. 2d Appellate Review § 804, at 540 (2007) (stating that "it is preferred that an appellate court address the merits of an appeal whenever possible" and further, that "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal"). Although Defendants' appeal satisfies *Dogwood's* criteria for dismissal, we believe the fundamental principle of *Dogwood*, to "promote public confidence in the administration of justice in our appellate courts[,]" does not necessi-

1. Among the serious violations of the Rules of Appellate Procedure committed by Defendants are the following: Defendants did not properly preserve their objections at trial in violation of N.C.R. App. P. 10(b)(1). Defendants did not properly serve the proposed record on appeal, settle the record on appeal, or file and serve the record on appeal in violation of N.C.R. App. P. 11 and 12. In addition, Defendants' notice of appeal contained six pages of argument on the merits of the underlying case in violation of N.C.R. App. P. 3(d). Finally, Defendants' assignments of error do not comply with N.C.R. App. P. 10(c)(1) because they do not contain any specific record or transcript references. As a result of the seriousness of these rule violations, Defendants' appeal is certainly subject to dismissal pursuant to N.C.R. App. P. 25(b).

tate dismissal in the instant case. We will attempt to evaluate the merits given Defendants' vigorously-stated contentions that they have not received fair treatment in accordance with North Carolina law.

After careful study of the record and Defendants' brief, we can discern four possible issues in this appeal: (1) whether the trial court erred by denying Defendants' motion for a change of venue; (2) whether the trial court erred by refusing to continue the trial; (3) whether the trial court erred by failing to grant Defendants' request for a trial by jury; and (4) whether this court should grant Defendants request for a trial "*de novo.*"[2] After careful consideration of the record and briefs, we conclude that the trial court did not commit prejudicial error in the proceedings leading up to the entry of judgment.[3]

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2. Defendants also appear to argue that the trial court erroneously decided this case on the merits. However, as best we are able to understand Defendants' argument, they merely claim that the trial court failed to take various items of "evidence" into consideration or believed testimony that Defendants contend is inaccurate or incomplete. Since statements made in filings by the Defendants in various trial court proceedings or on appeal were not made under oath and subject to cross examination at the trial conducted before the trial court, those statements do not constitute evidence which the trial court was required to consider. *See Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 857 (1996) (standing for the proposition that an appellant court will not consider evidence on appeal that was not submitted at trial, and declining to "take judicial notice of a document outside the record when no effort has been made to include it"). Furthermore, the fact that Defendants contest the credibility, accuracy, or completeness of Plaintiff's evidence is not a valid basis for providing relief on appeal given this Court's lack of authority to look behind properly-supported findings by the trial court and the absence of any specific challenge directed to any of the trial court's findings of fact or conclusions of law. *Freeman v. Bennett*, 249 N.C. 180, 183, 105 S.E.2d 809, 810 (1958) (stating that, "[w]hen a question of fact is presented for decision, the court's findings are conclusive on appeal if supported by competent evidence[;] [m]oreover, it is presumed that findings of fact are supported, hence conclusive on appeal, unless challenged by appropriate exceptions" (citations omitted)). As a result, we will not discuss this facet of Defendants' argument in any detail in this opinion.

3. A consistent theme that runs throughout the argumentative documents that Defendants included in the record on appeal and throughout Defendants' brief is the assertion that the parties were involved in a single case that started in Montgomery County and ended in Mecklenburg County. Such thinking clearly underlies Defendants' repeated contentions that the trial court in this case erroneously failed to honor decisions made by the presiding judge in Montgomery County. This view of the situation is, however, fundamentally mistaken. Instead of a single case, the materials in the record reveal the existence of three separate and distinct cases involving the same parties and the same basic issues. For that reason, filings made and decisions rendered in the two Montgomery County cases are generally irrelevant to the proper disposition of the Mecklenburg County case, which has to be evaluated independently.

"Two Dismissal" Rule

[2] As an initial matter, we address *sua sponte* an issue which Defendants have not raised on appeal: whether the "two dismissal" rule stemming from N.C. Gen. Stat. § 1A-1, Rule 41 operates to bar Plaintiff's claim against Defendants.

> N.C. Gen. Stat. § 1A-1, Rule 41 states:
>
> Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). "[I]n enacting the two dismissal provision of Rule 41(a)(1), the legislature intended that a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would operate as an adjudication on the merits and bar a third action based upon the same set of facts." *Richardson v. McCracken Enters.*, 126 N.C. App. 506, 509, 485 S.E.2d 844, 846 (1997). The "two dismissal" provision of N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) has two components: (1) "the plaintiff must have filed notices to dismiss under Rule 41(a)(1)," *Centura Bank v. Winters*, 159 N.C. App. 456, 459, 583 S.E.2d 723, 724 (2003), and (2) "the second suit must have been based on or including the same claim" as the first suit. *City of Raleigh v. College Campus Apartments, Inc.*, 94 N.C. App. 280, 282, 380 S.E.2d 163, 165 (1989) (internal quotations omitted). After careful consideration, we conclude that the "two dismissal" rule does not necessitate granting of an award of appellate relief in this instance.

In *North Carolina R. Co. v. Ferguson Builders Supply, Inc.*, 103 N.C. App. 768, 407 S.E.2d 296 (1991), this Court "noted that the complaint in this case . . . [does not] disclose the fact that both of [the former] actions were voluntarily dismissed" and that, in order for the trial court to have properly concluded that a party's action is barred by the "two dismissal" rule, the trial court must necessarily "consider

both of the complaints filed in the prior actions and the notices of dismissal." *Ferguson Builders Supply, Inc.*, 103 N.C. App. at 771, 407 S.E.2d at 298. The trial court in this case does not appear to have ever considered whether Mecklenburg County File No. 08 CVD 1498 should have been dismissed pursuant to the "two dismissal" rule because Defendants failed to challenge the validity of Plaintiff's complaint on this basis in the court below. In view of the fact that Defendants do not appear to have raised this issue before the trial court and have not included an assignment of error premised on the application of the "two dismissal" rule on appeal, it is clear that Defendants have not preserved this issue for appellate review. N.C.R. App. P. 10. In addition, while the record contains the notice of dismissal filed in Montgomery County File No. 06 CVD 153, it does not contain a similar document relating to Montgomery County File No. 04 CVD 168.[4] As a result, since both the trial court and this Court must necessarily "consider both of the complaints filed in the prior actions and the notices of dismissal" in order to determine whether the "two dismissal" rule set out in N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) applies in any particular instance, *Ferguson Builders Supply, Inc.*, 103 N.C. App. at 771, 407 S.E.2d at 298, we are simply unable to say that the "two dismissal" rule would operate to bar Plaintiff from proceeding in this case. Thus, although we recognize the possibility that there is a "two dismissal" issue in this case, we cannot conclude, given the absence of any indication that Defendants made a dismissal motion predicated on the "two dismissal" rule in the trial court and in the absence of relevant material from the record before us, that Plaintiff's complaint should have been dismissed under N.C. Gen. Stat. § 1A-1, Rule 41(a)(1).

Venue

[3] Defendants first contend that the trial court erred by denying their motion for change of venue. We disagree.

According to N.C. Gen. Stat. § 1-82, a civil "action must be tried in the county in which the plaintiffs or the defendants, or any of them,

4. Defendants state on a number of occasions in the record and their brief that Plaintiff's complaint in Montgomery County File No. 04 CVD 168 was "withdrawn" or that it "went away." However, we are unwilling to accept these statements as evidence that Plaintiff took a voluntary dismissal of its first Montgomery County complaint without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a) because Defendants did not properly settle the record on appeal with Plaintiff, precluding us from accepting their statements as stipulations by the parties, and because it is not clear to us what Defendants mean by "withdrawn" or that the first Montgomery County complaint "went away."

reside at its commencement . . . ." As a practical matter, the plaintiff generally gets to make an initial choice as to the venue in which a particular civil action should be litigated. However, a number of statutory provisions authorize efforts to seek a change of venue. First, according to N.C. Gen. Stat. § 1-83:

> If the county designated . . . is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court. The court may change the place of trial in the following cases:
>
> (1) When the county designated for that purpose is not the proper one.
>
> (2) When the convenience of witnesses and the ends of justice would be promoted by the change.
>
> (3) When the judge has, at any time, been interested as party or counsel.

N.C. Gen. Stat. § 1-83. A motion challenging an "[i]mproper venue or division" should be asserted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) and must be advanced within the time limits specified in N.C. Gen. Stat. § 1A-1, Rule 12. "It is well settled that a court's decision upon a motion for a change of venue pursuant to G.S. 1-83(2) will not be disturbed absent a showing of a manifest abuse of discretion." *Smith v. Mariner*, 77 N.C. App. 589, 591, 335 S.E.2d 530, 531 (1985). However, "when the venue where the action was filed is not the proper one, [and N.C. Gen. Stat. § 1-83(1) is applicable], the trial court does not have discretion, but must upon a timely motion and upon appropriate findings transfer the case to the proper venue." *Cheek v. Higgins*, 76 N.C. App. 151, 153, 331 S.E.2d 712, 714 (1985).

In addition, N.C. Gen. Stat. § 1-84, provides for a change of venue in another set of circumstances:

> In all civil actions in the superior and district courts, when it is suggested on oath or affirmation on behalf of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed for trial to any adjacent county, if he is of the opinion that a fair trial cannot be had in said county, after

> hearing all the testimony offered on either side by oral evidence or affidavits.

N.C. Gen. Stat. § 1-84. "A motion for change of venue [pursuant to N.C. Gen. Stat. § 1-84] . . . [and] on the ground that a fair and impartial trial cannot be obtained in the county in which the action is pending, is addressed to the sound discretion of the trial court." *Everett v. Robersonville*, 8 N.C. App. 219, 222, 174 S.E.2d 116, 118 (1970) (citations omitted).

The Defendants have not specified the identity of the statutory provision or provisions under which they sought a change of venue from Mecklenburg County to Montgomery County. The Defendants' change of venue motion simply states that Defendants move for change of venue pursuant to "Rule 1A of the North Carolina Rules of Civil Procedure" and that Mecklenburg is not the "proper" venue.[5] For that reason, it is not entirely clear whether Defendants are contending that venue in Mecklenburg County was improper *ab initio* or whether Defendants are contending that the trial court should have changed the venue for this proceeding from Mecklenburg County to Montgomery County for some other reason, such as the convenience of the witnesses. As a result, we will attempt to address both grounds on which the trial court might have evaluated Defendants' change of venue motion.

We first address whether the filing of this action in Mecklenburg County contravened the venue rules set out in N.C. Gen. Stat. § 1-82. Plaintiff alleged in its complaint that Defendants were residents of Mecklenburg County. Defendants never explicitly denied this allegation in their answer. On the contrary, Defendants stated in their answer that they "hold residences in both Mecklenburg County and Montgomery County" and are "retired and spend time at both their Mecklenburg County residence and their Montgomery County residence." In addition, during a colloquy between Defendants and the trial court, Defendants did not deny that they lived in Mecklenburg County and simply argued that "[t]he same issue that is before the court today has been filed and argued in Montgomery County for four years." When the trial court directly stated, "But your residence is

5. Although Defendants filed their answer on or about 14 February 2008 and their change of venue motion on or about 10 March 2008, their answer did argue that this case should be heard in Montgomery County rather than Mecklenburg County. As a result, we believe that Defendants did assert a request that the venue for this case be changed from Mecklenburg County to Montgomery County in their answer when it is liberally construed and we will, for that reason, address this issue on the merits.

here in Mecklenburg County," Defendants responded, "Most of the time we're here." "Definitions of 'residence' include 'a place of abode for more than a temporary period of time' and 'a permanent and established home' and the definitions range between these two extremes[.]" *Great American Ins. Co. v. Allstate Ins. Co.*, 78 N.C. App. 653, 656, 338 S.E.2d 145, 147 (1986) (citation omitted). As a result, the information that would have been available to the trial court at the time that it ruled on Defendants' motion for change of venue tends to show that Defendants had a "permanent and established" home in Mecklenburg County where they lived most of the time.[6] Thus, the trial court had ample justification for finding venue in Mecklenburg County to have been proper.

Secondly, we address the issue of whether the trial court abused its discretion by denying Defendants' motion for change of venue pursuant to N.C. Gen. Stat. § 1-83(2) or N.C. Gen. Stat. § 1-84. On appeal, Defendants argue that the trial court erroneously denied their motion for change of venue because the court "ignor[ed] plaintiff's obvious manipulation of the courts as it moved its litigation against defendants out of Montgomery County and into Mecklenburg County in a clear attempt to circumvent exposure to a trial by jury[.]" Even if we were to accept this argument, it would not support allowance of a change of venue motion lodged pursuant to N.C. Gen. Stat. § 1-83(2), which focuses on convenience of the parties and witnesses, or N.C. Gen. Stat. § 1-84, which requires proof that the moving party cannot obtain a fair and impartial trial in the county where the action is currently pending. As a result, the trial court did not abuse its discretion by denying Defendants' motion for change of venue pursuant to N.C. Gen. Stat. § 1-83(2) or N.C. Gen. Stat. § 1-84.

Continuance

[4] We next address Defendants' contention that the trial court erred by not continuing the trial. After careful consideration of the parties' arguments, we conclude that the trial court did not err in proceeding to conduct a trial on the merits in this case at the 15 September 2008 session of the Mecklenburg County District Court.

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6. In their brief, Defendants claimed to have been legal residents of Montgomery County as of the date of their attempt to obtain a change of venue and stated that "many records had been moved and the remainder were being moved to effect that new residence status." Although the Defendants' assertions do not constitute evidence, their statement does suggest that they were residents of Mecklenburg County at the time that the complaint was filed, which is the relevant date for purposes of N.C. Gen. Stat. § 1-82.

N.C. Gen. Stat. § 1A-1, Rule 40(b) states that:

> No continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require. Good cause for granting a continuance shall include those instances when a party to the proceeding, a witness, or counsel of record has an obligation of service to the State of North Carolina, including service as a member of the General Assembly or the Rules Review Commission.

N.C. Gen. Stat. § 1A-1, Rule 40(b); *see also Trivette v. Trivette*, 162 N.C. App. 55, 63, 590 S.E.2d 298, 305 (2004). "Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." *Shankle v. Shankle*, 289 N.C. 473, 482, 223 S.E.2d 380, 386 (1976). "The chief consideration is whether granting or denying a continuance will further substantial justice." *Doby v. Lowder*, 72 N.C. App. 22, 24, 324 S.E.2d 26, 28 (1984) (citing *Shankle*, 289 N.C. at 483, 223 S.E.2d at 386). "[G]ranting or refusing the continuance of a cause is a matter which rests in the discretion of the trial court and in the absence of gross abuse is not subject to review on appeal." *Sykes v. Blakey*, 215 N.C. 61, 63, 200 S.E. 910, 911 (1939) (citing *State v. Sauls*, 190 N.C. 810, 130 S.E. 848 (1925)); *see also O'Brien v. O'Brien*, 266 N.C. 502, 146 S.E.2d 500 (1966) (stating that a motion for continuance is addressed to the sound discretion of the trial court and its ruling is not reviewable absent a manifest abuse of discretion).

As a preliminary matter, it is, at best, doubtful that Defendants actually applied to the trial court for a continuance. At a hearing on 15 September 2008, the following colloquy transpired between the trial court and Defendant Howard White[7]:

> Court: Yeah, but I don't want to hear about the merits of it right now, Mr. White, what I'm trying to find out is what, what about this motion to continue and I'm not trying to decide your case, I'm trying to decide whether we're going to hear the case or not. What's the reason we can't hear the case?

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7. As a non-lawyer, Defendant Howard White was only entitled to represent himself and was not entitled to appear on behalf of Defendant Judith White. Thus, there is no indication that Defendant Judith White ever properly sought a continuance of the trial of this case.

White: Well, we didn't come prepared. We've been out of state. We didn't come prepared to argue the summary judgment.

Court: That's not a good excuse, that you didn't come prepared.

White: The summary judgment was denied in Montgomery County and I didn't bring my, all my papers with me.

Court: Oh, well I'm not going to do it right this minute, I'll give you a chance to get your papers. I just was trying to find out why you need a continuance and so far all you've told me is you're not prepared and you don't have your papers and I'm not going to hear it today so that wouldn't give you a problem about getting your papers.

At the same hearing, the trial court asked the parties whether they were free "Thursday morning[,]" to which Plaintiff's counsel responded that he was required to be in court in Cabarrus County at that time. Defendant Howard White made no response. After expressing a preference that everyone be present for the trial, the trial court asked, "how about Thursday afternoon? That ought to give you plenty of time to get whatever papers you need, Mr. White." In response, Defendant Howard White stated, "Your Honor, we had requested the jury trial on this and you're talking like we're not going to get a jury trial." Defendant Howard White did not, at any point during the hearing, state that he had a scheduling conflict on Thursday afternoon. Thereafter, despite the fact that the trial court indicated that the parties should appear "at two o'clock on Thursday," neither Defendant took any additional formal steps to have the trial continued from the designated date and time.

In their brief to this Court, Defendants state that:

> It turned out that the date the Court had selected . . . conflicted with a business meeting my wife had scheduled with people from New York State. I tried repeatedly to call the court to notify it of our scheduling conflict, but never received a reply to my telephone call until the hearing had begun. The Court representative on the telephone informed me that the Judge would [proceed]. . . . It seemed reasonable to expect that we Defendants would not be denied our right to a jury trial[.] . . .

According to the trial transcript, Defendant Howard White called the office of the Clerk of Superior Court of Mecklenburg County "in the middle of [the] trial." At that point, the courtroom clerk interrupted

the proceedings and stated that "[w]e have the other party on the telephone[.] . . . [H]e's protesting, apparently, . . . the proceeding." According to the courtroom clerk, Howard White argued that he "was supposed to get a jury." Other than this transcript reference, there is no indication in the official record of the proceedings in the trial court that either Defendant ever protested the trial court's decision to proceed to trial at the 15 September 2008 session of the Mecklenburg County District Court.

Defendants' challenge to the trial court's decision to proceed to trial during the 15 September 2008 session fails for two different reasons. First, a phone call to the court after the trial has been calendared does not constitution an application for a continuance, *see Trivette*, 162 N.C. App. at 63, 590 S.E.2d at 305 (holding that "[a] telephone call, absent extenuating circumstances, does not qualify as application to the court"). Secondly, even if one were to treat the phone calls described in Defendants' brief as an application for a continuance, a business meeting with out-of-state "people" does not establish the requisite "good cause." *See Wachovia Bank & Trust Co., N.A. v. Templeton Oldsmobile-Cadillac-Pontiac, Inc.*, 109 N.C. App. 352, 357, 427 S.E.2d 629, 631 (1993) (holding that the fact that a party was not prepared for trial did not entitle the party to a continuance); *Daniel Boone Complex, Inc. v. Furst*, 57 N.C. App. 282, 284, 291 S.E.2d 296, 298 (1982) (holding that the trial court did not abuse its discretion by denying the plaintiff's motion for continuance predicated on the claim that plaintiff's counsel had not had adequate time to prepare for trial and had experienced difficulties in obtaining the presence of a witness); *Tripp v. Pate*, 49 N.C. App. 329, 331, 271 S.E.2d 407, 408 (1980) (holding that the trial court did not abuse its discretion by denying the plaintiff's motion for continuance predicated on the claim "that her attorney had been unable to adequately prepare for trial due to a schedule conflict" given that plaintiff's counsel had had "over a year to prepare her case for trial").

"[A] party to a lawsuit must give [the suit] the attention a prudent man gives to his important business." *Chris v. Hill*, 45 N.C. App. 287, 290, 262 S.E.2d 716, 718, *disc. review denied*, 300 N.C. 371, 267 S.E.2d 674 (1980) (stating that the "[d]efendants in this case received adequate notice, and the evidence supports the court's finding that their failure to appear for trial was not excusable"). We conclude, therefore, that Defendants' application to the court for a continuance, via telephone, did not constitute a proper request for a continuance and that, wholly aside from this problem, Defendants did not show "good

cause" that the trial court should grant any motion for a continuance Defendants actually made. As a result, the trial court did not err by proceeding to the trial of this case at the 15 September 2008 session of the Mecklenburg County District Court.

Trial by Jury

[5] We next address Defendants' contention that the trial court erred by denying Defendants' request for a trial by jury. We conclude that this argument has no merit given the facts revealed by the present record.

Article I, Section 25 of the North Carolina Constitution provides that, "in all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. Const. art. I, § 25. "A party may waive his right to jury trial by (1) failing to appear at the trial, (2) by written consent filed with the clerk, (3) by oral consent entered in the minutes of the court, (4) by failing to demand a jury trial pursuant to G.S. 1A-1, Rule 38(b)." *Frissell v. Frissell*, 47 N.C. App. 149, 152, 266 S.E.2d 866, 868; *see also North Carolina State Bar v. Du Mont*, 52 N.C. App. 1, 17, 277 S.E.2d 827, 836 (1981) (stating that "[f]ailure of a party to serve demand for trial by jury as required by the Rules of Civil Procedure constitutes a waiver of trial by jury") (citing N.C. Gen. Stat. 1A-1, Rule 38(d)).

N.C. Gen. Stat. § 1A-1, Rule 38, specifies the method by which a party is required to assert his or her right to trial by jury in civil litigation:

> (b) Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be made in the pleading of the party or endorsed on the pleading.
>
> . . .
>
> (d) Except in actions wherein jury trial cannot be waived, the failure of a party to serve a demand as required by this rule and file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury as herein provided may not be withdrawn without the consent of the parties who have pleaded or otherwise appear in the action.

N.C. Gen. Stat. § 1A-1, Rule 38. According to N.C. Gen. Stat. § 1A-1, Rule 39, "[i]ssues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a trial by jury in an action in which such a demand might have been made of right[.]"

Here, Defendants waived their right to a trial by jury in two ways. First, Defendants arguably failed to serve "a demand [for a trial by jury] in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading." N.C. Gen. Stat. § 1A-1, Rule 38(b). Although Defendants made repeated references to their desire to have a jury trial in Montgomery County File No. 06 CVD 153, there is no clear and unequivocal statement in the answer that Defendants filed in Mecklenburg County File No. 08 CVD 1498 that they wished a jury trial in that proceeding. Secondly, and more importantly, Defendants failed to appear at trial. The fact that Defendants had persuaded the court in Montgomery County File No. 06 CVD 153 to deny summary judgment and set the matter for a jury trial is legally irrelevant to the issue of whether Defendants properly demanded a jury trial in Mecklenburg County File No. 08 CVD 1498. As we have previously noted, Mecklenburg County File No. 08 CVD 1498 is a new proceeding rather than a continuation of previous Montgomery County proceedings, so that the previous ruling in Montgomery County File No. 06 CVD 153 denying Plaintiff's request for summary judgment has no bearing on the proper resolution of this issue. As a result, the Defendants' argument that they were improperly deprived of their right to a jury trial is without merit, the trial court properly heard this case on the merits sitting without a jury, and the associated assignments of error are overruled.

New Trial

[6] Finally, we address Defendants' argument that this Court should grant Defendants a new trial. After careful consideration of Defendants' arguments, we are not able to ascertain any lawful basis for disturbing the trial court's judgment.

N.C. Gen. Stat. § 1A-1, Rule 59(a) provides that, "[o]n a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." A new trial may be granted on all or part of the issues for any of the following reasons:

(1) Any irregularity by which any party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;

(5) Manifest disregard by the jury of the instructions of the court;

(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;

(8) Error in law occurring at the trial and objected to by the party making the motion, or

(9) Any other reason heretofore recognized as grounds for new trial.

N.C. Gen. Stat. § 1A-1, Rule 59(a). "A motion for a new trial shall be served not later than 10 days after entry of the judgment." N.C. Gen. Stat. § 1A-1, Rule 59(b); *see also Trivette v. Trivette*, 162 N.C. App. 55, 62, 590 S.E.2d 298, 303 (2004) (holding that, "[s]ince defendant's Rule 59 motion was untimely, the trial court properly denied it").

The trial court entered judgment against Defendants on 1 October 2009. Defendants have not, to this date, filed or served a motion for new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. Instead, Defendants have simply requested this Court to "[permit] a trial by jury to be scheduled[,]" to "direct plaintiff to . . . accept trial by jury[,]" and to "return said litigation to Montgomery County, where it originated[.]" Under North Carolina law, we have no authority to grant that request in the absence of properly-preserved legal errors assigned as error and presented to this Court for decision. For that reason, Defendants' failure to file a timely motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 or to otherwise establish that they are entitled to relief on appeal precludes this Court from granting relief. In other words, since Defendants have not satisfied the legal prerequisites for obtaining appellate relief, we have no author-

ity to grant the new trial before a Montgomery County jury that they request. As a result, since Defendants did not file a timely motion for a new trial or advance any of the grounds for obtaining a new trial specified in N.C. Gen. Stat. § 1A-1, Rule 59 or otherwise establish adequate grounds for an award of appellate relief, we hold that they are not entitled to have a new trial. *See Trivette,* 162 N.C. App. at 62, 590 S.E.2d at 303.

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

AFFIRMED.

Judge ELMORE concurs.

Judge STROUD dissents by separate opinion.

Stroud, Judge, dissenting.

Due to defendants' numerous egregious violations of the North Carolina Rules of Appellate Procedure, I would grant plaintiff's motion to dismiss this appeal. I therefore respectfully dissent.

The majority explains the convoluted procedural history of this case, defendants' failure to appear at the trial of this matter and thus to preserve any objections for review, and the many violations of the Rules of Appellate Procedure in the record and in defendants' brief. The deficiencies in the record on appeal are even acknowledged by defendants' statement in the record that

> [a]ppellants have not been able to work with the attorney for the appellee in the manner customary for litigants in cases where each side is represented by attorneys. Appellants must presume that appellee's attorney is holding back with the expectation that appellants not trained in the law will not successfully negotiate the procedures that must be mastered. Consequently, this Record of Appeal is not a joint document where areas of agreement and areas of disagreement are well defined.

However, the record also shows no indication that the defendants sought judicial settlement of the record. In short, the majority and I are in agreement that defendants' violations of the Rules of Appellate Procedure are numerous and egregious and that "[d]efendants' appeal satisfies *Dogwood's* criteria for dismissal[.]"

However, the majority then goes on to review several legal arguments which defendants *might* have raised in this appeal. The deficiencies and violations in the record and defendants' brief are so numerous and severe that, in the majority's well-meaning effort to review defendants' appeal on the merits, it has actually created arguments for defendants, including arguments not addressed by either party's brief. The North Carolina Supreme Court set forth the proper analysis for failure to comply with the appellate rules in *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008).

The most egregious violations result in waiver of the appeal and these "arise[ ] out of a party's failure to properly preserve an issue for appellate review." *Id.* at 194-95, 657 S.E.2d at 363. "[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Id.* at 195-96, 657 S.E.2d at 364 (citations omitted).

Here, defendants failed to appear or have counsel appear on their behalf at trial, and thus they violated Rule 10(b)(1) which provides, "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make[.]" N.C.R. App. P. 10(b)(1); *see Dogwood Dev. & Mgmt. Co., LLC* at 195, 657 S.E.2d at 363 (citations, quotation marks, ellipses, and brackets omitted) ("The requirement expressed in Rule 10(b) that litigants raise an issue in the trial court before presenting it on appeal goes to the heart of the common law tradition and our adversary system. This Court has repeatedly emphasized that Rule 10(b) prevents unnecessary new trials caused by errors that the trial court could have corrected if brought to its attention at the proper time. Rule 10(b) thus plays an integral role in preserving the efficacy and integrity of the appellate process. We have stressed that Rule 10(b)(1) is not simply a technical rule of procedure but shelters the trial judge from an undue if not impossible burden."). Furthermore, defendants failed to assign error to a single finding of fact or conclusion of law made by the trial court. Findings of fact to which no error is assigned are binding on appeal. *Hartsell v. Hartsell*, 189 N.C. App. 65, 68, 657 S.E.2d 724, 726 (2008). Also, "[t]he appellant must assign error to each conclusion it believes is not supported by the evidence. 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." *Orix Fin. Servs., Inc. v. Raspberry Logging, Inc.*, 190 N.C.

App. 657, 660, 660 S.E.2d 609, 610-11 (2008) (citations omitted). Due to defendants' failure to appear at trial and preserve any issues for appeal and failure to assign any error to the findings of fact or conclusions of law upon which the judgment is based, I conclude defendants have waived their right to appeal. *See* N.C.R. App. P. 10(a), (b)(1); *Dogwood Dev. & Mgmt. Co., LLC* at 194-96, 657 S.E.2d at 363-64; *Orix Financial* at ——, 660 S.E.2d at 610-11; *Hartsell* at 68, 657 S.E.2d at 726.

Having determined that defendants' have waived their right to appeal, the last inquiry is whether this Court should use Rule 2 to reach the merits of the case. *See Dogwood Dev. Mgmt. Co., LLC* at 196, 657 S.E.2d at 364; *see also* N.C.R. App. P. 2 ("To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.") However, use of Rule 2 is proper only "when necessary to prevent manifest injustice to a party or to expedite decision in the public interest. Rule 2 . . . must be invoked cautiously, and . . . [only] exceptional circumstances . . . allow the appellate courts to take this extraordinary step." *Dogwood Dev. & Mgmt. Co., LLC* at 196, 657 S.E.2d at 364 (citations and quotation marks omitted).

Although I appreciate the difficulties defendants may have had in representing themselves, the fact that defendants are *pro se* is not an "exceptional circumstance" which would justify use of Rule 2. *Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999). ("[The Rules of Appellate Procedure] apply to everyone—whether acting *pro se* or being represented by all of the five largest law firms in the state.") Furthermore, there is nothing in the record which would indicate that this case presents any "exceptional circumstance" for which Rule 2 should be invoked "to prevent manifest injustice or to expedite decision in the public interest." *Dogwood Dev. & Mgmt. Co., LLC* at 196, 657 S.E.2d at 364. "The Rules of Appellate Procedure are mandatory; failure to comply with these rules subjects an appeal to dismissal." *Bledsoe* at 125, 519 S.E.2d at 317 (citation omitted). I therefore respectfully dissent and would grant plaintiff's motion to dismiss this appeal.

STATE OF NORTH CAROLINA v. NEZAR ANTHONY YARBOROUGH

No. COA08-1185

(Filed 7 July 2009)

1. Kidnapping— confinement to commit murder—confinement inherent in robbery—irrelevant

The trial court did not err by not dismissing a kidnapping prosecution where defendant argued that the confinement was inherent in an attempted robbery, but defendant was charged with kidnapping for the purpose of facilitating murder and was not charged with or convicted of robbery.

2. Kidnapping— confinement—evidence sufficient

The evidence was sufficient to allow a reasonable jury to conclude that a kidnapping victim was confined to the living and eating area of his trailer, even if he did not comply with defendant's order to lie on the floor.

3. Kidnapping— for the purpose of murder—evidence not sufficient

There was no evidence that defendant kidnapped any of the victims for the purpose of committing murder, as alleged in the indictments, and those convictions were reversed. A defendant cannot kidnap a person for the purpose of facilitating a felony murder.

4. Burglary— breaking and entering in the nighttime—evidence sufficient

The trial court did not err by failing to dismiss a charge of first-degree burglary for insufficient evidence where the State presented sufficient direct and circumstantial evidence to allow a reasonable juror to find that the breaking and entering occurred during the nighttime. The motion to dismiss first-degree murder, on the basis of insufficient evidence of the underlying felony, was also correctly denied.

5. Criminal Law— defense of accident—shooting after abandonment of robbery

There was no error in not instructing the jury on the defense of accident in a case arising from a break-in, a struggle, and a shooting. The defense of accident is not available if the defendant was engaged in misconduct at the time of the killing; even assum-

ing that the shooting occurred after defendant had decided to abandon the intended robbery and attempted to leave, this would not constitute a break in the events giving rise to the shooting.

6. Homicide— instructions—first-degree murder—lesser included offenses not supported by evidence

The trial court did not err by denying defendant's request for an instruction on first-degree murder under a premeditation and deliberation theory and on all lesser included offenses supported by the evidence. The shooting occurred during the course of a first-degree burglary, regardless of whether defendant decided at some point that he wished to leave, and defendant did not articulate how the evidence would support any lesser included offense. There was no conflict in the evidence supporting felony murder and no evidence supporting lesser included offenses.

7. Constitutional Law— effective assistance of counsel—concession of some offenses—credibility

Defendant did not receive ineffective assistance of counsel in a prosecution for first-degree murder, first-degree burglary, and multiple counts of kidnapping where his attorney conceded guilt of burglary and kidnapping. It was a reasonable strategy to admit guilt of offenses which had overwhelming evidence in the hope of establishing greater credibility for the first-degree murder charge.

Appeal by Defendant from judgment entered 20 March 2008 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 24 March 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander McC. Peters and Assistant Attorney General William P. Hart, for the State.

Parish, Cooke & Condlin, by James R. Parish, for Defendant.

BEASLEY, Judge.

Defendant (Nezar Anthony Yarborough) appeals from judgments entered on his convictions of first-degree murder, first-degree burglary, first-degree kidnapping, and three counts of second-degree kidnapping. We vacate in part and find no error in part.

Defendant was indicted in September 2006 on three counts of second-degree kidnapping, and one count each of first-degree kid-

napping, first-degree burglary, assault with a deadly weapon with intent to kill, and first-degree murder. He was tried before a Nash County, North Carolina, jury in March 2008. The State's evidence generally showed the following: In April 2006 Cannon Williams lived at 8863 Medlin Way, in Sharpsburg, North Carolina. During the evening of 17 April 2006 a friend of Williams, Eric Watson, stopped by Williams's home after work. About thirty to forty-five minutes later, Williams' cousin, Derek Smith, arrived with Dana Denton. The group watched a movie, Williams and Watson went out for beer, and the four continued visiting in Williams's living room.

Without warning, Defendant and Jerry O'Neal entered the trailer. Their faces were covered and Defendant carried a shotgun. Defendant ordered everyone to lie on the floor. Defendant went towards a counter separating the living and kitchen areas. Instead of following Defendant's order to lie down, Williams picked up a gun from the kitchen table; the gun appeared realistic, but actually was a BB gun that was incapable of discharging. Williams hit Defendant on the head with the BB gun and attempted to disarm Defendant. Williams and Defendant wrestled over control of Defendant's shotgun, and Smith joined the fight. Defendant fired several shots during his struggle with Williams to retain control of his shotgun. One of these shots struck Smith, killing him.

The State offered testimony from Watson, Williams, O'Neal, and Denton about the shooting. All the eyewitnesses testified that neither they nor Smith had any previous acquaintance with Defendant or O'Neal; that Defendant and O'Neal entered the trailer without permission and ordered those present to lie down; that Williams fought with Defendant for possession of Defendant's gun; and that during the struggle Defendant fired a shot that proved fatal to Derek Smith. The witnesses also agreed that the entire incident took only a few minutes, that O'Neal was unarmed, that Defendant fired several shots during the tussle with Williams, and that Defendant left very shortly after shooting Derek Smith. Law enforcement officers offered statements taken from these witnesses, which corroborated their trial testimony.

Defendant's trial testimony was mostly consistent with that of the State's witnesses. Defendant testified that he and O'Neal went to Williams's trailer with the intent to steal cocaine. Defendant carried a fully loaded shotgun. Upon entering the trailer, Defendant told everyone to lie on the ground and went to a kitchen drawer where he had

been told to look for cocaine. As he opened the drawer, Williams "jumped him" and the two fought over Defendant's shotgun. During the melee several shots were fired from Defendant's shotgun. One of these shots killed Smith. Defendant testified that he brought the gun to Williams's house to scare the victims, but did not intend to harm anyone. He testified that the gun discharged while he was trying to leave the trailer.

Further details of the witnesses' testimony will be discussed as pertinent to the issues raised on appeal.

Defendant first argues that the court erred by not dismissing the charge of first-degree kidnapping against Derek Smith, and the three charges of second-degree kidnapping against Eric Watson, Dana Denton, and Cannon Williams, on the grounds that the evidence as to each charge was insufficient as a matter of law.

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. The trial court must examine the evidence in the light most favorable to the State, granting the State every reasonable inference to be drawn from the evidence." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998) (citations omitted).

[1] Under N.C. Gen. Stat. § 14-39(a)(2) (2007), a defendant is guilty of kidnapping if he or she "shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person" for the purpose of "[f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony[.]" In the instant case, Defendant was charged with kidnapping Williams, Smith, Denton, and Watson, each "for the purpose of facilitating the commission of a felony, Murder."

Defendant next argues that, if he restrained or confined any of the victims, it was only to the degree inherent in his attempted robbery. Defendant cites several cases holding that, if the extent of confinement or restraint is no more than that which is inherent in the charged offense, such evidence is insufficient to support a charge of kidnapping. The State argues that, inasmuch as Defendant was not charged with or convicted of robbery, any relationship between the restraint of the victims in this case and a hypothetical robbery charge is irrelevant. We agree. This assignment of error is overruled.

[2] Defendant also argues that he cannot be convicted of kidnapping Williams, because Williams did not obey Defendant's order to lie on the ground. We disagree. Our Supreme Court has held that,

> "as used in N.C. Gen. Stat. § 14-39 the term 'confine' connotes some form of imprisonment within a given area, such as a room, a house or a vehicle. The term 'restrain,' while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement."

State v. Gainey, 355 N.C. 73, 95, 558 S.E.2d 463, 478 (2002) (quoting *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978)). In the instant case, it is undisputed that two people entered Williams's trailer. O'Neal stood in the doorway, while Defendant brandished a loaded shotgun and ordered everyone to get down. This evidence is sufficient to allow a reasonable jury to conclude that Williams was "confined" to the living and eating area of his trailer, even if Williams did not comply with Defendant's order to lie on the ground. This assignment of error is overruled.

[3] Defendant further argues that the kidnapping charges should have been dismissed, on the grounds that there was a fatal variance between the indictments for kidnapping and the trial evidence. "[A] fatal variance between the indictment and proof is properly raised by a motion for judgment as of nonsuit or a motion to dismiss, since there is not sufficient evidence to support the charge laid in the indictment." *State v. Faircloth*, 297 N.C. 100, 107, 253 S.E.2d 890, 894 (1979) (citations omitted). Defendant was charged with kidnapping in indictments that charge Defendant with confining or restraining the victims without their consent "for the purpose of facilitating the commission of a felony, Murder." Defendant asserts that all of the evidence shows that any confinement or restraint of the named victims was solely to facilitate the commission of attempted robbery. On this basis, he contends that the kidnapping convictions should be vacated. We agree.

An indictment charging a defendant with kidnapping to facilitate commission of a felony need not specify which particular felony was facilitated by kidnapping the victims.

> An essential element of kidnapping under N.C.G.S. 14-39(a)(2) is that the confinement, restraint or removal be for the purpose of facilitating the commission of any felony or facilitating escape

> following the commission of a felony. The requirements of N.C.G.S. 15A-924(a)(5) are met for purposes of alleging this element by the allegation in the indictment that the confinement, restraint, or removal was carried out for the purpose of facilitating "a felony" or escape following "a felony." The allegations in the indictment adequately notify the defendant that he is charged with the crime of kidnapping. It is not required that the indictment specify the felony referred to in N.C.G.S. 14-39(a)(2).

State v. Freeman, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985).

However, "[w]hen an indictment alleges an intent to commit a particular felony, the state must prove the particular felonious intent alleged." *State v. White*, 307 N.C. 42, 48, 296 S.E.2d 267, 270 (1982) (citing *State v. Faircloth* 297 N.C. 388, 255 S.E.2d 366 (1979)) (other citation omitted).

In the instant case, Defendant was charged with kidnapping to facilitate the commission of murder. Under N.C. Gen. Stat. § 14-17 (2007), first-degree murder includes any murder "which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon[.]" Significantly:

> [t]his statute does not require that the defendant intend the killing, only that he or she intend to commit the underlying felony. An unintentional killing occurring during the commission of a felony is a felony murder under G.S. 14-17. Otherwise stated, a conviction of felony murder requires no proof of intent other than the proof of intent necessary to secure conviction of the underlying felony.

State v. Lea, 126 N.C. App. 440, 449, 485 S.E.2d 874, 880 (1997) (citations omitted). This Court concluded in *Lea* that "a charge of 'attempted felony murder' is a logical impossibility in that it would require the defendant to intend what is by definition an unintentional result." *Id.* at 450, 485 S.E.2d at 880. In *State v. Coble*, 351 N.C. 448, 452, 527 S.E.2d 45, 48 (2000), our Supreme Court cited *Lea* with approval and concluded that:

> [l]ikewise, a charge of attempted second-degree murder is a logical impossibility. Second-degree murder, like felony murder, does not have, as an element, specific intent to kill. Rather, where the

> element of malice in second-degree murder is proved by intentional conduct, a defendant need only intend to commit the underlying act that results in death.

We apply the reasoning of *Lea* and *Coble* and conclude that a defendant cannot kidnap a person for the purpose of facilitating a felony murder. Accordingly, where the defendant is indicted under N.C. Gen. Stat. § 14-39(a)(2) and charged with kidnapping for the purpose of facilitating the commission of a murder, the State must prove the defendant's intent to commit a premeditated and deliberate murder.

"In order to convict a defendant of premeditated, first-degree murder, the State must prove: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation. *See* N.C.G.S. § 14-17 [(2007)]." *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007). "Moreover, '[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime.' " *State v. Garcell*, 363 N.C. 10, 69, ––– S.E.2d –––, ––– (2009) (quoting *State v. Watts*, 357 N.C. 366, 380, 584 S.E.2d 740, 750 (2003) (citations and quotation marks omitted)).

> Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.

State v. Conner, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994) (citations omitted).

> Premeditation and deliberation are processes of the mind. In most cases, they are not subject to proof by direct evidence but must be proved, if at all, by circumstantial evidence. Among other circumstances from which premeditation and deliberation may be inferred are (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has

been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Vause, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991) (citing *State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693 (1986)).

In the instant case, it is undisputed that Defendant had never met Derek Smith, or any of the others who were at Williams's house, until the attempted robbery on 17 April 2006. Defendant had no particular ill-will towards Smith and made no threats or declarations against Smith, either before or after the shooting. Smith was killed by a single bullet fired during an affray in which Smith took part. Defendant left the trailer almost immediately, taking no actions to prolong Smith's suffering or inflict additional wounds. Furthermore, law enforcement officers corroborated Defendant's testimony that he was distraught and remorseful after the shooting, declaring it to have been unintentional. We conclude that the record is devoid of evidence that Defendant had the specific intent to kill Derek Smith; therefore, Defendant did not kidnap Smith in order to facilitate a premeditated and deliberate murder.

The State does not argue that there was evidence that Defendant restrained or confined the victims to facilitate the commission of murder. Instead, the State contends that the naming of a specific felony in the kidnapping indictment was mere surplusage and can be disregarded. In support of its position, the State cites *State v. Freeman*. *Freeman* is easily distinguished and we conclude that it does not control the outcome of the instant case.

The defendant in *Freeman* was indicted for kidnapping the victim to facilitate the felonies of "rape or robbery." Defendant argued the indictment improperly alleged two offenses disjunctively. Our Supreme Court held that in "passing upon [the] validity" of a kidnapping indictment under N.C. Gen. Stat. § 14-39(a)(2), the specific felony or felonies need not be identified and were "mere harmless surplusage." *Freeman*, 314 N.C. at 436, 333 S.E.2d at 745-46. However, *Freeman* did not present the issue of a fatal variance between the indictment and the proof, as there was evidence of the defendant's commission of both rape and robbery. Consequently, the *Freeman* court did not discuss the issue raised in the instant case, and did not overrule the line of cases holding that, having alleged a specific felony, the State is then obliged to prove that the defendant's intent to commit that particular offense. *See, e.g.*, *State v. White*, 307 N.C. 42,

296 S.E.2d 267; *State v. Faircloth*, 297 N.C. 100, 253 S.E.2d 890; and *State v. Morris*, 147 N.C. App. 247, 555 S.E.2d 353 (2001).

We conclude that there was no evidence that Defendant kidnaped any of the victims for the purpose of committing murder, as alleged in the indictments. We reverse Defendant's convictions of second degree kidnapping of Eric Watson, Cannon Williams, and Dana Denton, and his conviction of first-degree kidnapping of Derek Smith.

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[4] Defendant next argues that the trial court erred by failing to dismiss the charge of first-degree burglary for insufficient evidence. We disagree.

> When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine "whether there is substantial evidence of each essential element of the offense charged[.] . . . 'Substantial evidence' is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. . . . The reviewing court considers all evidence in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. Evidentiary "contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." Finally, sufficiency review "is the same whether the evidence is circumstantial or direct, or both."

State v. Garcia, 358 N.C. 382, 412-13, 597 S.E.2d 724, 746 (2004) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996); *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995); and *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981)) (other citations omitted).

"The elements of first-degree burglary are: (i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony therein. N.C.G.S. § 14-51 [(2007)]." *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996) (citations omitted). Defendant challenges the sufficiency of the evidence that the breaking and entering occurred at night.

"There is no statutory definition of 'nighttime' for the offense of burglary in North Carolina. North Carolina courts adhere to the com-

mon law definition of 'nighttime.' . . . [T]his Court has described 'nighttime' as that period of time after sunset and before sunrise 'when it is so dark that a man's face cannot be identified except by artificial light or moonlight.' " *State v. Ledford*, 315 N.C. 599, 607, 340 S.E.2d 309, 315 (1986) (quoting *State v. Lyszaj*, 314 N.C. 256, 266, 333 S.E.2d 288, 295 (1985)) (other citations omitted). Moreover, "the State is not limited to proving solely by direct evidence that the breaking and entering was accomplished in the nighttime; this essential element may be shown by proof of circumstances which convince a reasonable mind of the fact." *Ledford*, 315 N.C. at 607-08, 340 S.E.2d at 315 (citation omitted).

We conclude that the State presented sufficient direct and circumstantial evidence to allow a reasonable juror to find that the breaking and entering occurred during the nighttime. This evidence includes testimony that Watson visited with Williams after work, arriving around 6:00 p.m., and that Denton and Smith did not arrive until about thirty to forty-five minutes after Watson. Other witnesses testified that Denton and Smith arrived at around 7:00 p.m. or 7:30 p.m.; that the four then watched a movie; that following the movie Williams and Watson went out for beer and snacks; that it was after 8:00 p.m. when they returned, and; that the burglary did not occur until after they returned from buying snacks for the group. This is sufficient circumstantial evidence to support a finding that the break-in was during the nighttime.

Additionally, the State offered direct testimony that the incident occurred at night. Kimberly Smith, the Defendant's former girlfriend, testified that on 17 April 2006 she had a job interview in Gold Rock, North Carolina. After the interview, she and the Defendant went to the house where Defendant stayed, and watched television. That evening Defendant received a phone call from Robert Lewis, an acquaintance. Lewis told Defendant that Cannon Williams was in possession of a quantity of cocaine which would be easy for Defendant to steal. When Defendant and Smith left home, they went first to O'Neal's house. O'Neal agreed to participate in the robbery, and the three of them then went to Lewis's trailer. From there, O'Neal and Defendant walked to Williams's trailer, where the attempted robbery took place. Significantly, Smith testified several times that they did not leave for O'Neal's house until after dark:

> PROSECUTOR: All right. Where did you go when you went to Sharpsburg?

SMITH: Went to his friends, Daniel and Damien's house.

. . . .

PROSECUTOR: And how long were you there?

SMITH: Up until dark, till we left.

. . . .

PROSECUTOR: Okay. How long did you stay?

SMITH: Up until dark.

PROSECUTOR: Sorry?

SMITH: Up until dark.

PROSECUTOR: Up until dark. And did there come a time when you and Mr. Yarborough left?

SMITH: It was.

PROSECUTOR: Okay. Approximately what time?

SMITH: About 8:00, maybe.

. . . .

PROSECUTOR: Where did you go?

SMITH: He wanted me to go get his friend A.J. to help him with his robbery.

(emphasis added). This testimony alone is sufficient to allow the jury to find that the burglary occurred at night. This assignment of error is overruled.

In a related argument, Defendant contends that the trial court erred by failing to dismiss the charge of first-degree murder, on the grounds that there was insufficient evidence to submit the charge to the jury. Defendant argues that there was insufficient evidence of a breaking or entering at night, and thus that there was insufficient evidence of the underlying felony. On this basis he contends the charge of first-degree murder should have been dismissed. However, as we conclude that there was sufficient evidence that the break-in occurred at night, we necessarily reject this argument. This assignment of error is overruled.

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[5] Defendant next argues that the trial court committed plain error by failing to instruct the jury on the defense of accident. Defendant correctly states the general rule that "[i]t is the duty of the trial court to instruct the jury on the law applicable to the substantive features of the case arising on the evidence[.]" *State v. Robbins*, 309 N.C. 771, 776, 309 S.E.2d 188, 191 (1983). Defendant asserts that, on the facts of this case, he was entitled to an instruction of the defense of accident. We disagree.

Defendant concedes that he failed to request an instruction on the defense of accident, or to object to the trial court's failure to instruct the jury on accident. "Because defendant failed to object to the instructions at trial, we consider only whether the trial court committed plain error. *See* N.C. R. App. P. 10(c)(4)." *State v. Smith*, 362 N.C. 583, 596, 669 S.E.2d 299, 308 (2008). The *Smith* court also noted that:

> "[a] reversal for plain error is only appropriate in the most exceptional cases." Plain error analysis should be applied cautiously and only when "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.' " An appellate court "must be convinced that absent the error the jury probably would have reached a different verdict."

Id. (quoting *State v. Duke*, 360 N.C. 110, 138, 623 S.E.2d 11, 29 (2005); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983); *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)); and *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (other citations omitted). "Before applying plain error analysis to jury instructions, 'it is necessary to determine whether the instruction complained of constitutes error.' " *State v. Dean*, 196 N.C. App. ——, ——, 674 S.E.2d 453, 463 (2009) (quoting *State v. Cummings*, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007)).

" 'Where the death of a human being is the result of accident or misadventure, in the true meaning of the term, no criminal responsibility attaches to the act of the slayer.' " *State v. Phillips*, 264 N.C. 508, 512, 142 S.E.2d 337, 340 (1965) (quoting *State v. Faust*, 254 N.C. 101, 112, 118 S.E.2d 769, 776 (1961)). "The defense of accident 'is triggered in factual situations where a defendant, without premeditation, intent, or culpable negligence, commits acts which bring about the death of another. . . . It is not an affirmative defense, but acts to

negate the *mens rea* element of homicide.' " *State v. Turner*, 330 N.C. 249, 262, 410 S.E.2d 847, 854 (1991) (quoting *State v. Lytton*, 319 N.C. 422, 425-26, 355 S.E.2d 485, 487 (1987)).

However, the defense of accident is unavailable if the defendant was engaged in misconduct at the time of the killing. "The law is clear that 'evidence does not raise the defense of accident where the defendant was not engaged in lawful conduct when the killing occurred.' " *State v. Gattis*, 166 N.C. App. 1, 11, 601 S.E.2d 205, 211 (2004) (quoting *State v. Riddick*, 340 N.C. 338, 342, 457 S.E.2d 728, 731 (1995)). "Any defense based on the suggestion that the death was the result of an accident or misadventure must be predicated upon the absence of an unlawful purpose on the part of the defendant." *State v. York*, 347 N.C. 79, 96, 489 S.E.2d 380, 390 (1997) (citations omitted).

In the instant case, it is undisputed that Defendant broke into Williams's home with the intent of robbing him, and that the killing occurred within a few minutes of the entry, during a struggle over Defendant's shotgun. Defendant was engaged in misconduct at the time of the shooting, and may not avail himself of the defense of accident. Moreover:

> the jury specifically found that the underlying felony of [first degree burglary] was committed, which supports defendant's conviction of murder in the first degree on the basis of felony murder. It is well established that "[t]he killing of another human being, whether intentional or otherwise, while the person who kills is engaged in the perpetration of a felony, which felony is inherently or foreseeably dangerous to human life, is murder[.]" . . . [Burglary] is such a felony.

State v. Woods, 316 N.C. 344, 348-49, 341 S.E.2d 545, 547-48 (1986) (quoting *State v. Shrader*, 290 N.C. 253, 261, 225 S.E.2d 522, 528 (1976)) (other citations omitted).

Defendant acknowledges that he broke into Williams's trailer intending to steal drugs and immediately went to the drawer where he believed he would find the drugs. Before Defendant could open the drawer, Williams hit him and tried to disarm him. Defendant concedes that he did not leave the trailer at that point, but instead struggled with Williams for control of Defendant's shotgun. He further admits that the shot that killed Smith was fired during this struggle. Defendant asserts, however, that after he and Williams started fight-

ing, Defendant decided to "abandon" his plan to commit robbery and decided he wanted to leave. Defendant asserts that when he "abandoned" his plan to rob Williams, his right to the defense of accident was thereby "restored." Defendant contends that "there was a break in the sequence and chain of causation" and that because the shooting occurred while Defendant was trying to escape the trailer, it may legally be deemed an accident. We disagree.

Defendant claims that his right to the defense of accident was restored as soon as he decided to leave the trailer and informed Williams of his change of plan. Defendant essentially contends that, because the shooting occurred after he abandoned the plan to pursue the underlying felony of burglary, he is therefore entitled to rely on a defense of accident. In support of this position, Defendant cites several cases addressing the right to self defense. None of these cases hold that the defense of accident is available to a defendant under these circumstances. Indeed:

> [t]he felony murder rule was promulgated to deter even accidental killings from occurring during the commission of or attempted commission of a dangerous felony. The rationale of the felony murder rule is "that one who commits a felony is a bad person with a bad state of mind, and he has caused a bad result, so that we should not worry too much about the fact that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended."

State v. Richardson, 341 N.C. 658, 666-67, 462 S.E.2d 492, 498 (1995) (quoting *State v. Wall*, 304 N.C. 609, 626, 286 S.E.2d 68, 78 (1982) (Copeland, J., dissenting)).

In addition, Defendant fails to cite authority supporting his position that the facts he has alleged would constitute a legally significant "break in the sequence of events." Defendant asserts that the shooting took place while he was trying to leave the trailer, after Defendant no longer wanted to rob Williams. However, a killing committed while a defendant is trying to flee the scene of a felony is a felony murder.

> "A killing is committed in the perpetration or attempted perpetration of a felony within the purview of a felony-murder statute when there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is linked to or part of the series of incidents, forming one continuous

> transaction." . . . [E]scape is ordinarily within the *res gestae* of the felony and that a killing committed during escape or flight is ordinarily within the felony murder rule.

State v. Squire, 292 N.C. 494, 511-12, 234 S.E.2d 563, 573 (1977) (quoting *State v. Thompson*, 280 N.C. 202, 212, 185 S.E.2d 666, 673 (1972), *superseded by statute as stated in State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982)) (other internal quotations omitted). In the instant case, it is undisputed that Smith was shot within a few minutes of the break in. We conclude that, even assuming, *arguendo*, that the killing occurred after Defendant had decided to abandon the intended robbery and attempted to leave, this would not constitute a "break" in the events giving rise to the shooting.

We conclude that Defendant was not entitled to an instruction on the defense of accident, and that the trial court did not err by failing to give this instruction. Accordingly, we need not reach the issue of plain error. This assignment of error is overruled.

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[6] Defendant argues next that the trial court erred in denying his request for an instruction on first-degree murder under the theory of premeditation and deliberation, and on all lesser included offenses that were supported by the evidence. We disagree.

Defendant correctly cites the general rule that

> when the state proceeds on a first-degree murder theory of felony murder only, the trial court must instruct on all lesser-included offenses "[i]f the evidence of the underlying felony supporting felony murder is in conflict and the evidence would support a lesser-included offense of first-degree murder." Conversely, when the state proceeds on a theory of felony murder only, the trial court should not instruct on lesser-included offenses "[i]f the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder."

State v. Gwynn, 362 N.C. 334, 336, 661 S.E.2d 706, 707 (2008) (quoting *State v. Millsaps*, 356 N.C. 556, 565, 572 S.E.2d 767, 773, 774 (2002)) (citation omitted).

Defendant reiterates a summary of the evidence, and draws our attention to evidence suggesting that he shot Derek Smith while attempting to leave the trailer. However, the undisputed evidence, from both the State and the Defendant, showed that Defendant broke into Williams's house to commit a robbery, and that: (1) Defendant

and Williams started fighting almost as soon as Defendant entered the trailer; (2) Smith was shot shortly after they started scuffling, and; (3) the entire incident was over in a few minutes. On these facts we conclude that the shooting occurred during the course of Defendant's commission of first-degree burglary, regardless of whether, at some point during the few minutes he was in Williams's home, Defendant decided he wished to leave. As discussed above, we reject Defendant's argument that, if he had "abandoned" his plan to rob Williams when he shot Smith, this might legally excuse what would otherwise be a felony murder.

Defendant also contends that there was "no substantial evidence" that the break-in occurred during the nighttime. We have previously rejected this argument.

Furthermore, Defendant does not articulate that this evidence would support any lesser included offense, does not assert that any particular lesser included offense is supported by the evidence, and does not explain which evidence would support an instruction on which lesser included offense.

We conclude that there was no conflict in the evidence supporting felony murder. The evidence is uncontradicted that Defendant took a fully loaded shotgun to Williams's house, broke into Williams's house without permission, and that he planned to steal drugs and/or money from Williams. We also conclude that there was no evidence supporting the submission of any lesser included offenses. This assignment of error is overruled.

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[7] Finally, Defendant argues that he received ineffective assistance of counsel, because his attorney conceded his guilt of burglary and kidnapping. We disagree.

> The components necessary to show ineffective assistance of counsel are (1) "counsel's performance was deficient," meaning it "fell below an objective standard of reasonableness," and (2) "the deficient performance prejudiced the defense," meaning "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Garcell, 363 N.C. at 51, ––– S.E.2d at ––– (quoting *Strickland v.Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, ––– (1984); and citing *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985)).

> "The question becomes whether a reasonable probability exists that, absent counsel's deficient performance, the result of the proceeding would have been different." When a court undertakes to engage in such an analysis, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

State v. Mason, 337 N.C. 165, 177-78, 446 S.E.2d 58, 65 (1994) (quoting *State v. Moorman*, 320 N.C. 387, 399, 358 S.E.2d 502, 510 (1987); and *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694).

In the instant case, the evidence was overwhelming that Defendant had committed first-degree burglary. The evidence supporting the kidnapping charge, including Defendant ordering the victims to lie down, was likewise undisputed. The legal argument for setting aside the kidnapping convictions was not based on any conflict in this evidence, but on a legal variance between indictment and evidence. Defense counsel apparently decided that, if Defendant admitted his guilt of burglary and kidnapping, it might improve his credibility before the jury regarding the actual shooting. It was a reasonable strategy to admit guilt of these offenses for which the evidence was overwhelming, in hopes of establishing greater credibility with the jury regarding the charge of first-degree murder. This assignment of error is overruled.

For the reasons discussed above, we conclude that Defendant's convictions of kidnapping must be reversed, and that there was no reversible error in his convictions of first-degree burglary and first-degree murder.

Reversed in part, no error in part.

Judges McGEE and GEER concur.

DOUGLAS J. MARTINI, PLAINTIFF v. COMPANION PROPERTY & CASUALTY INSURANCE COMPANY, DEFENDANT

No. COA08-1127

(Filed 7 July 2009)

1. Insurance— automobile—UIM—substitute vehicle

The trial court did not err by granting summary judgment for plaintiff on the question of whether a UIM policy provided coverage where the only vehicle on the policy was a Toyota Sequoia, the policy allows a temporary substitute if the covered auto is out of service, plaintiff had to drive to the airport but was concerned about a dashboard brake light on the Sequoia which had come on again after a recent service, plaintiff asked his wife to take the Sequoia for service and drove another car to the airport, he suffered a serious accident, and his wife drove the Sequoia to the hospital. Had plaintiff not been injured while driving to the airport, it is reasonable to assume that plaintiff's wife would have taken the car to the mechanic and it would have been completely unusable.

2. Insurance— automobile—UIM—professional association as insured—use of personal car

Plaintiff was an insured under a UIM policy even though the policy listed his professional association as the insured and plaintiff was driving a personal car. The policy clearly states that anyone occupying a temporary substitute for a covered auto is insured.

3. Insurance— automobile—UIM—stacking of policies—credit for payment

The trial court properly granted summary judgment for plaintiff in an action to determine underinsured motorist coverage where defendant argued that it was entitled to a credit for the $250,000 payment made by plaintiff's primary insurance carriers. N.C.G.S. § 20-279.21(b)(4) permits interpolicy stacking of coverage limits. Plaintiff had received $30,000 from the exhausted liability policy, which was credited against his underinsured coverage under his primary policy, both of those policies were exhausted, and plaintiff still had $1,000,000 underinsured motorist coverage under his policy with defendant.

4. Insurance— unfair claims practice—investigation and denial of claim—issues of fact

The trial court erred by granting summary judgment for defendant insurer on an unfair claims practices and unfair trade practices claim in an action to determine UIM coverage. There were issues of material fact concerning defendant's investigation and denial of the claim.

Judge STEELMAN dissenting in part and concurring in the result in part.

Appeal by plaintiff and defendant from order entered 12 May 2008 by Judge Leon J. Stanback, Jr., in Wake County Superior Court. Heard in the Court of Appeals 25 February 2009.

Brown, Crump, Vanore & Tierney, L.L.P., by R. Scott Brown and W. John Cathcart, Jr., for plaintiff.

Teague, Campbell, Dennis & Gorham, L.L.P., by Henry W. Gorham and Edward S. Schenk III, for defendant.

ELMORE, Judge.

Both Douglas J. Martini, M.D. (plaintiff), and Companion Property & Casualty Insurance Company (defendant) appeal from a 12 May 2008 order granting partial summary judgment to both parties. For the reasons stated below, we affirm that part of the order granting summary judgment to plaintiff and reverse that part of the order granting summary judgment to defendant.

Background

On 9 January 2005, plaintiff's wife informed plaintiff that the brake warning light of their 2001 Toyota Sequoia was on. Mrs. Martini testified that because the brakes in the Sequoia had recently been serviced due to premature wear, she planned to take the Sequoia to be repaired the next morning. Plaintiff normally drove the Sequoia, which was insured in the name of his professional association, Douglas J. Martini, M.D., P.A. However, because his wife planned to take the Sequoia to be repaired, plaintiff drove the couple's other car, a 2001 Mitsubishi Montero, to the airport early on the morning of 10 January 2005. Plaintiff was planning to attend a medical conference.

At approximately 4:54 a.m., as plaintiff was driving to the airport, the Montero was struck by a vehicle driven by Nicholas Marquez.

Marquez had tried to drive his car from the left lane to the center lane between two vehicles that were already driving in the center lane. Marquez failed, colliding with the back of plaintiff's Montero, which caused plaintiff to lose control of his car. The Montero flipped over on the roadway several times, then flipped over the median barrier, eventually coming to rest on the median on the other side of the highway.

Plaintiff was extracted from his car and taken to the trauma center at a local hospital. He had a fracture to his C-7 vertebra, left and right rotator cuff contusions, a puncture wound in his left chest, as well as various lacerations and abrasions on his body. He returned to work about three weeks later, for two hours at a time. However, after six weeks, the fracture had slipped out of place and there was severe nerve compression. Plaintiff underwent surgical fusion surgery on 8 March 2005 to repair his broken neck. He was not able to return to work for nearly six months following the collision.

Plaintiff's wife drove the Sequoia to and from the hospital on 10 January 2005. Plaintiff next took the Sequoia to be serviced on or about 24 March 2005.

Marquez carried minimum liability insurance coverage of $30,000.00. Plaintiff made a claim against Marquez's insurance policy as well as the underinsured and medical payments provisions of his insurance policies for the Montero and Sequoia. Marquez's insurance carrier paid plaintiff $30,000.00, the limit of Marquez's policy. Plaintiff notified his insurers, including defendant. Plaintiff's primary carrier, Southern Guarantee Insurance Company (Southern Guarantee), paid plaintiff $250,000.00, the limit of that policy's coverage. The coverage limit of plaintiff's underinsured and medical payments insurance policy (the UIM policy) with defendant was $1,000,000.00. Defendant denied plaintiff's underinsured and medical payments claims.

Plaintiff then filed a complaint, asking the court to "declare the coverage, and the rights, responsibilities, duties and obligations of the parties under the Defendant's policy of insurance and that the vehicle which Plaintiff was operating be declared a covered vehicle under Defendant's policy of insurance and that Defendant's policy be declared to cover plaintiff's injuries and damages." Plaintiff also alleged that defendant had engaged in unfair claims practices and/or unfair and deceptive trade practices, entitling him to treble damages. Defendant counterclaimed, asking for a declaratory judgment "declaring the relative rights and obligations of the parties under" the

UIM policy and declaring that the UIM policy "does not provide coverage for the uninsured/underinsured benefits" sought by plaintiff. Defendant also sought to dismiss plaintiff's complaint.

Defendant moved for summary judgment as to the insurance coverage question and plaintiff's unfair and deceptive trade practices claim. Defendant moved, in the alternative, for summary judgment that the policy's potentially applicable limit of $1,000,000.00 had been legally reduced by the $250,000.00 payments tendered by Southern Guarantee. Plaintiff also moved for summary judgment on the insurance coverage question and his unfair and deceptive trade practices claim.

On 12 May 2008, the trial court entered an order of summary judgment. The order granted plaintiff's motion in part and defendant's motion in part. The trial court concluded that the UIM policy did provide uninsured motorist coverage and medical payments coverage to plaintiff for the collision. It also concluded that the uninsured motorist insurance limit was $1,000,000.00 upon satisfactory proof of damages; no credit was due defendant for prior liability insurance payment or prior underinsured motorist payment. Finally, the trial court concluded that defendant had not committed any unfair settlement practices or unfair and deceptive trade practices; the trial court dismissed those claims with prejudice.

Both parties now appeal. We address defendant's arguments first and then reach plaintiff's.

Defendant's Appeal

[1] Defendant first argues that the trial court erred by granting summary judgment to plaintiff because the UIM policy does not provide insurance coverage to plaintiff as a matter of law. We disagree.

The only vehicle that is listed on the UIM policy's "Schedule of Autos You Own" is the Sequoia, which is owned by plaintiff's business entity, Douglas J. Martini, M.D., P.A. The UIM policy includes the following relevant language:

> B. Who Is An Insured
>
> If the Named Insured is designated in the Declarations as:
>
> * * *
>
> 2. A partnership, limited liability company, corporation or any other form of organization, then the following are "insureds":

a. Anyone "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.

b. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

Defendant argues that the Montero was not a temporary substitute for the covered auto, the Sequoia, because the Sequoia was not out of service because of its breakdown, repair, servicing, loss, or destruction. Defendant points to Mrs. Martini's use of the Sequoia to drive to the hospital on the morning of the accident as evidence that the Sequoia was not out of service. To support this position, defendant relies on the Supreme Court's opinion in *Ransom v. Fidelity and Casualty Co.*, 250 N.C. 60, 108 S.E.2d 22 (1959), and on our opinion in *Maryland Casualty Co. v. State Farm Mutual Automobile Insurance Company*, 83 N.C. App. 140, 349 S.E.2d 307 (1986).

In *Ransom*, Francis Lee drove his brother's car because his own car, a Buick, was "low on gas." *Ransom*, 250 N.C. at 60, 108 S.E.2d at 22. Lee collided with a man on a bicycle, who was killed. *Id.*, 250 N.C. at 61, 108 S.E.2d at 23. The man's estate sued Lee for wrongful death and sought payment from the Buick's insurer, arguing that the brother's car was a temporary substitute vehicle for the Buick. *Id.* at 62, 108 S.E.2d at 23. The brother's car was not insured. *Id.* at 61, 108 S.E.2d at 23. The trial court dismissed the case, and the Supreme Court affirmed because the policy required that the covered vehicle be "withdrawn from normal use" and being "low on gas" did not mean that the Buick had been withdrawn from normal use. *Id.* at 64, 108 S.E.2d at 25. The Supreme Court did note, however, that "[i]t would seem there could be circumstances under which one might be justified in substituting another car, if the one insured was so defective mechanically that the owner was afraid to drive it on an extended trip." *Id.* (citation omitted).

Maryland Casualty also involved a collision, this time between Kell Thomas and Max Sherrill. *Maryland Casualty*, 83 N.C. App. at 141, 349 S.E.2d at 308. Sherrill was injured in the collision and his insurer sought payment from Thomas's insurer. *Id.* However, the truck that Thomas was driving that day was not insured; Thomas's only vehicle insurance policy was on a car. *Id.* Sherrill's insurer argued that the truck was a temporary substitute vehicle for the car and, thus, was covered by the insurance policy. The policy defined a

temporary substitute vehicle as one driven because the covered vehicle was "out of normal use because of its: a. breakdown; b. repair; c. servicing; d. loss; or e. destruction." *Id.* at 142, 349 S.E.2d at 308. This Court concluded that Thomas's truck was not a temporary substitute vehicle because the car was only "rusted out" and "in bad condition," which did not remove the car from normal use. *Id.*

The case at hand is easily distinguished from both *Ransom* and *Maryland Casualty* and instead better falls in line with *Nationwide Mutual Insurance Company v. Fireman's Fund Insurance Company*, 279 N.C. 240, 182 S.E.2d 571 (1971). In *Fireman's Fund*, our Supreme Court affirmed coverage when the covered vehicle was at a paint and body shop to be repainted and the insured wrecked the car he had borrowed while his was being repainted. *Id.* at 250-51, 182 S.E.2d at 578. Here, plaintiff and his wife were concerned with the safe operation of the Sequoia. The car's brakes had been recently repaired, and the brake light on the dash indicated that something was amiss again with the brakes. Without question, the car was operational, but plaintiff asked his wife to have it serviced because the brake light was on. Had plaintiff not been injured while driving to the airport, it is reasonable to assume that Mrs. Martini would have taken the car to the mechanic on the morning of 10 January 2005, and the car would have been completely unusable, as in *Fireman's Fund*. It is also reasonable to assume that Mrs. Martini did not immediately have the Sequoia serviced because her husband had broken his neck in a car accident that morning. When plaintiff drove the Montero to the airport, it was because the Sequoia was out of service; he had asked his wife, an officer of his professional association, to take the car to be repaired.

[2] Defendant next argues that plaintiff was not an "insured" under the UIM policy because he is an individual and the policy lists plaintiff's professional association as the insured. Again, we disagree. The policy clearly states that anyone occupying a temporary substitute for a covered auto, the Montero in this case, is insured. Plaintiff was occupying the Montero and is therefore covered by the policy.

[3] Defendant next argues that, even if plaintiff is covered by the UIM policy, defendant is entitled to a credit for the $250,000.00 payment made by plaintiff's primary insurance carriers, thereby reducing the maximum available coverage to $750,000.00. Again, we disagree.

The Motor Vehicle Safety and Financial Responsibility Act (the Act) exists to protect "innocent victims who may be injured by finan-

cially irresponsible motorists." *Hendrickson v. Lee*, 119 N.C. App. 444, 449, 459 S.E.2d 275, 278 (1995) (quotations and citation omitted). "[T]he provisions of the Act 'are written into every automobile liability policy as a matter of law, and, when the terms of [a] policy conflict with the statute, the provisions of the statute will prevail.' " *Id.* (quoting *Insurance Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977)) (internal quotations omitted; alteration in original). The Act includes N.C. Gen. Stat. § 20-279.21(b)(4), which states that a liability insurance policy "shall . . . provide underinsured motorist coverage." N.C. Gen. Stat. § 20-279.21(b)(4) (2007).

> [I]f a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the *total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy*[.]

Id. (emphasis added). As this Court recently noted, § 20-279.21(b)(4) permits interpolicy "stacking" of coverage limits. *Benton v. Hanford*, 195 N.C. App. 88, 93, 671 S.E.2d 31, 34 (2009). In this case, the highest limits available under each of plaintiff's underinsured motorist coverages were $250,000.00 (Southern Guarantee) and $1,000,000.00 (defendant). Plaintiff had received $30,000.00 from Marquez's exhausted liability policy, which was credited against plaintiff's underinsured motorist coverage under his Southern Guarantee policy, the primary policy. In other words, Marquez's policy paid $30,000.00 and Southern Guarantee paid $220,000.00, exhausting both of those policies. Plaintiff still had $1,000,000.00 underinsured motorist coverage remaining under his UIM policy with defendant. Accordingly, the trial court properly granted summary judgment to plaintiff as to his underinsured motorist coverage limit.

Plaintiff's Appeal

[4] We next address plaintiff's argument on appeal. He argues that the trial court erred by granting defendant's motion for summary judgment as to plaintiff's unfair claims settlement practices and unfair and deceptive trade practices claims. After careful review, we agree.

In his amended complaint, plaintiff alleged that defendant engaged in an unfair or deceptive trade practice under N.C. Gen. Stat.

§§ 58-63-15 and 75-1.1. Chapter 75 of our general statutes provides a private cause of action for consumers. *Gray v. N.C. Insurance Underwriting Assoc.*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). Chapter 58 of our general statutes prohibits unfair methods of competition and unfair and deceptive acts or practices in the business of insurance and grants the Commissioner of Insurance the authority to enforce its provisions. N.C. Gen. Stat. § 58-63-10 (2007); *Gray*, 552 N.C. at 69, 529 S.E.2d at 682. Unfair claim settlement practices are among the activities prohibited by Chapter 58. N.C. Gen. Stat. § 58-63-15(11) defines unfair claim settlement practices, in relevant part, as:

> Committing or performing with such frequency as to indicate a general business practice of any of the following:
>
> * * *
>
> b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
>
> * * *
>
> d. Refusing to pay claims without conducting a reasonable investigation based upon all available information;
>
> * * *
>
> g. Compelling [the] insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insured;
>
> h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;
>
> * * *
>
> m. Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage[.]

N.C. Gen. Stat. § 58-63-15(11) (2007). Although § 58-63-15(11) itself does not create a private cause of action, any "conduct that violates subsection (f) of N.C.G.S. § 58-63-15(11) constitutes a violation of N.C.G.S. § 75-1.1, as a matter of law, without the necessity of an ad-

ditional showing of frequency indicating a 'general business practice[.]' " *Gray*, 352 N.C. at 71, 529 S.E.2d at 683 (additional citation omitted). This Court extended *Gray's* holding to "the other prohibited acts listed in N.C. Gen. Stat. § 58-63-15(11)," holding that they "are also acts which are unfair, unscrupulous, and injurious to consumers" and can support a § 75-1.1 claim. *Country Club of Johnston County, Inc. v. United States Fid. & Guar. Co.*, 150 N.C. App. 231, 246, 563 S.E.2d 269, 279 (2002).

Plaintiff specifically alleges that defendant failed to conduct a reasonable and complete investigation before denying plaintiff's claim—indeed, before speaking directly to plaintiff—and continuing to deny plaintiff's claim after speaking with plaintiff and receiving an alternate explanation as to why the Montero was driven to the airport. Plaintiff also alleges that defendant failed to follow its claims handling guidelines. These allegations raise genuine issues of material fact, and thus it was improper for the trial court to resolve plaintiff's Chapter 75 claim by summary judgment.

Accordingly, we hold that the trial court erred by granting partial summary judgment in favor of defendant as to plaintiff's claim for unfair and deceptive trade practices pursuant to § 75-1.1. We remand this case to the trial court for a trial on the merits of plaintiff's unfair and deceptive trade practices claim.

Affirmed in part; reversed and remanded in part.

Judge BRYANT concurs.

Judge STEELMAN dissents in part and concurs in the result in part by separate opinion.

STEELMAN, Judge, dissenting in part and concurring in the result in part.

I must respectfully dissent from the majority decision in the appeal of defendant and concur in the result only in the appeal of plaintiff.

I. Summary Judgment

A. Standard of Review

Our appellate courts review a trial court's ruling on a motion for summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649

S.E.2d 382, 385 (2007). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007).

> Summary judgment may not be used to resolve factual disputes which are material to the disposition of the action. Nor may summary judgment be used where conflicting evidence is involved. Where there is any question regarding the credibility of plaintiffs' evidence . . . or if there is a question which can be resolved only by the weight of the evidence, summary judgment must be denied.

Federal Paper Board Co. v. Kamyr, Inc., 101 N.C. App. 329, 333, 399 S.E.2d 411, 414 (internal citations omitted), *disc. review denied*, 328 N.C. 570, 403 S.E.2d 510 (1991). "The factual truth must be clear and undisputed for summary judgment to be granted." *Camby v. Railway Co.*, 39 N.C. App. 455, 459, 250 S.E.2d 684, 687, *disc. review denied*, 297 N.C. 298, 254 S.E.2d 919 (1979).

B. Analysis

1. Defendant's Appeal

The issue in defendant's appeal is whether the trial court properly granted summary judgment holding that the insurance policy for the Toyota Sequoia (Toyota) provided underinsured motorist coverage for the Mitsubishi Montero (Mitsubishi) that plaintiff was operating at the time of the accident. Only if the Mitsubishi was a "temporary substitute" for the Toyota is this coverage applicable.

At the summary judgment hearing, sharply conflicting evidence was presented by the parties. The trial court and the majority accept at face value the testimony of the Martinis that there was a brake problem with the Toyota, and that is the reason that plaintiff operated the Mitsubishi on the morning of 10 January 2005. The majority further engages in the rank speculation that it is "reasonable to assume that Mrs. Martini did not immediately have the [Toyota] serviced because her husband had broken his neck in a car accident that morning." The evidence was that the Toyota was not taken in for servicing until over two months after the accident. This is not the appropriate standard to be applied on a summary judgment motion. Rule 56 requires that there be "no genuine issue as to any material

fact" before summary judgment can be entered. Whether the Mitsubishi was a temporary substitute vehicle as defined by the insurance policy and our case law was the material issue of fact in this case.

Brooks Allen (Allen), an adjuster for defendant, testified by way of deposition that he spoke to plaintiff's wife on 1 March 2005 concerning the accident. Allen's contemporaneous claims log note states:

> Ms. Martini called. Husband was on his way to the airport to go to a business meeting when the accident occurred. *He was driving the personally owned Mitsubishi, rather than a business owned Toyota, as the Toyota is much newer and nicer. So he did not want to leave it in the parking lot at the airport. Toyota is garaged at home and was available for use that day.*

(Emphasis added). Based upon this conversation, defendant denied plaintiff's claim.

On 21 March 2005, George Williams, plaintiff's insurance agent, left Allen a voice message stating that he had spoken with plaintiff and he had asserted that he was driving the Mitsubishi "because the brake light had come on in the Toyota the night before the accident" and he wanted to "have it checked out[.]" Williams further stated that plaintiff's wife knew this to be true during their first conversation, but did not think it was important. On 7 April 2005, Allen interviewed plaintiff by telephone, and recorded the conversation. After discussing the accident, plaintiff's injuries, and the amount of medical bills, Allen asked plaintiff "Okay, why were you driving the Mitsubishi at the time of the accident?" Plaintiff responded:

> I, there was, it was a Sunday afternoon, I believe, . . . my wife took one of my sons either to soccer or baseball practice, and I had noticed that the brake light was on, and in discussion that evening she just mentioned that that was on, and I was heading to the airport, so I said I would, because of that, I'll just take that, the other vehicle.

Plaintiff went on to state that he and his wife continued to use the Toyota for "several weeks" and that "the brake light did go off."

The deposition of plaintiff's wife tended to show that they owned three vehicles, a Mitsubishi, a Toyota, and an Audi. Plaintiff's wife primarily drove the Mitsubishi and plaintiff drove the Audi for personal use and the Toyota for business purposes. On the morning of the acci-

dent, both the Toyota and the Audi were parked at their residence. Plaintiff's wife drove the Toyota to the hospital that morning because the Audi was "a stickshift" and she "[didn't] like to drive it." Later that day she drove the Toyota back home without any problems. Plaintiff's wife testified that there were no mechanical malfunctions or difficulties associated with the Toyota aside from the brake light being activated. Plaintiff's wife further testified that she did not take the Toyota to be serviced until 24 March 2005, more than two months after the accident. The invoice from the National Tire & Battery Store on that date listed the following under Item Description: "Wheel Balance," "Tire Rotation," "Brakes Check & Advise" and "Patch & Balance Tire Repair[.]" Plaintiff's wife was only charged for the tire repair at a rate $19.99. When asked if she recalled telling Allen that the Mitsubishi was nicer than the other cars she owned, she responded:

> Well, the nicest car at our house would have been the Audi TT. And if I would have said—I wouldn't have said that the Toyota is newer or nicer than the Mitsubishi, because the Mitsubishi was actually newer. That just wasn't true. And I am thinking that there's confusion there with the Audi, that—that he thinks that I was talk—that—I had been talking about the Audi, not the Mitsubishi.

Based on the above-recited testimony before the trial court, there was a genuine issue of material fact as to why plaintiff operated the Mitsubishi on the morning of the accident. The resolution of this issue requires the assessment of the credibility of the witnesses and the weighing of the testimony. This is a task for the trier of fact and not for the court upon a motion for summary judgment. Since neither party requested a jury trial, the trial court should have heard the evidence, and entered a judgment containing findings of fact and conclusions of law. N.C. Gen. Stat. § 1A-1, Rule 52 (2007); *Federal Paper Board Co.*, 101 N.C. App. at 333, 399 S.E.2d at 414; *see also Craddock v. Craddock*, 188 N.C. App. 806, 813, 656 S.E.2d 716, 721 (2008) ("The *Capps* reminder still holds true, as the trial judge may not assume the role of trier of fact too soon.") (citation omitted)); *Capps v. City of Raleigh*, 35 N.C. App. 290, 292, 241 S.E.2d 527, 528-29 (1978) ("[T]he Supreme Court and this Court have emphasized in numerous opinions that upon a motion for summary judgment it is [not] part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. Despite our frequent reminders, we find that some of the trial judges continue to treat the motion for summary judgment as a hearing upon the merits before

the court without a jury where the judge becomes the trier of the facts." (internal citation and quotation omitted)).

The insurance policy states "[t]he covered 'auto' must be out of service because of its breakdown, repair, servicing, 'loss' or destruction." North Carolina appellate courts have interpreted similar provisions with varying results based upon the specific facts of each case as is correctly articulated in the majority opinion. *See*, *e.g.*, *Insurance Co. v. Insurance Co.*, 279 N.C. 240, 182 S.E.2d 571 (1971); *Ransom v. Casualty Co.*, 250 N.C. 60, 108 S.E.2d 22 (1959); *Maryland Casualty Co. v. State Farm Mutual Ins. Co.*, 83 N.C. App. 140, 349 S.E.2d 307 (1986). The general rules that can be gleaned from this prior case law are that the vehicle covered under the insurance policy need not be withdrawn from use because of some mechanical defect, it may also be unavailable due to body work in order for another vehicle to qualify as a substitute. *Insurance Co.*, 279 N.C. at 251, 182 S.E.2d at 578; *Maryland Casualty Co.*, 83 N.C. App. at 142, 349 S.E.2d at 308-09. "[H]owever, the initially covered vehicle must nonetheless be actually withdrawn from use." *Maryland Casualty Co.*, 83 N.C. App. at 142, 349 S.E.2d at 309.

No reasonable interpretation of the policy provision in the instant case would conclude that the Toyota was "out of service because of its breakdown, repair, servicing, 'loss' or destruction" because plaintiff did not want to leave it in the parking lot at the airport because it was "newer and nicer" than the Mitsubishi. If the trial court believed Allen's testimony as to why plaintiff drove the Mitsubishi to the airport, plaintiff would be excluded from coverage pursuant to the underinsured motorist insurance policy. On the other hand, the trial court could determine that plaintiff drove the Mitsubishi on the morning of the accident because the Toyota's brake light had activated. If the trial court made such a finding, the next question the trial court must resolve is whether the Toyota's activated brake light caused the vehicle to be "out of service because of its breakdown, repair, servicing, 'loss' or destruction." This ruling will depend upon the evidence plaintiff presents at trial. In making this determination, the trial court should consider the purpose of the typical substitution provision:

> the purpose of the provision is not to narrowly limit or defeat coverage, but to make the coverage reasonably definite as to the vehicles the insured intends normally to use, while at the same time permitting operations to go on should the particular vehicles named be temporarily out of commission, thus enabling the insurer to issue a policy upon a rate fair to both insured

> and insurer, rather than one at a prohibitive premium for blanket coverage of any and all vehicles which the insured might own or operate.

Ransom, 250 N.C. at 63, 108 S.E.2d at 24. If plaintiff presents evidence at trial establishing by the greater weight of the evidence that the Toyota was "out of service" on the day the accident occurred, the Mitsubishi would be a temporary substitute vehicle and there would be underinsured motorist coverage under the policy for the Toyota. If plaintiff fails to present such evidence, coverage would be precluded.

Because the resolution of this factual dispute is outcome determinative, it may not be resolved at summary judgment. *Federal Paper Board Co.*, 101 N.C. App. at 333, 399 S.E.2d at 414. The trial court's entry of partial summary judgment in favor of plaintiff was improper.

2. Plaintiff's Cross-Appeal

The issue in plaintiff's cross-appeal is whether the trial court properly granted summary judgment holding plaintiff failed to show defendant committed unfair settlement practices and unfair and deceptive trade practices pursuant to N.C. Gen. Stat. §§ 58-63-15(11) and 75-1.1.

I disagree with the majority's assertion that the allegations in plaintiff's unverified complaint are sufficient to raise genuine issues of material fact. *See Tew v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999) ("[T]he trial court may not consider an unverified pleading when ruling on a motion for summary judgment." (citations omitted)), *disc. review improvidently allowed*, 352 N.C. 145, 531 S.E.2d 213 (2000); *Venture Properties I v. Anderson*, 120 N.C. App. 852, 855, 463 S.E.2d 795, 797 (1995) (holding that "[s]ince [the] defendant's pleadings were unverified, the trial court acted properly in refusing to consider them" when granting the plaintiff summary judgment (citations omitted)), *disc. review denied*, 342 N.C. 898, 467 S.E.2d 908 (1996). In the instant case, a genuine issue of material fact was raised by conflicting evidence in the parties' depositions, answers to interrogatories, and affidavits as to why plaintiff operated the Mitsubishi on the morning of the accident. Whether defendant violated N.C. Gen. Stat. §§ 58-63-15(11) and 75-1.1 is largely contingent upon the resolution of this factual dispute, which would dictate whether the Mitsubishi was a temporary substitute vehicle. Once the trial court has properly determined whether or not plaintiff is provided coverage under the underinsured motorist insur-

ance policy, it can then determine whether defendant conducted a reasonable and complete investigation before denying plaintiff's claim and whether defendant was justified in continuing to deny plaintiff's claim after the 7 April 2005 conversation. Because plaintiff's cross-appeal also depends upon a factual dispute which is material to the disposition of the action, partial summary judgment in favor of defendant was improper. Therefore, I concur in the result reached in the majority opinion.

I would hold the trial court erred by granting partial summary judgment in favor of plaintiff as to the coverage issue and granting partial summary judgment in favor of defendant as to plaintiff's claim for unfair settlement practices and unfair and deceptive trade practices pursuant to N.C. Gen. Stat. §§ 58-63-15(11) and 75-1.1. This case should be remanded for a trial on the merits.

IN THE MATTER OF: C.M. AND M.H.M.

No. COA08-1551

(Filed 7 July 2009)

1. Appeal and Error— preservation of issues—failure to argue

The assignments of error that respondents failed to argue in their brief are deemed abandoned under N.C. R. App. P. 28(b)(6).

2. Child Abuse and Neglect— abuse—sufficiency of findings of fact—non-accidental injuries—clear and convincing evidence

The trial court did not err by concluding that the minor son was an abused juvenile because: (1) there was clear and convincing evidence to support the trial court's findings of fact that the son's injuries were inflicted by non-accidental means, the trauma occurred very close in time to and shortly before his admission to the emergency room, and the son's injuries were significant and life threatening; and (2) these findings of fact supported the court's conclusions of law that the son was an abused juvenile within the meaning of N.C.G.S. § 7B-101(1) in that a parent or other person responsible for the child's care allowed to be inflicted upon him a serious physical injury by other than acci-

dental means and created or allowed to be created a substantial risk of serious physical injury.

3. Child Abuse and Neglect— neglect—living with person who has abused or neglected other children—instability and volatility of living conditions

The trial court did not err by concluding that the two minor children were neglected juveniles because: (1) the trial court was permitted, although not required, to conclude that the minor daughter was neglected based on evidence that respondent father had abused the minor son since the statutory definition of a neglected child includes living with a person who has abused or neglected other children and since the Court of Appeals has held that the weight to be given that factor is a question for the trial court; and (2) the findings of fact provided clear and convincing evidence that both children were substantially at risk due to the abuse of the son, the instability and volatility of the living conditions, and the deceptive nature of respondent parents.

4. Child Abuse and Neglect— disposition requirements—written visitation plan

The trial court erred in a child abuse and neglect case by failing to enter a disposition which complied with N.C.G.S. § 7B-905(c), and the case is remanded for the court's establishment of a written visitation plan.

Appeal by respondents from an adjudication and disposition order entered 22 July 2008 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 5 May 2009.

Staff Attorney Elizabeth Kennedy-Gurnee, for Cumberland County Department of Social Services.

Attorney Advocate Beth A. Hall for guardian ad litem. Janet K. Ledbetter for respondent-father appellant. Robin E. Strickland for respondent-mother appellant.

HUNTER, JR., Robert N., Judge.

Respondent-father appeals from an adjudication and disposition order entered 22 July 2008 adjudicating his minor child M.H.M. abused and neglected. Respondent-father and respondent-mother appeal from the same order adjudicating their minor child C.M. neglected. We affirm the trial court's adjudication of M.H.M. as

abused, in that a parent or other person responsible for the juvenile's care inflicted or allowed to be inflicted upon the juvenile a serious physical injury by other than accidental means and created or allowed to be created a substantial risk of serious physical injury to the juvenile by other than accidental means; and we affirm the adjudication of M.H.M. and C.M. as neglected, in that they lived in an environment injurious to their welfare and did not receive proper care, supervision, or discipline from their parent, guardian, custodian, or caretaker. Because the trial court erred by not addressing visitation in its Adjudication and Disposition Order, we remand for written disposition of that issue.

I. Facts

Two children C.M. and M.H.M. (hereinafter referred to by the pseudonyms "Alexander" and "Tess") are the juveniles whose welfare is involved in this appeal. Both have the same father (hereinafter referred to by the pseudonym "Phillip"), who is one respondent. Alexander's mother, wife of Phillip (hereinafter referred to as "Olympia," also a pseudonym) was not a party to this proceeding as explained *infra*. Tess's mother (hereinafter referred to as "Nicei," a pseudonym) is also a respondent. During the times relevant to the instant proceedings, Alexander and Tess resided in Nicei's dwelling.

Phillip married Olympia in 2002. Olympia, who is a citizen and resident of the United Kingdom, was deported from the United States in January 2007 and barred from return for at least ten years. Upon being deported, she left Alexander and her teenaged daughter from a prior relationship behind. Phillip became responsible for both. His wife's daughter went to school each day, but Alexander needed a caretaker.

In September 2003, during Phillip's marriage to Olympia, he picked up Nicei from the side of the road as she was walking home from the store. Phillip, who was more than twenty years older than Nicei, had an ongoing affair with her and moved her into his mother's house. When Phillip left Nicei at his mother's house, he would go home to the house he shared with Olympia.

Olympia gave birth to Alexander in September 2005. Nicei gave birth to Tess in December 2005 and obtained public housing for herself and Tess. She believed Phillip did not join them because it would violate public housing rules. Nicei did not know that Phillip was married to Olympia, and Olympia did not know about Nicei; they found out about one another just before Olympia was deported. Phillip then

told Nicei that he had a son, Alexander, Alexander's mother had been deported, and he needed someone to take care of Alexander. He did not tell her that he was still married to Olympia.

Nicei cared for Alexander every weekday and sometimes on the weekends as well. She considered herself Alexander's "step-mom" and treated him like he was her "own son." While Phillip hired lawyers to attempt to get his wife back, he kept Nicei "on the back burner" and busy at the apartment caring for his children. She cooked, cleaned, and did laundry for them.

Nicei lost her public housing due to Phillip coming in and out of her home. Phillip then found a house that he rented. Because Olympia was out of the country, Phillip was able to live with Nicei and two of his children. He sent Olympia's daughter to live with her father.

At the time of the underlying proceedings, Phillip admitted to having fathered sixteen children by various women. He also admitted to using aliases for deceptive purposes such as business dealings and concealing his identity from law enforcement. The record does not disclose Phillip's parental status with his other fourteen offspring.

Nicei was unemployed, very dependent on Phillip, and willing to lie to protect him. She had no job, driver's license, or house phone, and she had to rely on a cell phone, on which Phillip placed minutes for her use.

In August 2007, Nicei made statements under oath in order to obtain a Domestic Violence Protective Order against Phillip She wrote: "From December the 2nd, 2003, to August the 19th, 2007, [Phillip] would always hit me when he was mad." In the same document she explained that she was scared for her life and that he would leave marks on her. As to Alexander, Nicei wrote that "[Phillip] hits his son and leaves marks." Based on that document, she was issued an ex-parte Domestic Violence Order of Protection. In addition to obtaining the protective order, she sought shelter in February 2008.

On 4, 6, and 9 August 2007, Alexander was taken to the Emergency Room at Cape Fear Valley Medical Center ("CFVMC"). On each occasion, Phillip drove Nicei to the hospital with Alexander. Rather than going in with them, Phillip instructed Nicei to take Alexander inside the hospital, since Olympia had Medicaid for Alexander, and hospital officials would not know Nicei was not Alexander's mother.

On 4 August 2007, Alexander was feverish, had a sore in his mouth, and had stomach pain. He was diagnosed with stomatitis, given medication, and released. On 6 August 2007, Alexander's fever and stomach pain continued. He was diagnosed with herpangina, given medication, and released. On 9 August 2007, Alexander was again seen for his stomach pain. He also had a lump on the back of his head and his hair was noticeably sparse. He was diagnosed with herpangina, tinea capitis, and scalp hematoma. During this visit, Nicei advised the Emergency Room physician that Alexander had fallen a couple of days earlier. Alexander was again released with medications.

On 18 August 2007, Phillip took Alexander to the races while Nicei stayed home with Tess. He returned late that evening, and Alexander would not easily go to bed. Phillip slapped Alexander's head and told him to "shut the f—- up."

The next day, Phillip, Nicei, Alexander, and Tess left the house to go grocery shopping, but Alexander did not want to go. He was dropped off at a "cousin['s]" house. After grocery shopping, they picked up Alexander, stopped by McDonald's for lunch, and went home.

During the evening hours, Nicei was cooking, cleaning, and washing clothes as well as caring for Alexander and Tess, who were asleep on the couch. She noticed that Alexander was having difficulty breathing. When she tried to awaken him, he was unresponsive. Nicei made two calls to 911. The first call came in at 7:22 p.m. and the second at 7:29 p.m., a seven minute lapse. During the first call, Nicei told the 911 operator that she had a question and stated: "I don't know if it's an emergency, but what if a person is breathing and his eye . . . one pupil is big and one is small, what does that mean?" The 911 operator declined to give medical advice but offered to give Nicei the number to call for medical assistance, or the operator could dispatch an ambulance to the residence at that time. Nicei did not request an ambulance and said she would call back. Nicei indicated in the second call that Alexander was having difficulty breathing and was unresponsive. The operator dispatched assistance. While on the phone with the 911 operator, Nicei requested that the operator call Phillip and have him come to the hospital, because she did not have cell phone minutes with which to call him. She reported that Phillip had left the residence going to Betsy Johnson Hospital in Dunn, North Carolina, to see his dying sister.

E.M.S. responded and transported Alexander to CFVMC. Phillip called a friend to go pick up Nicei and take her to the hospital. When Alexander arrived at the hospital, Phillip was already there, despite allegedly being en route to a different hospital when he received the call from the 911 operator.

At the hospital, Alexander was examined by Emergency Room physicians. Due to his difficulty breathing and lack of response, emergency medical personnel had to intubate him and place him on a ventilator in order to save his life. An examination exposed bruises on his back and chin, and a CT scan revealed a subdural hematoma.

While emergency room personnel worked to save Alexander's life, Phillip and Nicei argued in the presence of Detective Manuel DeJesus and others. Phillip's family had confronted Nicei and suggested that Phillip implicated Nicei in hurting Alexander. Nicei became angry at Phillip while he was holding Tess. Detective DeJesus had to restrain Nicei, and a nurse had to take Tess in order to remove her from the zone of danger.

Dr. David Smith, head of the Pediatric Emergency Services, first saw Alexander. Based upon history provided by Phillip and Nicei that Alexander was doing fine during the day, and based on Alexander's medical charts, medical tests, medical history, and injuries, he found that the injuries sustained by Alexander were inflicted by nonaccidental trauma and were "sustained [] shortly prior to his presentation in the emergency department." Dr. Loughlin, an expert in Pediatrics concentrating in child abuse evaluations, examined Alexander and provided additional expertise and diagnosis and agreed with the preliminary diagnosis. He ordered additional testing to rule out other possible causes. Dr. Caruso, a pediatric radiologist, was called in to further assist in the care and treatment of Alexander. The doctors suspected nonaccidental trauma as the cause of the injury. Alexander remained in the hospital for a number of days. Additional tests were conducted to rule out other causes. With no other plausible medical cause for Alexander's injuries and without any explanation of any accidental injury that might have caused his traumatic brain injury, the doctors concluded that the evidence established "to a reasonable medical certainty that the trauma was caused by non-accidental means."

As a result of a 20 August 2007 referral from CFVMC, Cumberland County Department of Social Services ("DSS") on 21 August 2007 filed a petition alleging that Alexander and Tess were neglected and

abused juveniles. On the same day, the trial court issued a Non-Secure Custody Order awarding DSS legal custody of the juveniles with physical placement in foster care. In an order entered 22 July 2008, the trial court adjudicated Alexander to be an abused juvenile and Alexander and Tess to be neglected juveniles.

II. Issues

On appeal, respondent-father raises three arguments. He contends that the trial court committed reversible error when it: (1) entered an order adjudicating juvenile Alexander abused without clear, cogent, and convincing evidence presented at the hearing; (2) entered an order adjudicating juveniles Alexander and Tess neglected without clear, cogent, and convincing evidence presented at the hearing; and (3) failed to order DSS to arrange, facilitate, and supervise an appropriate visitation plan expressly approved by the court in the disposition order entered on 22 July 2008, in violation of N.C. Gen. Stat. § 7B-905(c).

Respondent-mother raises two issues on appeal. She contends that the trial court erred when it (1) concluded as a matter of law that Tess was a neglected juvenile; and (2) failed to enter a disposition that complies with N.C. Gen. Stat. § 7B-905.

III. Standard of Review

> Allegations of abuse and neglect must be proven by clear and convincing evidence. "A proper review of a trial court's finding of [abuse and] 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 [abuse and] 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 (2002) (citations omitted).

IV. Analysis

[1] We note initially that while respondents assigned error to several of the trial court's findings of fact, they have not brought forward some of those assignments of error in their respective briefs.

Assignments of error that were not brought forward in the brief are deemed abandoned. N.C. R. App. P. 28(b)(6) (2007). The trial court's remaining findings of fact are deemed to be supported by competent evidence and are binding upon the parties and this Court. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Abuse of Alexander

[2] Respondent-father first argues that the trial court's findings of fact are insufficient to support the trial court's conclusion that Alexander was an abused juvenile. We disagree.

> An abused juvenile is statutorily defined, in pertinent part, as:
>
> Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:
>
> a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means; [or]
>
> b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[.]

N.C. Gen. Stat. § 7B-101(1)(a)&(b) (2007). Respondent-father specifically contends that there was no clear and convincing evidence to determine whether Alexander's brain injury was caused by accidental or non-accidental means, none of the doctors testified with "reasonable medical certainty" whether the cause was accidental or non-accidental, and doctors could not say with "reasonable medical certainty" the specific mechanism or exact time that the brain injury occurred.

Dr. Loughlin, who reviewed Alexander's records, both from the evening of 19 August 2007 when he was admitted and from earlier admissions, testified that Alexander's condition was "very critical," and that the "extensive bleeding" over the surface of the brain was "acute" or "fresh" blood from the past "seven days or less." He testified that respondent-father told him that "he didn't know why [Alexander] was in the condition he was in," and that the day before Alexander was doing "fine." He testified that he could not say with "absolute certainty" as to whether Alexander's injuries were accidental or non-accidental, but that there were "a number of factors" that made him think that it was "likely that this was a non-accidental injury." Based on the location of the injury, his extensive evaluation, Alexander's age, and the history given to him, he concluded it was

"likely that this was non-accidental." He stated: "[M]y feeling it is likely to have been non-accidental injury, but I can't tell you exactly what caused the injury or exactly what time it occurred. . . . Given the severity of his injury when he arrived at the emergency room, I think it's unlikely to have been accidental."

Dr. Caruso, when asked to opine as to "a reasonable medical certainty as to the type of cranial injury" that caused Alexander's injuries, testified that the scalp swelling "indicates a nonspecific blow to the head." He testified that the swelling, subdural hematoma, and midline shift "wouldn't be explained by something . . . ten days earlier," and that the injury happened "most likely within a . . . day or on the day of the admission[.]" He testified that the injury would not be a result of the average type of head bump, but rather he analogized it to an impact coming from a motor vehicle accident.

Dr. Smith testified that he had received no plausible explanation for how the injury could have occurred. He was suspicious and concerned that Alexander had been the victim of abusive injury. He deemed Alexander's brain injuries to be the result of an abusive or non-accidental injury and explained that the scalp hemorrhage came from a high-impact trauma or blow to the back of the head. Based on the swelling and bleeding of the initial CT scan, he believed the injury was sustained likely very close to the time of presentation at the emergency room, at most within a few hours. When asked whether he had an opinion as to a "reasonable medical certainty" as to the cause of Alexander's presentation to the emergency room on 19 August, he opined that Alexander "sustained a high-impact injury to the head that caused . . . the injury pattern . . . and that he sustained it shortly prior to his presentation in the emergency department." When asked his opinion to a "reasonable medical certainty" whether Alexander's injuries were accidental or non-accidental, he stated, based on the history and medical investigation, that Alexander "sustained an abusive or non-accidental injury as the source of the brain swelling and . . . bleeding that was seen on the initial CAT scans."

Defense witness Dr. Peter Stephens, a pathologist, opined that "to a reasonable degree of medical certainty" Alexander's injuries were "more probably accidental." He also explained, however, that a five-day delay between any accident and the period of unresponsiveness with which Alexander presented would be unlikely and explainable only by a repeated fall between 14 August and 19 August. He admitted the record showed no evidence of a second fall.

In addition to the doctors' testimony in support of the trauma being inflicted immediately prior to Alexander's being seen by emergency medical personnel, the trial court's findings included a photograph admitted into evidence at the hearing that showed no noticeable swelling to Alexander's head earlier in the day. On admission to the hospital, however, Alexander had significant swelling due to a large scalp hematoma to the back of his head on both the left and right sides. Alexander also had subdural hematomas and profuse swelling of the right side of the brain. A review of the CT scans and MRI readings indicated that the only blood was acute blood. The swelling of the brain increased over a period of three or so days peaking on or about 23 August 2007. The trial court found this was consistent with the injury being inflicted very close in time to the hospital admission.

The trial court also found that respondent-mother told Social Worker Nunnery that earlier during the day of 19 August 2007, respondent-father slapped Alexander up beside the head and said to "shut the f—- up." She reported that Alexander did not look right afterward and he urinated on the sofa, prior to being taken to CFVMC.

We hold that there is clear and convincing evidence to support the trial court's findings of fact that Alexander's injuries were inflicted by non-accidental means, the trauma occurred "very close in time" to and "shortly before" his admission to CFVMC, and Alexander's injuries were "significant and life threatening." These findings of fact support the court's conclusions of law that Alexander was an abused juvenile within the meaning of N.C. Gen. Stat. § 7B-101(1), in that a parent or other person responsible for Alexander's care allowed to be inflicted upon him a serious physical injury by other than accidental means and created or allowed to be created a substantial risk of serious physical injury to Alexander by other than accidental means. *See In re Pittman*, 149 N.C. App. at 763-64, 561 S.E.2d at 566. We deem the trial court's findings of fact conclusive, because they are supported by clear and convincing competent evidence. *See id.* Accordingly, respondent-father's assignments of error related to the adjudication of Alexander as an abused juvenile are overruled.

Neglect of Alexander and Tess

[3] Respondent-father also contends the trial court's findings of fact are insufficient to support the trial court's conclusion that Alexander

and Tess are neglected juveniles. Respondent-father argues that there was a lack of clear and convincing evidence to find neglect, and bases his argument on his previous argument that there was not clear and convincing evidence to find abuse of Alexander.

Respondent-mother contends the trial court's findings of fact are insufficient to support the trial court's conclusion that Tess is a neglected juvenile. In assessing whether Tess is neglected, we consider the standard set forth in *In re Montgomery*, which states: "[T]he determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). Respondent-mother argues that Tess "just happened to be another child in the home," that "[n]othing in the record suggests that the home itself was improper for [Tess]," and that the court's conclusion as to Tess's lack of "proper care, supervision or discipline" was unfounded. We disagree with both respondent-father and respondent-mother.

N.C. Gen. Stat. § 7B-101(15) defines a neglected juvenile 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 been subjected to abuse or neglect by an adult who regularly lives in the home.*"

N.C. Gen. Stat. § 7B-101(15) (emphasis added). While each of the above criteria is sufficient to establish neglect, the trial court's findings must be based upon the evidence presented.

This Court has " '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 order to adjudicate a juvenile neglected.' " *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (citations omitted); *see also In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (listing cases holding that a substantial risk of impairment is sufficient to show neglect).

As to the neglect of Alexander, the trial court found that Alexander sustained life-threatening trauma that was non-accidental; respondent-father gave a medical history which was inconsistent with the injuries sustained by Alexander; respondent-father and respondent-mother adapted their story to try to link Alexander's injuries with an earlier alleged fall; and there was no credible medical evidence to find a relationship between injuries received by Alexander on 9 August 2007 with the condition with which he presented on 19 August 2007.

Respondent-mother, in her brief, states: "[Phillip] contributed money and corporal punishment to the family, but little else," and "[Phillip]. . . . disciplined the children, sometimes leaving marks behind." In addition, respondent-mother at first denied ambulance care for Alexander even when she stated to the 911 operator that one of his pupil's was big and one was small. Regarding the 911 call, it is particularly telling that the attorney for respondent-father stated at the hearing: "I know that I would have to concede on the neglect . . . due to the 911 call when they asked about an ambulance and she said no . . . and, at that point knew he could be injured[.]"

In considering the neglect of Tess, the trial court found that respondent-mother was deceptive, unemployed, very dependent on respondent-father, had no driver's license, and had no phone use unless respondent-father put minutes on her cell phone. The court found that during the volatile argument between respondent-father and respondent-mother at the hospital, Tess had to be kept out of harm's way and out of the zone of danger. The court also found that respondent-father was physically abusive at times to respondent-mother, acts of domestic violence had occurred in the presence of the juveniles, and respondent-mother had taken out a Domestic Violence Protective Order against respondent-father.

Respondent-mother later testified that she made the statements in obtaining the protective order "to get even with [Phillip]" for threatening to take her daughter, and that respondent-father had hit her only in "[p]laying around." Her testimony changed again in response to the question: "Has [Phillip] ever hit you?", to which she replied: "Yes. Sometimes; on occasion." She then confirmed that she did not want to get respondent-father in trouble and that she wanted to be with him. She testified during the hearing that respondent-father had warned her about what she should say to the social workers and the police. The court observed during the hearing that respondent-mother "rarely made any decisions without first consult-

ing with [Phillip] . . . often . . . to the irritation and sometimes the objection of her counsel of record."

In an apparent attempt to minimize her own culpability for neglect of Tess, respondent-mother posits in her brief that she "[w]as more like a servant than a girlfriend" to respondent-father; that she "relies upon [Phillip] for food, transportation, and cell phone minutes"; and that "[e]verything about their relationship was one-sided." She admittedly had no knowledge of respondent-father's other life, and she stated that she "complied with instructions" respondent-father gave her.

Although she argues she provided a "stable environment" for Tess, we fail to see how an environment in which a mother who considers herself a servant to a deceitful, abusive partner and father is "stable." That she has no other means of support or connection to the outside world, other than through respondent-father, is of great concern. Her claim that Tess was not at a "substantial risk of harm" by living in such an environment rings hollow considering the surrounding circumstances discussed *supra*, particularly the volatile nature of the relationship and respondent-father's abuse of Alexander. As to the "proper care, supervision or discipline" Tess received from her parents, respondent-mother admitted in her brief that respondent-father had "inappropriately disciplined" Tess and that he "disciplined the children, sometimes leaving marks behind."

Moreover, while the language regarding abuse or neglect of other children "does not mandate" the trial court's conclusion of neglect, the trial judge has "discretion in determining the weight to be given such evidence." *In re Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994) (construing the identically worded statutory predecessor to § 7B-101). Since the statutory definition of a neglected child includes living with a person who has abused or neglected other children, and since this Court has held that the weight to be given that factor is a question for the trial court, the trial court, in this case, was permitted, although not required, to conclude that Tess was neglected based on evidence that respondent-father had abused Alexander. *See, e.g.*, *In re A.S.*, 190 N.C. App. 679, 690, 661 S.E.2d 313, 321 (2008) (affirming the trial court's adjudication of neglect of one child based on evidence that respondent had abused another child by intentionally burning her), *affirmed per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009); *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) (affirming adjudication of neglect of one child based on prior adjudication of neglect with respect to other children and lack of accepting

responsibility). With this Court's determination *supra* that Alexander was properly adjudicated abused, any weight given by the trial court to the abuse adjudication in determining Tess's neglect was proper.

In this case, the findings of fact provide clear and convincing evidence that both Alexander and Tess were substantially at risk due to the abuse of Alexander, the instability and volatility of the living conditions, and the deceptive nature of the respondent-father and respondent-mother. *See In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676. Furthermore, the environment in which they lived was injurious in that it involved violence. The trial court's findings of fact therefore support the conclusion of law that Alexander and Tess are neglected juveniles. Accordingly, respondent-father's and respondent-mother's assignments of error related to the adjudication of Alexander and Tess as neglected juveniles are overruled.

Written Visitation Order

[4] The parties next argue that the trial court erred by failing to enter a disposition which complies with N.C. Gen. Stat. § 7B-905(c). We agree.

N.C. Gen. Stat. § 7B-905(c) (2007) provides:

> Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile's placement is continued outside the home *shall provide for appropriate visitation* as may be in the best interests of the juvenile and consistent with the juvenile's health and safety. If the juvenile is placed in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved by the court.

(Emphasis added.) Thus, whether a trial court decides to allow visitation or not, its dispositional order must include an order regarding visitation. *In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 651 (2005) ("The trial court maintains the responsibility to ensure that an appropriate visitation plan is established within the dispositional order."). If a court finds that visitation would not be in the best interest and welfare of the child, the court may deny the parent visitation rights. *In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971). If the court does not make such findings, however, "the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place and con-

ditions under which such visitation rights may be exercised." *Id.*; *see also In re E.C.*, 174 N.C. App. at 523, 621 S.E.2d at 652 ("An appropriate visitation plan must provide for a minimum outline of visitation such as the time, place, and conditions under which visitation may be exercised.").

We hold that, pursuant to statutory requisites, the trial court erred by not addressing visitation in its dispositional order. We therefore remand for the court's establishment of a written visitation plan.

Conclusion

We affirm the trial court's adjudication of abuse of Alexander in that a parent or other person responsible for Alexander's care allowed to be inflicted upon him a serious physical injury by other than accidental means and created or allowed to be created a substantial risk of serious physical injury to Alexander by other than accidental means. We further affirm the trial court's adjudication of neglect of Alexander and Tess where the juveniles were substantially at risk due to the abuse of Alexander, the instability and volatility of the living conditions, and the deceptive nature of the respondent-father and respondent-mother. The juveniles were also at risk due to violence in the home. We remand for written disposition of child visitation orders.

Affirmed and remanded.

Judges WYNN and JACKSON concur.

ROBERT G. YUREK AND WIFE, SUSAN G. YUREK, PLAINTIFFS v. SARA PAGE SHAFFER AND MATTHEW CHRISTIAN BOYD, DEFENDANTS

No. COA08-1410

(Filed 7 July 2009)

1. Child Support, Custody, and Visitation— child custody—nonparents—consent judgment—subject matter jurisdiction

The trial court did not err in a child custody case involving a child born out of wedlock by denying defendant mother's motion for N.C.G.S. § 1A-1, Rule 60(b) relief from a consent judgment, by concluding that it had jurisdiction over the parties and the subject matter of this action when entering the original consent judg-

ment, and by determining that the minor child's interests were best served by maintaining his primary physical custody with plaintiffs because: (1) defendant admitted during oral arguments that plaintiffs, the father's sister and brother-in-law, qualified as "relatives" under N.C.G.S. § 50-13.1(a) who are permitted to bring a child custody action; (2) regarding defendant's constitutionally protected status as a parent, plaintiffs' complaint for custody alleged that both she and the fifteen-year-old father were, at the time of the complaint, unemployed, dealing with substance abuse issues, and not able to provide for the care of the minor child; (3) a natural parent's execution of a valid consent judgment granting exclusive care, custody, and control of a child to a nonparent may be a factor upon which the trial court could base a conclusion that a parent has acted inconsistently with his or her constitutionally protected status; and (4) the evidence constituted clear and convincing proof that defendant's conduct was inconsistent with her right to custody of the child, including that defendant at the time of the "In Home Family Agreement" acknowledged substance abuse and domestic violence issues and voluntarily agreed that it was in the best interests of the minor child to be placed with plaintiffs; defendant voluntarily consented to the minor child's placement with other parties including first with the father's parents and then with plaintiffs; and defendant failed to produce evidence that she had a substantial degree of personal, financial, or custodial contact with the minor child after these placements.

2. Judgments— consent judgment—failure to show duress or undue influence

The trial court did not act arbitrarily in a child custody case by determining that defendant mother failed to show she was under duress or undue influence when she executed a consent judgment because: (1) although defendant's drug abuse problems were well-documented in the record, she failed to provide any evidence, other than her bare allegations, that she was under the influence of any drug or other mind-altering substance on the date she signed the consent judgment; (2) although Rule 4.3 of the North Carolina Rules of Professional Conduct prohibits a lawyer from giving legal advice to an unrepresented adverse party, there was no evidence in the record indicating that the attorney for DSS and plaintiffs gave defendant any legal advice or attempted to influence her decision in any way; (3) approxi-

mately thirteen days passed between the last of the meetings regarding the minor child's placement and defendant's execution of the consent judgment, but she made no effort during this time to seek legal advice despite her contention that she was unduly influenced by plaintiff's statement that she did not need a lawyer; (4) although defendant testified at the Rule 60(b) motion hearing that her understanding of the legal consequences of the consent judgment was initially limited, the record revealed, and the trial court found, that at the time of the consent judgment, defendant was twenty years old, enrolled in community college, and had previously interacted with DSS several times; and (5) defendant's testimony also indicated that at the time of the consent judgment, she made a rational determination that placing the minor child with someone else while she was "getting sober" was in the child's best interest, and that she understood that whenever she got herself back together and wanted the child to come home, defendant just had to go to the court and petition the court to get him back.

3. Judgments— subject matter jurisdiction—third party cannot challenge validity of consent judgment entered into by minor

Although defendant mother contends the trial court lacked subject matter jurisdiction to enter or approve a consent judgment in a child custody case since defendant father was a minor, was not appointed a guardian *ad litem*, was not represented by any other type of guardian or by counsel, and thus was incapable of consenting to the judgment as a matter of law, a third party has no standing to challenge the validity of a consent judgment entered into by a minor. Defendants signed the consent judgment separately, and although the mother was a party to the consent judgment, she does not have standing to challenge the father's capacity to consent to the judgment.

Appeal by defendants from judgment entered 6 June 2008 by Judge Charles W. Wilkinson, Jr. in Granville County District Court. Heard in the Court of Appeals 20 April 2009.

James T. Duckworth, III for defendant-appellant Shaffer.

Michael P. Burnette for plaintiff-appellees.

MARTIN, Chief Judge.

Defendant-appellant Sara Page Shaffer ("Shaffer") appeals from the trial court's 6 June 2008 denial of her Rule 60(b) motion to vacate a consent judgment entered 13 November 2006.

Shaffer and defendant Matthew Christian Boyd ("Boyd") are the natural parents of the minor child J.C.B., who was born on 26 May 2006. Shaffer, Boyd, and J.C.B. lived together in Person and Granville Counties from J.C.B.'s birth until 18 August 2006. Shaffer, who was 19 years old at the time, was dealing with substance abuse issues and was on felony probation for breaking or entering and larceny. Boyd was only 15 years old. During this period, the Person County Department of Social Services ("DSS") initiated an investigation with respect to J.C.B.

On 18 August 2006, J.C.B. went to live with Shaffer's parents, and continued living in their home until 1 November 2006. During that time, the Granville County DSS was managing the case and providing services to Shaffer, Boyd, and J.C.B. under the supervision of In Home Family Services agent Kay Putney ("Putney"). Putney went to Shaffer's parents' home to investigate and insure J.C.B.'s safety. At some point in fall 2006, Shaffer's parents approached DSS and expressed their unwillingess to maintain full-time custody of J.C.B. Putney met with Shaffer and Boyd at Boyd's parents' home, and then, on 17 October 2006, met with all of the parties at the offices of the Granville County DSS to formulate an "In Home Family Services Agreement." The following parties were present at this meeting: Shaffer, Boyd, DSS Supervisor Jonathon Cloud, Foster Care Supervisor Shelia Smith, Shaffer's sister Doris Jacobs, Boyd's mother Joyce Boyd, and Boyd's sister and brother-in-law, Susan and Robert Yurek ("plaintiffs").

The "In Home Family Services Agreement" identified domestic violence and substance abuse as behaviors of concern and listed "decide whether to place [J.C.B.] in foster care or give custody to family members Robert and Susan Yurek" as an activity of the meeting. A subsequent provision of the agreement provided that, if J.C.B.'s safety could no longer be assured, "[a] petition will be filed and the child will be placed in foster care." On 1 November 2006, the parties met in the law offices of Hopper, Hicks, & Wrenn, L.L.P., with attorney N. Kyle Hicks ("Hicks") to discuss the custody of J.C.B. Hicks was paid by and represented the interests of DSS, and also represented plaintiffs privately. Shaffer and Boyd were not represented by counsel at the time of this meeting.

On 13 November 2006, Shaffer, Boyd, and plaintiffs again met with Hicks and were presented with a complaint, summons, and consent judgment. Shaffer and Boyd signed the consent judgment without objection. That same day, plaintiffs filed a complaint for custody, alleging, inter alia, that "plaintiff, Susan Yurek is Boyd's sister, and therefore is an aunt to [J.C.B]." The complaint also alleged that "[p]laintiffs are fit and proper persons to have custody of the minor child and have discussed the same with [Boyd and Shaffer, who] have consented to the Plaintiffs having custody of the minor child." The consent judgment was entered in Granville County District Court on 1 December 2006 and provided in part:

> 4. That [Boyd and Shaffer] are the biological parents of the minor child, [J.C.B.] born May 26, 2006.
>
> . . . .
>
> 8. That the Plaintiffs are fit and proper persons to exercise the exclusive care, custody and control of the minor child, and that it is in the best interest of said minor child, and would best promote his general welfare, that his exclusive care, custody and control be granted to the Plaintiffs.
>
> 9. That the minor child, [J.C.B.], born May 26, 2006, has resided with [Boyd and Shaffer] from his date of birth up to August 17, 2006 at which time the minor child resided with the maternal grandparents. The minor child began to reside with the Plaintiffs on November 1, 2006.
>
> 10. That the Plaintiff, Robert Yurek, is employed and the Plaintiff, Susan Yurek, is a stay at home mother, and Plaintiffs have a home with sufficient space and provisions for the minor child, including the child's own bedroom, toys, clothing, food and all of the essential provisions for the minor child.
>
> 11. That the Defendants are both currently unemployed and are dealing with substance abuse issues in their own lives and not able at this time to provide for the care of the minor child.
>
> 12. That the minor child was born out of wedlock and [Boyd] has not established paternity judicially or by affidavit filed in a central registry maintained by the Department of Health and Human Services, and the father has not legitimated the minor child pursuant to the provisions of N.C.G.S. § 49-10, or filed a Petition for that specific purpose, nor has the respondent father legitimated the minor child by marriage to the mother of the minor child.

> 13. That [Boyd and Shaffer] have agreed to surrender custody of the minor child to Plaintiffs.
>
> 14. That the parties have agreed that [Boyd and Shaffer] will have visitation with the minor child as may be agreed upon between them.
>
> 15. That by their signature hereto [Boyd and Shaffer] have waived their rights to further answer or respond to the Complaint herein. In addition, [Boyd and Shaffer] have waived their right to be notified for hearing and consent to this Judgment being entered as soon as possible at any term of the District Court in Granville County by any District Court Judge of the 9th Judicial District.

Based upon these and other findings of fact, the district court concluded as a matter of law that the parties were properly before the district court, and that facts existed justifying the district court to assume jurisdiction to determine the custody of J.C.B. pursuant to N.C.G.S. § 50A-3. The district court further concluded that plaintiffs are fit and proper persons to exercise exclusive care, custody and control of J.C.B. and that "it is in the best interest of [J.C.B.], . . . and would promote his general welfare for his exclusive care, custody and control to be granted to plaintiffs." The consent judgment was signed by plaintiffs, Shaffer, Boyd, and Hicks as counsel for plaintiffs.

On 10 May 2007, Shaffer filed a motion to vacate the consent judgment pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure, alleging that she was threatened with termination of her parental rights unless she signed the consent judgment, and that, because there were "insufficient findings of fact to support a divestiture of legal and physical custody" from Shaffer and Boyd, the district court was without jurisdiction to enter the consent judgment. Shaffer asked the district court to find that the "proceedings, procedures and representations made to the Defendant Shaffer constitute fundamental unfairness which violate her constitutionally guaranteed custodial rights as a biological mother, . . . substantive (and procedural) due process rights as guaranteed by the 14th Amendment to the United States Constitution and the Constitution of the State of North Carolina, . . . that Shaffer did not execute the consent judgment voluntarily, but under threat, coercion and duress," and, accordingly, to vacate the consent judgment as void as a matter of law.

On 6 June 2008, the district court entered an order denying Shaffer's motion to set aside the consent judgment pursuant to Rule

60(b). The district court found that the allegations contained in plaintiffs' complaint and the findings of fact contained in the consent judgment filed 1 December 2006 were true and accurate, and thus adopted them for purposes of the order. The district court also made the following findings of fact:

> 12. That [at the 17 October 2006 meeting between the parties,] the alternative given to [Shaffer] [sic] decide whether to place [J.C.B.] in foster care or give custody to [plaintiffs].
>
> 13. That the matters of [Shaffer]'s substance abuse and domestic violence was [sic] acknowledged by [Shaffer] and taken into consideration.
>
> 14. That it was agreed by all parties present that it would be in the best interests of the minor child that custody be placed with the Plaintiffs, . . . rather than to begin a [DSS] Petition for Neglect and perhaps place [J.C.B.] in foster care.
>
> 15. That [DSS] agreed to effect the transfer to [plaintiffs].
>
> 16. That on the 1st day of November 2006, all parties met with and in the office of [Hicks], an attorney with 23 years of legal experience and a partner in the firm of Hopper, Hicks, & Wrenn, L.L.P.
>
> 17. That [Hicks] was paid by and represented the interests of [DSS] with the knowledge and consent of [Shaffer and Boyd]. That the Complaint and the Consent Judgment both reflect that [Hicks] also represented [plaintiffs] privately.
>
> 18. That neither [Shaffer or Boyd] was represented by counsel during either the investigatory process nor at any time during the legal proceeding.
>
> 19. That no conflict existed between any of the parties and in [sic] [Hicks] at the date the above-entitled action was begun.
>
> 20. That it was anticipated and expressed by the parties to [Shaffer and Boyd], that when issues of substance abuse and domestic violence and parental responsibility were resolved, that [Shaffer and Boyd] could *petition* for a change of custody.
>
> 21. That on the 13th of November, 2006 [Shaffer and Boyd] and the Plaintiffs prior to November 13, 2006, [sic] the parties again met at the office of [Hicks] and were presented with a Complaint,

> Summons, and Consent Judgment all of which were executed without objection and further that said Consent Judgment "waived any further hearing and consented to the entry of the Judgment as soon as possible . . . . by any District Court Judge of the Ninth Judicial District."
>
> 22. That [Putney] and [Hicks] reported that Plaintiffs' house was also visited by [Putney] on multiple occasions and the last one was when the file was closed in December, 2006 which was in the final report.
>
> 23. That at the time of the Consent Judgment [Shaffer] was 20 years of age, competent, attending school making B's and C's, and was otherwise able to understand the consequences of her actions although she stated that she was impaired by the use of marijuana on the 13th day of November, 2006.
>
> 24. That on the 13th day of November, 2006 it was in the best interests of the minor child that custody be placed with the Plaintiffs.

(Emphasis in original.) Based upon these and other findings of fact, the district court made the following conclusions of law:

> 1. That the Court has jurisdiction of the parties hereto and of the subject matter herein.
>
> 2. That the Consent Judgment entered on the 13th day of November 2006 was freely and knowingly entered into by [Shaffer] and that no extraordinary circumstances existed to justify setting aside the Consent Judgment.
>
> 3. That on the 13th day of November, 2006 it was in the best interests of the minor child that custody be placed with [plaintiffs].

From this order, Shaffer now appeals, arguing that: (1) the district court did not have subject matter jurisdiction over this action because plaintiffs did not have standing; (2) the district court abused its discretion by failing to find as fact that the 1 December 2006 consent judgment was a result of misconduct by Hicks; (3) Boyd, as a minor at the time of the consent judgment, was incapable of consenting to the judgment as a matter of law. For the reasons stated below, we affirm the ruling of the trial court.

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[1] Shaffer first assigns error to the trial court's finding and conclusion, in its order denying her motion for Rule 60(b) relief, that it had

jurisdiction of the parties and the subject matter of this action in entering the original consent judgment. As part of this argument, Shaffer contends that plaintiffs did not have standing to sue for custody of J.C.B. under N.C.G.S. § 50-13.1(a). We disagree.

While the standard of appellate review of a trial court's ruling on a Rule 60(b) motion is generally for an abuse of discretion, *Barnes v. Wells*, 165 N.C. App. 575, 580, 599 S.E.2d 585, 589 (2004) (citing *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616, *disc. review denied*, 348 N.C. 281, 502 S.E.2d 846 (1998)), " 'whether 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) (quoting *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004)).

Subject matter jurisdiction has been defined as a court's power to hear a specific type of action, 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) (citing *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987)). A lack of subject matter jurisdiction has been found where the petitioner lacked standing. *See In re Miller*, 162 N.C. App. 355, 358-59, 590 S.E.2d 864, 866 (2004) (no subject matter jurisdiction because DSS lacked standing to petition). Standing for an individual to bring an action for child custody is governed by N.C.G.S. § 50-13.1(a), which provides in pertinent part that "[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child . . . ." N.C. Gen. Stat. § 50-13.1(a) (2007). Although N.C.G.S. § 50-13.1(a) broadly grants standing to any parent, relative, or person claiming the right to custody, when such actions are brought by a non-parent to obtain custody to the exclusion of a parent, our appellate courts have also required allegations of some act inconsistent with the parent's constitutionally protected status. *See Penland v. Harris*, 135 N.C. App. 359, 362, 520 S.E.2d 105, 107 (1999) (holding that the ruling in *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), required maternal grandmother seeking custody to allege facts sufficient to show that mother acted inconsistently with her constitutionally protected status). As our Supreme Court has explained, "[a] natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child."

Price, 346 N.C. at 79, 484 S.E.2d at 534 (citing *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614 (1983). However, the Court continued,

> the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. However, conduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights, would result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents. Where such conduct is properly found by the trier of fact, based on evidence in the record, custody should be determined by the "best interest of the child" test mandated by statute.

Id. at 79, 484 S.E.2d at 534-35 (citations omitted). Our Supreme Court later held that "a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citing *Santosky v. Kramer*, 455 U.S. 745, 747-48, 71 L. Ed. 2d 599, 603 (1982)).

In *Cantrell v. Wishon*, 141 N.C. App. 340, 540 S.E.2d 804 (2000), this Court was presented with a set of facts similar to those in the case at bar. A mother signed a document stating she wanted plaintiffs, the paternal aunt and uncle of her minor children, to act as the children's parents, and then voluntarily left the children with the plaintiffs while she underwent drug rehabilitation treatment. *Id.* at 341, 540 S.E.2d at 805. After five months of infrequent visits from the mother, the plaintiffs sued for custody of the children. *Id.* We indicated that plaintiffs had standing to bring a suit for custody, but ultimately remanded to the trial court for findings as to whether mother had acted inconsistently with her constitutionally protected status. *Id.* at 344, 540 S.E.2d 806. Our opinion discussed the *Price* court's treatment of the issue:

> In determining whether the mother acted inconsistently with her protected status, the Court considered a number of other issues: Whether her relinquishment of custody was intended to be temporary or permanent; whether her behavior had created the family unit that existed between the plaintiff and the child; and the degree of custodial, personal and financial contact between her and her child.

Cantrell, 141 N.C. App. at 343, 540 S.E.2d at 806 (2000) (citing *Price*, 346 N.C. at 83-84, 484 S.E.2d at 537).

Here, Shaffer first argues in her brief that the father of a child born out of wedlock is considered an "other person" under the statute, and, by extension, the relatives of such a father should also be considered "other persons." However, at oral argument, Shaffer's attorney admitted to this Court that plaintiffs in this case qualify as "relatives" under N.C.G.S. § 50-13.1(a). Furthermore, we note that neither Shaffer nor Boyd has disputed plaintiffs' status as biological relatives of J.C.B. until this appeal. A "relative" has been defined as a "person connected with another by blood or affinity; a person who is kin with another." Black's Law Dictionary 1315 (7th ed. 2004). Under this plain meaning, the meaning which all parties have apparently assigned to the term as utilized in the statute, we conclude that plaintiffs properly filed a claim for custody of J.C.B. as relatives under N.C.G.S. § 50-13.1(a).

As to Shaffer's constitutionally protected status, we first note that plaintiffs' complaint for custody alleged that both Shaffer and Boyd were, at the time of the complaint, unemployed, dealing with substance abuse issues, and not able to provide for the care of J.C.B. We also note that, under the factors considered by the *Price* Court and noted by this Court in *Cantrell*, a natural parent's execution of a valid consent judgment granting exclusive care, custody, and control of a child to a nonparent, may be a factor upon which the trial court could base a conclusion that a parent has acted inconsistently with his or her constitutionally protected status. *See Cantrell*, 141 N.C. App. at 343, 540 S.E.2d at 806. Though Shaffer disputes the validity of the consent judgment, the findings contained in the trial court's consent judgment and in its order denying Shaffer's Rule 60(b) motion, which appear well supported by our review of the record, demonstrate that Shaffer, prior to execution of the consent judgment, invariably acted in a manner inconsistent with her paramount interest in the custody, care, and control of J.C.B. Notably, at the time of the "In Home Family Agreement," Shaffer acknowledged substance abuse and domestic

violence issues and voluntarily agreed that it was in the best interests of J.C.B. to be placed with plaintiffs. Furthermore, Shaffer voluntarily consented to J.C.B.'s placement with other parties-first with Boyd's parents, and then with plaintiffs—and Shaffer has produced no evidence that she had a substantial degree of personal, financial, or custodial contact with J.C.B. after these placements.

The trial court's findings of fact are sufficient to support a conclusion that Shaffer's conduct was inconsistent with her protected interest in the custody of J.C.B. Moreover, the evidence of record constitutes clear and convincing proof that Shaffer's conduct was inconsistent with her right to custody of the child. As such, the trial court did not err in applying the "best interest of the child" standard, determining that J.C.B.'s interests were best served by maintaining his primary physical custody with plaintiffs, and entering the consent judgment. Accordingly, this assignment of error is overruled.

[2] Shaffer contends, however, that we should not consider her execution of the consent judgment and she assigns error to the trial court's denial of her Rule 60(b) motion to set it aside. Shaffer alleges that because she was young, unrepresented by counsel, and allegedly under the influence of marijuana at the time she signed the consent judgment, she was particularly vulnerable to the undue influence of Hicks and DSS, and that Hicks's communications with Shaffer leading up to her execution of the consent judgment amounted to improper misconduct. Accordingly, Shaffer contends, the district court's denial of her Rule 60(b) motion was manifestly unsupported by reason. We disagree.

Shaffer relies on N.C.G.S. § 1A-1, Rule 60(b)(3), which provides in pertinent part:

> On motion and upon such terms as are just, the court *may* relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . . .
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other *misconduct* of an adverse party;

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2007) (emphasis added). We review the denial of a motion pursuant to Rule 60 for an abuse of discretion. *Ollo v. Mills*, 136 N.C. App. 618, 625, 525 S.E.2d 213, 217 (2000) (citing *Hickory White Trucks, Inc. v. Greene*, 34 N.C. App. 279, 237

S.E.2d 862 (1977)). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citing *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980)). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

A consent judgment has been defined by this Court as "the contract of the parties entered upon the records of a court of competent jurisdiction with its sanction and approval." *Blankenship v. Price*, 27 N.C. App. 20, 22, 217 S.E.2d 709, 710 (1975) (citing *King v. King*, 225 N.C. 639, 35 S.E.2d 893 (1945)). Because a consent judgment incorporates the bargained agreement of the parties, such a judgment may be attacked only on limited grounds: "it cannot be changed without the consent of the parties or set aside except upon proper allegation and proof that consent was not in fact given or that it was obtained by fraud or mutual mistake, the burden being upon the party attacking the judgment." *Id.* (citation omitted).

This Court has held that, under Rule 60(b), duress or undue influence used to secure execution of a consent order may amount to misconduct justifying relief from the order. *Coppley*, 128 N.C. App. at 664, 496 S.E.2d at 618 (reversing trial court's denial of defendant's Rule 60(b) motion to set aside a consent judgment obtained when defendant was under the influence of prescription medication and emotionally distraught after plaintiff's threats to expose her extramarital affair in court and in front of their children). " 'Duress is the result of coercion.' " *Stegall v. Stegall*, 100 N.C. App. 398, 401, 397 S.E.2d 306, 307-08 (1990) (quoting *Link v. Link*, 278 N.C. 181, 191, 179 S.E.2d 697, 703, *disc. review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991)). " 'Duress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will.' " *Id.* (quoting *Link*, 278 N.C. at 194, 179 S.E.2d at 705). "Factors relevant in determining whether a victim's will was actually overcome" are as follows:

> [T]he age, physical and mental condition of the victim, whether the victim had independent advice, whether the transaction was fair, whether there was independent consideration for the transaction, the relationship of the victim and alleged perpetrator, the value of the item transferred compared with the total wealth of

> the victim, whether the perpetrator actively sought the transfer and whether the victim was in distress or an emergency situation.

Id. at 401-02, 397 S.E.2d at 308 (quoting *Curl v. Key*, 64 N.C. App. 139, 142, 306 S.E.2d 818, 820 (1983), *rev'd on other grounds*, 311 N.C. 259, 316 S.E.2d 272 (1984)). "In the instance where the court cannot find sufficient threat to constitute duress, it may still find the presence of undue influence," *Coppley*, 128 N.C. App. at 664, 496 S.E.2d at 617, which has been defined as " 'the exercise of an improper influence over the mind and will of another to such an extent that his professed act is not that of a free agent, but in reality is the act of the third person who procured the result.' " *Stephenson v. Warren*, 136 N.C. App. 768, 772, 525 S.E.2d 809, 812 (quoting *Lee v. Ledbetter*, 229 N.C. 330, 332, 49 S.E.2d 634, 636 (1948)), *disc. review denied*, 351 N.C. 646, 543 S.E.2d 883 (2000).

First of all, we note that, although Shaffer's drug abuse problems have been well-documented in the record, Shaffer has failed to provide any evidence, other than her bare allegations, that she was under the influence of any drug or other mind-altering substance on the date she signed the consent judgment. We also note that, when acting as the finder of fact, the trial court has the opportunity to observe the demeanor of the witnesses and determine their credibility, the weight to be given their testimony and the reasonable inferences to be drawn therefrom. *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citing *Knutton v. Cofield*, 273 N.C. 355, 160 S.E.2d 29 (1968)). Accordingly, the trial court's findings of fact "are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975).

"[T]here is no prohibition generally on [an attorney] communicating directly with an adverse party who is not represented by counsel." Ethics Op. RPC 15, *N.C. State Bar Lawyers' Handbook* 2008, at 170 (October 24, 1986) (discussing whether an attorney may contact an unrepresented adverse party and make a demand or propose a settlement). Although Rule 4.3(a) of the North Carolina Rules of Professional Conduct prohibits a lawyer from giving legal advice to an unrepresented adverse party, *see* N.C. Rev. R. Prof'l. Conduct R. 4.3(a), 2009 Ann. R. N.C. 818, we find no evidence in the record indicating that Hicks gave Shaffer any legal advice or attempted to influence her decision in any way. Here, Shaffer does not point to any false statement made by Hicks to Shaffer or the trial court leading up to the

consent judgment. Furthermore, though Hicks alleges she was unduly influenced by Putney's statement, "No, you don't need [a lawyer]. You just need to sign all this," we note that the context of this statement belies this allegation. The statement occurred after several meetings where Shaffer had participated in discussions regarding J.C.B.'s placement with plaintiffs and in response to Shaffer's question, "Are y'all sure I don't need a lawyer?" The record also reveals that approximately thirteen days passed between the last of these meetings and Shaffer's execution of the consent judgment, but she made no effort during this time to seek legal advice.

Although Shaffer testified at the Rule 60(b) motion hearing that her understanding of the legal consequences of the consent judgment was initially limited, the record reveals, and the trial court found, that at the time of the consent judgment, Shaffer was twenty years old, enrolled in community college, and had previously interacted with DSS several times. Shaffer's testimony also indicated that, at the time of the consent judgment, she made a rational determination that placing J.C.B. with someone else while she was "getting sober" was in J.C.B.'s best interest, and that she understood that "whenever I got myself back together and I wanted [J.C.B.] to come home, I just had to go to the court and petition the court to get him back." Clearly, Shaffer's will was not "actually overcome," there is little evidence to support a claim of undue influence, and our review of the record reveals no "egregious scheme of directly subverting the judicial process." *Henderson v. Wachovia Bank*, 145 N.C. App. 621, 628, 551 S.E.2d 464, 469 (internal quotation marks omitted), *disc. rev. denied*, 354 N.C. 572, 558 S.E.2d 869 (2001). The trial court did not act arbitrarily in determining that Shaffer failed to show she was under duress or undue influence when she executed the consent judgment. Because Shaffer has not met her burden of showing that the trial court's denial of her Rule 60(b) motion was manifestly unsupported by reason, this assignment of error is overruled.

[3] Finally, Shaffer argues that the trial court lacked subject matter jurisdiction to enter or approve the consent judgment because Boyd was a minor, was not appointed a guardian ad litem, was not represented by any other type of guardian or by counsel, and therefore was incapable of consenting to the judgment as a matter of law.

A consent judgment is a bargained-for agreement, *Stevenson v. Stevenson*, 100 N.C. App. 750, 752, 398 S.E.2d 334, 336 (1990), and in North Carolina, "agreements or contracts, except for those dealing

with necessities and those authorized by statute, 'are voidable at the election of the infant and may be disaffirmed *by the infant* during minority or within a reasonable time of reaching majority.' " *Creech v. Melnick*, 147 N.C. App. 471, 476, 556 S.E.2d 587, 591 (2001) (emphasis added) (quoting *Bobby Floars Toyota, Inc., v. Smith*, 48 N.C. App. 580, 582, 269 S.E.2d 320, 322 (1980)). A third party thus has no standing to challenge the validity of a consent judgment entered into by a minor.

Here, Shaffer and Boyd signed the consent judgment separately. Shaffer, though a party to the consent judgment, does not have standing to challenge Boyd's capacity to consent to the judgment. Accordingly, this assignment of error is overruled.

Affirmed.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA v. RONALD DAVID LARK

No. COA08-1239

(Filed 7 July 2009)

1. Sexual Offenses— first-degree—performing or receiving fellatio

N.C.G.S. § 14-27.4(a) does not distinguish between forcing a victim to perform fellatio or performing fellatio upon a victim, and the trial court did not err by denying defendant's motion to dismiss a charge of first-degree sexual offense by fellatio where there was evidence that defendant forced his son to perform fellatio, but at one point the court instructed the jury that defendant was accused of performing fellatio on the victim.

2. Child Abuse and Neglect— felonious abuse—fellatio—instructions

There was no plain error in a prosecution for felonious child abuse in an instruction that gave three alternative theories for the charge where defendant argued that the evidence was insufficient to support two of the theories. The evidence supported the instruction that defendant committed felonious child abuse

based upon committing a sexual act with the victim; N.C.G.S. § 14-27.1 does not distinguish between performing or receiving fellatio. Furthermore, considering the evidence presented at trial and the instruction, the jury could not have been confused by a misstatement in the instruction.

3. Indictment and Information— variance with evidence—felonious child abuse—particular sexual act

There was no fatal variance between an indictment for felonious child abuse and the evidence where the court instructed on the theory of anal intercourse alleged in the indictment and also on the theory of fellatio, which was not alleged in the indictment but which was supported by the evidence. The State was not required to allege the particular sexual act defendant committed in order to support a felonious child abuse charge, the language alleging anal intercourse was surplusage, and the trial court did not substitute a different theory for the one alleged in the indictment.

4. Evidence— testimony of clinical social worker—victim's post-traumatic stress—no limiting instruction

There was no plain error in a felonious child abuse instruction where the court did not give an instruction limiting the testimony of a clinical social worker about the victim's post-traumatic stress disorder to corroborative purposes. Defendant did not request such an instruction and cross-examined the witness as to the basis for the opinion.

5. Criminal Law— judgment and commitment forms—clerical errors

Convictions for felonious child abuse, first-degree sexual offense, and other related charges were remanded for correction of clerical errors in the judgment and commitment forms.

Appeal by Defendant from judgments entered 4 April 2008 by Judge John W. Smith in Superior Court, Stokes County. Heard in the Court of Appeals 6 May 2009.

Attorney General Roy Cooper, by Assistant Attorney General Mary Carla Hollis, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for Defendant-Appellant.

McGEE, Judge.

Ronald David Lark (Defendant) was found guilty on 4 April 2008 of indecent liberties with a child by fellatio, first-degree sexual offense by fellatio, crime against nature, and felonious child abuse. Defendant was acquitted of indecent liberties with a child by anal sex and first-degree sexual offense by anal sex. The trial court consolidated Defendant's indecent liberties with a child and first-degree sexual offense convictions and sentenced Defendant to 336 months to 413 months in prison. The trial court consolidated Defendant's crime against nature and felonious child abuse convictions and sentenced Defendant to 34 months to 50 months in prison to run consecutively with Defendant's prior judgment. Defendant appeals.

At trial, the State presented the following evidence. Defendant is the biological father of J.A.S., the victim. J.A.S. first began visiting Defendant in late 2002, when J.A.S. was nine years old. J.A.S. testified that on one occasion when he was visiting Defendant, Defendant called J.A.S. into the bathroom and told J.A.S. to "suck [Defendant's] wiener." J.A.S. did as he was told and put Defendant's penis in his mouth. Defendant told J.A.S. that if he told anyone, Defendant would hurt J.A.S. or J.A.S.'s mother. On another occasion when J.A.S. was visiting Defendant, Defendant again asked J.A.S. to "suck his wiener[.]" When J.A.S.'s mother picked him up from that visit, J.A.S. told his mother Defendant had called her names. As a result, J.A.S.'s mother stopped J.A.S.'s visits with Defendant.

J.A.S.'s mother allowed J.A.S. to resume visits with Defendant in the middle of 2005, when J.A.S. was twelve years old. J.A.S.'s mother testified that after J.A.S. resumed visits with Defendant, she noticed a difference in J.A.S.'s attitude. J.A.S. became withdrawn, his grades dropped, and he began having behavioral problems at school. In November 2005, J.A.S. was suspended from school for two days for an angry outburst. On the first day of J.A.S.'s suspension, his mother took him to Defendant's house. J.A.S. testified that while he was at Defendant's house, Defendant again told J.A.S. to "suck his wiener." Defendant then pushed J.A.S. onto a bed and forced anal sex on him. On the second day of J.A.S.'s suspension from school, he begged his mother not to take him back to Defendant's house. J.A.S. testified he did not tell his mother about Defendant's abuse because he was afraid Defendant would hurt him. J.A.S. testified that Defendant had anal intercourse with him two or three times and that Defendant forced him to put Defendant's penis in his mouth six or seven times.

J.A.S.'s mother testified that two weeks after being suspended from school, J.A.S. was caught molesting other children. J.A.S. told his mother that Defendant "did things" to him. Detective Kelly Beard (Detective Beard) with the King Police Department investigated the allegations of abuse against Defendant. Defendant voluntarily came to the police station to answer questions. Defendant denied J.A.S.'s allegations. However, when Detective Beard told Defendant that J.A.S. engaged in sex acts with other boys, Defendant said: "Well, I guess somebody showed him how to do it." Defendant told Detective Beard that he had problems finding dates. As Defendant left the police station, he said to Detective Beard: "Well, I'm a little crippled. . . . [A] man's got to do what a man's got to do."

At the time of trial, J.A.S. was living in a residential treatment facility. Victor Isler (Isler), a clinical social worker at the facility, was qualified as an expert in the fields of sexualized trauma and in recognizing sexualized behaviors in victims. Isler testified that J.A.S.'s behavior was consistent with that of a person who had experienced sexualized trauma. Isler further testified that as a result of that trauma, J.A.S. suffered from post-traumatic stress disorder.

At the end of the State's evidence, Defendant made a motion to dismiss the charges. The trial court denied Defendant's motion. Defendant presented evidence at trial, including the testimony of several family members and friends who testified that J.A.S. was never at Defendant's house. However, Defendant's nephew testified that J.A.S. was at Defendant's house two or three times a month. Defendant's son, Christopher Lark (Lark), testified that he had lived with Defendant since he was fifteen years old. Lark testified that he had seen J.A.S. at Defendant's house.

Defendant testified on his own behalf and denied allegations that he sexually abused J.A.S. At the end of Defendant's evidence, Defendant renewed his motion to dismiss the charges against him. The trial court again denied Defendant's motion.

I.

[1] Defendant argues in his assignment of error number one that the trial court erred in denying Defendant's motion to dismiss the charge of first-degree sexual offense by fellatio.

The standard of review for a motion to dismiss in a criminal trial is "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2)

of [the] defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citing *State v. Roseman*, 279 N.C. 573, 184 S.E.2d 289 (1971)). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Kraus*, 147 N.C. App. 766, 769, 557 S.E.2d 144, 147 (2001) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992)).

First-degree sexual offense is defined as "a sexual act . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.4 (2007). N.C. Gen. Stat. § 14-27.1 defines a "sexual act" as "cunnilingus, fellatio, analingus, . . . anal intercourse . . . [or the] penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.1 (2007).

Because J.A.S. testified that on numerous occasions Defendant forced J.A.S. to perform fellatio, we find the State presented sufficient evidence to support Defendant's first-degree sexual offense charge. However, at one point in the trial court's jury instruction on first-degree sexual offense, the trial court stated: "[D]efendant is accused of committing first degree sex offense by performing fellatio upon J.A.S." Defendant argues that because the trial court misspoke in its jury instructions, there was insufficient evidence to support Defendant's conviction for first-degree sexual offense.

"The Due Process Clause . . . requires that the sufficiency of the evidence to support a conviction be reviewed with respect to the theory of guilt upon which the jury was instructed." *State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (citing *Presnell v. Georgia*, 439 U.S. 14, 16, 58 L. Ed. 2d 207, 211 (1978)). In *Wilson* there was sufficient evidence that the defendant committed murder by acting in concert but insufficient evidence that the defendant committed murder by himself. *Id.* at 123, 478 S.E.2d at 510. However, the trial court failed to instruct the jury on acting in concert, thereby making it necessary for the State to prove each element of first-degree murder on the theory of premeditation and deliberation, including that the

defendant fired the shots. *Id.* Our Supreme Court overturned the defendant's conviction for first-degree murder because there was insufficient evidence to support the conviction based upon the theory that the defendant committed the murder himself. *Id.* at 123-25, 478 S.E.2d at 510-12.

However, the present case is distinguishable from *Wilson*. The first-degree sexual offense statute only requires that the State prove Defendant "engage[d] in" a sexual act with J.A.S. N.C. Gen. Stat. § 14.27.4(a) (2007). The statute does not distinguish between forcing a victim to perform fellatio or performing fellatio upon a victim. *Id.* Further, our Supreme Court has held that "the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct." *State v. Boykin*, 310 N.C. 118, 125, 310 S.E.2d 315, 319 (1984).

In the present case, the trial court twice correctly instructed the jury that to find Defendant guilty of first-degree sexual offense, the jury must conclude that Defendant engaged in a sexual act with J.A.S. The trial court instructed the jury that "sexual act" meant "either fellatio or anal intercourse." The trial court further defined fellatio as "the touching by the lips or tongue of one person and the male sexual organ of another." Although in instructing the jury on Defendant's charges of first-degree sexual offense, the trial court misspoke by saying "*performing*" fellatio instead of "*engaging in*" fellatio, reading the jury instructions as a whole, the trial court correctly instructed the jury that to convict Defendant of first-degree sexual offense, it must find that Defendant engaged in a sexual act with J.A.S. As this instruction on first-degree sexual offense was supported by the evidence, we hold the trial court did not err by denying Defendant's motion to dismiss. Therefore, Defendant's first assignment of error is overruled.

II.

[2] In Defendant's assignment of error number twelve, he argues the trial court committed plain error by instructing the jury on three alternative theories in support of the charge of felonious child abuse where the evidence was insufficient to support two of the three theories.

Defendant did not object to the jury instruction at trial; therefore, we review the trial court's jury instruction for plain error. N.C.R. App.

P. 10(c)(4). Under plain error review, Defendant must demonstrate the claimed error is a

> " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings[.]' "

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

Defendant was charged with felonious child abuse under N.C. Gen. Stat. § 14-318.4(a2) which states: "Any parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon a juvenile is guilty of a Class E felony." N.C. Gen. Stat. § 14-318.4(a2) (2007). "Sexual act" is defined as "cunnilingus, fellatio, analingus, . . . anal intercourse . . . [or the] penetration, however slight, by any object into the genital or anal opening of another person's body." N.C.G.S. § 14-27.1.

The trial court instructed the jury that it could find Defendant guilty of felonious child abuse if the jury found Defendant

> intentionally committed a sexual act upon a juvenile. Either intentionally performing fellatio or anal intercourse, or both, would constitute sexual acts for the purpose of this charge. So if you find from the evidence beyond a reasonable doubt that . . . [D]efendant intentionally committed a sexual act upon [J.A.S.], it would be your duty to return a verdict of guilty as to that charge.

Defendant argues that two of the theories of felonious child abuse were not supported by the evidence because they were based on Defendant's having performed fellatio upon J.A.S.

In *State v. Hughes*, 114 N.C. App. 742, 746, 443 S.E.2d 76, 79, *disc. review denied*, 337 N.C. 697, 448 S.E.2d 536 (1994), the trial court instructed the jury that it could find the defendant guilty of first-degree sexual offense if the jury concluded the defendant committed a sexual act with the victim, defined as either fellatio or penetration by an object into the victim's body. However, there was insufficient evidence to support the theory that the defendant penetrated the vic-

tim. *Id.* Our Court held that the trial court erred in instructing the jury that it could base its conviction on the theory of penetration where the evidence did not support that theory. *Id.*

The present case is distinguishable from *Hughes*. The evidence supported the instruction that Defendant committed felonious child abuse based upon a sexual act with J.A.S., that act being fellatio, anal intercourse, or both. As discussed in the preceding section, although the trial court instructed the jury by saying "*performing*" fellatio instead of "*engaging in*" fellatio, reading the jury instructions as a whole, the trial court correctly instructed the jury that to find Defendant guilty of felonious child abuse, the jury must find that Defendant engaged in a sexual act with J.A.S. N.C.G.S. § 14-27.1 defines sexual act and does not distinguish between performing or receiving fellatio. In addition, the trial court instructed the jury that "sexual act" meant "either fellatio or anal intercourse." In defining sexual act to the jury, the trial court did not distinguish between forcing fellatio upon J.A.S. or performing fellatio on J.A.S. Therefore, taking the trial court's jury instruction as a whole, the instruction on the sexual act supporting felonious child abuse was supported by the evidence.

Further, assuming *arguendo* it was error when the trial court misspoke and said "performed" fellatio, we find the error does not rise to the level of plain error. All of the testimony admitted for substantive purposes supported the theory that J.A.S. was forced to perform fellatio upon Defendant. The jury was instructed that a sexual act "mean[t] either fellatio or anal intercourse." Thus, considering together the evidence presented at trial and the trial court's jury instruction on "sexual act," the jury could not have been confused by the misstatement in the trial court's instruction. Therefore, Defendant's assignment of error number twelve is overruled.

III.

[3] Defendant argues in his assignments of error numbers two and three that the trial court committed plain error by instructing the jury on a theory of felonious child abuse not alleged in the indictment.

Defendant was charged with a superseding indictment for felonious child abuse on 14 January 2008. Defendant's indictment for felonious child abuse states:

> THE JURORS FOR THE STATE upon their oath present that on or about the 4th day of November, 2005 through the 21st day of

> November, 2005 and all inclusive dates therein and in the county named above [] [Defendant] named above unlawfully, willfully and feloniously did commit a sexual act, *anal intercourse* with [J.A.S.], who was 12 years of age thus under 16 years of age. At the time [] [Defendant] committed the offense, [] [Defendant] was the parent.

(emphasis added). The trial court instructed the jury that it could find Defendant guilty of felonious child abuse if the jury found "that [Defendant] intentionally committed a sexual act upon a juvenile. Either intentionally performing fellatio or anal intercourse, or both, would constitute sexual acts for the purpose of this charge."

Defendant does not dispute the sufficiency of the indictment to confer subject matter jurisdiction to the trial court. Rather, Defendant contends the indictment is insufficient to support his conviction for felonious child abuse because there is a fatal variance between the offense charged in the indictment and the jury instructions given at trial.

"It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980) (citations omitted). However, " '[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.' " *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996) (quoting *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972)).

Defendant was charged with felonious child abuse under N.C.G.S. § 14-318.4(a2). The essential elements of felonious child abuse under subsection (a2) are (1) the defendant is a parent or legal guardian of (2) a child less than 16 years of age, (3) who commits or allows the commission of any sexual act upon that child. N.C. Gen. Stat. § 14-318.4(a2); *see State v. Qualls*, 130 N.C. App. 1, 8, 502 S.E.2d 31, 36 (1998) (holding variance between the specific injury alleged in the indictment and the evidence at trial was not fatal where it was only necessary to allege under N.C. Gen. Stat. § 14-318.4(a) that the defendant caused serious injury and the actual injury alleged was surplusage), *disc. review denied*, 349 N.C. 237, 516 S.E.2d 604 (1998), *aff'd per curiam*, 350 N.C. 56, 510 S.E.2d 376 (1999).

The indictment in the present case sufficiently alleged the essential elements of N.C. Gen. Stat. § 14-318.4(a2). The State was not

required to specifically allege the particular sexual act that Defendant committed. *See* N.C. Gen. Stat. § 15-144.2; *State v. Mueller*, 184 N.C. App. 553, 558, 647 S.E.2d 440, 445 (short-form indictment for sexual offense only requires the State to allege the essential elements of the offense and does not require the State to allege the particular sexual act committed), *cert. denied*, 362 N.C. 91, 657 S.E.2d 24 (2007).

In his reply brief, Defendant cites *State v. Loudner*, 77 N.C. App. 453, 335 S.E.2d 78 (1985), and *State v. Williams*, 303 N.C. 507, 279 S.E.2d 592 (1981) for the proposition that even if the State was not required to allege the particular sexual act Defendant committed, the State is nevertheless bound by the allegations the State chose to allege in the indictment.

In *Williams*, the defendant was charged with first-degree sexual offense. *Williams*, 303 N.C. at 510, 279 S.E.2d at 594. The indictment alleged the defendant committed the sexual acts of cunnilingus and anal intercourse. *Id.* However, the State's evidence showed only that the defendant committed a sexual act by the penetration of an object into the victim's body. *Id.* The defendant argued the trial court erred in denying his motion to dismiss the charges because there was a fatal variance between the allegations in the indictment and the proof at trial. *Id.* at 509, 279 S.E.2d at 594. Our Supreme Court held that because there was no evidence demonstrating the defendant committed the sexual acts alleged in the indictment, the trial court erred in denying the defendant's motion to dismiss. *Id.* at 510, 279 S.E.2d at 594.

Similarly, in *Loudner*, the defendant was charged with committing a sexual act with a person in his custody. *Loudner*, 77 N.C. App. at 453, 335 S.E.2d at 79. The indictment alleged the defendant committed the sexual act of "performing oral sex" on the victim. *Id.* However, the State's evidence showed only that the defendant digitally penetrated the victim's vagina. *Id.* The defendant argued the trial court erred in denying his motion to dismiss the charges because there was a fatal variance between the allegations in the indictment and the proof at trial. *Id.* Our Court, relying on *Williams*, held that because there was no evidence demonstrating the defendant committed the sexual act alleged in the indictment, the trial court erred in denying the defendant's motion to dismiss. *Id.* at 454, 335 S.E.2d at 79.

However, we find the present case distinguishable from *Loudner* and *Williams*. The defendants in both *Loudner* and *Williams*

assigned error to the trial court's denial of their motions to dismiss for insufficiency of the evidence. In the present case, Defendant does not argue that the evidence of anal intercourse was insufficient. Rather, he assigns error to the trial court's jury instructions on felonious child abuse that instructed on a second theory *in addition* to the theory alleged in the indictment. Therefore, we find our appellate Courts' decisions on variance between indictments and jury instructions more applicable to the present case.

Our Courts have found that a trial court's jury instructions which vary from the allegations of the indictment might constitute error where the variance is regarding an *essential element* of the crime charged. For instance, in a kidnapping case, it is essential to a valid indictment that the indictment allege the State's theory of the defendant's specific purpose(s) for the kidnapping. *State v. McClain*, 86 N.C. App. 219, 356 S.E.2d 826 (1987). Therefore, our Courts have repeatedly held that a trial court's jury instruction on a purpose theory different than the purpose theory alleged in the indictment, might constitute plain error where the evidence of the defendant's guilt is not overwhelming. *See State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986); *State v. Taylor*, 301 N.C. 164, 270 S.E.2d 409 (1980); *State v. Smith*, 162 N.C. App. 46, 589 S.E.2d 739 (2004).

In *State v. Williams*, the defendant was charged with first-degree rape under N.C. Gen. Stat. § 14-27.2(a)(2) which requires the State to show the defendant engaged in vaginal intercourse "[w]ith another person by force and against the will of the other person[.]" *State v. Williams*, 318 N.C. 624, 629, 350 S.E.2d 353, 356 (1986). However, the trial court instructed the jury under N.C. Gen. Stat. § 14-27.2(a)(1) by instructing the jury that they could find the defendant guilty of first-degree rape if they found the defendant "engaged in vaginal intercourse with [D.M.W.], and that at that time, [D.M.W.] was a child under the age of thirteen years, and that [the defendant] was at least twelve years old and was at least four years older than [D.M.W.]." *Williams*, 318 N.C. at 629, 350 S.E.2d at 356. Our Supreme Court held the trial court's jury instructions were fundamentally erroneous because the jury was instructed on a theory based on a different subsection from the subsection under which the defendant was charged in the indictment. *Id.* at 631, 350 S.E.2d at 357.

In the present case, the trial court instructed the jury on the theory of anal intercourse that was alleged in the indictment. In addition, the trial court also instructed on the theory of fellatio that was not alleged in the indictment, but that was supported by the evidence.

Unlike the kidnapping cases before our appellate Courts, the particular sexual act is not an essential element required to be alleged in the indictment. *See Tucker*, *Taylor*, *and Smith*. Further, this is not a case where the trial court instructed the jury on felonious child abuse based on a theory supported by a different subsection of N.C.G.S. § 14-318.4. *See Williams*, 318 N.C. 624, 350 S.E.2d 353. Rather, the trial court instructed the jury on the essential elements of felonious child abuse under N.C. Gen. Stat. § 14-318.4(a2) and tailored the instruction to the evidence presented at trial.

We find our Court's decision in *State v. Bollinger*, 192 N.C. App. 241, 665 S.E.2d 136 (2008), *aff'd per curiam*, 363 N.C. 251, —— S.E.2d —— (2009), most applicable to the case before us. In *Bollinger*, the defendant was charged with carrying a concealed weapon. *Bollinger* at 243, 665 S.E.2d at 138. The indictment alleged that the defendant was carrying a "[m]etallic set of knuckles." *Id.* The evidence at trial showed that in addition to a metallic set of knuckles, the defendant was also carrying one or more knives. *Id.* at 243, 665 S.E.2d at 138. The trial court instructed the jury that it could find the defendant guilty of carrying a concealed weapon if it found the defendant carried one or more knives. *Id.* at 243, 665 S.E.2d at 138. The trial court did not instruct the jury on the defendant's carrying a metallic set of knuckles. *Id.* at 243, 665 S.E.2d at 138. Our Court distinguished a first-degree burglary charge, which requires the State to allege the particular felony the defendant intended to commit, and stated "specific allegations are not required to support a conviction for carrying a concealed weapon." *Id.* at 243-44, 665 S.E.2d at 139. Our Court held that the additional language in the indictment describing the particular weapon was "mere surplusage" and therefore the trial court's instructions on carrying a concealed weapon were not erroneous. *Id.* at 243-44, 665 S.E.2d at 139-40.

Similar to *Bollinger*, the State in the present case was not required to allege the particular sexual act Defendant committed in order to support a felonious child abuse charge. Therefore, the language in Defendant's indictment alleging he engaged in "anal intercourse" was mere surplusage. In addition, in the present case the trial court did not substitute a different theory for the one alleged in the indictment. Rather, the trial court instructed on the theory alleged in the indictment in addition to a second theory supported by the evidence. Therefore, we find the trial court's instructions on felonious child abuse were not erroneous. Defendant's assignments of error numbers two and three are overruled.

IV.

[4] Defendant argues in his assignment of error number thirteen, that the trial court committed plain error in failing to instruct the jury that Isler's opinion evidence could only be considered for corroborative purposes.

Isler testified that J.A.S. suffered from "sexualized trauma" and had been "diagnosed with post[-]traumatic stress disorder . . . as a result of sexualized trauma." During the charge conference, Defendant did not request a limiting instruction for Isler's expert opinion testimony. The trial court did not give a limiting instruction to the jury.

"[E]vidence that a prosecuting witness is suffering from post-traumatic stress syndrome should not be admitted for the substantive purpose of proving that a rape has in fact occurred." *State v. Hall*, 330 N.C. 808, 821, 412 S.E.2d 883, 890 (1992). However, "it may be admitted for certain corroborative purposes." *Id.* If evidence of post-traumatic stress disorder is admitted, the trial court "should take pains to explain to the jurors the limited uses for which the evidence is admitted." *Id.* at 822, 412 S.E.2d at 891. Nonetheless, "an instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such instruction." *State v. Quarg*, 334 N.C. 92, 101, 431 S.E.2d 1, 5 (1993).

In the present case, Defendant did not request a limiting instruction regarding Isler's opinion testimony. Further, Defendant cross-examined Isler and clarified that Isler's opinion was based on J.A.S.'s allegations and was not based on Isler's own independent observations. Therefore, we find the trial court did not commit plain error by failing to give a limiting instruction regarding Isler's testimony. Defendant's assignment of error number thirteen is overruled.

V.

[5] In Defendant's assignment of error number seven, he argues and the State concedes, that Defendant's judgments and commitments do not comport with the trial court's oral pronouncements.

The trial court announced the following at Defendant's sentencing proceeding:

> As required by law, the Court does find that the designated offenses are reportable convictions within G.S. 14-208.6, and [] Defendant is directed to register as a sex offender as required by

> law. The Court finds that he is not, does not fall in the classification statutorily of a sexually violent predator or any of the other aggravated factors, that registration should occur under level two, part two for registration.

Defendant's two judgment and commitment forms, case numbers 05 CRS 52822 and 06 CRS 50107, both contain a box for the trial court to check, stating: "10. finds the above designated offense(s) is a reportable conviction involving a minor. G.S. 14-208.6." Despite the trial court's oral sentencing pronouncement indicating that the offenses for which Defendant was convicted were reportable under N.C.G.S. § 14-208.6, neither the judgment nor commitment forms have box ten marked. Moreover, in direct contradiction to the oral sentencing pronouncement, the form in case number 06 CRS 50107 has the following box marked: "9. finds this is an aggravated offense. G.S. 14-208.6."

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citations omitted). A clerical error is " '[a]n error resulting from a minor mistake or inadvertence, [especially] in writing or copying something on the record, and not from judicial reasoning or determination.' " *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting but not necessarily adopting Black's Law Dictionary 563 (7th ed. 1999)).

In the present case, it appears that the trial court inadvertently failed to mark the appropriate box, i.e., box number ten, on the judgment form in case number 05 CRS 52822, and marked the wrong box on the judgment form in case number 06 CRS 50107. These errors were clerical in nature. *See State v. Gell*, 351 N.C. 192, 218, 524 S.E.2d 332, 349 (2000) (finding the inadvertent checking of a box finding an aggravating factor on a judgment form to be a clerical error), *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000). Accordingly, we remand the present case to the trial court for the limited purpose of correcting the clerical errors in the judgment and commitment forms.

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; remanded for correction of clerical errors.

Judges HUNTER, Robert C. and BEASLEY concur.

HYMAN SPRUILL LEGGETT, PLAINTIFF-APPELLEE v. AAA COOPER TRANSPORTATION, INC., DEFENDANT-APPELLANT

No. COA08-1027

(Filed 7 July 2009)

1. Appeal and Error— subject matter jurisdiction—workers' compensation—employer's lien—assignments of error too broad

An argument concerning the trial court's subject matter jurisdiction in a case involving an employer's lien against an employee's third-party recovery was dismissed where the assignments of error were broad, unspecific, and not sufficient to preserve the issue for review.

2. Workers' Compensation— employer's lien extinguished—no abuse of discretion

The trial court did not abuse its discretion by extinguishing defendant employer's workers' compensation lien against the third-party tortfeasor where defendant contended that the trial court had not reviewed all of the medical records submitted as evidence, that the court's findings were not supported by competent evidence, and that the court's order resulted in a double recovery for plaintiff.

Appeal by Defendant from order entered 25 February 2008 by Judge Alma L. Hinton in Superior Court, Halifax County. Heard in the Court of Appeals 12 February 2009.

Keel O'Malley, LLP, by Joseph P. Tunstall, III, for Plaintiff-Appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Kelli A. Burns, for Defendant-Appellant.

STEPHENS, Judge.

I. Procedural History and Factual Background

Hyman Spruill Leggett ("Plaintiff") was employed in 2005 as a full-time truck driver for AAA Cooper Transportation, Inc. ("Defendant"), located in Washington, North Carolina. During the course of his employment, Plaintiff was involved in an automobile collision near Greensboro, North Carolina on 24 July 2005. Pursuant

to N.C. Gen. Stat. § 97-10.2(j), Plaintiff filed a special proceeding against Defendant on 3 January 2008. A hearing was held in Halifax County Superior Court on 24 February 2008. The evidence presented at the hearing tended to show the following:

On the day of the collision, Plaintiff was driving a tractor-trailer for Defendant when another vehicle suddenly crossed the center line and collided head-on with Plaintiff. Plaintiff's tractor-trailer then veered off an overpass, collided with a cement divider, and caught fire. Plaintiff sustained injuries to multiple parts of his body, including burns to his lower extremities and chest, six broken ribs, fractures in his hand, and injury to his back.

Plaintiff saw Dr. Gilbert Alligood ("Dr. Alligood") on 30 August 2005 complaining of chest pain. A chest x-ray showed moderately displaced fractures of the third through eighth ribs on Plaintiff's right side. Plaintiff saw Dr. David C. Miller ("Dr. Miller") on 17 October 2005, complaining of lower back pain, knee problems, and some numbness in his feet. An MRI revealed that Plaintiff had no evidence of nerve root compression, but did have pre-existing degenerative changes which were aggravated by the collision. Dr. Miller released Plaintiff to resume light duty work on 14 December 2005, but restricted Plaintiff to lifting a maximum of twenty-five pounds. Dr. Miller also released Plaintiff to drive without restrictions on the same date.

Despite Plaintiff's continuing medical problems with his back and ribs, and numbness in his toes, Plaintiff returned to work on 19 December 2005. Dr. Miller released Plaintiff entirely on 11 January 2006 after finding that Plaintiff had reached maximum medical improvement and that Plaintiff was "relatively pain free" and was performing his regular job. Plaintiff returned to Dr. Alligood on 30 January 2006 complaining of discomfort when lifting or pulling. Dr. Alligood did not think Plaintiff required any further treatment and believed Plaintiff's symptoms should continue to improve.

Plaintiff saw Dr. Alligood again on 28 February 2006 complaining of right shoulder pain. Although Defendant originally denied Plaintiff's shoulder claim on the grounds that Plaintiff's complaints were unrelated to Plaintiff's work injury, Defendant ultimately accepted Plaintiff's complaints and provided treatment. Defendant also reinstated indemnity benefits.

Plaintiff underwent an arthroscopic debridement and subacromial decompression on his right shoulder on 23 May 2006. The result-

ing postoperative diagnoses were right shoulder glenoid labral tear, subacromial impingement syndrome, and chronic arthropathy.

Three days after undergoing surgery, on 26 May 2006, Plaintiff's employment was terminated by Defendant pursuant to company policy as Plaintiff's Family Medical Leave Act time had expired. Dr. Alligood saw Plaintiff for a follow-up examination on 28 July 2006 and opined that Plaintiff needed no further treatment for his previous chest trauma. He also noted that Plaintiff had made a good recovery from his shoulder surgery. Plaintiff was released to normal work duties with respect to his right shoulder on 21 September 2006.

Following Plaintiff's release to normal work without restrictions, the Industrial Commission issued an order terminating Plaintiff's workers' compensation benefits on 29 November 2006. Plaintiff underwent a physical examination on 12 December 2006, and was cleared to return to work. Plaintiff saw Dr. Robert C. Martin ("Dr. Martin") for a follow-up examination on 20 December 2006. Dr. Martin opined that Plaintiff had a full range of motion in his shoulder, normal strength, and an excellent result from his right shoulder surgery. Dr. Martin also released Plaintiff to normal work duty.

After Plaintiff was released to normal duty, Defendant offered Plaintiff a job as a dock worker in December 2006. The dock worker position paid $18.00 to $19.00 per hour, and once Plaintiff returned to work, Plaintiff could petition management to reinstate Plaintiff's seniority. Plaintiff acknowledged that the position was offered to him and that he knew the pay scale and potential for seniority, but he refused the position.

Plaintiff testified that at approximately the end of May or beginning of June 2007, he began working for East Carolina Outfitters, a hunting outfitting service, and that he earned $10.00 per hour. This employment was only seasonal, however, and Plaintiff ceased working for East Carolina Outfitters in December 2007.

Plaintiff testified that his medical bills and wages while he was out of work were paid by worker's compensation. Plaintiff's medical bills paid by Defendant, which is self-insured for workers' compensation, total $147,873.28. Plaintiff reached a settlement with the third-party tortfeasor and received $30,000.00, which was the maximum recovery possible from the third-party's insurance. After credits, Plaintiff's personal underinsured motorist coverage provided another $69,000.00 in coverage. Plaintiff's attorney's fees totaled $15,000.00.

Pursuant to N.C. Gen. Stat. § 97-10.2(j), Defendant had a lien of $182,961.28 on Plaintiff's third-party recovery as of the date of the trial court's hearing on 25 February 2008. That amount represents $35,088.00 in indemnity benefits and $147,873.28 in medical expenses.

By its order entered 25 February 2008, the trial court ruled that Defendant recover nothing from the third-party funds. Defendant appeals.

II. Subject Matter Jurisdiction

[1] Citing its assignments of error numbers 2 and 29, Defendant first argues that the trial court lacked subject matter jurisdiction over this matter. Specifically, Defendant argues that in making findings of fact regarding Plaintiff's medical treatment and disability, the trial court made factual determinations outside of its jurisdiction under N.C. Gen. Stat. § 97-10.2(j) as the Industrial Commission has exclusive jurisdiction to determine disputed issues related to an injured employee's medical treatment and disability. N.C. Gen. Stat. § 97-10.2(j) grants limited jurisdiction to the superior court to determine the amount of the employer's lien in the event the employee receives compensation from a third-party judgment or settlement. N.C. Gen. Stat. § 97-10.2(j) (2007) ("[I]n the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge . . . to determine the subrogation amount. After . . . an opportunity to be heard by all interested parties, . . . the judge shall determine, in [her] discretion, the amount, if any, of the employer's lien. . . .").

However, in neither of the two assignments of error Defendant cites for this argument does Defendant raise this asserted jurisdictional conflict between the trial court and the Industrial Commission. In assignment of error 2, Defendant contends the trial court's order amounted to an abuse of discretion because "the competent evidence of record in its entirety does not support the findings of fact or the [trial court's] determination." Defendant's assignment of error number 29 assigns error to

> [the trial court's award], and all paragraphs thereof, and to the signing and entry of the Award, on the grounds that it is based upon Findings of Fact and Conclusions of Law which are erroneous, are not supported by the competent evidence or evidence of Record, are contrary to the competent evidence of Record, and are contrary to law.

Rule 10 of the North Carolina Rules of Appellate Procedure provides that "[e]ach assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C. R. App. P. 10(c)(1). Neither of these assignments of error assert that the trial court exceeded its authority by deciding issues solely within the Industrial Commission's jurisdiction. Rather, these assignments of error "essentially amount to no more than an allegation that 'the court erred because its ruling was erroneous.' " *Walker v. Walker*, 174 N.C. App. 778, 783, 624 S.E.2d 639, 642 (2005), *disc. review denied*, 360 N.C. 491, 632 S.E.2d 774 (2006). "[Defendant's] assignment[s] of error [are] designed to allow counsel to argue anything and everything they desire in their brief on appeal. 'This assignment—like a hoopskirt—covers everything and touches nothing.' " *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005) (quoting *State v. Kirby*, 276 N.C. 123, 131, 171 S.E.2d 416, 422 (1970)). Such broad and unspecific assignments of error are insufficient to preserve this issue for our review. Although we acknowledge that the trial court went too far in making certain factual determinations, and that certain of the trial court's factual determinations appear to conflict with the facts as previously determined by the Industrial Commission, we are constrained to conclude that the issue of the trial court's subject matter jurisdiction is not properly before us. This argument is dismissed.

III. Reduction of Workers' Compensation Lien

[2] Defendant argues in the alternative that the trial court abused its discretion in reducing Defendant's workers' compensation lien to zero, pursuant to N.C. Gen. Stat. § 97-10.2(j).

As earlier noted, N.C. Gen. Stat. § 97-10.2(j) grants the superior court discretion to determine the amount of the employer's lien when a settlement is reached between the injured employee and the third party tortfeasor. *See id.* The trial court may reduce or completely eliminate a workers' compensation lien if warranted by the facts, and this Court may not interfere absent an abuse of discretion. *See In re Biddix*, 138 N.C. App. 500, 503-05, 530 S.E.2d 70, 72-73 (holding that the trial court did not abuse its discretion in reducing workers' compensation lien to zero where the trial court determined the $25,000.00 third-party settlement was inadequate to compensate the plaintiff, who suffered from extensive physical injuries and emotional trauma), *cert. denied*, 352 N.C. 674, 545 S.E.2d 418 (2000). Our Supreme Court

has often stated that the test to be used when evaluating an abuse of discretion issue is "whether a decision is manifestly unsupported by reason, . . . or so arbitrary that it could not have been the result of a reasoned decision[.]" *Frost v. Mazda Motors of America, Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000) (internal quotation marks and citations omitted). An abuse of discretion occurs when "the trial court's decision was unsupported by reason and could not have been a result of competent inquiry." *McIntosh v. McIntosh*, 184 N.C. App. 697, 702, 646 S.E.2d 820, 823 (2007) (internal quotation marks and citation omitted).

Defendant bases its assertion that the trial court abused its discretion on three arguments: (1) that the trial court entered an order without reviewing all of the evidence of record; (2) that the trial court's findings of fact are not supported by competent evidence; and (3) that the trial court entered an order which resulted in a double recovery for Plaintiff. We address each of these arguments in turn.

A. Review of Medical Records

Defendant first argues the trial court abused its discretion by failing to review any of Plaintiff's medical records before entering its order. Specifically, Defendant argues the trial court did not review any of the 808 pages of Plaintiff's medical records which were submitted by Plaintiff as evidence, and that a failure to review all of the evidence of record cannot be considered a "competent inquiry." *Id.*

At the section 97-10.2(j) hearing, Plaintiff submitted 808 pages of medical records as Plaintiff's Exhibit No. 7. Defendant alleges the trial court did not review any of these medical records during the hearing on 25 February 2008 or prior to entering its order the same day. Defendant argues the transcript of the hearing demonstrates the trial court did not take a recess or review the medical records off the record. However, because Defendant failed to have the trial court's alleged failure to review the medical records put on the record at the hearing, our determination of this issue is guided by pure speculation only.

Defendant had ample opportunity to bring the alleged discrepancies between Plaintiff's testimony and Plaintiff's medical records to the trial court's attention. Defendant cross-examined Plaintiff and presented a closing argument to the trial court. Plaintiff's evidence at the hearing included Plaintiff's testimony and eleven marked exhibits, including Plaintiff's medical records. The trial court made

thirty-two findings of fact and five conclusions of law. Defendant does not argue any specific findings which Defendant contends are not supported by competent evidence. Moreover, in its argument below, Defendant identifies at least two findings of fact that were supported *only* by Plaintiff's medical records, which indicates the trial court did in fact review these records. On the record before us, we cannot conclude that the trial court, for this reason, abused its discretion in extinguishing Defendant's lien. Accordingly, Defendant's argument is overruled.

B. Trial Court's Findings of Fact

Defendant next argues the trial court abused its discretion because its findings of facts are not supported by competent evidence, and thus, did not support the trial court's conclusions of law. Again, we disagree.

Defendant specifically assigns error to findings of fact five, eleven, twelve, fourteen, fifteen, sixteen, and seventeen. We address each of these findings in turn.

The trial court's finding of fact five is as follows:

> [Plaintiff] suffered severe and debilitating injuries resulting in multiple surgeries, a herniated disc and resulting radiculopathy, crushed ribs on his right side, a laceration of his right hand, a torn rotator cuff of his right shoulder and burns over 20% of his body resulting in several skin grafts and scars on both legs and his upper torso.

Defendant concedes that this finding is accurate and supported by Plaintiff's medical records. However, Defendant assigns error to this finding because it is "not supported by Plaintiff's testimony, the only evidence that Judge Hinton considered." Defendant has failed to show that finding of fact five was not supported by the evidence. "If there is any evidence in the record to support a finding of fact, it is conclusive on appeal, even if there is substantial evidence to the contrary." *Childress v. Fluor Daniel, Inc.*, 162 N.C. App. 524, 526, 590 S.E.2d 893, 896 (2004). Moreover, as Plaintiff's medical records were admitted as evidence at trial, Defendant's argument contradicts its above assertion that the trial court did not review Plaintiff's medical records.

In finding of fact twelve, the trial court found

> [Plaintiff] returned to work in January 2006, while still on restrictions from his doctors and attempted to return to full duty. He had complaints of pain within weeks of returning and was restricted from heavy lifting.

Plaintiff's medical records indicate Plaintiff was able to "return to light duty work" as of 14 December 2005. Plaintiff testified at trial that he returned to work on 19 December 2005. Although the trial court's finding is inconsistent with the evidence regarding the date on which Plaintiff returned to work, this error is immaterial to the trial court's ultimate conclusions of law and does not amount to an abuse of discretion.

Defendant also assigns finding of fact fourteen as error. Finding of fact fourteen states that "[t]hree days after the surgery to repair the torn rotator cuff, [Plaintiff] was fired for missing excessive days due to his on-the-job injury." Defendant first objects to this finding of fact because the existence of Plaintiff's torn rotator cuff could only be determined by a review of Plaintiff's medical records. However, this argument merely serves to discredit Defendant's argument above that the trial court did not review the medical records.

Defendant further objects to finding of fact fourteen because it misrepresents the reason behind Plaintiff's termination. Defendant argues "[t]his finding is tantamount to concluding Defendant-Appellant discriminated against Plaintiff for his workers' compensation claim." Plaintiff testified that his employment was terminated because he had exceeded his time off work under the Family Medical Leave Act ("FMLA"). Under the FMLA, an employer is required to hold a position open for twelve weeks in a fifty-two week period for medical leave. 29 U.S.C. § 2612(a)(1) (2008). After that time, the employer may hire someone else to fulfill the position left by the employee. *Id.* Although the trial court could have made a clearer finding as to the reason for Plaintiff's termination, its finding does not go so far as to insinuate Defendant discriminated against Plaintiff for his claim. The trial court's poor phrasing in finding of fact fourteen does not amount to an abuse of discretion.

Defendant also contests the trial court's findings of fact eleven, fifteen, sixteen, and seventeen, which determined that Plaintiff sustained economic losses as a result of his injury, as follows:

> 11) [Plaintiff] was unable to work from July 24, 2005 until December 19, 2005. During that time he was paid $688.00 per week. The net loss during this period is approximately

> $13,452.00 as he lost approximately $560.50 per week for 24 weeks.
>
> . . . .
>
> 15) [Plaintiff] then received workers' compensation benefits from May 22, 2006 until November 29, 2006. During those 28 weeks[, Plaintiff] lost approximately $15,694.00. On November 29, 2006[,] an Order suspending [Plaintiff's] compensation was granted.
>
> 16) Defendant did offer Plaintiff a position as a dockworker. He would be required to lift significant amounts of weight and would have to take a pay cut to $18-19 per hour. He was physically unable to return to this position.
>
> 17) [Plaintiff] applied for unemployment and was granted unemployment until June, 2007. In June, [Plaintiff], after having put in approximately thirty (30) applications for employment, accepted a position as a contract guide making approximately $10.00 per hour. He worked in this position from June of 2007 until January 1, 2008. During this period he worked approximately 35-40 hours per week and lost approximately $21.21 per hour during this six months for an approximate $21,210.00.

Defendant asserts these findings were erroneous because they were in direct conflict with the Commission's finding that Plaintiff was not disabled as of 29 November 2006, when the Commission allowed Defendant to terminate Plaintiff's disability benefits. The trial court's finding, however, is supported by Plaintiff's testimony at trial. In a non-jury trial, it is the trial court's

> duty to consider and weigh all the competent evidence before [it]. [The trial court] passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, [the trial court] determines which inferences shall be drawn and which shall be rejected.

Knutton v. Cofield, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (citation omitted). Thus, the trial court's finding is supported by competent evidence, and does not constitute an abuse of discretion. Furthermore, as we held above, the issue of whether the trial court exceeded its authority by determining issues already decided by the Industrial Commission is not properly before us.

For the reasons stated, Defendant's assignments of error in support of its arguments that the trial court abused its discretion in entering these findings of fact are overruled.

C. Double Recovery for Plaintiff

Defendant also argues the trial court abused its discretion in extinguishing Defendant's lien because this result provided Plaintiff with a double recovery. "The purpose of the North Carolina Workers' Compensation Act is not only to provide a swift and certain remedy to an injured worker, but also to ensure a limited and determinate liability for employers." *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997). "The Act was not intended to provide the employee with a windfall by recovering from both his employer and a third-party tortfeasor." *Childress*, 162 N.C. App. at 526, 590 S.E.2d at 896 (citation omitted).

Defendant argues the Supreme Court's holding in *Johnson v. Southern Industrial Constructors*, 347 N.C. 530, 495 S.E.2d 356 (1998), implicitly overruled this Court's decision in *Allen v. Rupard*, 100 N.C. App. 490, 397 S.E.2d 330 (1990), *rev. allowed*, 328 N.C. 270, 400 S.E.2d 449 (1991), which allowed a double recovery for the plaintiff. *See Rupard*, 100 N.C. App. at 497, 397 S.E.2d at 334 (affirming trial court's order that injured plaintiff and workers' compensation carrier each receive $12,500.00 out of the $25,000.00 third-party settlement, where workers' compensation lien totaled $40,000.00). In *Johnson*, our Supreme Court considered the question of

> whether a superior court may assert its jurisdiction over the jurisdiction of the Industrial Commission, pursuant to the provisions of N.C.G.S. § 97-10.2(j), by adding assumed future workers' compensation benefits to those currently paid by the employer, to establish that an employee's recovery from a third-party tort-feasor was insufficient to compensate the employer's subrogation lien, and thus allow the trial court to determine the amount and distribution of such lien.

Johnson, 347 N.C. at 531, 495 S.E.2d at 357. In *Johnson*, the Supreme Court held that the trial court could not assert its jurisdiction over the jurisdiction of the Industrial Commission in this manner. *Id.* at 534, 495 S.E.2d at 358. When *Johnson* was decided, N.C. Gen. Stat. § 97-10.2(j) provided in part:

> Notwithstanding any other subsection in this section, in the event that a judgment is obtained *which is insufficient to com-*

> *pensate the subrogation claim of the Workers' Compensation Insurance Carrier*, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to . . . the presiding judge before whom the cause of action is pending, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard . . . , the judge shall determine, in his discretion, the amount, if any, of the employer's lien.

N.C. Gen. Stat. § 97-10.2(j) (1991) (emphasis added).

Following our decision in *Johnson*, N.C. Gen. Stat. § 97-10.2(j) was amended to provide in pertinent part:

> Notwithstanding any other subsection in this section, *in the event that a judgment is obtained by the employee in an action against a third party*, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose, where the injured employee resides or the presiding judge before whom the cause of action is pending, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, *whether based on accrued or prospective workers' compensation benefits*, and the amount of cost of the third-party litigation to be shared between the employee and employer. *The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien.*

N.C. Gen. Stat. § 97-10.2(j) (1999) (emphasis added where statute was amended).[1]

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1. N.C. Gen. Stat. § 97-10.2(j) was also amended in 2004, in which the first sentence of this section was rewritten to read as follows: "Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior

The amendment to section 97-10.2(j) eliminated the requirement that a third-party settlement be insufficient to compensate the workers' compensation carrier before the trial court could exercise its discretion in determining the subrogation amount. *See Biddix*, 138 N.C. App. at 503, 530 S.E.2d at 72 ("[T]here is no requirement that the settlement amount be insufficient to compensate the workers' compensation insurance carrier[.]"). Thus, under the amended statute, the trial court has broader discretion to reduce or eliminate the employer's lien. This Court has recognized the broader discretion given the trial court and upheld orders reducing the employer's lien even where the third-party settlement was sufficient to compensate the workers' compensation carrier.

In *Biddix*, Biddix received workers' compensation benefits in the amount of $16,844.03 and temporary total disability benefits in the amount of $1,874.40 from Wal-Mart, Inc. after being injured as a result of a third-party's negligence in the course and scope of her employment with Wal-Mart. *Id.* at 501, 530 S.E.2d at 70. "Biddix subsequently entered into a settlement with the insurer for the third[-]party tortfeasor for $25,000[.]" *Id.* "The trial court entered an order concluding that the settlement did not adequately compensate Biddix for her injuries and ordering the elimination of Wal-Mart's subrogation lien." *Id.* at 502, 530 S.E.2d at 71. "[T]he [trial] court made findings with respect to the extent of Biddix's injuries, her ongoing pain and suffering, her medical expenses as paid by Wal-Mart, her compensation for temporary disability, and the amount of the settlement and the fact that the third[-]party tortfeasor had no additional assets from which she could recover[,]" and concluded that the amount of the settlement inadequately compensated Biddix for her injuries. *Id.* at 505, 530 S.E.2d at 72-73. On appeal, this Court held that the trial court's determination that the workers' compensation lien be eliminated was factually supported and was a proper, constitutional exercise of its discretion. *Id.*

Likewise in the present case, the trial court made findings of fact as to the extent of Plaintiff's injuries, and determined Plaintiff was not adequately compensated by workers' compensation benefits. Here, the trial court found

> Plaintiff was not made whole pursuant to the workers' compensation system which did not compensate Plaintiff for his pain and

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court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount."

suffering, loss of mobility and independence, emotional damages, scarring, negligent infliction of emotional distress, loss of consortium for his wife and the strain this financial loss has placed on Plaintiff and his family due to the seriously reduced income for plaintiff.

The trial court thus concluded that N.C. Gen. Stat. § 97-10.2(j) compelled it "to use its broad discretion to fairly allocate proceeds that fall 'short of being sufficient to reimburse [P]laintiff for his pain[,] suffering[,] and other losses.' " *Rupard*, 100 N.C. App. at 497, 397 S.E.2d at 334. In light of the broader discretion enjoyed by the trial court under the amended version of section 97-10.2(j) applicable to this case and given our recent holding in *Biddix*, we conclude the trial court did not abuse its discretion in eliminating Defendant's lien, as this outcome is "justified by the equities of the case." *Sherman v. Home Depot U.S.A.*, 160 N.C. App. 404, 408, 588 S.E.2d 478, 480 (2003) (citation omitted). Defendant's argument is overruled. Defendant has failed to argue its remaining assignments of error, and they are deemed abandoned. N.C. R. App. P. 28(b)(6). The order of the trial court before this Court for review is

AFFIRMED.

Judges STEELMAN and GEER concur.

IN THE MATTER OF: J.V. AND M.V.

No. COA09-213

(Filed 7 July 2009)

1. Child Abuse and Neglect— jurisdiction on appeal—challenge to permanency planning order—modification of custody

The Court of Appeals had jurisdiction to consider a father's challenge to a permanency planning order where the trial court modified custody from DSS to an aunt and uncle.

2. Child Abuse and Neglect— permanency planning order— return to home—no findings

The findings in a permanency planning order did not address the issues required by N.C.G.S. § 7B-907(b), and the order was remanded, where it could not be discerned from the findings whether the trial court believed the child could be returned home at some point and, if so, the circumstances under which that might be possible. The use of guardianship does not eliminate the need to address the issue because guardianship can be terminated.

Appeal by respondent from order entered 25 November 2008 by Judge Charles M. Neaves in Stokes County District Court. Heard in the Court of Appeals 8 June 2008.

J. Tyrone Browder for petitioner-appellee Stokes County Department of Social Services.

Pamela Newell Williams Attorney for Guardian Ad Litem, appellee.

Ryan McKaig for respondent-appellant.

ERVIN, Judge.

John V. (Respondent Father) appeals from a permanency planning review order entered by the trial court on 8 June 2008 which, *inter alia*, awarded custody and guardianship of his daughter, J.V.[1] to Donna and James Allen S., her maternal aunt and uncle (Donna and James).[2] For the reasons set forth below, we vacate the trial court's order and remand this proceeding to the trial court for additional findings of fact.

1. In order to protect the privacy of the juvenile and for ease of reading, the juvenile who is the subject of this appeal will be referred to throughout the remainder of this opinion as Joy.

2. Donna and James sought leave to intervene in this proceeding on 11 August 2008, a request that was allowed by the court.

Respondent Father and his wife, Anita V. (Mother), are the parents of three daughters, V.V.[3], M.V.[4], and Joy. On 15 October 2007, the Stokes County Department of Social Services (SCDSS) filed juvenile petitions alleging that Marilyn was an abused, neglected and dependent juvenile and that Joy was a neglected and dependent juvenile. According to the allegations set out in the petition, Joy was afraid of Respondent Father because he physically abused Veronica and Marilyn; Respondent Father punched Marilyn in the nose on 11 October 2007, causing a nosebleed; Respondent Father confirmed the physical altercation; and domestic violence had occurred between Respondent Father and Mother.

At the time of the filing of the petition, the SCDSS took nonsecure custody of all three children. Mother, who entered into a consent agreement concerning her adjudication of incompetence, voluntarily placed herself outside the home with Adult Protective Services.[5] The trial court allowed Respondent Father to have supervised visitation with Marilyn and Joy. Respondent Father also entered into a case plan with the SCDSS in which he agreed to take parenting classes, learn alternative means of discipline, and attend domestic violence counseling.

The court subsequently adjudicated Marilyn and Joy to be neglected juveniles based upon a stipulation by the parties. The trial court placed Marilyn and Joy with Donna and James and ordered Respondent Father to cooperate with the SCDSS to effect reunification of Marilyn and Joy with Respondent Father and Mother.

At a review hearing held on 14 February 2008, the court concluded that immediate return of the juveniles to their home would be contrary to their health, safety and best interests and that the permanent plan for Marilyn and Joy would be reunification with their parents, with an alternative plan of "custody to a relative or court approved other." The court ordered that custody of the juveniles be with the SCDSS and that the juveniles be placed with Donna and

3. In order to protect the juvenile's privacy and for ease of reading, V.V. will be referred to as Veronica throughout the remainder of this opinion. Although Veronica has turned 18 years old and is no longer subject to the jurisdiction of the juvenile court, we will still use a pseudonym for her given that she was a subject of the proceedings in the court below at an earlier time.

4. For the same reasons that pseudonyms have been adopted for V.V. and J.V., M.V. will be referred to as Marilyn throughout the remainder of this opinion.

5. However, she was living at home with Respondent Father as of the date of the permanency planning hearing.

James. Although Joy continued to reside with Donna and James throughout the proceedings in this case, Marilyn was subsequently transferred to a foster home.

On 24 September 2008, the trial court conducted a permanency planning review hearing. In the 25 November 2008 permanency planning order entered following a hearing held on 30 September 2008, the trial court ordered that reunification with the parents would be the permanent plan for Marilyn and that guardianship with Donna and James would be the permanent plan for Joy. As a result, custody and guardianship of Joy was awarded to Donna and James. The trial court provided for supervised visitation between Respondent Father and both Marilyn and Joy and released the SCDSS and the guardian *ad litem* for Joy but not Marilyn. The trial court concluded that this plan was in the best interests of the children. Respondent Father noted an appeal to this Court from the permanency planning order.

[1] We first note that, by making Donna and James the guardians for Joy, the trial court modified her custody from the SCDSS to Donna and James, which allows Respondent Father to appeal the permanency planning order as to Joy pursuant to N.C. Gen. Stat. § 7B-1001(a)(4) (which renders "[a]ny order, other than a nonsecure custody order, that changes legal custody of a juvenile" immediately appealable). As a result, this Court has jurisdiction to consider Respondent Father's challenge to the permanency planning order on the merits.

[2] "The purpose of [a] permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(a). "At any permanency planning review, 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 it in the court's review." N.C. Gen. Stat. § 7B-907(b). "The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-907(b). "At the conclusion of the hearing, the judge shall 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," including the appointment of "a guardian of the person for the juve-

nile pursuant to [N.C. Gen. Stat. §] 7B-600" or "any disposition authorized by [N.C. Gen. Stat. §] 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 . . . ." N.C. Gen. Stat. § 7B-907(c). "If the juvenile is not returned home, the court shall enter an order consistent with its findings . . . ." N.C. Gen. Stat. § 7B-907(c). "[T]he court shall consider the following criteria and make written findings regarding those that are relevant" if "the juvenile is not returned home":

> (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.

N.C. Gen. Stat. § 7B-907(b). "[I]n determining whether it is possible for the children to return home within six months of the permanency planning hearing, the court must look at the progress the parents have made in eliminating the conditions that [led] to the removal of the children." *In re T.K.*, 171 N.C. App. 35, 39, 613 S.E.2d 739, 741 (2005), *aff'd*, 360 N.C. 163, 622 S.E.2d 494 (2005). "Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and [whether] 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).

In the permanency planning order, the trial court found as a fact that:

6. [Joy] is currently thirteen years old and is placed with her aunt and uncle, [Donna and James]. She attends middle school in Rockingham County, where she is doing well.

7. The juveniles have been in out-of-home placement for 11 months.

8. Prior to today's date, the permanent plan was reunification with parents or a parent. The alternate plan is custody to a relative or court-approved other.

9. A DSS Court Summary and a GAL Court Report were received into evidence and are incorporated by reference as additional findings of fact. The following items were also received into evidence and are incorporated by reference: [Joy's] letter, Dr. John Holt['s] letter, Dr. Thomas Holm's Child Family Evaluation and recommendations dated February 11, 2008, Intervenors' court report dated September 30, 2008, [Donna's] criminal record, [Mother's] consent competency order, 07 SP 249, and [Respondent Father's] Parenting Report with attachments, dated September 30, 2008.

10. The [SCDSS] has made reasonable efforts to prevent and/or eliminate the need for the juveniles' placement. These efforts include the following: foster care services, foster care legal, transportation, Medicaid, contact with schools, LINKS, coordination with caregivers, visits with parents and children, contact with [Veronica's] school and assistance with college applications, gas vouchers for [Veronica's] trips to school, kinship care assessments and relative placements, child support referrals, adult Guardianship of the mother, supervised visits between the father and [the] juveniles, referral to Community Support Services, Dr. Holm, WISH, Insight, coordination with appropriate agencies, Dr. Kroiss, coordination with medical services for [the] juveniles. In addition, the facts of the case indicate the [SCDSS] has made reasonable efforts.

11. [Marilyn] and [Joy]'s return to their own home would be contrary to their health, safety, welfare, and best interests.

12. [Veronica] was previously assaulted by [Respondent Father], and she was verbally and emotionally abused by [Respondent Father]. She also witnessed her father's assaults on her mother.

13. [Marilyn is] the victim of her father's assaults, although she currently says she is not afraid of him. She believes he is more positive and religious. [Marilyn] does not object to unsupervised visits with her father. She is attending counseling through Triumph.

14. [Respondent Father] was criminally charged for assaulting [Marilyn]. The charges were resolved by his entering into a Deferred Prosecution Agreement.

15. [Joy] was interviewed in chambers with the consent of all parties. She witnessed her father assault her sister on numerous occasions. Her father yelled at the girls and verbally abused them. [Mother] was unable to protect them from their father. [Joy] does not want to visit her father, unless visits are supervised by one of her sisters or her guardian.

16. [Joy] is involved in church and has a goal of attending the North Carolina School of Science and Mathematics. She has an interest in becoming a social worker or a lawyer.

17. [Respondent Father] has completed the following: the TASC Program and parenting classes. He, in addition, attends AA once per week, pays regular child support, and has been in individual counseling for anger management and domestic violence. He is completing the terms of his Deferred Prosecution Agreement resulting from the assault on [Marilyn].

. . . .

20. In the report dated February 11, 2008, by Dr. Thomas Holm, the doctor stated, "despite the mistreatment they (the children) had witnessed and experienced, (which included frequent criticism by their father, intense marital conflict between the parents, excessive punishment and frequent disregard for the children's need for emotional support from the parents,) [Veronica], [Marilyn] and [Joy] appear to be, to a large extent, well-adjusted and capable young women. I was unable to identify evidence of serious emotional damage that would include severe anxiety, depression, withdrawal, and/or aggressive behavior toward self or others. All three children are competent, successful in the classroom, and able to sustain an even emotional adjustment. . . . Somewhat surprisingly, they have arrived at their foster home placement with relatives in sound psychological condition at this time."

21. There was no evidence that any type of corporal punishment [was] used against the youngest child [Joy] other than a spanking several years earlier.

22. [Donna], one of the Intervenors, failed to appear in court after having been subpoenaed by [Respondent Father]. [Donna's] criminal record includes a conviction in Rockingham County Superior Court of Felony Forgery of an instrument wherein [Respondent Father] was the Complainant . . . . [Respondent Father] was unable to examine this Intervenor during the hearing because she did not appear.

23. Counseling for all three children had been ordered in February of 2008, and no counseling took place until very late in the summer. . . . [Marilyn] and [Joy] did not go to court ordered counseling until very late in the summer, and have attended very few sessions. There have been no attempts at family counseling.

24. No convictions of any kind were presented concerning [Respondent Father], although a deferred prosecution agreement resulted from the criminal charges filed concerning the incident that resulted from the removal of the children.

. . . .

26. [Respondent Father] has done everything that has been ordered by the court. He has attended counseling on a regular basis, completed the 90 day TASC program, took a parenting class thru the SCAN organization, has maintained housing, maintained a job, has paid his child support, and has not been in any more trouble since the removal of the children. He has gone to AA meetings. He has successfully completed the required community service and made the required court costs of his deferred prosecution. His wife was returned home to live with him and there have been no problems with her return. [Marilyn] testified that she has seen that he is more positive and more religious, she is not afraid of her father and believes unsupervised visits with her father would be all right.

Based on these findings of fact, the trial court concluded as a matter of law that:

2. It is in [Joy's] best interests for her permanent plan to be custody and guardianship with [Donna and James].

. . . .

> 6. There has been a substantial change of circumstances since the entry of the last order in the matter of [Joy] and it is in the best interests of [Joy] that custody and guardianship be awarded to [Donna and James]. Visitation with her parents shall be arranged during the day and supervised by an appropriate adult.
>
> 7. [Veronica] is emancipated. [Marilyn] and [Joy] are doing well in their current placements, the [SCDSS] has made reasonable efforts to reunite the family.
>
> 8. [Respondent Father] has complied with his case plan but it is still not safe to return custody of [Marilyn] and [Joy] to the father. . . .

As a result, the trial court ordered that:

> 1. Pending further hearings, [Marilyn] shall remain in the custody of the [SCDSS] with placement . . . in a licensed foster home. [Joy] shall be placed in the custody and guardianship of [Donna and James].
>
> . . . .
>
> 7. Visitation between [Marilyn], [Joy] and their parents shall be during the daytime and supervised by an appropriate adult; however, [Respondent Father] has completed his case plan and efforts shall be made to establish a relationship with [Marilyn] and [Joy]. Because of their maturity and because they are both doing well in their placements, [Marilyn's] and [Joy's] desires for visitation shall be given consideration. . . .
>
> 8. The [SCDSS] and the GAL are released in the matter of [Joy].
>
> 9. A review and a permanency planning hearing shall be held in six (6) months or earlier upon motion of either party.

Respondent does not argue in his brief that the trial court's findings of fact are unsupported by the evidence. Consequently, these findings of fact are binding for purposes of appellate review. *See In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404-05 (2005) (concluding respondent had abandoned assignments of error directed to certain findings of fact when she "failed to specifically argue in her brief that they were unsupported by evidence"). Thus, the issues raised by Respondent Father must be evaluated based on the facts found by the trial court.

Respondent Father does, however, assert that Finding of Fact No. 11 has been mischaracterized as a finding of fact and is actually a

conclusion of law. As we have already noted, Finding of Fact No. 11 provides that "[Marilyn's] and [Joy's] return to their own home would be contrary to their health, safety, welfare, and best interests." After careful consideration, we agree with Respondent Father that Finding of Fact No. 11 is a determination which requires an exercise of judgment and is more properly classified a conclusion of law than as a finding of fact. *See In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) ("best interest determinations are conclusions of law because they require the exercise of judgment.") For that reason, we treat Finding of Fact No. 11 as a conclusion of law for purposes of evaluating Respondent Father's challenges to the trial court's permanency planning order. *See In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (limiting review of conclusions of law to whether they are supported by findings of fact).

Respondent Father contends that the trial court erred by failing to make the factual findings required in permanency planning orders by N.C. Gen. Stat. § 7B-907(b). After careful consideration of the record and briefs, we agree that the permanency planning order does not comply with the requirements of N.C. Gen. Stat. § 7B-907(b), so that the permanency planning order should be vacated and this matter remanded to the trial court for the entry of a new permanency planning order that complies with the requirements of N.C. Gen. Stat. § 7B-907(b).[6]

According to the decision of this Court in *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003), a trial court must make "findings of fact under the specific criteria provided in [N.C. Gen. Stat. § 7B-907(b)]" in a permanency planning order and that a trial court fails to comply with this requirement by simply "stating a single evidentiary fact and adopting DSS and guardian *ad litem* report." As a result, a permanency planning order contravened N.C. Gen. Stat. § 7B-907(b) where it failed to find "that efforts toward reunification with respondent would be futile [or] that such efforts would be inconsistent with the juveniles' health, safety and need for a permanent home." *In re Weiler*, 158 N.C. App. 473, 478, 581 S.E.2d 134, 137 (2003). *See also In re Everett*, 161 N.C. App. 475, 480-81, 588 S.E.2d 579, 583 (2003) (finding that " 'reunification with [mother] remains the plan but reunification is not imminent' " does not constitute sufficient compliance with N.C. Gen. Stat. § 7B-907(b)); *In re Ledbetter*, 158 N.C. App. 281, 285-86, 580 S.E.2d 392, 394-95 (2003) (trial court

6. Since we conclude that the trial court must enter a new permanency planning order on remand, we need not address Respondent Father's other arguments.

failed to "make findings regarding 'whether it is possible for the juvenile to be returned home . . . within the next six months' " or "why the child was being transferred from the [foster parents] to his father"); *In re Eckard*, 148 N.C. App. 541, 547, 559 S.E.2d 233, 236 (2002), *dis. review denied*, 356 N.C. 163, 568 S.E.2d 192-93(2002) ("the trial court should have considered whether the natural father was a candidate for custody of Patricia"). On the other hand, a permanency planning order adequately complies with N.C. Gen. Stat. § 7B-907(b) in the event that the trial court "did consider and make written findings regarding the relevant [N.C. Gen. Stat. §] 7B-907(b) factors." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004). *See also In re L.B.*, 181 N.C. App. 174, 190, 639 S.E.2d 23, 31 (2007). As a result, even though a "permanency planning order does not contain a formal listing of the [N.C. Gen. Stat. §] 7B-907(b) factors, expressly denominated as such," that order was not subject to reversal for failing to address the issue of whether the children could return home in the next six months because the trial court "chang[ed] the permanent plan for [the juveniles] to adoption." *In re J.C.S.*, 164 N.C. at 106, 595 S.E.2d at 161. As a result, in order to address Respondent Father's challenge to the permanency planning order, we must decide whether that order adequately addressed the issues posited by N.C. Gen. Stat. § 7B-907(b).

The challenge lodged by Respondent Father to the adequacy of the permanency planning order's compliance with N.C. Gen. Stat. § 7B-907(b) hinges upon his contention that, although "the [trial] court found that it was not in the best interests [of] the children to be returned home at the time of the hearing," it "made no such findings about whether the children could be returned home within the next six months." After careful review of the trial court's findings of fact, we agree with Respondent Father's contention. A cursory examination of the trial court's findings demonstrates that the trial court never specifically addressed the issue of whether Joy could be returned to the home within the next six months. Furthermore, nothing in the trial court's findings addresses this issue by implication, as occurred in *In re J.C.S.*, 164 N.C. App. at 105-06, 595 S.E.2d at 161 ("by changing the permanent plan for J.C.S. and R.D.S. to adoption, the trial court necessarily determined that it was not in the children's best interests to return home within the next six months"), and *In re L.B.*, 181 N.C. App. at 190-92, 639 S.E.2d at 31-32 (findings that mother failed to undergo or make adequate efforts to obtain a required psychological examination, failed to demonstrate that she had adequate room for the juveniles, or conquered her anger problems coupled

with a finding that the juvenile had no interest in visiting with the mother at this time complied with the requirement that findings be made addressing whether the juvenile could be returned to the home within the next six months). The only relevant statements in the permanency planning order before the Court in this case are the trial court's finding that (1) Joy had witnessed seriously inappropriate conduct by Respondent Father in the past and did not want unsupervised visits with Respondent Father; its finding that (2) Joy was doing well in her current placement; and its conclusion that, (3), despite Respondent Father's successful completion of his case plan, returning [Marilyn] and [Joy] "to their own home would be contrary to their health, safety, and best interests." After careful consideration of the trial court's findings, we are unable to discern whether the trial court believes that returning Joy to the family home at some point in the future would be possible and, if so, when and under what circumstances such a development might be appropriate. Furthermore, the fact that the trial court adopted guardianship as the permanent plan for Joy does not eliminate the necessity for addressing the issue raised by Respondent Father in the same manner that the selection of adoption as a permanent plan clearly does, since N.C. Gen. Stat. § 7B-600 allows the termination of a guardianship established in a permanency planning order and the reintegration of the juvenile "into a parent's home" in the event that "the court finds that the relationship between the guardian and the juvenile is no longer in the juvenile's best interest, that the guardian is unfit, that the guardian has neglected the guardian's duties, or that the guardian is unwilling or unable to continue assuming a guardian's duties." Thus, since the trial court's findings of fact simply do not address the issues posited in N.C. Gen. Stat. § 7B-907(b), we conclude that the permanency planning order should be vacated and that this matter should be remanded to the trial court for the entry of a new permanency planning order containing adequate findings of fact and conclusions of law.

Vacated and remanded for additional findings.

Judges ROBERT N. HUNTER, JR., and BEASLEY concur.

BOBBIEJO LEE WOODS, ADMINISTRATRIX OF THE ESTATE OF ROBERT GORDON WOODS, PLAINTIFF v. MOSES CONE HEALTH SYSTEM D/B/A MOSES CONE MEMORIAL HOSPITAL AND GUILFORD NEUROSURGICAL ASSOCIATES, P.A., DEFENDANTS

No. COA08-1556

(Filed 7 July 2009)

1. **Appeal and Error— appealability—interlocutory order—discovery of privileged information**

   An interlocutory order affected a substantial right and was properly before the Court of Appeals where the order compelled production of a letter which might be statutorily privileged as part of a hospital peer review following a postoperative death.

2. **Medical Malpractice— peer review committee—statutory requirements satisfied**

   A Surgical Peer Review Committee (SPRC) met the definition of a medical review committee within the meaning of N.C.G.S. § 131E-76(5).

3. **Medical Malpractice— peer review committee—requested information—absolutely privileged**

   The trial court erred in a medical malpractice action by concluding that the physician responsible for the postoperative treatment of a deceased patient could waive the medical peer review privilege by disseminating a letter to the peer review committee to people outside the committee. The letter was produced at the request of the committee and is absolutely privileged under N.C.G.S. § 131E-95. The issue of reliance on the privileged material by the doctor's experts was not raised at trial and was not properly before the appellate court.

4. **Appeal and Error— assignments of error—not sufficiently specific**

   Assignments of error involving information furnished to a medical peer review committee did not state specifically the findings and conclusions plaintiff contended were erroneous. The conclusion that the root cause analysis report from the committee was privileged was binding.

Appeal by Defendant Moses Cone Health System d/b/a Moses Cone Memorial Hospital and by Plaintiff from order entered 7 July 2008 by Judge Anderson Cromer in Superior Court, Guilford County. Heard in the Court of Appeals 20 May 2009.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr., for Plaintiff.

Wilson & Coffey, LLP, by G. Gray Wilson and Lorin J. Lapidus for Defendant.

North Carolina Hospital Association, by Linwood L. Jones; and The North Carolina Association of Defense Attorneys, by Timothy P. Lehan and Deanna Davis Anderson, amicus curiae.

McGEE, Judge.

Thirty-one-year old Robert Gordon Woods (Woods) was scheduled for ambulatory surgery on 22 February 2005 at Moses Cone Memorial Hospital and was to be discharged that same day. However, due to complications with his surgery, Woods was admitted to the hospital immediately following his surgery. Woods began complaining of difficulty swallowing and weakness in his right hand and foot. Woods' condition deteriorated over the next two days and he was returned to surgery at approximately 7:00 a.m. on 24 February 2005. Woods' medical condition continued to deteriorate and after a final respiratory arrest on 4 March 2005, Woods died.

Bobbiejo Lee Woods (Plaintiff) is the administrator of Woods' estate. Plaintiff filed a medical malpractice action on 6 February 2007 against Moses Cone Health System d/b/a Moses Cone Memorial Hospital (Defendant) and Guilford Neurosurgical Associates, P.A. (GNA), alleging Defendant and GNA were negligent in administering medical care to Woods and that their negligence caused Woods' death. GNA is not a party to this appeal. Plaintiff served Defendant with interrogatories and a request for production of documents. Defendant's answer and response included objections to Plaintiff's discovery requests, stating that the information sought by Plaintiff was privileged.

Plaintiff filed a motion to compel on 23 May 2008. In response, Defendant filed a motion for a protective order on 16 June 2008. Defendant claimed the discovery materials sought by Plaintiff were protected by N.C. Gen. Stat. § 131E-95 as materials produced by a medical review committee. In support of its motion for a protective order, Defendant filed an affidavit on 20 June 2008 of Amy Parker (Parker), a clinical risk management specialist employed by Defendant. Parker's affidavit stated:

> 1. The hospital maintains a medical review committee pursuant to North Carolina law, such that its proceedings are confidential. This committee conducted a peer review investigation into the medical care provided to [Woods] with regard to his hospitalization in February-March 2005, which is the subject matter of this lawsuit. In June 2005, the committee directed a written request to Dr. [] Stern for information about [the Woods case], to which Dr. Stern replied by correspondence to the committee in November 2005, which information was considered and utilized by the committee in its investigation of [the Woods case], and treated as strictly confidential at all times. In addition to responding to the written request of the committee for information, Dr. Stern was also a member of the committee at the time.
>
> 2. The hospital also has a quality assurance committee pursuant to North Carolina law, such that its proceedings are also confidential. This committee performed a root cause analysis on March 30, 2005 with regard to [Wood's] hospitalization as set forth above. The report generated by this committee was based on its investigation of this matter and is treated as strictly confidential as well.

Plaintiff's motion to compel and Defendant's motion for a protective order were heard on 26 June 2008. By stipulation of Plaintiff and Defendant, the only issues the trial court considered at the hearing were whether or not Plaintiff could compel discovery of (1) the 1 November 2005 letter (the letter) from Dr. Joseph Stern (Dr. Stern), the GNA neurosurgeon responsible for the post-operative treatment of Woods, to Dr. Mark Yates (Dr. Yates), Chairperson of Defendant's Surgical Peer Review Committee (SPRC), and (2) the root cause analysis report as described in Parker's affidavit. The trial court entered an order on 7 July 2008, in which it granted in part and denied in part Plaintiff's motion to compel, and granted in part and denied in part Defendant's motion for a protective order. The trial court held that:

> 4. . . . The root cause analysis reports are the final result of [] quality assurance investigations or inquiries into the delivery of health services at [] [Defendant] Hospital. The inquiry was facilitated by the Serious Event Task Force (SETF) Committee, which is comprised of both healthcare providers and non-health care providers and that this committee is a subcommittee of the Medical Performance Improvement Committee, which

> qualifies as a medical review committee under G.S. §§ 90-21.22 *et seq*. The [SETF] Committee was acting pursuant to peer review activity under the auspices of the Medical Performance Improvement Committee when ordering a root cause analysis inquiry. The root cause analysis report described by [] Parker in her testimony and in her affidavit is confidential, privileged and not subject to discovery as a peer review document generated by a medical review committee as that term is defined in G.S. §§ 90-21.22 *et seq*.

The trial court held that "the letter from Dr. Stern to Dr. Yates, [the chairperson of the SPRC], was a part of peer review activities at [Defendant] Hospital and would, nothing else appearing, be entitled to confidentiality pursuant to peer review statutes and authority as privileged material." However, the trial court further held:

> 6. Counsel for [GNA] has made the letter of November 1, 2005 from Dr. Stern to Dr. Yates available to one or more reviewing experts. . . .
>
> 7. The November 2, 2005 letter from Dr. Stern to Glenn Waters, [Defendant's chief operating officer], which enclosed a copy of the November 1, 2005 letter, was not part of peer review activities and was not directed to a medical review committee or any committee entitled to claim privilege or confidentiality.
>
> 8. The disclosure of the letter of November 1, 2005 from Dr. Stern to Dr. Yates (a) to Mr. Waters, and (b) to reviewing experts by counsel for defendant [GNA] made the letter otherwise available and operated as a waiver by Dr. Stern of the confidentiality of the information contained in the letter. However, upon conducting its *in camera* review, some information contained in the November 1, 2005 letter refers to root cause analysis or opinions about peer review activity. The Court has redacted those parts of the letter from the November 1 letter. . . .

The trial court sealed the original and redacted versions of the letter to be made part of the court file in the event of appellate review. Defendant filed notice of appeal on 22 July 2008. Plaintiff filed notice of appeal on 23 July 2008.

I.

[1] The trial court's order in the present case is an interlocutory order. However, N.C. Gen. Stat. § 7A-27(d)(1) permits an appeal from

an interlocutory order which affects a substantial right. N.C. Gen. Stat. § 7A-27(d)(1) (2007). Our Supreme Court has held that "when . . . a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999); *see also Hayes v. Premier Living, Inc.*, 181 N.C. App. 747, 751, 641 S.E.2d 316, 318 (2007) (finding that the interlocutory discovery order compelling production of reports which might be privileged pursuant to N.C. Gen. Stat. §§ 90-21.22A and 131E-107 affected a substantial right and was therefore immediately appealable). Because the trial court's order in the present case compels the production of a letter which might be statutorily privileged, the interlocutory order affects a substantial right and is therefore properly before us.

II.

A. Defendant's appeal

[2] Defendant assigns error to the trial court's conclusion in paragraph eight of the trial court's order that the letter from Dr. Stern to Dr. Yates was discoverable because Dr. Stern's dissemination of the letter to parties outside the medical review committee made the letter "otherwise available and operated as a waiver" of the confidentiality of the letter. Defendant argues that because the letter was produced by a medical review committee, the letter is absolutely privileged and cannot become "otherwise available."

In paragraph one of its order, the trial court concluded that the letter was "part of peer review activities at [Defendant] Hospital and would, nothing else appearing, be entitled to confidentiality pursuant to peer review statutes and authority as privileged material." However, the trial court did not specifically find whether the SPRC was a medical review committee, and if so, pursuant to which statute.

Plaintiff's suit against Defendant is a civil action against a hospital and N.C. Gen. Stat. § 131E-95, part of the Hospital Licensure Act, creates protection for medical review committees in civil actions against hospitals. Therefore, N.C. Gen. Stat. § 131E is the applicable statute for determining whether the SPRC was a medical review committee and if so, the extent of protection granted to it.

N.C. Gen. Stat. § 131E-76(5) defines "medical review committee" as:

> (5) "Medical review committee" means any of the following committees formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing:
>
> a. A committee of a state or local professional society.
>
> b. A committee of a medical staff of a hospital.
>
> c. A committee of a hospital or hospital system, if created by the governing board or medical staff of the hospital or system or operating under written procedures adopted by the governing board or medical staff of the hospital or system.

N.C. Gen. Stat. § 131E-76(5) (2007). The Bylaws of the Medical and Dental Staff of Defendant Hospital (the Bylaws) state in pertinent part:

> 10.15 PEER REVIEW COMMITTEES
>
> (a) Committees. The Service Chief of each Service shall appoint a Peer Review Committee for the Service to perform the duties provided in Section 10.15(d). . . .
>
> (b) Membership. The membership of a Peer Review Committee shall be as determined by the Service Chief of the Service or the Section Chair of the Section . . . provided that the membership shall consist primarily of members of the Staff with only a very limited number of non-Staff appointments (if any), and shall otherwise be limited, such that composition of the Committee shall qualify the Committee, and preserve the Committee's status, as a medical review committee as defined by N.C. Gen. Stat. § 131E-76(5).
>
> . . . .
>
> (d) Function. The duties of the Committee shall be to:
>
> (1) work in cooperation with the Service Chief or Section Chair to establish effective systems for monitoring and evaluating the care rendered by the Service or Section and identify opportunities for improvement.

We find that, according to the Bylaws, the SPRC is a peer review committee of the surgical section and that the composition and function of the SPRC as defined by the Bylaws meet the definition of a "medical review committee" within the meaning of N.C.G.S. 131E-76(5).

See Shelton v. Morehead Memorial Hospital, 318 N.C. 76, 87, 347 S.E.2d 824, 831 (1986).

[3] Having determined that the SPRC is a medical review committee under N.C. Gen. Stat. § 131E, we next interpret the extent of the privilege given the SPRC under N.C. Gen. Stat. § 131E-95. We review the trial court's statutory interpretation *de novo*. *A&F Trademark, Inc. v. Tolson*, 167 N.C. App. 150, 153, 605 S.E.2d 187, 190 (2004) (citations omitted). Statutory interpretation begins with the plain meaning of the words of the statute. *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997) (citation omitted). N.C. Gen. Stat. §131E-95 states in pertinent part:

> (b) The proceedings of a medical review committee, the records and materials it produces, and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1 . . . and shall not be subject to discovery or introduction into evidence in any civil action against a hospital . . . which results from matters which are the subject of evaluation and review by the committee.

N.C. Gen. Stat. § 131E-95 (2007). By its plain language, N.C. Gen. Stat. § 131E-95 creates three categories of information protected from discovery and admissibility at trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee. Additionally, N.C.G.S. § 131E-95 states: "However, information, documents, or other records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee." N.C.G.S. § 131E-95.

Plaintiff argues that the trial court correctly concluded that this exception clause applies to all three protected categories of information and that even if the letter was originally produced by a medical review committee, it has since become "otherwise available" and therefore no longer immune from discovery or use at trial. However, this interpretation of N.C. Gen. Stat. § 131E-95 is contrary to the purpose of the Hospital Licensure Act and case law interpreting N.C.G.S. § 131E-95.

"Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks

to accomplish." *Shelton*, 318 N.C. at 81-82, 347 S.E.2d at 828 (citations omitted). "The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently." *Id.* at 82, 347 S.E.2d at 828 (citing *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 615 (1977)).

> The stated purposes of the Hospital Licensure Act are to promote the public health, safety and welfare and to provide for basic standards for care and treatment of hospital patients. Section 95 of the Act protects from discovery and introduction into evidence medical review committee proceedings and related materials because of the fear that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. [The Act] represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs access to evidence.

Id. (citations and internal quotations omitted). "It would severely undercut the purpose of § 95, i.e., the promotion of candor and frank exchange in peer review proceedings, if we adopted [Plaintiff's] construction of the statute," *id*, for it would mean a document, which was created solely at the behest of a medical review committee, would no longer be protected if the author chose to subsequently disseminate the document to persons or entities outside the medical review committee.

Further, the language in *Shelton* makes it clear that if the material sought to be discovered or introduced at trial falls within the first two categories of information under N.C. Gen. Stat. § 131E-95, the material is absolutely protected and cannot later become "otherwise available." Our Supreme Court in *Shelton* stated: "[I]nformation, in whatever form available, from *original sources other than the medical review committee* is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings," *id.* at 83, 347 S.E.2d at 829 (emphasis added); and "[p]ermitting access to information *not generated by the committee itself* but merely presented to it does not impinge on this statutory purpose." *Id.* at 83-84, 347 S.E.2d at 829 (emphasis added).

Our Supreme Court further stated in *Shelton* that "it may be necessary to identify not only the document by name and its custodian, but also the document's *source and the reason for its creation*," *id.* at 86, 347 S.E.2d at 831 (emphasis added), and held that "[d]ocuments and information which are otherwise immune from discovery

under § 95 do not, however, lose their immunity because they were transmitted" to persons outside the medical review committee. *Id.* at 84-85, 347 S.E.2d at 830.

Similarly, in *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 467, 515 S.E.2d 675, 687 (1999), the plaintiff attached to his complaint records and materials produced by a medical review committee. Our Supreme Court held that once the peer review records (the records) were attached to the plaintiff's complaint and filed with the trial court, the records became available to the public. *Id.* Nonetheless, our Supreme Court stated that because N.C.G.S § 131E-95 expressly prohibited the introduction of peer review records into evidence, it was improper for the plaintiff to attach the records to his complaint and they remained inadmissible despite having becoming public record. *Id.*

In the present case, Parker's affidavit stated: "the committee *directed* a written request to Dr. [] Stern for information about [the Woods case], to which Dr. Stern replied by correspondence to the committee [on 1 November 2005], which information was considered and utilized by the committee in its investigation of [the Woods case]." (emphasis added). The trial court stated that the letter was "to Dr. [] Yates, chair[person] of the [SPRC], and they [sic] were *produced for the committee at the direction of the committee's chair[person]*." (emphasis added). Because the letter was produced at the request of a medical review committee, the letter is absolutely privileged under N.C.G.S. § 131E-95. Although the letter might be seen by persons outside the committee, it nonetheless remains protected from discovery and admissibility at trial. Therefore, the trial court erred in concluding that Dr. Stern could waive the privilege by disseminating the letter to persons outside the committee. Thus, the trial court's order partially granting Plaintiff's request to compel Defendant to produce a redacted version of the letter is reversed.

In its brief, Defendant asks our Court to provide specific instructions that GNA's experts not be permitted to testify at deposition or trial because they might have based their expert opinions on information contained in the privileged letter. However, Defendant limited its motion for a protective order to protection from compelling the discovery of the privileged material. Because the issue of GNA's experts' reliance on the privileged material was not raised at the trial court, Defendant's argument is not properly before us. N.C.R. App. P. 10(b)(1).

B. Plaintiff's Appeal

[4] In Plaintiff's sole assignment of error, Plaintiff states:

> The trial court erred by not fully granting [P]laintiff's motion to compel and by granting [D]efendant['s] . . . motion for a protective order in part on the grounds that "the Root Cause Analysis" of the death of . . . Woods is not confidential, or privileged, or entitled to protection as a peer review document generated by a medical care committee as that term is defined in G.S. 90-21.22, *et seq.*

N.C. R. App. P. 10(c)(1) requires that "[e]ach assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C.R. App. P. 10(c)(1). Our Court held in *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) (citations omitted), that "[w]here findings of fact are challenged on appeal, each contested finding of fact must be separately assigned as error, and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding." We further stated that "[w]here an appellant fails to assign error to the trial court's findings of fact, the findings are 'presumed to be correct.' " *Id.* (quoting *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998)). "Failure to [assign error to each conclusion] constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999).

Plaintiff's assignment of error fails to specifically state which findings of facts and/or conclusions of law Plaintiff contends were erroneous. Our Court cannot determine from Plaintiff's assignment of error if Plaintiff meant to challenge the trial court's conclusion that (1) the root cause analysis was generated by a medical care committee, (2) the root cause analysis was not confidential, privileged, or protected, (3) the court utilized an incorrect statute to determine that the committee was a medical care committee, or (4) some combination of errors. Nor can we determine if Plaintiff intended to challenge the sufficiency of the findings of fact or just the trial court's conclusions of law.

The trial court found that "[t]he root cause analysis report . . . is confidential, privileged and not subject to discovery as a peer review document generated by a medical review committee as that term is

defined in G.S. §§ 90-21.22 *et seq*." Because Plaintiff failed to properly assign error to the trial court's conclusions, they are binding on appeal. *See Fran's Pecans, Inc.* Therefore, the trial court's conclusion that the root cause analysis was privileged and not subject to discovery is affirmed.

Affirmed in part; reversed and remanded in part.

Judges JACKSON and ERVIN concur.

STATE OF NORTH CAROLINA v. GEORGE IRVAN RIVENS

No. COA08-1042

(Filed 7 July 2009)

1. Appeal and Error— preservation of issues—assignments of error—not supported by argument

Assignments of error not supported by argument were deemed abandoned.

2. Search and Seizure— presence of officers in yard—lawfulness

The presence of police officers in defendant's yard, where they questioned and ultimately arrested him, was lawful where they entered the yard for the purpose of a general inquiry regarding a report that shots had been fired.

3. Search and Seizure— frisk—justification

A frisk was justified based upon an officer's reasonable and articulable suspicion of criminal activity where officers who were lawfully in defendant's yard noticed a bulge in defendant's shirt, the smell of marijuana on defendant, and defendant's mouth twitching nervously.

4. Search and Seizure— consent to be searched—not coerced

Defendant's consent to be searched was not coerced where no specific coercive acts were alleged beyond approaching defendant on his property to ask questions. Such actions were permissible for the officer and are not coercive in nature.

5. Sentencing— aggravating factor—juvenile admission of delinquency

The trial court did not err when sentencing defendant for possession of cocaine with intent to sell or deliver by not dismissing the aggravating factor of a previous adjudication of delinquency. Although the evidence consisted of the transcript of admission and not the adjudication order, an admission of guilt by a juvenile has been held to be equivalent to a guilty plea, and constitutes acceptable grounds for the aggravating factor of being adjudicated delinquent.

Appeal by defendant from judgment entered 5 November 2007 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 February 2009.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Gilda C. Rodriquez, for defendant-appellant.

JACKSON, Judge.

George Irvan Rivens ("defendant") appeals from his conviction of possession of cocaine with intent to sell or deliver. For the following reasons, we hold no error.

On 8 October 2005, the Charlotte-Mecklenburg Police Department ("CMPD") received an anonymous call for service. The caller stated that five males were on the side of Longleaf Drive, firing a gun. The caller described one as wearing a green shirt and one who had dreadlocks as wearing a white shirt. Officers Roberto Correa ("Officer Correa") and Michael Lowe ("Officer Lowe") arrived on the scene and saw a group of approximately five males standing on the lawn at 1629 Longleaf Drive. Two of the males matched the descriptions from the service call.

Officers Correa and Lowe approached the men to ask them about a gun's being fired. Officer Lowe interviewed one of the men, Christopher Burke ("Burke"). Burke consented to a pat down, and no weapons or contraband were found. Officer Correa approached the man in the white shirt with dreadlocks, identified as defendant. Officer Correa requested that defendant come over to him, but defendant declined, pointing to the house-arrest tracking device on his leg, indicating that he was not allowed to leave the property. As

Officer Correa approached defendant, he noticed defendant's right cheek twitching. Officer Correa also noticed that defendant's shirt was bunched in a way that possibly could conceal a weapon, and he smelled marijuana on defendant.

Officer Correa told defendant that he was investigating a report of gunshots. Officer Correa asked defendant if he had anything on him that Officer Correa should know about, and defendant responded that he did not. Officer Correa continued, asking defendant whether he had been smoking marijuana, and defendant did not respond. Officer Correa asked for defendant's consent to be searched. Defendant said, "Go ahead," and he raised his arms over his head. During this search, Officer Correa did not find a gun, but he did find a small bag in defendant's pocket which held four smaller baggies, each containing what appeared to be a rock of cocaine. These four rocks later were identified positively as 1.25 grams of cocaine. Officer Correa then arrested defendant. A more thorough search of defendant's person incident to his arrest revealed $50.00 cash in defendant's sock.

Defendant was tried on one count of possession of cocaine with intent to sell or deliver. On 29 December 2006, defendant filed a motion to suppress to exclude evidence obtained by the police when they made the stop at 1629 Longleaf Drive on 8 October 2005. On 30 October 2007, the trial court denied his motion. On 2 November 2007, a jury returned a guilty verdict at defendant's trial.

During sentencing, the State offered evidence that defendant previously had been adjudicated delinquent for an offense that would be a Class B2 felony if it had been committed by an adult. This evidence was presented as an aggravating factor to be considered in sentencing. Detective Gary L. McFadden ("Detective McFadden") of the CMPD testified concerning a homicide case he had investigated in 2000 and 2001. Detective McFadden stated that he was present when defendant made an admission of guilt in that case. Gladys L. Patterson ("Patterson") of the Mecklenburg County Clerk's Office testified as the custodian of defendant's juvenile records concerning these events. These records contained a Transcript of Admission by Juvenile, in which defendant admitted to the crime of second-degree murder. The Transcript of Admission was signed by defendant, the prosecutor, and the trial court. Patterson testified that the file ought to contain an Arraignment/Adjudication Order but that, for unknown reasons, the order was not in the file. The jury found that defendant previously had been adjudicated delinquent for an offense that would be a Class B2 felony if committed by an adult. The trial court sen-

tenced defendant to a twelve to fifteen-month term of imprisonment. Defendant appeals.

[1] Defendant first argues that the trial court erred in denying his motion to suppress concerning evidence gathered by the police on the night of the arrest. We disagree.

"Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether [the trial court's] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Allison*, 148 N.C. App. 702, 704, 559 S.E.2d 828, 829 (2002) (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). The trial court's conclusions of law are reviewed *de novo*. *State v. Haislip*, 362 N.C. 499, 500, 666 S.E.2d 757, 758 (2008) (citation omitted). When the trial court's findings of fact "are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004) (citing *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984)), *disc. rev. denied*, 358 N.C. 240, 594 S.E.2d 199 (2004).

On appeal, defendant fails to present arguments as to his assignments of error numbered 3 through 6. Accordingly, these assignments of error are abandoned, and the trial court's findings of fact challenged therein are deemed to be supported by competent evidence. *See* N.C. R. App. P. 28(b)(6) (2007); *Citizens Addressing Reassignment & Educ., Inc. v. Wake County Bd. of Educ.*, 182 N.C. App. 241, 245, 641 S.E.2d 824, 827 (2007).

[2] Defendant contends that Officers Correa and Lowe did not have sufficient reasonable suspicion to approach him in his yard. Defendant claims that (1) any probable cause that subsequently developed from Officer Correa's interaction with defendant was "fruit of the poisonous tree" and was therefore invalid; and (2) the consent given by defendant for Officer Correa to search him was not voluntary.

"Law enforcement officers have the right to approach a person's residence to inquire whether the person is willing to answer questions." *State v. Wallace*, 111 N.C. App. 581, 585, 433 S.E.2d 238, 241, *disc. rev. denied*, 335 N.C. 242, 439 S.E.2d 161 (1993) (citation omitted). "[W]hen officers enter private property for the purpose of a general inquiry or interview, their presence is proper and lawful. . . . '[O]fficers are entitled to go to a door to inquire about a matter; they are not trespassers under these circumstances.' " *State v. Church*, 110

N.C. App. 569, 573-74, 430 S.E.2d 462, 465 (quoting *State v. Prevette*, 43 N.C. App. 450, 455, 259 S.E.2d 595, 599-600 (1979), *disc. rev. denied*, 299 N.C. 124, 261 S.E.2d 925, *cert. denied*, 447 U.S. 906, 64 L. Ed. 2d 855 (1980)). Arriving at a home in order to perform an investigation and requesting to speak with the occupant does not constitute an "investigative stop," does not require an "articulable suspicion of criminal activity," and does not constitute a search or seizure. *See id.*; *see generally Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968).

In this case, Officers Correa and Lowe entered the yard—a lesser intrusion than entering the house or doorway—for the purpose of a general inquiry regarding a report that shots had been fired. Officer Correa approached defendant to conduct his inquiry, and defendant did not request that Officer Correa leave the premises. Notwithstanding defendant's house arrest and ankle bracelet, defendant was free to enter his home to avoid dealing with Officers Correa and Lowe. We hold the Officer's presence in the yard was lawful.

[3] After lawfully approaching defendant to conduct his inquiry, Officer Correa noticed a bulge in defendant's shirt, the smell of marijuana on defendant, and the nervous twitch of defendant's mouth. These observations may be considered by an officer in forming reasonable suspicion for a non-consensual search of a suspect pursuant to the plain view and plain smell rules. *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981) (requiring that reasonable suspicion take into account "the totality of the circumstances"); *State v. Rigsbee*, 285 N.C. 708, 713, 208 S.E.2d 656, 660 (1974) ("if the officer is at a place where he has a legal right to be and if the item seized is in plain view[,]" then no unlawful search or seizure has occurred); *State v. Yates*, 162 N.C. App. 118, 589 S.E.2d 902 (2004) (detailing the "plain smell" rule analogous to the "plain sight" rule).

In this case, the smell of marijuana, bolstered by defendant's nervousness, was sufficient to create a reasonable and articulable suspicion of criminal activity. *See Cortez*, 449 U.S. 411, 66 L. Ed. 2d 621; *Terry*, 392 U.S. 1, 20 L. Ed. 2d 889; *State v. Buie*, 297 N.C. 159, 162-63, 245 S.E.2d 26, 28-29 (1979) (using nervousness as a factor supporting a reasonable suspicion of criminal activity). Therefore, the frisk was justified based upon Officer Correa's reasonable, articulable suspicion of criminal activity.

[4] After lawfully approaching defendant and taking note of suspicious facts concerning defendant, Officer Correa asked for defendant's consent to be searched. The trial court found as a fact—uncon-

tested on appeal—that consent was given. Defendant now contests as a matter of law whether consent was given, suggesting obliquely that, in view of the totality of the circumstances, defendant was coerced into consenting.

"[E]ven when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means." *State v. Campbell*, 359 N.C. 644, 663, 617 S.E.2d 1, 13 (2005) (quoting *United States v. Drayton*, 536 U.S. 194, 201, 153 L. Ed. 2d 242, 251 (2002)). In this case, no specific coercive acts are alleged beyond approaching defendant on his property to ask questions. As previously detailed, such actions were permissible for Officer Correa and are not coercive in nature. Accordingly, we hold the trial court's uncontested findings of fact support its conclusions of law concerning defendant's consent to be searched and the admission of evidence from the day of the arrest.

[5] Defendant further contends that the trial court erred in failing to dismiss the aggravating factor of previous adjudication of delinquency. We disagree.

Denial of a motion to dismiss an aggravating factor is a question of sufficiency of the evidence. Such an issue is a question of law which is reviewed *de novo*. *See State v. Bagley*, 183 N.C. App. 514, 519, 644 S.E.2d 615, 623 (2007). Evidence is sufficient to sustain a denial of a motion to dismiss "when, viewed 'in the light most favorable to the State' and giving the State 'every reasonable inference' therefrom, there is substantial evidence 'to support a [jury] finding[.]' " *Id.* at 522-23, 644 S.E.2d at 621 (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (quoting *State v. Smith*, 200 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)).

The motion to dismiss at issue here concerns an aggravating factor rather than a criminal charge. However, the evidentiary standard of "beyond a reasonable doubt" applies to the sentencing portion of a criminal proceeding. N.C. Gen. Stat. § 15A-1340.16(a1) (2007). The judge's role in determining which arguments to allow a jury to hear is the same in both aspects of a criminal case. *See State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Therefore, we apply the same analysis.

At trial, evidence was presented to the jury concerning defendant's juvenile admission of delinquency, which was accepted by the juvenile court on 26 March 2001. This evidence consisted of both the Transcript of Admission by Juvenile and a witness to defendant's admission while defendant was still a juvenile.

In brief summary, there are three steps in the procedure for processing a juvenile who admits to the charges against him: (1) a Transcript of Admission by Juvenile is completed and is accepted by the juvenile court, showing that the admission was acquired appropriately, with a factual basis for the charges and with the juvenile being fully informed (analogous to a guilty plea); (2) a Juvenile Adjudication Order is filled out, where the juvenile court finds the juvenile delinquent (analogous to an entry of judgment); (3) a Disposition/Commitment Order is filled out, in which the time for which the juvenile will be committed is determined and recorded (analogous to sentencing). *See In re T.H.T.*, 362 N.C. 446, 449, 665 S.E.2d 54, 56 (2008); N.C. Gen. Stat. § 7B-807 (2007); N.C. Gen. Stat. § 7B-905 (2007); N.C. Gen. Stat. § 7B-2407 (2007).[1]

In this case, the Juvenile Adjudication Order is missing, without explanation, from defendant's juvenile case file, and the Disposition/Commitment Order was not allowed into evidence by the trial court. At the time of the juvenile court's acceptance of the Transcript of Admission by Juvenile, defendant had not yet been adjudicated delinquent by the court. Patterson testified that a Transcript of Admission does not constitute a juvenile adjudication. It is not until the proceedings continue that actual adjudication occurs.

However, "[f]or the purpose of imposing [a] sentence, a person has been convicted when he has been adjudged guilty *or has entered a plea of guilty* or no contest." N.C. Gen. Stat. § 15A-1331(b) (2007) (emphasis added). "We have interpreted N.C. Gen. Stat. § 15A-1331(b) to mean that formal entry of judgment is not required in order to have a conviction." *State v. Hatcher*, 136 N.C. App. 524, 527, 524 S.E.2d 815, 817 (2000) (citing *State v. Fuller*, 48 N.C. App. 418, 268 S.E.2d 879, *disc. rev. denied*, 301 N.C. 403, 273 S.E.2d 448 (1980)); *see also State v. Canellas*, 164 N.C. App. 775, 778, 596 S.E.2d 889, 891 (2004).

[A] defendant's guilt can only be established by a properly entered and accepted plea of guilty or of no contest, or by the verdict of

1. There have been no relevant changes to these laws or to the time line of juvenile proceedings since defendant's juvenile proceeding in 2001.

a jury. Absent a plea of guilty or of no contest, guilt can never be established by judgment of the court, but only by a verdict of the jury. However, in returning a verdict of guilty, it is sometimes said that the jury "adjudged" the defendant guilty. It was in this sense that the legislature used the word "adjudged" in G.S. 15A-1331(b). We conclude, and so hold, that by use of the word "adjudged" in G.S. 15A-1331(b) with respect to determining when a defendant has been "convicted" of an offense, the legislature was not referring to the formal entry of judgment by the court but rather to the return by the jury of a verdict of guilty.

State v. Fuller, 48 N.C. App. 418, 420, 268 S.E.2d 879, 881, *disc. rev. denied*, 301 N.C. 403, 273 S.E.2d 448 (1980).

An admission of guilt by a juvenile, like that recorded in a Transcript of Admission, has been held by this Court and by the North Carolina Supreme Court to be "equivalent to a guilty plea in a criminal case[.]" *In re T.E.F.*, 167 N.C. App. 1, 4, 604 S.E.2d 348, 350 (2004) (quoting *In re Chavis*, 31 N.C. App. 579, 581, 230 S.E.2d 198, 200 (1976)), *aff'd*, 359 N.C. 570, 575, 614 S.E.2d 296, 299 (2005); *cf. State v. Boyce*, 175 N.C. App. 663, 669, 625 S.E.2d 553, 557 (2006), *aff'd and disc. rev. improvidently allowed in part*, 361 N.C. 670, 651 S.E.2d 879 (2007); *but see State v. Yarrell*, 172 N.C. App. 135, 142, 616 S.E.2d 258, 263 (2005) (holding that adjudications, unlike criminal convictions, must be found by a jury beyond a reasonable doubt before being used as an aggravating factor), *disc. rev. improvidently allowed*, 360 N.C. 473, 628 S.E.2d 380 (2006). While there are differences between juvenile delinquency cases and criminal cases, an admission carries with it the same protections and implications as a guilty plea. *See In re T.E.F.*, 167 N.C. App. at 4, 604 S.E.2d at 350. A significant difference between juvenile proceedings and criminal proceedings is the increase in the protections afforded to juveniles. *Id.* The effect of the juvenile offense upon the case at bar is that of an aggravating factor, thereby increasing the punishment of the adult crime. As defendant in this case is no longer a juvenile and is being punished here for a crime he committed as an adult, we are not concerned with additional protections which may be afforded to juveniles in this instance.

Here, the State presented evidence sufficient to support a jury verdict that defendant admitted to the offenses brought against him in juvenile court. Such an admission constitutes acceptable grounds for the aggravating factor of being adjudicated delinquent.

For the foregoing reasons, we discern no error in the trial below.

No error.

Judges STEPHENS and STROUD concur.

STATE OF NORTH CAROLINA BY AND THROUGH THE ALBEMARLE CHILD SUPPORT ENFORCEMENT AGENCY, EX REL., SHAWN L. JOHNSON, PLAINTIFF v. ROBERT B. EASON, DEFENDANT

No. COA08-1432

(Filed 7 July 2009)

1. Child Support, Custody, and Visitation— Florida support petition—notarization

The trial court did not err when it denied defendant's motion to dismiss a child support petition from Florida based on its determination that plaintiff's petition was verified. Although defendant asserts that the Florida notarization of the petition was void because it did not reflect the type of identification relied upon to verify plaintiff's identity, no Florida case was found stating that a notarization was void for failing to indicate this information when there are no allegations of fraud or injury and all other statutory requirements were met.

2. Appeal and Error— preservation of issues—grounds not raised at trial

Assignments of error concerning a Florida child support petition were not preserved for appeal where defendant requested that the appellate court review the trial court's decisions on grounds other than those he raised before the trial court.

Appeal by defendant from order entered 2 July 2008 by Judge Eula E. Reid in Camden County District Court. Heard in the Court of Appeals 20 April 2009.

Roy Cooper, Attorney General, by Gerald K. Robbins, Special Deputy Attorney General, for the State.

Frank P. Hiner, IV, for defendant-appellant.

MARTIN, Chief Judge.

Shawn L. Johnson and defendant, Robert B. Eason, were married to each other on 1 July 1998 in Virginia. Defendant thereafter adopted Ms. Johnson's son. The parties separated on 17 September 2001, and the marriage was declared void and was annulled in Virginia on 30 May 2002 on grounds that Ms. Johnson "had not legally dissolved an earlier marriage." On 11 April 2007, Ms. Johnson, a resident of the State of Florida, signed a Uniform Support Petition seeking child support and medical insurance coverage for the child, C.L.E., as well as recovery of retroactive support owed to the State of Florida paid for the benefit of the child, from defendant, who was then a resident of the State of North Carolina. The petition was signed and dated by Florida-commissioned notary public D. Harrison, Commission No. DD509426, who affixed a State of Florida notary seal to the signed petition. The State of Florida initiated this civil action under the Uniform Interstate Family Support Act ("UIFSA") by forwarding Ms. Johnson's petition to the State of North Carolina. The petition was filed in Camden County on 24 July 2007, along with a Child Support Enforcement Transmittal #1 Initial Request form and a ten-page General Testimony form, which was signed by Ms. Johnson and notarized in the same manner as the petition.

On 25 July 2007, defendant was served with the petition and a summons for a proceeding brought by the State of North Carolina for relator Ms. Johnson ("plaintiff"). On 24 September 2007, defendant filed a pleading entitled Motion to Dismiss; Answer; Affirmative Defenses. Defendant's motion to dismiss was based "on the grounds that plaintiff failed to state a claim upon which relief can be granted . . . based upon the notary public's allegedly improper acknowledgment of relator's signature on the petition and as to the form of the petition." After a hearing, the trial court denied defendant's motion to dismiss, determining that "[t]he petition received into evidence as plaintiff's exhibit 1, as well as the notary public's acknowledgment affixed thereto, substantially conforms with the forms mandated by federal law." The court granted plaintiff's request for child support, medical insurance coverage, and reimbursement of retroactive support owed to the State of Florida, and ordered that income withholding be instituted against defendant. Defendant gave timely notice of appeal to this Court from the district court's order.

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[1] "Child support orders are accorded substantial deference by appellate courts and we must limit our review to a 'determination of

whether there was a clear abuse of discretion.' " *Hendricks v. Sanks*, 143 N.C. App. 544, 548, 545 S.E.2d 779, 781 (2001) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). However, in the present case, defendant contends the trial court erred as a matter of law when it determined that plaintiff's support petition was properly verified in accordance with the statutory requirements of Chapter 52C of the North Carolina General Statutes. Accordingly, "[w]here a party asserts an error of law occurred, we apply a *de novo* standard of review." *State ex rel. Lively v. Berry*, 187 N.C. App. 459, 462, 653 S.E.2d 192, 194 (2007) (quoting *Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Hum. Servs.*, 176 N.C. App. 46, 51, 625 S.E.2d 837, 840 (2006)).

"Our General Assembly enacted UIFSA to provide a uniform method for handling interstate child support obligations." *Reid v. Dixon*, 136 N.C. App. 438, 439, 524 S.E.2d 576, 577 (2000) (citing *Welsher v. Rager*, 127 N.C. App. 521, 491 S.E.2d 661 (1997)); *see also* N.C. Gen. Stat. § 52C-9-901 (2007) (providing that UIFSA, codified in Chapter 52C, "shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among states enacting it").

N.C.G.S. § 52C-3-310(a) provides, in part, that "[a] petitioner seeking to establish or modify a support order or to determine parentage in a proceeding under [UIFSA] *must verify the petition*." N.C. Gen. Stat. § 52C-3-310(a) (2007) (emphasis added). In the present case, the parties agree that the petition at issue included the following: (1) the signature of Ms. Johnson, dated 11 April 2007, below a statement that read, "Under penalties of perjury, all information and facts stated in this Petition are true to the best of my knowledge and belief"; and (2) the signature of a Florida-commissioned notary public, dated 11 April 2007, next to a statement that read, "Sworn to and Signed Before Me," accompanied by the State of Florida's notary seal, which included the notary public's printed name, commission number, and the expiration date of said commission. However, defendant asserts the trial court erred by denying his motion to dismiss because the Florida- commissioned notary public did not notarize plaintiff's petition in accordance with *Florida* law. Thus, defendant contends plaintiff's petition was not properly verified and so deprived the trial court of subject matter jurisdiction to hear the matter.

Chapter 52C does not set forth the procedures with which a petitioner must comply to verify his or her petition in accordance with N.C.G.S. § 52C-3-310 in a UIFSA proceeding. Therefore, in the ab-

sence of any such specific requirements, in order to determine whether plaintiff's petition was verified in this case, we apply the requirements for verification established by Rule of Civil Procedure 11(b) and N.C.G.S. § 1-148. *Cf. In re Triscari Children*, 109 N.C. App. 285, 287, 426 S.E.2d 435, 437 (1993) ("[B]ecause the procedure set forth in the termination of parental rights provisions requires a verified petition, and verification is not defined in chapter 7A, the requirements for verification established in chapter 1A, Rule 11(b) should determine whether the pleading has been properly verified.").

"Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." N.C. Gen. Stat. § 1A-1, Rule 11(a) (2007). However, if a rule or statute requires that a pleading be verified, Rule 11(b) requires that such a pleading "shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true," and requires that such a verification "shall be by affidavit of the party." N.C. Gen. Stat. § 1A-1, Rule 11(b). Additionally, N.C.G.S. § 1-148 provides:

> Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the General Court of Justice, *notary public, in or out of the State*, or magistrate, *is competent to take affidavits for the verification of pleadings*, in any court or county in the State, and for general purposes.

N.C. Gen. Stat. § 1-148 (2007) (emphasis added); *see also Rockingham Cty. Dep't of Soc. Servs. ex rel. Shaffer v. Shaffer*, 126 N.C. App. 197, 199, 484 S.E.2d 415, 416-17 (1997) ("Verification by affidavit requires that the verification be 'sworn to before a notary public or other officer of the court authorized to administer oaths.' ") (citing 1 G. Gray Wilson, *North Carolina Civil Procedure* § 11-7, at 196 (2d ed. 1995)).

Moreover, while the General Assembly has expressly provided that pleadings may be verified by notaries public from other jurisdictions, *see* N.C. Gen. Stat. § 1-148, it has further provided that a notarial act "*performed in another jurisdiction in compliance with the laws of that jurisdiction is valid* to the same extent as if it had been performed by a notary commissioned under [our Notary Public Act] if . . . performed by . . . any person authorized to perform notarial acts in that jurisdiction." N.C. Gen. Stat. § 10B-20(f) (2007) (emphasis added). Accordingly, since a petition—which serves as the pleading—in a UIFSA proceeding must be verified, and since such a petition may

be verified by a notary public from another state, we must now determine whether the petition filed by plaintiff in the present case was notarized by the Florida-commissioned notary public in compliance with the laws of the State of Florida.

According to Florida law, "[w]hen notarizing a signature, a notary public shall complete a jurat or notarial certificate . . . of acknowledgment" which "shall contain the following elements:"

(a) The venue stating the location of the notarization in the format, "State of Florida, County of _____."

(b) The type of notarial act performed, an oath or an acknowledgment, evidenced by the words "sworn" or "acknowledged."

(c) That the signer personally appeared before the notary public at the time of the notarization.

(d) The exact date of the notarial act.

(e) The name of the person whose signature is being notarized. It is presumed, absent such specific notation by the notary public, that notarization is to all signatures.

(f) The specific type of identification the notary public is relying upon in identifying the signer, either based on personal knowledge or satisfactory evidence specified in subsection (5).

(g) The notary's official signature.

(h) The notary's name, typed, printed, or stamped below the signature.

(i) The notary's official seal affixed below or to either side of the notary's signature.

Fla. Stat. § 117.05(4) (2008). Subsection (5) of F.S. § 117.05, which is referenced in subsection (4)(f) above, additionally provides that "[a] notary public may not notarize a signature on a document unless he or she personally knows, or has satisfactory evidence, that the person whose signature is to be notarized is the individual who is described in and who is executing the instrument." Fla. Stat. § 117.05(5) (providing further that "[a] notary public *shall certify* in the certificate of acknowledgment or jurat *the type of identification*, either based on personal knowledge or other form of identification, *upon which the notary public is relying*") (emphasis added).

In the present case, when the Florida-commissioned notary public notarized Ms. Johnson's support petition, the notary failed to indicate on the jurat of the petition the type of identification upon which he relied to identify Ms. Johnson, in contravention of the express language of F.S. § 117.05(4)(f). Moreover, defendant directs this Court's attention to a 1973 Opinion from the Office of the Attorney General of the State of Florida that cites the then-elements of notarization, codified at the time in F.S. §§ 117.07(1), (2), and 117.09(1)—which required that there "must be reasonable proof of the identity of the person whose signature is being notarized" but did not require, as F.S. § 117.05 does now, that the type of proof upon which the notary relies must be indicated on the jurat—and concludes: "Under these statutory provisions, I am of the opinion that notarization of a document cannot reach completion until a notary public has complied with the aforesaid statutory requirements." Elements of Act of Notarization—Duties Related Thereto, Op. Att'y Gen. Fla. No. 073-185 (May 24, 1973) (internal quotation marks omitted) (responding to the question, "When a notary public watches an individual sign a document and the document is held by a person other than the notary public until a later date, at which time the notary affixes his signature, stamp, and seal upon said document, when does a notarization occur . . . ?"). However, we are not persuaded by defendant's argument that the Florida-commissioned notary public's failure to indicate on the jurat of the petition the type of identification upon which he relied to identify Ms. Johnson at the time she signed the petition, *standing alone*, required the district court to conclude that "the verification [of plaintiff's support petition] was therefore *void* for failing to comply with Florida law." (Emphasis added.)

In the present case, there is no dispute that the notary public properly identified Ms. Johnson at the time that she signed the support petition. In fact, the documents before us indicate that D. Harrison, who notarized both Ms. Johnson's petition and the ten-page General Testimony form referenced therein, is also the agency representative for the Escambia County Child Support Enforcement Office who assisted Ms. Johnson with completing the support petition and the thirteen pages of accompanying documents that were forwarded to this State to initiate UIFSA proceedings. There is also no dispute that Ms. Johnson was present at the time the petition was notarized. *But cf. Griem v. Zabala*, 744 So. 2d 1139, 1140, 24 Fla. L. Weekly D2442, D2443 (Fla. 3d Dist. Ct. App. 1999) (per curiam) (concluding that there was "insufficient evidence to support a finding that the Zabalas had a valid deed" because "the notary testified at trial that

she had never met the Griems prior to trial nor were they in her presence when she notarized the deed"). Moreover, defendant does not allege fraud or injury as a result of the notary's omission. Instead, defendant asserts only that the notarization is void because the notary public failed to amend the pre-printed jurat of the Uniform Support Petition to reflect the type of identification upon which he relied to verify Ms. Johnson's identity.

Defendant has not presented, nor have we found, any Florida case stating that a notarization which fails to indicate the information required by F.S. § 117.05(4)(f) will render such a notarization void when (1) there are no allegations of fraud or injury as a result of the clerical omission and (2) the evidence in the record suggests that the notary public properly complied with all other statutory requirements in Chapter 117 of the Florida Statutes, and we decline to make such a determination. *Cf. House of Lyons, Inc. v. Marcus*, 72 So. 2d 34, 36 (Fla. 1954) (per curiam) (" 'Clerical errors will not be permitted to defeat acknowledgments [for deeds and other instruments that must be acknowledged or proven so that they may be recorded] when they, considered either alone or in connection with the instrument acknowledged, and viewed in the light of the statute controlling them, fairly show a substantial compliance with the statute.' ") (quoting *Summer v. Mitchell*, 29 Fla. 179, 180, 10 So. 562, 562 (Fla. 1892)); *Cleland v. Long*, 34 Fla. 353, 357, 16 So. 272, 273 (Fla. 1894). Therefore, we conclude that the district court did not err when it denied defendant's motion to dismiss based on the court's determination that plaintiff's petition was verified, and we overrule this assignment of error. Our holding renders it unnecessary to address defendant's contention that a failure to properly verify a UIFSA petition deprives the district court of subject matter jurisdiction to establish or modify a support order or to determine parentage in a proceeding under Chapter 52C. Accordingly, we dismiss this assignment of error.

[2] In his remaining assignments of error, defendant contends the trial court erred by: (1) admitting Plaintiff's Exhibit 3—defendant's employer verification letter, which is said to have been submitted for the purpose of establishing defendant's monthly gross income for use in the calculation of his child support obligation—because "the State failed to establish the identity of the alleged person who signed the document (employer or employer designee?)"; and (2) admitting Plaintiff's Exhibit 1—plaintiff's support petition—because the "actual Exhibit entered into evidence" was "a one[-]page document consisting of the first page of the child support enforcement transmittal

request with a file stamp, from the Camden County Clerk's Office" which "ha[d] no signature, [wa]s not verified and d[id] not provide the proper information for the trial court to make a ruling concerning child support."

According to the hearing transcript in the record, defendant objected to Plaintiff's Exhibit 3 on the grounds that it was "unverified hearsay," stating: "There's no notary. It's not verified. It's not given under oath. It's simply a letter. And that, from every way you look at it, is obviously hearsay. So I would object." Additionally, defendant objected to Plaintiff's Exhibit 1 on the grounds that "no foundation [had been] laid for that whatsoever." In other words, defendant requests that this Court review the trial court's decisions to admit Plaintiff's Exhibits 1 and 3 on grounds other than those he raised before the trial court. Since "[a] specific objection, if overruled, will be effective only to the extent of the ground specified," *Santora, McKay & Ranieri v. Franklin*, 79 N.C. App. 585, 589, 339 S.E.2d 799, 801-02 (1986) (citing *State v. Jones*, 293 N.C. 413, 238 S.E.2d 482 (1977)), and since defendant's objections at trial "in no way supported [his] assignment[s] of error on appeal" with respect to the admissibility of Plaintiff's Exhibits 1 and 3, *see State v. Francis*, 341 N.C. 156, 160, 459 S.E.2d 269, 271 (1995), we conclude that defendant has not properly preserved his remaining assignments of error for appellate review. *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."). Accordingly, the trial court's order is affirmed.

Affirmed.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA v. LEVALL DERAYLE DAVIS

No. COA08-1405

(Filed 7 July 2009)

1. Appeal and Error— preservation of issues—failure to renew motion of dismiss

The issue of whether defendant's motion to dismiss for insufficient evidence should have been granted was not properly preserved for appeal where the transcript does not reflect a renewed motion at the close of the evidence, the record includes an affidavit from defendant's attorney that the motion was made at an unrecorded bench conference, but the record did not contain the trial court's ruling. Nevertheless, the issue was considered pursuant to Rule 2 because trial counsel did renew the motion, and if the State did not produce sufficient evidence to support its case, then defendant would be imprisoned for a crime the State did not prove beyond a reasonable doubt.

2. Possession of Stolen Property— value of property—portion of DVD system

The trial court did not err by denying defendant's motion to dismiss a charge of felonious possession of stolen property for insufficient evidence where the issue was whether the stolen DVD player met the $1,000 threshold, there was evidence that the unit sold for over $1,300 new, it was in substantially the same condition as when purchased, and, although only part of the system was stolen, the jury could have reasonably concluded that the value of the player deck defendant possessed was worth over $1,000.

Appeal by defendant from judgment entered 1 August 2008 by Judge Thomas D. Haigwood in Halifax County Superior Court. Heard in the Court of Appeals 22 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Lotta A. Crabtree, for the State.

Gilda C. Rodriguez for defendant.

ELMORE, Judge.

Levall Derayle Davis (defendant) was convicted by a jury of felonious possession of stolen goods for possessing a DVD player belong-

ing to Mr. Kevin Davis (Kevin). He was sentenced to six to eight months in the custody of the Department of Corrections. Defendant appeals his conviction. For the reasons stated below, we hold that defendant received a trial free from error.

FACTS

On the morning of 18 July 2007, Kevin finished his shift at the KapStone Paper Mill in Roanoke Rapids and returned to his car, where he found his driver side window broken and his Panasonic "motorized, flipout, touchscreen unit [with] DVD capabilities" missing from the "main dash." Kevin inspected his vehicle for other damage, called 911 to report the incident, gave his statement to the responding officer, and then drove home.

At home, Kevin explained to his wife, Angelica, what had happened to his car and the DVD player. Angelica suspected that someone would bring the DVD player deck to Supreme Audio/Video, the only Panasonic dealer in the Roanoke Rapids area and the dealer from which she and Kevin had purchased the DVD player, for repair. She phoned Mr. Devino Putney, Supreme Audio/Video's manager, and asked him to "keep his eye out" for the missing player.

Kevin originally purchased the DVD player from Supreme Audio/Video for approximately $1,300.00. The player was actually part of a two-component system: A separate control module, or "brain," processes the sound and picture information received from the in-dash player. According to Kevin, "[t]he [player] deck is actually useless without the control module," and can produce no sound or picture without its brain. At trial, Putney testified that the DVD player's brain is typically installed under or behind a vehicle's seats, and that without the brain, the player deck cannot function. Similarly, "[t]here is pretty much nothing you can do with a brain unless you have an exact model [of player deck] that matches the brain." Putney also testified that Supreme Audio/Video sells that model for "around $1,300 or $1,400." Kevin identified State's Exhibit 1 as "the deck part of the . . . DVD player that was stolen out of my car," in substantially the same condition as it was when Kevin bought it, but testified that the brain was not taken from under the passenger seat.

Several days after 18 July 2007, Angelica was notified that someone had brought a Panasonic DVD player deck matching the description she had given to Supreme Audio/Video for repair. Detective Jeffrey Wayne Baggett of the Roanoke Rapids Police Department tes-

tified that he received a call from Angelica that her missing "stereo" had been brought to Supreme Audio/Video. Detective Baggett met Angelica at Supreme Audio/Video, where Detective Baggett identified Levall Davis as a possible suspect based on the name and cell phone number left with Supreme Audio/Video as contact information for the repair job. Detective Baggett also confirmed that the DVD player was the property of Kevin and Angelica by matching its serial number to the player's original packaging, produced by Angelica.

Detective Baggett prepared a photo line-up, from which Putney identified defendant as the man who brought the DVD player to Supreme Audio/Video for repair. Baggett called the phone number left at Supreme Audio/Video, but could not verify that the person who answered was defendant. However, on 5 September 2007, defendant went to the police station, gave a statement regarding the DVD player, and signed a Miranda waiver form. At trial, Putney confirmed that defendant was the man who brought the DVD player to Supreme Audio/Video to be repaired, and that State's Exhibit 1 was the DVD player that defendant had brought to the shop. On his own behalf, defendant testified that he had purchased the DVD player for $100.00 from an unidentified man outside of a store in Weldon, but that defendant did not believe that he was purchasing a stolen DVD player. Defendant believed that the DVD player was worth $300.00.

Following the close of the State's evidence, defense counsel moved to dismiss on the grounds that there was "not evidence before the [c]ourt that [would] sustain the charges when looked at in the light most favorable to the State . . . ." The trial court denied that motion. There is no renewed motion to dismiss following the close of all evidence recorded in the transcript. However, defense counsel signed an affidavit certifying that he made such a motion in an untranscribed bench conference at the close of all evidence. The jury found defendant guilty of felonious possession of stolen goods and the trial court imposed a sentence of a minimum term of six months and a maximum term of eight months in prison. Defendant appeals.

ARGUMENTS

I. Issue Not Properly Preserved for Appeal

[1] Defendant argues that the trial court erred by denying defendant's motion to dismiss for insufficient evidence the charge of felonious possession of stolen property. We first address the State's contention that defendant's assignment of error should be overruled because this issue was not preserved for appeal.

North Carolina Rule of Appellate Procedure 10(b)(3) gives specific instructions for preserving questions involving sufficiency of the evidence:

> 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 . . . at trial. If a defendant makes such a motion . . . [and] then introduces evidence, his motion for dismissal . . . made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.
>
> A defendant may make a motion to dismiss the action . . . at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. . . . However, if a defendant fails to move to dismiss the action . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C.R. App. P. 10(b)(3) (2008). Rule 10(b)(1) further requires that the complaining party "obtain a ruling upon the . . . motion" in order to preserve the issue for appeal. N.C. R. App. P. 10(b)(1) (2008).

Rule 10(b) "is not simply a technical rule of procedure" and "a party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 363-64 (2008) (quotations and citations omitted). Nevertheless, this Court's "imperative to correct fundamental error . . . may necessitate appellate review of the merits despite the occurrence of default." *Id.* at 196, 657 S.E.2d at 364. Our Supreme Court elaborated upon our discretion to review for error issues not properly preserved for appeal:

> Rule 2 permits the appellate courts to excuse a party's default . . . when necessary to prevent manifest injustice to a party . . . . Rule 2, however, must be invoked cautiously, and we reaffirm . . . the exceptional circumstances which allow the appellate courts to take this extraordinary step.

Id. at 196, 657 S.E.2d at 364 (quotations and citations omitted). Accordingly, we have invoked Rule 2 to review the merits of an appeal where the defendant failed to renew his motion to dismiss for insufficient evidence, in violation of N.C.R. App. P. 10(b)(3). *See, e.g.*,

State v. Batchelor, 190 N.C. App. 369, 378, 660 S.E.2d 158, 164 (2008) ("If we do not review the issue of the sufficiency of the evidence in the present case, [the d]efendant would remain imprisoned for a crime that the State did not prove beyond a reasonable doubt. Such a result would be manifestly unjust and we are therefore compelled to invoke Rule 2[.]"); *State v. Denny*, 179 N.C. App. 822, 824, 635 S.E.2d 438, 440 (2006), *aff'd in part and rev'd in part on other grounds*, 361 N.C. 662, 652 S.E.2d 212 (2007).

In this case, although defendant's motion to dismiss at the close of State's evidence appears in the record, the transcript does not reflect that defendant's trial counsel renewed his motion to dismiss at the close of all evidence, as required by Rule 10(b)(3). The record on appeal, as approved by the State, contains an affidavit from defendant's trial counsel that a renewed motion to dismiss was made during an unrecorded bench conference at the close of all evidence, but does not contain the trial court's ruling on the renewed motion to dismiss, as required by Rule 10(b)(1). Accordingly, this issue was not properly preserved for appellate review.

Nevertheless, we examine the circumstances surrounding the case at hand to determine whether defendant's appeal merits substantive review. *See Dogwood*, 362 N.C. at 196, 657 S.E.2d at 364. Although he did not preserve the court's ruling on defendant's renewed motion to dismiss, trial counsel did renew defendant's motion at the close of all evidence as required by Rule 10(b)(3). Moreover, if the State did not produce sufficient evidence to support its case against defendant, then defendant "would remain imprisoned for a crime that the State did not prove beyond a reasonable doubt." *Batchelor*, 190 N.C. App. at ——, 660 S.E.2d at 164. Considering these circumstances, to dismiss defendant's appeal would work "manifest injustice," and we therefore invoke Rule 2 to reach its merits.

II. Motion to Dismiss

[2] Defendant argues that the trial court should have granted his motion to dismiss because the State's evidence was insufficient to support his conviction for felonious possession of stolen goods. We disagree.

Our Supreme Court set forth the standard for when a trial court should properly deny a motion to dismiss for insufficient evidence:

> [T]he trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of

> the defendant being the perpetrator of the offense. . . . Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom. Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal.

State v. Olson, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citations omitted). Under this standard, we affirm the denial of a motion to dismiss for insufficient evidence "[i]f the record discloses substantial evidence of each essential element constituting the offense for which the accused was tried . . . ." *State v. Alford*, 329 N.C. 755, 759-60, 407 S.E.2d 519, 522 (1991) (citations omitted).

> A defendant may be found guilty of felonious possession of stolen property where the State proves (1) defendant was in possession of personal property, (2) valued at greater than $1,000.00, (3) which has been stolen, (4) with the possessor knowing or having reasonable grounds to believe the property was stolen, and (5) with the possessor acting with dishonesty.

State v. Parker, 146 N.C. App. 715, 717, 555 S.E.2d 609, 610 (2001) (quotations, citations, and alteration omitted); *see also* N.C. Gen. Stat. §§ 14-71.1, 14-72(a) (2007). Here, defendant contends that the State failed to present substantial evidence to establish the $1,000.00 value element of felonious possession of stolen property, but does not challenge the State's evidence of the other elements of the crime. Thus, we examine only whether the State's evidence, viewed in the light most favorable to the State, could support the conclusion that the stolen property defendant possessed was valued at greater than $1,000.00. *See Alford*, 329 N.C. at 759-60, 407 S.E.2d at 522.

"The fair market value of stolen property at the time of the theft must exceed the sum of [$1,000.00] for the possession to be felonious." *State v. Holland*, 318 N.C. 602, 610, 350 S.E.2d 56, 61 (1986), *overruled on other grounds*, *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). Stolen property's fair market value is the item's "reasonable selling price[] at the time and place of the theft, and in the condition in which it was when [stolen]." *State v. Dees*, 14 N.C. App. 110, 112, 187 S.E.2d 433, 435 (1972) (quotations and citation omitted). The State is not required to produce "direct evidence of . . . value" to support the conclusion that the stolen property was worth

over $1,000.00, provided that the jury is not left to "speculate as to the value" of the item. *Holland*, 318 N.C. at 610, 350 S.E.2d at 61.

In the present case, the State's evidence tended to show that defendant possessed a Panasonic DVD player that was stolen from Kevin's vehicle; that Kevin had purchased the DVD player for over $1,300.00; and that the DVD player in defendant's possession was in substantially the same condition as when Kevin purchased it. (T pp. 26, 72, 74, 80.) Furthermore, Putney confirmed that Supreme Audio/Video, the only Panasonic dealer around Roanoke Rapids, currently sells the same DVD player system for over $1,300.00. Viewed in the light most favorable to the State, the "reasonable selling price" of the Panasonic DVD player—in Roanoke Rapids, at the time it was stolen from Kevin's vehicle, and in like-new condition—was over $1,300.00. *Dees*, 14 N.C. App. at 112, 187 S.E.2d at 435. Therefore, the State's evidence was sufficient to satisfy the $1,000.00 fair market value statutory minimum and to support a felonious possession of stolen goods conviction.

Defendant contends, however, that the State's evidence does not show that the DVD player was worth over $1,000.00 because the player deck defendant possessed was not functional without its brain, which remained in Kevin's vehicle. This argument fails. The State did not have to prove that a DVD player without its brain was worth over $1,000.00, as long as the State provided some evidentiary basis that placed the jury's determination of its value beyond "speculat[ion]." *Holland*, 318 N.C. at 610, 350 S.E.2d at 61. Here, the jury could have reasonably concluded that the value of the DVD player deck defendant possessed was worth over $1,000.00 based on Putney's testimony that the entire system retails in his store for over $1,300.00.

Defendant's argument that the State produced no direct evidence of the value of a non-functional DVD player misinterprets *Holland*, 318 N.C. at 610, 350 S.E.2d at 61, and this Court's holdings in *In re J.H.*, 177 N.C. App. 776, 778-79, 630 S.E.2d 457, 459 (2006), and *Parker*, 146 N.C. App. at 717-18, 555 S.E.2d at 611. In those cases, the State produced no evidence at all of the value of the stolen property. *Holland*, 318 N.C. at 610, 350 S.E.2d at 61 (holding that "evidence tending to show that the victim owned two automobiles and that the 1975 Chrysler Cordoba was his favorite one of which he took especially good care, always keeping it parked under a shed" was not evidence of the Cordoba's value); *In re J.H.*, 177 N.C. App. at 778, 630 S.E.2d at 459 ("There was, however, no evidence as to [the property's]

value or condition."); *Parker*, 146 N.C. App. at 718, 555 S.E.2d at 611 ("[T]here is simply no evidence regarding the total value of the items contained in the trial court's charge.").

In this case, both Kevin and Putney testified that the DVD player system had a retail value of over $1,300.00, and Kevin testified that the player was still in like-new condition after it was stolen. The issue of whether the DVD player as defendant possessed it, without its critical brain module, was nonetheless worth more than $1,000.00 was properly before the jury for resolution. *See Olson*, 330 N.C. at 564, 411 S.E.2d at 595 ("Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal.") (citation omitted).

Viewed in the light most favorable to the State, the State's evidence did not, as defendant argues, "confirm[] the worthless value of the DVD player" without its control module. Rather, the jury could have reasonably concluded that the DVD player was worth $1,300.00 and was merely missing a necessary component, similar to a car missing its engine or a watch missing its batteries. Thus, the jury did not "speculate as to the value" of the DVD player, but merely reached a different conclusion than that advanced by defendant. *Holland*, 318 N.C. at 610, 350 S.E.2d at 61. We therefore hold that the trial court did not err in denying defendant's motion to dismiss for insufficient evidence.

III. Ineffective Assistance of Counsel

Defendant also raises an ineffective assistance of counsel claim based upon trial counsel's failure to move to dismiss in open court, thereby failing to record the motion and ruling to preserve the issue for appeal. Because we exercise our discretion to review the merits of defendant's appeal pursuant to Rule 2, we do not address defendant's ineffective assistance of counsel claim.

We hold that defendant received a trial free from error.

No error.

Judges STROUD and ERVIN concur.

STATE OF NORTH CAROLINA v. CARL LEWIS HUBBARD

No. COA08-1314

(Filed 7 July 2009)

1. Probation and Parole— violation report—sufficient notice of violation

A probation violation report gave defendant sufficient notice of the alleged violation pursuant to N.C.G.S. § 15A-1345(e). While the condition of probation which defendant allegedly violated might have been ambiguously stated, the report also set forth the specific facts that the State contended constituted the violation.

2. Probation and Parole— violation—intensive supervision rules—findings

The evidence was sufficient to support the trial court's findings made in support of revoking defendant's probation where the violation alleged that defendant failed to report in a reasonable manner during a curfew check and the court interpreted this to mean that defendant violated a condition of the intensive probation program by being drunk and disruptive.

Appeal by Defendant from judgment entered 8 August 2008 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 26 March 2009.

Attorney General Roy Cooper, by Assistant Attorney General Floyd M. Lewis, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for Defendant.

STEPHENS, Judge.

I. Procedural History and Factual Background

On 16 April 2008, Defendant Carl Lewis Hubbard pled guilty to possession of a firearm by a felon. The Honorable Edwin G. Wilson, Jr. sentenced Defendant to a prison term of 16 to 20 months, suspended the sentence, and placed Defendant on supervised probation for 36 months, including six months intensive probation. The Regular Conditions of Defendant's probation included the following:

> (6) Report as directed by the Court or the probation officer to the officer at reasonable times and places and in reasonable manner, permit the officer to visit at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.
>
> . . . .
>
> 21. Comply with the Special Conditions of Probation-Intermediate Punishments . . . .

The Special Conditions of Probation-Intermediate Punishments included the following:

> 4. Intensive Supervision Program . . . . Submit to supervision by officers assigned to the Intensive Probation Program . . . for a period of 6 months . . . and comply with the rules adopted by that program.

On 27 June 2008, Defendant's Probation Officer Ricky Wallace filed a probation violation report alleging that Defendant had violated a condition of Defendant's probation. The report alleged:

> Of the conditions of probation imposed . . . [D]efendant has willfully violated:
>
> 1. Other Violation
>
> S.O Michael Horn went to residence on 06/23/08 at 7:50 PM to check [Defendant's] curfew. The [Defendant] was home but he was so drunk that he could hardly walk. Officer Horn told this [Defendant] to stop drinking and go to bed. Officer Horn returned at 8:20 PM and [Defendant's] girlfriend was outside because she was scared to go back into [the] residence and [Defendant] was still drinking and raising cain. Officer Horn took [Defendant] into custody for his safety [and] the safety of his girlfriend and small child. This [Defendant] failed to report in a reasonable manner to his probation officer during a curfew check.

At the probation violation hearing, Officer Michael Vance Horn, an intensive surveillance officer with the North Carolina Department of Correction, testified that a curfew was imposed on Defendant as part of Defendant's intensive supervision program and that Horn was responsible for conducting curfew checks on Defendant. Horn further testified that during Horn's first visit with Defendant, Horn

explained that compliance with curfew meant that Defendant had to be in his home between the hours of 6:00 p.m. and 6:00 a.m., and

> [i]n regards to his personal conduct, I told him that as long as he drank—if he drank one beer there would be no problem. If he was intoxicated and he put—my safety felt endangered that he would be [cited for a probation violation] right then.

Horn testified further as follows: on 23 June 2008, at approximately 7:50 p.m., Horn went to Defendant's residence to conduct a curfew check. Horn found Defendant at home but "highly intoxicated." Horn testified that he "explained to [Defendant] that he needed to quit drinking at that point . . . and to go to bed[.]" At 8:15 p.m., Horn received a phone call from Defendant's girlfriend advising Horn that Defendant was in his front yard "yelling, carrying on." At approximately 8:20 p.m., Horn returned to Defendant's residence and observed Defendant entering his home. Horn went to Defendant's door and asked Defendant "what he was still doing up, that he had had plenty of time to go lay down." Horn testified that Defendant "commenced to start yelling." Horn told Defendant it was not necessary to yell, but Defendant "kept yelling and cursing different things[.]" Horn then placed Defendant under arrest for violating Defendant's probation.

When asked which condition of probation Defendant had violated, Horn responded,

> [i]t will be number 13, submit at a reasonable time to warrantless searches, that's warrantless searches; number 6, I believe. I can't find it right here, I'm trying to read.

The trial court then interjected, "I took it to be the intensive term?" Horn responded, "Yes, ma'am, part of the intensive supervision." Horn then testified, "[i]t says in number—the intensive supervision submit to a supervising officer, sign intensive program and down here 6 to 9 months . . . [a]nd that would be at a reasonable time and a reasonable manner." When asked by defense counsel if Horn could read that condition specifically, verbatim, Horn explained that it was "[Officer] Wallace's responsibility and not mine" to determine which condition Defendant had violated. Horn was able to testify that Defendant's probation did not prohibit Defendant from possessing or consuming alcohol.

As Defendant's probation officer, Wallace was responsible for supervising Defendant's compliance with the terms and conditions of

Defendant's probation. Wallace testified that the single violation he assigned to Defendant based upon Wallace's supervision of Defendant was

> regular condition number 6, that the Defendant report as directed by the Court or the probation officer to the officer at reasonable times, reasonable places[,] and in a reasonable [manner].

Wallace further testified that curfew is an ordinary condition of intensive probation, and that surveillance officers conduct curfew checks twice a week. Additionally, Wallace would visit Defendant once a month at Defendant's residence, and Defendant would report to Wallace's office once a month. Wallace testified that he had also explained to Defendant that "part of his intensive supervision is that . . . he's not at home drunk."

At the conclusion of the arguments, the trial court announced:

> After hearing the evidence I'm satisfied in the exercise of my discretion that the Defendant did violate the terms and conditions of his probation, specifically that he failed to comply with the condition of his probation that he submit to supervision by officers of the intensive probation program and comply with the rules adopted by that program.

After making oral findings regarding Defendant's failure to comply with the rules of Defendant's intensive probation, the trial court stated, "I don't know that I even have to read whether it was a violation of the terms of his regular probation."

On that same day, the trial court entered judgment and commitment upon revocation of probation, finding: "The condition(s) violated and the facts of each violation are as set forth . . . in paragraph(s) 1 in the Violation Report . . . dated 06/27/08." The judgment and commitment revoked Defendant's probation and activated his suspended sentence. From this judgment and commitment, Defendant appeals.

II. Discussion

[1] We first address Defendant's argument that the trial court lacked subject matter jurisdiction to enter judgment and commitment revoking Defendant's probation for the violation of a condition of probation of which Defendant had no notice.

Before revoking or extending a defendant's probation, "[t]he State must give the [defendant] notice of the [probation violation]

hearing and its purpose, including a statement of the violations alleged." N.C. Gen. Stat. § 15A-1345(e) (2007). The purpose of the notice mandated by this section is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act. *See, e.g.*, *State v. Russell*, 282 N.C. 240, 243-44, 192 S.E.2d 294, 296 (1972) (explaining that the purpose of an indictment in a criminal case is to put the defendant on notice of the charges against him so that he may prepare a defense and be protected from a second prosecution for the same act). Relying on *State v. Cunningham*, 63 N.C. App. 470, 305 S.E.2d 193 (1983), Defendant contends that he did not have sufficient notice of the alleged violation for which Defendant's probation was ultimately revoked. Defendant's argument is without merit.

In *Cunningham*, the probation violation report served upon defendant alleged that defendant had played loud music disturbing his neighbors and removed property signs posted by defendant's neighbors, in violation of the good behavior condition of defendant's probation. *Id.* at 475, 305 S.E.2d at 196. However, at the revocation hearing, the State sought to prove additional conduct not contained in the report—that defendant trespassed upon and damaged real and personal property belonging to defendant's neighbors. The trial court revoked defendant's probation for defendant's playing loud music as well as for defendant's trespass and damage to property. *Id.* This Court reversed the probation revocation based on defendant's trespass and damage to property because "[t]he record does not show that defendant received notice or a statement of an alleged violation consisting of trespass or damage to property." *Id.*

Here, the probation violation report alleged that Defendant "failed to report in a reasonable manner to his probation officer during a curfew check." Wallace testified that this language referred to Regular Condition number six in that Defendant failed to "report as directed by the Court or the probation officer to the officer at reasonable times, reasonable places[,] and in reasonable [manner]." The trial court interpreted the language to mean that Defendant "failed to . . . submit to supervision by officers of the intensive probation program and comply with the rules adopted by that program[,]" in violation of Special Condition number four. However, while the condition of probation which Defendant allegedly violated might have been ambiguously stated in the report, the report also set forth the specific facts that the State contended constituted the violation:

> S.O Michael Horn went to residence on 06/23/08 at 7:50 PM to check [Defendant's] curfew. The [Defendant] was home but he was so drunk that he could hardly walk. Officer Horn told this [Defendant] to stop drinking and go to bed. Officer Horn returned at 8:20 PM and [Defendant's] girlfriend was outside because she was scared to go back into [the] residence and [Defendant] was still drinking and raising cain.

Unlike *Cunningham*, the evidence at the revocation hearing established these same facts. Based on this evidence, the trial court found as fact the allegations contained in the report and, therefore, revoked Defendant's probation. Thus, in contrast to *Cunningham*, Defendant received notice of the specific behavior Defendant was alleged and found to have committed in violation of Defendant's probation. We thus conclude that the probation violation report served upon Defendant gave Defendant sufficient notice of the alleged violation pursuant to N.C. Gen. Stat. § 15A-1345(e). Accordingly, the assignments of error upon which Defendant's argument is based are overruled.

[2] Defendant next argues that the trial court erred in revoking Defendant's probation as the State presented insufficient evidence that Defendant violated the condition set forth in the violation report. We disagree.

A trial court may revoke a defendant's probation where the evidence is sufficient to "reasonably satisfy the [trial court] in the exercise of [its] sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967). "Findings made in support of revoking probation must be supported by competent evidence . . . ." *State v. Sherrod*, 191 N.C. App. 776, 777, 663 S.E.2d 470, 472 (2008). A trial court's judgment revoking a defendant's probation will be disturbed only upon a showing of a manifest abuse of discretion. *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960).

As stated *supra*, the probation violation report alleged that Defendant "failed to report in a reasonable manner to his probation officer during a curfew check." The trial court interpreted this allegation to mean that Defendant violated Special Condition number four, and the trial court found specifically that Defendant failed "to comply with the rules of the intensive probation program."

In support of this finding, the trial court announced:

> The officers testified, and I find it to be completely credible, that they informed [Defendant] of the curfews [sic]; that they told him they had to be able to communicate with him and talk to him during those curfews, that seems quite reasonable to me; nothing unreasonable about that requirement.
>
> It's also, I think, of note that they didn't arrest him for violating his probation the first time they went out there. They waited until he continued to be disruptive and failed to follow their instructions about not disrupting things at his home, and when the officer went back out there he cursed at them and threatened them.

The trial court's written order found as fact the allegation contained in the violation report:

> S.O Michael Horn went to residence on 06/23/08 at 7:50 PM to check [Defendant's] curfew. The [Defendant] was home but he was so drunk that he could hardly walk. Officer Horn told this [Defendant] to stop drinking and go to bed. Officer Horn returned at 8:20 PM and [Defendant's] girlfriend was outside because she was scared to go back into [the] residence and [Defendant] was still drinking and raising cain. Officer Horn took [Defendant] into custody for his safety [and] the safety of his girlfriend and small child.

Horn testified that he advised Defendant that Defendant "needed to be home between the hours of . . . 6:00 p.m. and 6:00 a.m." He also told Defendant that "[i]f [Defendant] was intoxicated and he put—my safety felt endangered that he would be subject to being violated right then."

Wallace testified that a curfew is a normal condition of intensive probation and that Wallace "talked [to Defendant] about him drinking and him not drinking; him being on intensive probation, and part of his intensive supervision is that, just like Mr. Horn explained, he's not at home drunk."

Horn testified that when he visited Defendant the first time on the evening in question, Defendant "was highly intoxicated. His girlfriend and small child . . . was [sic] actually standing outside. When I got out of the car she advised that she was scared to go in . . . and that [Defendant] was highly intoxicated." When Horn returned later that evening, Defendant's girlfriend and child were across the street as the

girlfriend was "scared to come back into the residence." Defendant's condition had worsened and Defendant "kept yelling and cursing different things, and at that time [Horn] placed [Defendant] under arrest for a probation violation." When the prosecutor asked Horn, "Did you feel like at that time that your safety was compromised in the discharge of your duties with respect to this Defendant?", Horn responded, "Yes, I did. I felt like it could escalate into a violent confrontation considering what crime that he was on probation for."

We conclude that this evidence is sufficient to support the trial court's findings made in support of revoking Defendant's probation. Although Defendant argues that the State failed to offer the rules adopted by the Intensive Supervision Program into evidence, and did not produce evidence that not being intoxicated was a rule of intensive supervision, both Horn and Wallace testified that compliance with Defendant's curfew, part of the Intensive Supervision Program, meant that Defendant could not be drunk in his home. Defendant failed to object to this testimony or to offer any evidence to the contrary.

We hold that the trial court did not abuse its discretion in revoking Defendant's probation and activating Defendant's suspended sentence.

AFFIRMED.

Judges JACKSON and STROUD concur.

CURTIS W. SMART, PLAINTIFF v. THE STATE OF NORTH CAROLINA, BY AND THROUGH THE ALBEMARLE CHILD SUPPORT ENFORCEMENT AGENCY, EX REL., NICOLE MARIE SMART, DEFENDANT

No. COA08-1286

(Filed 7 July 2009)

1. Child Support, Custody, and Visitation— support—motion to modify—treated as summary judgment

A husband's motion to modify child support was treated as a motion for summary judgment, and the findings disregarded, where the trial court received an exhibit from the husband which was not contested by the wife.

2. Child Support, Custody, and Visitation— support—motion to modify—change of circumstances between agreement and incorporation

The trial court did not err by using the date of a final divorce decree from which to measure a change in circumstances where plaintiff alleged a change in circumstances (discharge from the Marine Corps) after the separation agreement was entered but before the final divorce decree incorporating the separation agreement.

Appeal by plaintiff from order entered 5 December 2007 by Judge J. Carlton Cole in Pasquotank County District Court. Heard in the Court of Appeals 12 March 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Lisa Bradley Dawson, for the State.

The Twiford Law Firm, P.C., by Edward A. O'Neal, for plaintiff-appellant.

STROUD, Judge.

This case presents the sole question of whether the child support provision in a voluntary separation agreement which is incorporated into the final divorce decree can be judicially modified based solely on events occurring after execution of the separation agreement but before entry of the final divorce decree which incorporated the separation agreement. Because we answer negatively, we affirm.

I. Background

On 21 October 1997, plaintiff enlisted in the United States Marine Corps ("USMC"). Plaintiff (or "Husband") and defendant Nicole Marie Smart (or "Wife") married on 29 January 2000. The parties separated on or about 1 June 2005.

In February 2006, the USMC gave Husband the option to deploy to Iraq. When he declined to deploy, the USMC confirmed his discharge date of 23 November 2006. After this date, he would not be allowed to re-enlist.

On 31 May 2006, Husband signed a marital separation agreement ("the agreement"). The agreement was signed by Wife on 27 July 2006. The agreement provided, *inter alia*, that Husband would pay three-hundred twenty-six dollars ($326.00) to Wife every other week

for child support. The agreement further provided "[a]ll of the provisions of this Agreement shall be incorporated in any judgment or decree of divorce."

On 26 September 2006, Husband filed a verified complaint for divorce in Pasquotank County District Court. The complaint attached a copy of the agreement and stated "the parties previously entered into a Separation Agreement which addressed all issues pertaining to the dissolution of the marriage; paragraph 13 of said Agreement stated that the Separation Agreement would be incorporated into any subsequent decree of divorce." Husband moved for summary judgment on 16 November 2006.

A hearing on the summary judgment motion was held on 11 December 2006. That same day, the trial court entered an order granting Husband an absolute divorce and decreed that the parties' marriage was dissolved. The order expressly incorporated the agreement and attached a copy.

On 15 December 2006,[1] Husband filed a Motion and Notice of Hearing for Modification of Child Support Order. Husband's motion requested that his child support obligation as established by the incorporated separation agreement be reduced based upon a change in circumstances and alleged only his current unemployment as a change in circumstances. On 28 March 2007, Wife also filed a Motion and Notice of Hearing for Modification of Child Support Order. Wife's motion requested that the "child support agency be allowed to intervene and redirect child support through the child support enforcement agency" but did not request any change in the amount. Wife's motion was heard on 20 April 2007. On 12 June 2007, the trial court entered an order allowing the State to intervene for the purpose of enforcement of the order. The order also directed Husband to pay child support in the amount of seven-hundred six dollars ($706.00) per month[2] commencing 1 May 2007 and to pay an additional forty-four dollars ($44.00) per month as arrears.

On 28 June 2007, Husband filed a motion to set aside the 12 June 2007 order and also another motion to modify child support. The

1. The copy of Husband's 15 December 2006 motion appearing in the record has a large X through the clerk's date stamp. It was apparently returned to the husband by the Clerk of Court for reasons unclear from the record. Nevertheless, Wife conceded in open court that the motion was properly filed on 15 December 2006.

2. This amount of child support is the same as established by the incorporated separation agreement, but paid monthly instead of bi-weekly.

motion to modify alleged that Husband had been unemployed since leaving the USMC in November 2006 and requested the trial court "[t]o enter an Order modifying the Plaintiff's child support obligation effective December 15, 2006[,]" the date he had filed his original motion to modify child support.

The trial court scheduled a hearing on Husband's motions on 26 September 2007. At the hearing, Wife stipulated that the court should set aside the 12 June 2007 order[3] and consider "whether or not [Husband was] entitled to a modification of his existing child support obligation." Wife also orally moved for dismissal of Husband's motion to modify child support. Husband's military discharge papers, showing a discharge date of 23 November 2006, were received as the only exhibit in the case. The trial court received no affidavits and heard no testimony at the hearing.

On 5 December 2007, the trial court entered an order setting aside the 12 June 2007 order. The trial court's 5 December 2007 order found that "[i]n February 2006 plaintiff voluntarily chose not to reenlist with the [USMC]" and concluded "[t]here ha[d] not been a substantial change in circumstances since the entry of the December 11, 2006 Order which would justify the modification of plaintiff's child support obligation." Accordingly, the trial court denied Husband's motions of 15 December 2006 and 28 June 2007. Husband appeals.

II. Standard of Review

[1] The trial court's order purported to find facts and make conclusions of law based on those findings. However, there is "confusion in the record as to the procedural context of the trial court's action[,]" *Hensley v. Ray's Motor Co. of Forest City, Inc.*, 158 N.C. App. 261, 263, 580 S.E.2d 721, 723 (2003), so we must first discern the substance of husband's motion in order to determine the correct standard of review,[4] *id.*; *see also In re Quevedo*, 106 N.C. App. 574, 578, 419 S.E.2d 158, 159 ("[A] motion is treated according to its substance and not its label."), *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992).

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3. The motion to set aside was based upon the fact that Husband's original 15 December 2006 motion to modify had been "unfiled" and apparently returned to him by the office of the Clerk of Court, so it was not considered by the court at the 20 April 2007 hearing.

4. This problem often arises in domestic cases which are always tried before a judge without a jury, but are sometimes disposed of on summary judgment, *see, e.g.*, *Craddock v. Craddock*, 188 N.C. App. 806, 813, 656 S.E.2d 716, 720-21 (2008), or a motion to dismiss, *see, e.g.*, *Devaney v. Miller*, 191 N.C. App. 208, 211-13, 662 S.E.2d 672, 675 (2008).

When the trial judge sits as the trier of fact on a motion to modify child support "it must 'find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.' " *Koufman v. Koufman*, 330 N.C. 93, 96, 408 S.E.2d 729, 731 (1991) (quoting N.C. [Gen. Stat.] § 1A-1, Rule 52(a)). On appeal the reviewing court "evaluat[es] whether a trial court's findings of fact are supported by substantial evidence [and also] must determine if the trial court's factual findings support its conclusions of law." *Shipman v. Shipman*, 357 N.C. 471, 475, 586 S.E.2d 250, 254 (2003).

However, when a case is disposed of by summary judgment based on the undisputed facts, or by judgment on the pleadings based on the allegations of the pleadings taken as true, findings of fact are not necessary and are "disregarded on appeal." *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 261, 400 S.E.2d 435, 440 (1991); *see also Devaney v. Miller*, 191 N.C. App. 208, 212, 662 S.E.2d 672, 675 (2008) ("Generally, findings of fact are inappropriate where . . . the facts are not in dispute."). The reviewing court conducts a *de novo* review. *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428, 651 S.E.2d 386, 389 (2007)(reviewing summary judgment *de novo*); *Holleman v. Aiken*, 193 N.C. App. 484, 491, 668 S.E.2d 579, 584-85 (2008) (reviewing Rule 12(b)(6) dismissal *de novo*).

At the 26 September 2007 hearing on husband's motion, wife orally moved to dismiss on the grounds that husband's "motions fail on their face" because the sole allegation of a "change in circumstances," husband's discharge from the USMC, occurred *before* entry of the divorce decree. The trial court received one exhibit from husband at the hearing, his military discharge papers, and no other evidence appears in the record before us.[5]

5. The "Statement of Organization of the Trial Court" found in the record on appeal contains a list of five "stipulations." However, a "Statement of Organization of the Trial Court" should only contain "a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing[.]" N.C.R. App. P. 9(a)(1)(b). One purpose of the appellate rules, including Rule 9's direction as to the content of the record on appeal, is to "facilitate[] the reading and comprehension of large numbers of legal documents by members of the Court and staff." *State v. Riley*, 167 N.C. App. 346, 347-48, 605 S.E.2d 212, 214 (2004). We admonish counsel to closely adhere to Rule 9 in future appeals.

Furthermore, the "stipulations" were not signed by the parties or their attorneys and were not made orally at the hearing, so they are not contained in the transcript. "If . . . oral stipulations are not reduced to writing *it must affirmatively appear in the record* that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into[,]" *McIntosh v. McIntosh*, 74 N.C. App. 554, 556, 328 S.E.2d 600, 602 (1985) (emphasis added), and "better practice require[s] that . . . stipu-

Because the trial court received husband's exhibit, the validity of which was not contested by wife, we will treat husband's motion as one for summary judgment and disregard the findings of fact. *Hensley*, 158 N.C. App. at 263, 580 S.E.2d at 723 ("[S]ince the trial court was presented with affidavits and exhibits and did not exclude matters outside the pleadings, we treat the motion as one for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.") "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), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

III. Analysis

[2] Husband's brief makes two arguments. First, he argues that his severance from the USMC was involuntary and could therefore be a proper basis to modify his child support obligation. Second, husband argues that

> when Plaintiff was discharged from the USMC in November [2006], his earnings stopped, but there was not a child support order from which to seek modification because the divorce had not occurred which incorporated the Agreement into the decree. Plaintiff ha[d] to wait until the Agreement was incorporated into the divorce decree to seek a modification. . . . The 11 December 2006 Order was the first child support order to be entered and it was only after that date that the Plaintiff could file a Motion to modify.
>
> . . . The facts that would support a modification of the child support order would be to compare the parties['] circumstances that existed at the time [the] Agreement was signed and the circumstances that existed when the Plaintiff filed his Motion to modify, not at the instant the Agreement was incorporated into the decree as Judge Cole's Order would require.

We disagree with husband as to his second issue and it is dispositive.

"[A]n order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause

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lations entered into by counsel at the pretrial stage be evidenced by a signed writing." *Amick v. Shipley*, 43 N.C. App. 507, 511, 259 S.E.2d 329, 331 (1979). Even assuming that the "stipulations" are properly a part of the record, they would be undisputed by definition, leaving no disputed facts for the trial court to "find."

and a showing of changed circumstances by either party . . . ." N.C. Gen. Stat. § 50-13.7(a) (2007). When a party's sole ground for requesting a decrease in the amount of child support is a change in the party's income,

> absent a showing of a change in the needs of the child, only a substantial and involuntary decrease in the non-custodial parent's income can justify a decrease in the child support obligation. All other changes in income must be accompanied by facts showing that the needs of the child have changed.

Devaney, 191 N.C. App. at 216, 662 S.E.2d at 677-78 (citations and emphasis omitted). The date from which to measure the change in income is critical to ruling on a motion to modify child support. *Id.*

The question before us is which measuring date to use to determine if the husband had substantial and involuntary reduction in income: the date of the voluntary separation agreement which included a provision for child support, or the date of incorporation of the separation agreement into the final divorce decree. This question is answered by *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 347 S.E.2d 19 (1986), a case on all fours with the case *sub judice* but which neither party cited. According to *Cavenaugh*:

> By incorporating the separation agreement of the parties into the judgment of divorce the trial judge made that agreement an order of the court subject to modification on the basis of changed circumstances. However, defendant has presented no evidence that the circumstances of either party have undergone a material change subsequent to the incorporation of the separation agreement into the divorce decree. The changes which occurred in defendant's earnings and financial situation after the parties entered into the separation agreement, but before the agreement became an order of the court, are irrelevant since his obligations were purely contractual at that time. *We hold that a separation agreement which has been incorporated into a judgment of the court may be modified by the court only upon a showing that the circumstances of the parties have changed* ***subsequent to the date of incorporation***. If defendant did not desire such a result, he was free not to enter into a separation agreement which provided that either party could request that it be made an order of the court by motion filed in the divorce action.

317 N.C. at 659-60, 347 S.E.2d at 24 (emphasis added). *Cavenaugh* "note[d] the possibility that a trial judge, in the exercise of his equi-

table power, may be able to refuse to incorporate a separation agreement into the divorce decree if he finds that incorporation would be inequitable." 317 N.C. at 660, 347 S.E.2d at 24 n.1. However, in *Cavanaugh*, as here, "the parties [did] not raise[] this question and it is not before us." *Id.* In addition, we note that husband was the party who filed the divorce complaint which specifically requested incorporation of the separation agreement into the divorce decree and the party who requested the court to enter the summary judgment divorce decree which incorporated the agreement.

Husband's allegation of a change in circumstances after the separation agreement was entered, but before the final divorce decree incorporating the separation agreement, was irrelevant to his motion to modify child support. 317 N.C. at 660, 347 S.E.2d at 24. The facts are not in dispute, and Husband does not allege any change in circumstances after the date the separation agreement was incorporated into the final divorce decree. The trial court did not err in using the date of the final divorce decree from which to measure a change in circumstances in concluding that there had been no change in circumstances.

Because this question is dispositive, we need not address whether severance from the USMC was a voluntary or involuntary reduction of income. Either way, his severance occurred prior to incorporation of the separation agreement into the divorce decree. Accordingly, the trial court's order disallowing modification of child support is affirmed.

Affirmed.

Judges JACKSON and STEPHENS concur.

STATE OF NORTH CAROLINA v. WILLIE MOSEL McCLARY, DEFENDANT

No. COA09-102

(Filed 7 July 2009)

1. Indecent Liberties— motion to dismiss—sufficiency of evidence—writing sexually graphic letter—purpose of arousing or gratifying sexual desire

The trial court did not err by denying defendant's motion to dismiss the charge of taking indecent liberties with a child even though defendant contends the State presented insufficient evidence that he took or attempted to take an indecent liberty with the juvenile or that defendant's action was for the purpose of arousing or gratifying sexual desire because: (1) the Court of Appeals has specifically rejected the argument that the utterance of mere words, no matter how reprehensible, does not constitute the taking of an indecent liberty with a child; (2) the variety of acts included under N.C.G.S. § 14-202.1(a) demonstrates that the scope of the statute's protection is to "encompass more types of deviant behavior" and provide children with broader protection than that available under statutes proscribing other sexual acts; (3) taking the evidence in the light most favorable to the State, defendant gave the victim a letter containing sexually graphic language for the purpose of soliciting sexual intercourse and oral sex; (4) in light of the sexually graphic and grossly improper nature of the letter, the State presented sufficient evidence for a jury to reasonably conclude that defendant willfully took indecent liberties with the victim by writing and giving her the letter; (5) the requirement that defendant's actions were for the purpose of arousing or gratifying sexual desire may be inferred from the evidence of defendant's actions; and (6) the completion of defendant's ultimate desired act, having sexual intercourse and oral sex with the victim, was not required in order to allow the jury to reasonably infer that defendant's acts of writing and delivering the letter to the victim were for the purpose of arousing or gratifying sexual desire.

2. Evidence— prior crimes or bad acts—testimony—sexual letter given to another girl

The trial court did not commit plain error in a taking indecent liberties with a child case by admitting into evidence a statement by the victim regarding a prior letter allegedly given by

defendant to another girl because: (1) assuming *arguendo* that the trial court erred in admitting this testimony, the error did not rise to plain error since uncorroborated testimony of the victim is sufficient to convict under N.C.G.S. § 14-202.1 if the testimony establishes all of the elements of the offense; (2) the victim's testimony that defendant delivered the letter to her, defendant's use of sexually graphic language in the letter, and defendant's overt solicitation of sexual acts constituted substantial evidence showing defendant's willful taking of an indecent liberty with an underlying purpose of arousing or gratifying his sexual desire; and (3) defendant failed to show that the jury probably would have returned a different verdict absent the disputed testimony.

3. Constitutional Law— effective assistance of counsel—failure to object

Defendant did not receive ineffective assistance of counsel in an indecent liberties case based on trial counsel's failure to object to the admission of disputed testimony because defendant failed to show that absent the admission of the disputed testimony the jury probably would have returned a different verdict.

Appeal by defendant from judgment entered 29 May 2008 by Judge Thomas D. Haigwood in Wayne County Superior Court. Heard in the Court of Appeals 10 June 2009.

Attorney General Roy Cooper, by Assistant Attorney General Susan K. Hackney, for the State.

Kimberly P. Hoppin, for defendant-appellant.

STEELMAN, Judge.

Where the State presented substantial evidence to support each element of taking an indecent liberty with a child, the trial court properly denied defendant's motion to dismiss. Where defendant failed to show that the jury would have returned a different verdict absent the admission of the disputed testimony, the trial court did not commit plain error in admitting the testimony. Where defendant failed to show that the jury would have returned a different verdict had trial counsel objected to the admission of the disputed testimony, defendant was not denied his right to effective assistance of counsel.

I. Factual and Procedural Background

On 7 April 2008, defendant was charged with taking indecent liberties with a child. N.C. Gen. Stat. § 14-202.1(a) (2007).

Defendant and J.M. lived next door to each other. At the time of the alleged incident, defendant was thirty-seven years of age, and J.M. was fifteen years of age. Although J.M. never engaged in conversation with defendant, she would often walk by defendant's house, and he would come outside and say, "hey, beautiful" or "hey, sexy."

In the light most favorable to the State, the evidence presented at trial tended to show that on 20 January 2008, J.M. walked home alone from a park. As she crossed the railroad tracks she heard footsteps behind her. She turned around, and defendant handed her a letter written on notebook paper. He told her not to show the letter to anyone or tell anyone about it. When J.M. arrived home, she first showed the letter to her brother and then opened it up and read it. On the outside of the letter was written, "Let's 'f_____' Please Please give me some of that 'P_____' To: you from: me." On the inside was written the following:

> Baby Girl; Little Beautiful
>
> What's up Baby Girl? And what's going on with you At This present time; And moment; nothing much my WAy Just Thinking about you; And Trying To figure out when will you let; And Allow me To "f_____" you; And Receive some of your; "sweet"; "fat"; "Juicy"; and "Wet" "P_____"; I'm offering you $10 Dollars That's All That I Have; And Got to To give Right Now; But I want for us To Do This Thing This friday say Around Between 5-o clock; And 7-oclock when There's No-one Here But The Two of us Just "f_____ing" each other; Me "e_____ing" And "su_____ing" That "P_____" As well; so Boo; Boo let's get Together And Do The D_____ Thing; And Just "f_____" like we've Never "f_____" Before; you; And I; you; And Me us "f____ing"; so please shorty let Me Have some of That "P_____"; so let me Know By Thursday or Better yet Wens'Day Cause I Really want That "P_____";
>
> P.S. let No-one Know But you And Me okay Thank you;
>
> P.S.S. Between you; And Me let's "f_____" Please; So please give some of "your" "P_____"

P.S.S.S. Between you; And I Please give me "some of That "p_____" Please give Me That some "your"; "p_____"; Please; "p_____"; "P_____;

P.S.S.S. Please let Me Have "some" of "your" "P_____" Please "some" of "your" "P_____" Please give "some" of "your"; "P_____";

Upon reading the letter, J.M.'s father immediately called the police. During questioning, defendant did not deny writing the letter but asserted that he had written it for, and given it to, a lady his own age named Iris a few weeks earlier. He did not know her last name or where she currently lived, except that it was somewhere behind a Hardee's on Wayne Memorial Drive. After an investigation, the police were unable to locate any woman named Iris of that age with an address anywhere in the city.

On 29 May 2008, the jury found defendant guilty of taking an indecent liberty with a child. Defendant was found to be a prior record level I for felony sentencing and received an active sentence of thirteen to sixteen months.

Defendant appeals.

II. Taking an Indecent Liberty with a Child

[1] In his first argument, defendant contends that the trial court erred in denying defendant's motion to dismiss the charge of taking an indecent liberty with a child. 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)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The test for determining the sufficiency of the evidence to withstand defendant's motion to dismiss 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). "[I]f a motion to dismiss calls 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 (1979)). We view the evidence "in the light most favorable to

the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citing *State v. Small*, 328 N.C. 175, 180, 400 S.E.2d 413, 417 (1991)).

N.C. Gen. Stat. § 14-202.1(a) defines taking indecent liberties with a child in part as:

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]

N.C. Gen. Stat. § 14-202.1(a)(1) (2007).

Defendant contends that the State did not present sufficient evidence that defendant took or attempted to take an indecent liberty with the juvenile, or that defendant's action was for the purpose of arousing or gratifying sexual desire.

Indecent liberties are defined as "such liberties as the common sense of society would regard as indecent and improper." *State v. Every*, 157 N.C. App. 200, 205, 578 S.E.2d 642, 647 (2003) (quoting *State v. McClees*, 108 N.C. App. 648, 653, 424 S.E.2d 687, 690, *disc. review denied*, 333 N.C. 465, 427 S.E.2d 626 (1993)). Neither a completed sex act nor an offensive touching of the victim are required to violate the statute. *State v. Hicks*, 79 N.C. App. 599, 603, 339 S.E.2d 806, 809 (1986) (citing *State v. Turman*, 52 N.C. App. 376, 377, 278 S.E.2d 574, 575 (1981)). This Court has specifically rejected the argument that "the utterance of 'mere words,' no matter how reprehensible, does not constitute the taking of an indecent liberty with a child." *Every*, 157 N.C. App. at 205, 578 S.E.2d at 648.

The State is required to show that "the action by the defendant was for the purpose of arousing or gratifying sexual desire." *State v. Rhodes*, 321 N.C. 102, 104, 361 S.E.2d 578, 580 (1987) (citing *Hicks*, 79 N.C. App. at 602, 339 S.E.2d at 808). "[A] variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor." *Every*, 157 N.C. App. at 206, 578 S.E.2d at 648 (quoting *State v. Etheridge*, 319 N.C. 34, 49, 352 S.E.2d 673, 682 (1987)). Moreover, the variety of acts included under the statute demonstrate that the scope of the statute's protection is to "encompass more types of deviant behavior" and provide children with "broader protection"

than that available under statutes proscribing other sexual acts. *Id.* (quoting *Etheridge*, 319 N.C. at 49, 352 S.E.2d at 682).

In the instant case, taking the evidence in the light most favorable to the State, defendant gave J.M. a letter containing sexually graphic language for the purpose of soliciting sexual intercourse and oral sex. This letter included the use of the word "f_____" seven times and the word "p_____" thirteen times. The letter also offered to pay J.M. ten dollars. Defendant's actions of overtly soliciting sexual acts from J.M. through the sexually explicit language contained in the letter fall within the broad category of behavior that "the common sense of society would regard as indecent and improper." *Id.* at 205, 578 S.E.2d at 647 (quoting *McClees*, 108 N.C. App. at 653, 424 S.E.2d at 690). In light of the sexually graphic and grossly improper nature of the letter, the State presented sufficient evidence for a jury to reasonably conclude that defendant willfully took indecent liberties with J.M. by writing and giving her the letter.

The requirement that defendant's actions were for the purpose of arousing or gratifying sexual desire "may be inferred from the evidence of the defendant's actions." *Rhodes*, 321 N.C. at 105, 361 S.E.2d at 580. In *State v. McClees*, this Court held that the defendant's act of secretly videotaping an undressed child was for the purpose of arousing or gratifying sexual desire even though no evidence was presented showing that the defendant ever actually viewed the video. *McClees*, 108 N.C. App. at 654-55, 424 S.E.2d at 690-91. Thus, the completion of the defendant's ultimate desired act, watching the video tape, was not required in order to allow the jury to reasonably infer that the defendant's acts of secretly setting up the video camera and arranging for the child to undress directly in front of the camera were for the purpose of arousing or gratifying sexual desire.

In the instant case, the completion of defendant's ultimate desired act, having sexual intercourse and oral sex with J.M., was not required in order to allow the jury to reasonably infer that defendant's acts of writing and delivering the letter to J.M. were for the purpose of arousing or gratifying sexual desire. Taking the evidence in the light most favorable to the State, defendant's purpose in writing and giving the letter to the juvenile could be inferred from the language found in the letter. The repeated, explicit, sexual language expressing defendant's desire to engage in sexual acts with the juvenile was sufficient evidence for a jury to infer that defendant's written solicitation of sexual acts was for the purpose of arousing or gratifying his sexual desire.

We hold that the State presented sufficient evidence of each element of taking an indecent liberty with a child. The trial court properly denied defendant's motion to dismiss.

This argument is without merit.

III. Plain Error

[2] In his second argument, defendant contends that the trial court committed plain error by admitting into evidence testimony regarding a prior letter allegedly given to another girl by defendant. We disagree.

We review this issue for plain error because defendant failed to object to the admission of the testimony at trial. *See State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). Plain error review is only available in criminal cases and is limited to errors in jury instructions or rulings on the admissibility of evidence. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). In order to establish plain error, defendant has the burden of showing "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779.

During direct examination by the State, the officer in charge of the investigation read into evidence the statement he took from J.M. Included in J.M.'s statement was her response to the officer's question of whether she knew of any other girls defendant had given similar letters to. J.M.'s response was "[s]omebody told me that he did it to another girl named Jasmine who now goes to Eastern Wayne High School. She used to go to Goldsboro Middle. She is a freshman. My brother knows her phone number."

Assuming *arguendo* that the trial court erred in admitting this testimony, the error does not rise to plain error. "The uncorroborated testimony of the victim is sufficient to convict under N.C.G.S. § 14-202.1 if the testimony establishes all of the elements of the offense." *State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993) (citing *State v. Vehaun*, 34 N.C. App. 700, 705, 239 S.E.2d 705, 709 (1977), *cert. denied*, 294 N.C. 445, 241 S.E.2d 846-47 (1978)). In the instant case, the State presented sufficient evidence to allow a jury to reasonably conclude that defendant was guilty of taking an indecent liberty with a child. J.M.'s testimony that defendant delivered the letter to her, defendant's use of sexually graphic language in the letter,

and defendant's overt solicitation of sexual acts constituted substantial evidence showing defendant's willful taking of an indecent liberty with an underlying purpose of arousing or gratifying his sexual desire.

Defendant failed to show that the jury probably would have returned a different verdict absent the disputed testimony and thus, has failed to show plain error.

This argument is without merit.

IV. Ineffective Assistance of Counsel

[3] In his third argument, defendant contends that because trial counsel failed to object to the admission of the disputed testimony, defendant was denied his right to effective assistance of counsel. We disagree.

"The proper standard for attorney performance is that of reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). First, defendant must show that his counsel's performance was so deficient that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, defendant must show that counsel's deficient performance was so prejudicial as to deprive defendant of a fair trial. *Id.* Even an unreasonable error made by counsel does not warrant reversal unless there is a "reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985). If a reviewing court can determine that there is no reasonable probability that absent counsel's alleged error the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

As outlined in our foregoing analysis, defendant failed to show that absent the admission of the disputed testimony the jury probably would have returned a different verdict. Thus, defendant also failed to show that he was prejudiced by trial counsel's failure to object to the admission of the disputed testimony.

This argument is without merit.

Defendant has failed to argue his remaining assignments of error, and they are deemed abandoned. N.C. R. App. P. 28(b)(6) (2009).

NO ERROR.

Judges HUNTER, ROBERT C. and GEER concur.

FMB, INC., PLAINTIFF v. GLANNIS N. CREECH, UNMARRIED, MARGIE N. CRAWFORD, UNMARRIED, GLENDA GAYLE LEGGETT, AND HUSBAND, JOEL T. LEGGETT, VICKIE LYNN BALAZSI, UNMARRIED, KATHY C. SANDIFER, AND HUSBAND, SAMUEL M. SANDIFER, AND TRISTON NEAL ALAN HINSON, UNMARRIED, MELISSA GAYLE BALAZSI, MINOR, ANY UNBORN ISSUE OF DEFENDANTS VICKIE LYNN BALAZSI, GLENDA GAYLE LEGGETT, AND KATHY C. SANDIFER, AND ANY UNKNOWN HEIRS OF JAMES ROGERS NARRON, DECEASED, DEFENDANTS

No. COA08-1208

(Filed 7 July 2009)

Appeal and Error— appealability—interlocutory order—summary judgment—claim futile on merits

An appeal from summary judgment was dismissed as interlocutory in an action involving a complaint for specific performance of a contract to sell land or damages for breach of contract where the property had multiple owners, some with life estates, and at least one minor, because plaintiff's claim for specific performance would be futile on the merits and a *lis pendens* notice has been filed by plaintiff.

Appeal by plaintiff from judgment entered 27 June 2008 by Judge Narley L. Cashwell in Wilson County Superior Court. Heard in the Court of Appeals 11 March 2009.

Rose Rand Attorneys, PA, by Paul N. Blake, III and Jason R. Page for, plaintiff-appellant.

Faris & Faris, PA, by Robert A. Farris, Jr., for defendant-appellees Margie N. Crawford, Glenda Gayle Leggett, Joel T. Leggett, Vickie Lynn Balazsi, and Triston Neal Alan Hinson.

Millicent G. Graves, for defendant-appellees Melissa Gayle Balazsi, any unborn issue of Defendants Vickie Lynn Balazsi, Glenda Gayle Leggett, and Kathy C. Sandifer, and any unknown heirs of James Rogers Narron, deceased.

STEELMAN, Judge.

Where plaintiff appeals an interlocutory order that does not contain a Rule 54(b) certification, and fails to demonstrate that a substantial right will be lost unless it is immediately reviewed, the appeal is dismissed.

I. Factual and Procedural Background

Defendants each have an interest[1] in approximately 130 acres of real property located in Wilson County, North Carolina. During the first week of June 2003, Kathy C. Sandifer (Sandifer) contacted plaintiff regarding the sale of this property. On 12 June 2003, Sandifer met with plaintiff's representative, Cecil M. Bradley (Bradley). On 21 July 2003, Sandifer signed an Option To Purchase, which gave plaintiff the option to buy "130.09 ACRES @ BUCKHORN RESERVOIR" until 5:00 p.m. on 21 November 2003 for the amount of $10,000.00. Attached to the option was an Offer to Purchase and Contract showing the purchase price of the property to be $800,000.00 and requiring closing to be completed by 21 December 2003. The option and contract showed the seller to be "Kathy Sandifer, Et Al" and did not state that Sandifer was acting in a representative capacity with respect to any other person. Sandifer is the only person whose signature appears on these documents.

On 21 November 2003, Bradley notified Sandifer that plaintiff intended to purchase the property. Since that time, defendants have refused to convey the property to plaintiff. On 8 May 2006, plaintiff filed a complaint seeking specific performance or, in the alternative, damages based upon breach of contract and negligent misrepresentation. During the course of the litigation it was discovered that one of the owners of the real estate was a minor. On 5 February 2007, a guardian *ad litem* was appointed to represent the minor and also any unknown and unborn heirs. On 10 June 2008, defendants Margie N.

1. James Narron's last will and testament devised his real estate as follows: "I will and devise all of my real estate, including all real property which I may acquire or become entitled to after the execution of this Will, to my beloved Mother, Alma Bailey Narron, for and during the term of her natural life only, with remainder thereafter to my two beloved sisters, Glannis N. Creech, and Margie N. Crawford, share and share alike, for and during the term of their natural lives only, with remainder thereafter to my three beloved nieces, Vickie Lynn C. Balazsi, Glenda Gail [Leggett], and Kathy [C. Sandifer], share and share alike, for and during the term of their natural lives only, with remainder in fee simple to the living issue of Vickie Lynn C. Balazsi, Glenda Gail [Leggett], and Kathy [C. Sandifer], share and share alike." At the time this action commenced, Alma Bailey Narron was deceased. While litigation was pending, Glannis N. Creech died extinguishing her interest in the property on 1 April 2007.

Crawford, Glenda Gayle Leggett, Joel T. Leggett, Vickie Lynn Balazsi, and Triston Neal Alan Hinson filed a motion for summary judgment. That same day, Sandifer and Samuel M. Sandifer (Sandifer defendants) also moved for summary judgment by separate motion. The principal issue at summary judgment was whether Sandifer executed the option on behalf of the other defendants, and if so, whether she had actual or apparent authority to do so.

At a hearing on 23 June 2008, the Sandifer defendants did not argue their motion for summary judgment, but rather their motion to dismiss pursuant to Rule 12(b)(6) contained in earlier pleadings. By separate orders, the trial court denied Sandifer defendants' motion to dismiss and granted summary judgment as to the remaining defendants. Plaintiff appeals.

II. Interlocutory Nature of Appeal

As a threshold issue, we must decide whether plaintiff's appeal should be dismissed as interlocutory. *See Veazy v. 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." (citation omitted)), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Generally, there is no right of immediate appeal from an interlocutory order with two exceptions: "(1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed." *Currin & Currin Constr., Inc. v. Lingerfelt*, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003) (quotation omitted); *see also Jones v. Clark*, 36 N.C. App. 327, 329, 244 S.E.2d 183, 185 (1978) ("[T]here is a right of appeal under G.S. 1-277 from an order granting summary judgment, notwithstanding the failure to meet the requirements for a Rule 54(b) appeal where a substantial right is affected." (citations omitted)).

In the instant case, the trial court did not certify its order as immediately appealable pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Therefore, the burden is on plaintiff to establish that a substantial right will be lost unless its appeal is immediately reviewed by this Court. *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001). "The question of whether an interlocutory appeal affects a substantial right must be considered in light

of the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Grant v. Miller*, 170 N.C. App. 184, 186, 611 S.E.2d 477, 478 (2005) (quotation omitted). Our appellate courts have generally taken a restrictive view of the substantial right exception. *Embler*, 143 N.C. App. at 166, 545 S.E.2d at 262.

Plaintiff argues because the summary judgment order "resolves the Plaintiff's claim for specific performance of an option and contract to purchase real estate, therefore, concerning title to the subject property[,]" it adversely affects a substantial right. We disagree.

In support of its contention, plaintiff cites *N.C. Dep't. of Transp. v. Stagecoach Village*, which states, "interlocutory orders concerning title or area taken must be immediately appealed as 'vital preliminary issues' involving substantial rights adversely affected." 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005) (citations omitted). We note, however, that *Stagecoach Village* and the cases upon which it bases its analysis deal solely with issues of condemnation and the involuntary taking of a private citizen's property by the State of North Carolina. *See Dep't of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999); *Highway Commission v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967). In *Nuckles*, our Supreme Court reasoned that an immediate appeal following a condemnation hearing pursuant to N.C. Gen. Stat. § 136-108 was "mandatory based on the futility of proceeding with a damages trial when questions linger about what land is being taken and to whom that land belongs." *Rowe*, 351 N.C. at 176, 521 S.E.2d at 710 (citing *Nuckles*, 271 N.C. at 14, 155 S.E.2d at 784). Our Supreme Court noted in *Rowe* that the holding in *Nuckles* had been expanded to other issues arising from condemnation hearings, and expressly limited that holding to questions of title and area taken. *Id.* at 176, 521 S.E.2d at 709. This analysis is inapplicable to the instant case as it does not concern condemnation proceedings.

This Court has only once, in a published opinion, extended the substantial right exception found in *Stagecoach Village* to an issue outside of the area of condemnation. *See Watson v. Millers Creek Lumber Co.*, 178 N.C. App. 552, 555, 631 S.E.2d 839, 841 (2006). In *Watson*, the plaintiffs entered into an installment land contract with the defendant Millers Creek, which provided that upon payment in full of the purchase price, the defendant Millers Creek would deliver to the plaintiffs a sufficient deed. The installment land contract was recorded. Although the plaintiffs complied with the terms of the contract, defendant Millers Creek failed to deliver the deed and subse-

quently conveyed the property to defendant Counts, who had the deed recorded. *Id.* at 553, 631 S.E.2d at 840.

The plaintiffs filed a complaint against both of the defendants alleging, *inter alia*, resulting trust, constructive trust, and breach of contract. Defendant Counts filed a motion for summary judgment. The trial court granted defendant Counts motion and dismissed the action against him. The plaintiff appealed. *Id.* at 554, 631 S.E.2d at 840.

Because the defendant Millers Creek elected not to participate in the appeal, the plaintiff's appeal was interlocutory. The trial court did not certify the appeal as immediately reviewable pursuant to Rule 54(b). However, this Court cited *Stagecoach Village* for the proposition that because the order concerned the issue of title to real property, it involved a substantial right that was adversely affected. This Court further emphasized that because "defendant Millers Creek stipulated that title to the disputed property rest[ed] in either [the] plaintiffs or defendant Counts and their liability, if any, 'cannot be determined until a final decision is entered on appeal[,]' " the plaintiffs' appeal was properly before this Court. *Id.* at 554-55, 631 S.E.2d at 840-41.

The instant case is distinguishable from *Watson* for several reasons. First, there is no stipulation in this case, which was a key factor in the determination in *Watson* that the order was immediately appealable. Second, there is no dispute in this case as to who had legal title to the property. The issue presented was whether there was a valid option to sell the property to plaintiff based upon the signature of Sandifer.

Even assuming *arguendo* Sandifer had actual or apparent authority to sell the property to plaintiff, plaintiff's claim for specific performance would fail. At the time this action was filed, Margie N. Crawford was the rightful owner of the property for her lifetime. Vickie Lynn Balazsi, Glenda Gail Leggett, and Sandifer retained equal contingent life estates thereafter and Triston Neal Alan Hinson, Melissa Gail Balazsi, a minor child, and the unknown and unborn issue of Sandifer, Vickie Lynn Balazsi, and Glenda Gayle Leggett were the remaindermen in fee simple. N.C. Gen. Stat. § 41-11 (2003) provides:

> In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine

> who the remaindermen are, there may be a sale, lease or mortgage of the property by a special proceeding in the superior court, which proceeding shall be conducted in the manner pointed out in this section.

N.C. Gen. Stat. § 41-11 then sets forth the requirements that must be met in order for such property to be sold. The purpose of that statute is to ascertain and pay the life tenant the present value of his interest, while protecting the interests of the remainderman. *See Crumpton v. Crumpton*, 290 N.C. 651, 655, 227 S.E.2d 587, 591 (1976) (providing that the purpose of N.C. Gen. Stat. § 41-11 is "to promote the interest of all the parties by allowing the sale of desirable land free from restrictions imposed by the presence of uncertainties as to whom the land will ultimately belong. The statute contemplates that the proceeds of the sale, less expenses and perhaps the present worth of the life tenant's share, will be reinvested, either in purchasing or in improving real estate."), *overruled in part by Crumpton v. Mitchell*, 303 N.C. 657, 658 n.1, 281 S.E.2d 1, 2 n.1 (1981); *see also Menzel v. Menzel*, 250 N.C. 649, 656, 110 S.E.2d 333, 338 (1959) (stating the statutory authority given to ascertain and pay over to the life tenant the present value of his interest is found in N.C. Gen. Stat. § 41-11). A special proceeding pursuant to N.C. Gen. Stat. § 41-11 was not brought in the instant case and therefore the interests of the remaindermen were not protected. "In order that a valid conveyance of the land in fee simple be made pursuant to [N.C. Gen. Stat. § 41-11], it is essential that the provisions of the statute be strictly complied with." *Blades v. Spitzer*, 252 N.C. 207, 212, 113 S.E.2d 315, 319 (1960). Because the mandatory provisions of N.C. Gen. Stat. § 41-11 were not complied with here, the trial court could not order defendants to convey the property at issue to plaintiff.[2] On this basis alone, plaintiff's claim for specific performance would fail. An alternative ground exists in this case, which would preclude plaintiff's claim for specific performance: Melissa Gail Balazsi was a minor child at the time this action commenced. It is well-established that minors cannot be compelled to specifically perform a contract as long as they remain under the age of eighteen. *Tillery v. Land*, 136 N.C. 537, 541, 48 S.E. 824, 826 (1904).

Further, a Notice of *Lis Pendens* was filed with the Wilson County Superior Court, which provides possible purchasers of this

2. We note that a draft of a petition for sale of real property pursuant to N.C. Gen. Stat. § 41-11 at a private sale is included in the record on appeal. However, there is no indication in the record that such a petition was ever filed.

property with constructive notice of the existence of this pending litigation affecting title. The Notice of *Lis Pendens* was not ordered stricken by the trial court and therefore any party who purchases this property is bound by the judgment in this action, just as defendants would have been. *Peoples Freedom Baptist Church v. Watson*, 81 N.C. App. 478, 480, 344 S.E.2d 337, 339 (1986).

Because plaintiff's claim for specific performance would be futile on the merits and a *lis pendens* notice has been filed by plaintiff, resolution of this issue on a motion for summary judgment does not affect a substantial right. Plaintiff has failed to argue the presence of a substantial right with regards to its remaining claims of damages for breach of contract and negligent misrepresentation. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order[.]"). Accordingly, plaintiff's appeal is dismissed as interlocutory.

DISMISSED.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. RAYMOND BARTLETT PORTER

No. COA08-1497

(Filed 7 July 2009)

1. Robbery— common law robbery—motion to dismiss—sufficiency of evidence—continuous transaction

The trial court did not err by denying defendant's motion to dismiss the charge of common law robbery based on alleged insufficient evidence because: (1) defendant's use of violence was concomitant with and inseparable from the theft of the property from a store when defendant exited the store carrying a large box of shoes and had a shirt concealed in his pants; the store manager confronted defendant in the parking lot and attempted to retrieve the stolen property; and defendant struck the store manager with his fist, causing him to fall to the ground unconscious; (2) our Court of Appeals has uniformly held in armed rob-

bery cases that there is sufficient evidence to support a jury finding of a continuous transaction where the defendant exits a store with stolen merchandise and, while in the store parking lot, uses or threatens to use a dangerous weapon on store personnel to facilitate his escape from the premises; (3) the only distinction between the instant case and armed robbery cases is that defendant used his fist rather than a dangerous weapon in the commission of the robbery; (4) the fact that defendant set the box of shoes down when confronted by the store manager does not mean that the theft was complete and the assault was a separate act, nor does the fact that defendant abandoned the shoes after assaulting the store manager change this result; and (5) regardless of what occurred with the shoes, defendant absconded with a shirt after assaulting the store manager, and without the assault, defendant would have been apprehended in the parking lot and not at a cafeteria.

2. Robbery— common law robbery—failure to submit lesser-included offense of misdemeanor larceny

The trial court did not err by denying defendant's request for misdemeanor larceny to be submitted as a lesser-included offense of common law robbery because: (1) although defendant contends it was constitutional error and subjected to review under N.C.G.S. § 15A-1443(b), defendant made no constitutional argument at trial and thus cannot assert this argument on appeal; (2) the only conflict in the State's evidence concerning the element of violence or intimidation was whether defendant struck the store manager or pushed him as defendant stated to the police; (3) given that the State's evidence was uncontroverted that the assault knocked the store manager unconscious, whether it was a blow with the fist or a push was immaterial, and the element of violence was uncontroverted; and (4) the parking lot cases dealing with continuous transactions in the context of armed robbery have consistently refused to segment defendant's conduct into the two separate crimes of misdemeanor assault and misdemeanor larceny.

Appeal by defendant from judgment entered 7 August 2008 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 May 2009.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker, for the State.

Haral E. Carlin, for defendant-appellant.

STEELMAN, Judge.

Where the State offered substantial evidence to establish every element of common law robbery, the trial court did not err by denying defendant's motion to dismiss the charge. The trial court did not err by failing to instruct the jury on the lesser included offense of misdemeanor larceny.

I. Factual and Procedural Background

The State's evidence tended to show that on 4 October 2007, Lee Earl Pettit (Mr. Pettit) was the store manager for Rugged Warehouse on East Independence Boulevard in Charlotte. Mr. Pettit and two of his employees were unloading a delivery truck at the rear of the store when Mr. Pettit heard the store alarm go off. Mr. Pettit determined that the fire exit in the footwear section of the store had been breached. This fire exit was located at the rear of the store in the same general area of the parking lot where Mr. Pettit and his employees were unloading the delivery truck.

Mr. Pettit observed Raymond Bartlett Porter (defendant) standing outside near the fire exit. As Mr. Pettit started walking towards defendant, he observed defendant pick up a large box containing 14 pairs of shoes and carry it towards a burgundy SUV parked in the back of the store. Mr. Pettit recognized the box as property belonging to the Rugged Warehouse and demanded that defendant relinquish the stolen merchandise. As the vehicle slowly approached defendant, he dropped the box of shoes on the hood of the SUV. The driver of the vehicle accelerated out of the store parking lot causing the box of shoes to fall from the vehicle's hood onto the ground. Mr. Pettit then proceeded towards the stolen box of shoes. As Mr. Pettit was moving towards the box of shoes, defendant approached Mr. Pettit and struck him with his fist in the jaw. Mr. Pettit was knocked unconscious to the ground. Defendant ran from the store parking lot, carrying off with him a stolen Carthart shirt belonging to Rugged Warehouse. Defendant was subsequently apprehended at K&W Cafeteria with the stolen Carthart shirt concealed in his pants.

Defendant admitted to taking both the shoes and the Carthart shirt from Rugged Warehouse, but asserted that he only "pushed" Mr. Pettit.

On 15 October 2007, defendant was indicted for common law robbery. On 7 August 2008, the jury returned a verdict of guilty to the charge of common law robbery. The trial court found Porter to be a record level VI for felony sentencing purposes. Defendant was sentenced to an active term of twenty-nine to thirty-five months in the North Carolina Department of Corrections. Defendant appeals.

II. Motion to Dismiss

[1] In his first argument, defendant contends that the trial court erred in denying his motion to dismiss the charge of common law robbery based upon insufficient evidence to support each element of the offense. We disagree.

> In reviewing the denial of a defendant's motion to dismiss, this Court determines only whether the evidence adduced at trial, when taken in the light most favorable to the State, was sufficient to allow a rational juror to find defendant guilty beyond a reasonable doubt on each essential element of the crime charged.

State v. Cooper, 138 N.C. App. 495, 497, 530 S.E.2d 73, 75, *aff'd per curiam*, 353 N.C. 260, 538 S.E.2d 912 (2000) (citation omitted). "The State is entitled to all inferences that may be fairly derived from the evidence." *Id.* Contradictions and discrepancies in the evidence must be resolved in favor of the State, *State v. Berryman*, 170 N.C. App. 336, 340, 612 S.E.2d, 672, 675, *aff'd*, 360 N.C. 209, 624 S.E.2d 350 (2006) (citation omitted), and do not warrant dismissal. *State v. Workman*, 309 N.C. 594, 599, 308 S.E.2d 264, 267 (1983) (quotation omitted).

"Common law robbery is the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270 (1982) (citations omitted), *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982).

The element of violence must precede or be concomitant with the taking in order for the crime of robbery to be committed. *State v. Sumpter*, 318 N.C. 102, 111, 347 S.E.2d 396, 401 (1986). It is well-settled that "the exact time relationship, in armed robbery cases, between the violence and the actual taking is unimportant as long as there is one continuing transaction amounting to armed robbery with the elements of violence and of taking so joined in time and circumstances as to be inseparable." *State v. Hope*, 317 N.C. 302, 305-06, 345 S.E.2d 361, 363-64 (1986) (quotation omitted). To constitute robbery,

the element of taking is not complete until the thief succeeds in removing the stolen property from the possession of the victim. *Sumpter*, 318 N.C. at 111, 347 S.E.2d at 401. "Property is in the legal possession of a person if it is under the protection of that person." *State v. Bellamy*, 159 N.C. App. 143, 149, 582 S.E.2d 663, 668, *cert. denied*, 357 N.C. 579, 589 S.E.2d 130 (2003) (citation omitted). "Thus, just because a thief has physically taken an item does not mean that its rightful owner no longer has possession of it." *State v. Barnes*, 125 N.C. App. 75, 79, 479 S.E.2d 236, 238, *aff'd per curiam*, 347 N.C. 350, 492 S.E.2d 355 (1997).

Defendant argues that at the time he assaulted Mr. Pettit, he had relinquished possession of the stolen property and that the assault did not induce Mr. Pettit to give up the property of his employer. This argument fails for two reasons.

First, defendant's use of violence was concomitant with and inseparable from the theft of the property of Rugged Warehouse. Defendant exited the store carrying a large box of shoes and had the Carthart shirt concealed in his pants. The store manager confronted defendant in the parking lot and attempted to retrieve the stolen property. Defendant struck the store manager with his fist, causing him to fall to the ground unconscious.

In armed robbery cases, this Court has uniformly held that there is sufficient evidence to support a jury finding of a continuous transaction where the defendant exits a store with stolen merchandise and, while in the store parking lot, uses or threatens to use a dangerous weapon on store personnel to facilitate his escape from the premises. *See Barnes*, 125 N.C. App. at 75, 479 S.E.2d at 236; *Bellamy*, 159 N.C. App. at 143, 582 S.E.2d at 663; *State v. Hurley*, 180 N.C. App. 680, 637 S.E.2d 919, *disc. review denied*, 361 N.C. 433, 649 S.E.2d 394 (2007); *State v. Hill*, 182 N.C. App. 88, 641 S.E.2d 380 (2007).

> A victim of common law robbery is necessarily put in fear by the violence or threat of the defendant. However, when there is an actual danger or threat to the victim's life—by the possession, use, or threatened use of a dangerous weapon—the defendant may be charged and convicted of armed robbery rather than common law robbery.

State v. Duff, 171 N.C. App. 662, 671, 615 S.E.2d 373, 380 (citations omitted), *disc. review denied*, 359 N.C. 854, 619 S.E.2d 853 (2005). "The difference between the two crimes is the use of a dangerous

weapon in the commission of the robbery." *State v. Ryder*, 196 N.C. App. 56, 65, 674 S.E.2d 805, 811 (2009) (citation omitted). "Absent the firearm or dangerous weapon element, the offense constitutes common law robbery." *State v. Gaither*, 161 N.C. App. 96, 100, 587 S.E.2d 505, 508 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004).

Thus, the only distinction between the instant case and the above-cited armed robbery cases is that here, defendant used his fist rather than a dangerous weapon in the commission of the robbery. The taking of the property and the violence directed at Mr. Pettit were all part of a continuous transaction. The fact that defendant set the box of shoes down when confronted by Mr. Pettit does not mean that the theft was complete and the assault was a separate act. *Bellamy*, 159 N.C. App. at 143, 582 S.E.2d at 663. Nor does the fact that defendant abandoned the shoes after assaulting Mr. Pettit change this result. In *State v. Hurley*, when confronted by a store employee after pushing a chainsaw out of the store in a shopping cart, defendant brandished a knife, pushed the shopping cart away, and fled. *Hurley*, 180 N.C. App. at 680, 637 S.E.2d at 919. This Court held that "[t]he shoving away of the shopping cart when faced with imminent apprehension does not evince a voluntary intent to abandon the fruits of defendant's thievery." *Id.* at 682-83, 637 S.E.2d at 922.

Second, regardless of what occurred with the shoes, defendant absconded with the Carthart shirt after assaulting Mr. Pettit. Without the assault, defendant would have been apprehended in the parking lot and not at the cafeteria. Clearly, with respect to the shirt, the assault on Mr. Pettit was part of a continuous transaction.

This argument is without merit.

III. Misdemeanor Larceny

[2] In his second argument, defendant contends that the trial court erred in denying his request for misdemeanor larceny to be submitted as a lesser included offense of common law robbery. We disagree.

Defendant asserts that this was constitutional error and subject to review pursuant to N.C. Gen. Stat. § 15A-1443(b). However, defendant made no constitutional argument at trial, and cannot assert such an argument on appeal. *See State v. Allen*, 360 N.C. 297, 313, 626 S.E.2d 271, 284 (stating as a general rule, our appellate courts "will not consider constitutional arguments raised for the first time on appeal." (citation omitted)), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d

116 (2006). This issue is reviewed pursuant to N.C. Gen. Stat. § 15A-1443(a).

It is well-settled that "the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense." *State v. Rhinehart*, 322 N.C. 53, 59, 366 S.E.2d 429, 432 (1988) (quotation omitted). But when the State's evidence is positive as to each element of the crime charged and there is no conflicting evidence relating to any element, the submission of a lesser included offense is not required. *Id.* at 59, 366 S.E.2d at 432-33. "The mere contention that the jury might accept the State's evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense." *State v. Black*, 21 N.C. App. 640, 643-44, 205 S.E.2d 154, 156, *aff'd*, 286 N.C. 191, 209 S.E.2d 458 (1974) (citation omitted).

Defendant argues that "[b]ecause the State presented conflicting evidence on the greater crime, common law robbery, the trial court should have submitted the instruction to the jury to consider larceny."

Robbery is an aggravated form of larceny, and absent the element of violence or intimidation, the offense becomes larceny. *State v. Bailey*, 4 N.C. App. 407, 411, 167 S.E.2d 24, 26 (1969) (citation omitted). The only conflict in the State's evidence concerning the element of violence or intimidation was whether defendant struck Mr. Pettit, or "pushed" him as defendant stated to the police. Given that the State's evidence was uncontroverted that the assault knocked Mr. Pettit unconscious, whether it was a blow with the fist, or a "push" is immaterial. The element of violence was uncontroverted, and the trial court correctly declined to submit misdemeanor larceny as a lesser included offense.

We also note that the parking lot cases dealing with continuous transactions in the context of armed robbery have consistently refused to segment defendant's conduct into the two separate crimes of misdemeanor assault and misdemeanor larceny. *See Barnes*, 125 N.C. App. at 75, 479 S.E.2d at 236; *Hill*, 182 N.C. App. at 88, 641 S.E.2d at 380.

This argument is without merit.

Defendant expressly abandoned his third assignment of error, and it is not addressed. N.C.R. App. P. 28(b)(6) (2008).

NO ERROR.

Judges HUNTER, Robert C. and GEER concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF v. KELVIN LEE SIMPSON, RICKY RAY HARRINGTON, AND THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANTS

No. COA08-898

(Filed 7 July 2009)

Insurance— automobile—fraudulently obtaining policy—concealing accident

The trial court erred by granting summary judgment for defendant in a declaratory judgment action to determine whether there was liability insurance coverage for a motor vehicle accident. It is clear from the undisputed facts that defendant fraudulently obtained the policy by deliberately concealing the fact that he had been in an accident earlier that day.

Appeal by plaintiff from order filed 16 April 2008 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 29 January 2009.

Smyth & Cioffi, LLP, by Theodore B. Smyth, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Steven Armstrong, for The North Carolina Department of Transportation.

Gaskins & Gaskins, P.A., by Herman E. Gaskins, Jr., for defendant-appellee Ricky Ray Harrington.

STEELMAN, Judge.

An insurance company is not liable under an automobile insurance policy when a person fraudulently procures retroactive liability insurance after an accident occurs.

I. Factual and Procedural Background

The facts pertinent to the issues presented in this appeal are not in dispute. Defendant Kelvin Lee Simpson (Simpson) was the owner

and operator of a tractor-trailer. In early 2004, Simpson had liability insurance on the tractor-trailer through plaintiff, North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau). His policy expired on 30 April 2004. Simpson attempted to renew the policy for a period of six months but paid his premium with a worthless check. Farm Bureau notified Simpson by letter dated 25 May 2004 that his check had bounced. Simpson acknowledged receipt of the letter. By letter dated 8 June 2004, Farm Bureau notified Simpson of the expiration of his policy of insurance, effective 30 April 2004.

On 15 October 2004, at 9:20 a.m., Simpson was operating the tractor-trailer when it negligently struck a vehicle owned by the North Carolina Department of Transportation (DOT). At the time of the accident, there was no insurance on Simpson's vehicle. That same afternoon, Simpson went to the Farm Bureau office located in Chocowinity, North Carolina and tendered the past due premium of $412.34 to the local agent. Simpson testified in his deposition that he consciously decided not to tell the insurance agent that he had been in an accident because he knew it would result in an increase in his insurance rates. Two weeks after the accident, Farm Bureau issued a policy covering Simpson's vehicle, effective 12:01 a.m. on 15 October 2004. Farm Bureau was not notified of the accident until it received a letter from counsel for Ricky Ray Harrington (Harrington), the operator of the DOT vehicle, dated 5 November 2004. Simpson never notified Farm Bureau about the accident and failed to respond to their inquiries after Farm Bureau was notified by DOT.

On 3 November 2006, Farm Bureau filed this action seeking a declaratory judgment that it had no coverage applicable to the claims arising out of the 15 October 2004 accident. Farm Bureau and Harrington moved for summary judgment. On 16 April 2008, the trial court entered an order declaring that Farm Bureau "provided liability coverage in favor of Ricky Ray Harrington in the sum of $750,000.00 for the automobile accident of October 15, 2004 involving Kelvin Lee Simpson and Ricky Ray Harrington near Grimesland, North Carolina."

Farm Bureau appeals.

II. Standard of Review

Summary judgment cases are reviewed in the appellate courts under a *de novo* standard of review. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). On appeal from summary judgment,

"[w]e review the record in the light most favorable to the non-moving party." *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 165, 557 S.E.2d 610, 612 (2001) (citing *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975)), *aff'd*, 355 N.C. 485, 562 S.E.2d 422 (2002).

III. Analysis

In its first argument, Farm Bureau contends that the trial court erred in granting summary judgment in favor of Harrington, ruling that Farm Bureau provided liability insurance to Simpson at the time of the 15 October 2004 accident. We agree.

At the time of the accident, on the morning of 15 October 2004, there was no policy of insurance providing liability insurance on Simpson's vehicle. The question presented is whether Simpson could retroactively procure such coverage, effective back to the time of the accident, by his own admittedly fraudulent conduct. We hold that he could not.

The purpose of Article 9A of Chapter 20 of the General Statutes (Motor Vehicle and Financial Responsibility Act of 1953) is to require the operators of motor vehicles on the streets and highways of North Carolina to be financially responsible. *Insurance Com. v. Simmons, Inc.*, 262 N.C. 691, 696, 138 S.E.2d 512, 515 (1964). This goal is achieved by requiring that before a motor vehicle can be registered in this state, the owner must have financial responsibility. N.C. Gen. Stat. § 20-309(a) (2007) (see generally Article 13 of Chapter 20 of the General Statutes, The Vehicle Financial Responsibility Act of 1957). Financial responsibility required for private vehicles is set forth in N.C. Gen. Stat. § 20-279.1(11) and for commercial vehicles in N.C. Gen. Stat. § 20-309(a1) (adopting the amount required for "carriers transporting nonhazardous property in interstate or foreign commerce in 49 C.F.R. § 387.9."). N.C. Gen. Stat. § 20-279.1 (11) (2007); N.C. Gen. Stat. § 20-309(a1) (2007). The provisions of the Financial Responsibility Act are written into every motor vehicle liability policy as a matter of law. *Wilmoth v. State Farm Mut. Auto. Ins. Co.*, 127 N.C. App. 260, 262, 488 S.E.2d 628, 630 (1997) (citing *Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. 621, 622, 298 S.E.2d 56, 57 (1982), *cert. denied*, 307 N.C. 698, 301 S.E.2d 101 (1983)), *disc. review denied*, 347 N.C. 410, 494 S.E.2d 601-02 (1997).

It is the "avowed purpose of the Financial Responsibility Act . . . to compensate the innocent victims of financially irresponsible motorists." *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 265,

382 S.E.2d 759, 763 (1989) (citations omitted). The Financial Responsibility Acts are to be liberally construed so that their intended purpose may be fulfilled. *Id.* (citing *Moore v. Insurance Co.*, 270 N.C. 532, 535, 155 S.E.2d 128, 130-31 (1967)).

> (f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
>
> (1) Except as hereinafter provided, the liability of the insurance carrier with respect to the insurance required by this Article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy.

N.C. Gen. Stat. § 20-279.21(f)(1) (2007).

In the instant case, defendants contend that the trial court correctly ruled in their favor based upon this Court's decision in the case of *Odum v. Nationwide Mutual Ins. Co.*, 101 N.C. App. 627, 401 S.E.2d 87, *disc. review denied*, 329 N.C. 499, 407 S.E.2d 539 (1991). In *Odum*, the policy holder fraudulently represented to her insurance carrier that she was divorced, she was the sole driver in her household, and no one in the household had convictions for motor vehicle offenses in the past five years. In fact, the policy holder was not divorced, she was living with her husband, and he had a conviction for driving while impaired. The vehicle was subsequently involved in an accident while being operated by the policy holder's husband.

This Court framed the issue before it as "whether the insurer on an automobile liability policy can avoid liability after an injury has occurred on the ground that the policy was procured by the insured's deliberate and material misrepresentations on the application." *Odum*, 101 N.C. App. at 631, 401 S.E.2d at 89. The case was decided based upon the above-recited portion of N.C. Gen. Stat. § 20-279.21(f)(1), holding that to the extent of coverage mandated by the Financial Responsibility Act, fraud in the application for motor vehicle liability insurance is not a defense once injury has occurred. *Id.* at 631-33, 401 S.E.2d at 90-91.

Odum is distinguishable from the instant case. In *Odum*, there was a policy of insurance in full force and effect at the time the injury

or damage occurred. In the instant case, there was no policy of insurance in effect at the time the injury to Harrington and the damage to DOT occurred. The language of N.C. Gen. Stat. § 20-279.21(f)(1) presupposes the existence of a policy of insurance at the time of injury or damage. Once the injury or damage occurs, the liability of the insurance carrier becomes absolute, to the extent of the limits of coverage mandated by the Financial Responsibility Act. N.C. Gen. Stat. § 20-279.21(f)(1) (2007); *see also Hartford Underwriters Ins. Co. v. Becks*, 123 N.C. App. 489, 491-92, 473 S.E.2d 427, 429 (1996), *cert. denied and disc. review denied*, 345 N.C. 641, 483 S.E.2d 708 (1997).

The issue in this case is whether Simpson could retroactively procure insurance coverage from plaintiff through his own fraud. This is a question of first impression in North Carolina. However, this issue was decided by the Court of Appeals of Michigan in the case *Auto-Owners Ins. Co. v. Johnson*, 209 Mich. App. 61, 530 N.W.2d 485, *appeal denied*, 450 Mich. 897, 541 N.W.2d 266 (1995). In that case, Anderson's automobile liability insurance had lapsed. On 1 March 1991, Anderson was involved in an automobile accident that resulted in the deaths of two persons. Later that day, he applied for and procured a policy of insurance, which was effective 12:01 a.m. on 1 March 1991. *Id.* at 63, 530 N.W.2d at 486. Anderson did not disclose the accident to plaintiff-insurer. *Id.*

The court noted that under Michigan law, once an innocent third party is injured in an accident where insurance coverage was in effect, the insurer cannot assert the intentional material misrepresentations by the insured to rescind the policy. *Id.* at 64, 530 N.W.2d at 487. However, the court went on to hold that:

> We fail to see any reason in law or policy for plaintiff to be the source of recovery in this case where its policy came into effect after the accident already had occurred. Unlike previous cases before this Court in which the automobile insurance policy existed at the actual time of the loss, the loss in this case occurred before the time the insurance policy came into effect with respect to the automobile. We conclude that the trial court erred in denying plaintiff's motion for summary disposition.

Id. at 65, 530 N.W.2d at 487.

We find the reasoning of the Court of Appeals of Michigan to be persuasive. As in North Carolina, when injury has occurred, the lia-

bility of an insurer becomes absolute, *where there is a policy of insurance in effect at the time of the injury*. However, this is not the law when the policy was not in effect at the time of injury or damage. What defendants argue to this Court is that the provisions of N.C. Gen. Stat. § 20-279.21(f) are incorporated into a policy of insurance that was not in existence at the time of injury or damage. We reject this contention.

The General Conditions of the policy of insurance issued to Simpson provide:

> **2. Concealment, Misrepresentation Or Fraud** This Coverage Form is void in any case of fraud by you at any time as it relates to this Coverage Form. It is also void if you or any other "insured", at any time, intentionally conceal or misrepresent a material fact concerning:
>
> **a.** This Coverage Form;
>
> **b.** The covered "auto";
>
> **c.** Your interest in the covered "auto"; or
>
> **d.** A claim under this Coverage Form.

It is clear from the undisputed facts of this case that Simpson fraudulently obtained the policy of insurance from plaintiff by deliberately concealing the fact that he had been in an accident earlier that day. Because there was no policy of insurance in effect at the time of the accident, the above policy provision voids the policy as to the preexisting accident.

We recognize that in this case Harrington, DOT, and Farm Bureau are all innocent parties. There is only one guilty, responsible party: Simpson. While the public policy of North Carolina is to require financial responsibility of persons owning motor vehicles in North Carolina, and to protect innocent persons damaged by the negligent operation of motor vehicles, it does not extend so far as to allow the fraudulent, retroactive procurement of liability insurance.

The trial court erred in holding that there was coverage under plaintiff's policy of insurance for the 15 October 2004 accident. The order of the trial court is reversed, and this matter is remanded to the trial court for entry of judgment declaring that plaintiff did not have a policy of insurance in effect at the time of the 15 October 2004 accident with respect to defendant Simpson's motor vehicle.

REVERSED and REMANDED.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY MILLER

No. COA08-1530

(Filed 7 July 2009)

Search and Seizure— refusal to open fist—evasive answers, threatening gesture—reasonable suspicion to search for weapons

There was no plain error in denying defendant's motion to suppress evidence in a prosecution for felonious possession of cocaine and resisting a public officer where defendant was stopped for a broken headlight; the officer saw that there was something in defendant's closed right fist; defendant was evasive and gave erratic answers, and would not show the officer the contents of his fist; defendant raised his fist in a manner which led the officer to believe he was about to be struck; the officer tased defendant; and defendant dropped a paper towel containing a rock of crack cocaine. The officer had reasonable suspicion to search defendant for weapons based upon the totality of the circumstances informed by his training and experience.

Appeal by defendant from judgments entered 17 July 2008 by Judge James U. Downs in Rutherford County Superior Court. Heard in the Court of Appeals 20 May 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John R. Green, Jr., for the State.

Faith S. Bushnaq, for defendant-appellant.

JACKSON, Judge.

Michael Anthony Miller ("defendant") appeals from a 17 July 2008 judgment against him for felony possession of cocaine and resisting a public officer. Defendant received credit for the entirety of his activated sentence from the 282 days served between arrest and trial. In addition, defendant received twenty-four months of supervised probation. For the reasons stated below, we hold no error.

On 9 October 2007, at approximately midnight, Officer Donald Ruppe ("Officer Ruppe"), observed a passing automobile with a broken headlight while on patrol. Officer Ruppe then "ran" the vehicle's tag and stopped defendant. He approached the vehicle on the passenger side and stated to defendant that his headlight was out. As he spoke to defendant, Officer Ruppe noticed that defendant's right hand was clenched into a fist. At that point, however, Officer Ruppe was unconcerned with it and took no action. Defendant responded to Officer Ruppe's assertion by stating that he did not believe that his headlight was broken. Officer Ruppe then requested that defendant get out of the vehicle and see for himself.

During defendant's inspection of the headlight, Officer Ruppe noticed that defendant still was clenching his hand into a fist and that a white material was protruding from the bottom of it. Concerned that defendant's hand contained a weapon or narcotics, Officer Ruppe asked him to display the contents of his right hand. Defendant responded (1) by stating that he had nothing in his right hand, and (2) by showing Officer Ruppe the various documents he had in his left hand. Officer Ruppe then commanded defendant to show the contents of his right hand. After this second command, defendant began to back away from Officer Ruppe. Defendant then raised his right hand in a manner that made Officer Ruppe believe that defendant was about to strike him with his closed fist. Officer Ruppe responded by striking the defendant in the upper left thigh with his flashlight.

Following Officer Ruppe's initial strike, Corporal Hunter, arrived on the scene to assist Officer Ruppe. Officer Ruppe then aimed his taser at defendant. Defendant ignored Officer Ruppe's continued requests for him to remain still and submit to arrest, so Officer Ruppe tased defendant. Defendant fell to the ground and dropped the contents of his right hand—a white paper towel containing what Officer Ruppe believed to be a rock of crack cocaine. Subsequent chemical analysis proved that the object which fell was .2 grams of crack cocaine.

On appeal, defendant contends that the trial court committed plain error when it denied defendant's motion to suppress evidence because the evidence purportedly was obtained without reasonable suspicion. We disagree.

Traditionally, our review of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence . . . and whether those fac-

tual findings in turn support the judge's ultimate conclusions of law." *State v. Robinson*, 189 N.C. App. 454, 458, 658 S.E.2d 501, 504 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). "If the trial court's conclusions of law are supported by its factual findings, we will not disturb those conclusions on appeal." *State v. Pickard*, 178 N.C. App. 330, 333-34, 631 S.E.2d 203, 206, *appeal dismissed and disc. rev. denied*, 361 N.C. 177, 640 S.E.2d 59 (2006). Further, we review the trial court's conclusions of law *de novo*. *See State v. Stone*, 179 N.C. App. 297, 302, 634 S.E.2d 244, 247 (2006).

Here, the State correctly notes that defendant failed to object properly to the admission of the narcotics evidence at trial. Accordingly, defendant did not preserve the issue for appellate review pursuant to North Carolina Rules of Appellate Procedure, Rule 10(b)(1) which provides that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1) (2007). Notwithstanding defendant's failure to object, defendant properly assigned plain error on appeal and presented argument, albeit limited, in support of plain error review in his reply brief. Accordingly, defendant is afforded plain error review pursuant to North Carolina Rules of Appellate Procedure, Rule 10(c)(4), which provides that,

> [i]n criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(c)(4) (2007).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the

> instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (footnotes omitted) (emphasis in original). Moreover, "[a] reversal for plain error is only appropriate in the most exceptional cases." *State v. Duke*, 360 N.C. 110, 138, 623 S.E.2d 11, 29 (2005).

We previously have held that, "[a] police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway." *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007). These facts and the inferences drawn therefrom must be "viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). Additionally, the facts, as viewed by the officer, must be examined in their totality. *See United States v. Arvizu*, 534 U.S. 266, 273, 151 L. Ed. 2d 740, 749-50 (2002).

The Supreme Court has held that 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." *State v. Campbell*, 188 N.C. App. 701, 709, 656 S.E.2d 721, 727 (2008) (citing *United States v. Hensley*, 469 U.S. 221, 235, 83 L. Ed. 2d 604, 616 (1985)). Specifically, an officer may "frisk" a suspect who is at close range if he believes that the suspect is currently armed and dangerous. *See Terry v. Ohio*, 392 U.S. 1, 24, 20 L. Ed. 2d 889, 908 (1968). Further, although nervous behavior, standing alone, is not sufficient to establish reasonable suspicion, its presence with other facts may be used to establish reasonable suspicion. *See State v. Myles*, 188 N.C. App. 42, 50, 654 S.E.2d 752, 757-58 (2008). In addition, we have held that evasive actions taken by the defendant may be relevant when examining whether reasonable suspicion was present at the time of a stop. *See State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995) (noting that a suspect who attempts to hide narcotics by making "evasive maneuvers to avoid detection" uses evasive actions).

Here, Officer Ruppe stated that he believed defendant may have been hiding a weapon. Although he only saw defendant clenching a small piece of white material, Officer Ruppe was aware that small weapons could be concealed within a hand. As he testified at trial, "[w]e are always getting updates on possible weapons . . . . There's

always something that would fit in a hand[.]" Officer Ruppe used his prior experience and training to infer that the contents of defendant's right hand may have been a weapon. His inference that a weapon was present went beyond an "unparticularized suspicion or hunch[,]" as our Supreme Court has required. *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70. Because we previously have held that officers may take necessary steps to ensure their safety, Officer Ruppe acted reasonably when he requested to see what was in defendant's hand.

Moreover, Officer Ruppe was led to a reasonable suspicion because of defendant's (1) erratic answers, (2) evasive actions, (3) continued refusal to show Officer Ruppe the contents of his right fist, and (4) choice to raise his fist in a manner which led Officer Ruppe to believe that defendant was about to strike him.

First, defendant stated multiple times that he only had papers in his left hand. Defendant went on to tell Officer Ruppe, "I ain't got nothing in my right hand[,]" despite Officer Ruppe's clear view of the white material clenched in defendant's right hand. Second, Officer Ruppe commanded that defendant not "take another step to [defendant's] vehicle." At that point, defendant once again attempted to evade Officer Ruppe by stepping towards his vehicle. It was only at that point that Officer Ruppe decided to tase defendant. Third, Officer Ruppe believed that defendant's conflicting statements about the contents of his hands were meant to distract him while defendant tried to "hide [defendant's right hand] behind his back a little bit." Officer Ruppe commanded that defendant show the contents of his right hand several times. Each time, defendant refused to open his hands, and, as such, Officer Ruppe was unable to ensure his own safety by searching defendant for weapons. Finally, while Officer Ruppe was commanding defendant to show the contents of his hand, defendant backed away while raising his hand in a manner which made Officer Ruppe believe that "he was going to hit me or try to throw the dope away." Due to defendant's (1) erratic answers, (2) evasive actions, (3) continued refusal to show Officer Ruppe the contents of his right fist, and (4) choice to raise his fist in a manner which led Officer Ruppe to believe that defendant was about to strike him, we hold that the officer had reasonable suspicion to briefly search the defendant for weapons based upon the totality of the circumstances informed by his training and experience.

Upon review, the case *sub judice* does not present the "exceptional" circumstance contemplated by our Supreme Court in *Duke*

and *Odom*. Accordingly, we hold that the trial court did not commit plain error.

No error.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA v. RICHARD ANDERSON

No. COA08-1523

(Filed 7 July 2009)

1. Sexual Offenses— satellite-based monitoring—applicability—effect of guilty pleas—failure to object at trial

The trial court did not err in a felony indecent liberties with a child, felony crimes against nature, and first-degree sexual exploitation of a minor case by finding defendant was subject to lifetime satellite-based monitoring even though defendant contends he had not been advised prior to his 1994 guilty plea in Wilkes County to various felony offenses that monitoring might be imposed as a result of his pleas because: (1) defendant admitted at the hearing that the statute as written applied to him and subjected him to lifetime satellite-based monitoring; (2) defendant did not object at trial on this basis subjecting the argument to dismissal; and (3) this issue was decided against defendant in *State v. Bare*, 197 N.C. App. 461 (2009).

2. Constitutional Law— due process—satellite-based monitoring of sex offenders—vagueness

The trial court did not err by enrolling defendant in lifetime satellite-based monitoring even though defendant contends that N.C.G.S. § 14-208.40(a)(1) is void for vagueness and violated defendant's due process rights guaranteed by the United States and North Carolina Constitutions because: (1) at the hearing, defendant did not object upon the grounds that the statute was void for vagueness; and (2) defendant admitted that his conduct constituted recidivist behavior as defined by the statute, and thus he cannot now argue that the provisions for determining recidivism are unconstitutionally vague.

3. Constitutional Law— double jeopardy—satellite-based monitoring—civil instead of punitive intent

The Court of Appeals has already concluded that the provisions of the satellite-based monitoring program for sex offenders is civil in nature instead of punitive, and thus it cannot constitute a violation of defendant's right to be free from double jeopardy.

Appeal by Defendant from order entered 31 July 2008 by Judge Henry E. Frye, Jr. in Superior Court, Wilkes County. Heard in the Court of Appeals 20 May 2009.

Attorney General Roy Cooper, by Assistant Attorney General Thomas H. Moore, for the State.

Charlotte Gail Blake for Defendant-Appellant.

McGEE, Judge.

Defendant pled guilty to two counts of felony indecent liberties with a child, two counts of felony crimes against nature, and one count of first-degree sexual exploitation of a minor in Wilkes County in December of 1994. Defendant completed his sentence for those crimes. On 3 October 2007, Defendant pled guilty to misdemeanor sexual battery, which occurred in Haywood County on 13 September 2007. The trial court ordered Defendant to be subjected to life-time satellite-based monitoring pursuant to N.C. Gen. Stat. § 14-208.40(a)(1) on 31 July 2008. Defendant appeals.

[1] Defendant contends in his first argument that the trial court erred by finding Defendant was subject to lifetime satellite-based monitoring when Defendant had not been advised, prior to his 1994 guilty plea in Wilkes County to various felon offenses, including first-degree sexual exploitation, and his 2007 guilty plea in Haywood County to misdemeanor sexual battery, that lifetime satellite-based monitoring might be imposed as a result of his pleas. We disagree.

N.C. Gen. Stat. § 14-208.40(a) states in relevant part:

> The Department of Correction shall establish a sex offender monitoring program that uses a continuous satellite-based monitoring system and shall create guidelines to govern the program. The program shall be designed to monitor two categories of offenders as follows:
>
> (1) Any offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) and who is required to reg-

> ister under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense as those terms are defined in G.S. 14-208.6.

N.C. Gen. Stat. § 14-208.40(a) (2007).

The trial court found that Defendant was convicted of a reportable conviction as defined by N.C. Gen. Stat. § 14-208.6(4), and that Defendant was required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because defendant was a recidivist. At the hearing, Defendant admitted that the statute as written applied to him and subjected him to lifetime satellite-based monitoring.

First, Defendant did not object at trial to the imposition of lifetime satellite-based monitoring based upon an argument that he had not been informed prior to his guilty plea that he might be subject to lifetime satellite-based monitoring based upon his plea. Defendant's failure to object at the hearing subjects this argument to dismissal. N.C.R. App. P. 10(b)(1); *State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003). Further, this issue was recently decided against Defendant by this Court in *State v. Bare*, 197 N.C. App. 461, 478, ––– S.E.2d –––, ––– (2009). This argument is without merit.

[2] In Defendant's second argument, he contends that the trial court erred in enrolling him in lifetime satellite-based monitoring because the statute imposing monitoring "is void for vagueness and violates [Defendant's] due process rights guaranteed by the United States and North Carolina constitutions." We disagree.

The crux of Defendant's argument is that "the statute does not define whether the trial court was required to find that [Defendant] was a recidivist based on a preponderance of the evidence, based on clear and cogent evidence, based on proof beyond a reasonable doubt, or based on some other standard." Defendant contends the lack of a defined standard could lead to defendants being subjected to lifetime satellite-based monitoring under different standards.

At the hearing, Defendant did not object upon the grounds that N.C. Gen. Stat. § 14-208.40(a)(1) was void for vagueness. Both the State and the trial court stated that Defendant was a recidivist, and the trial court stated it found that Defendant was a recidivist based upon prior convictions. Defendant responded:

> Your Honor, he would object to Your Honor finding that [Defendant was subject to satellite-based monitoring]. I can't deny that the statute does read the way it does, and it seems to contemplate placing him on the satellite monitoring. He would raise issues of due process, equal protection, and ex post facto violations; also pointing out that the triggering conviction of this time, even though it's reportable, is a misdemeanor, the sexual battery, Your Honor.
>
> In reviewing the statute as it's laid out, it does appear that as it's written right now that it would, Your Honor.

Defendant later added: "I don't believe I made a claim of double jeopardy in that. For the recidivist conditions, it does not require any testing or anything; it's based solely on prior convictions." " 'Recidivist' means a person who has a prior conviction for an offense that is described in G.S. 14-208.6(4)." N.C. Gen. Stat. § 14-208.6(2b) (2007). N.C. Gen. Stat. § 14-208.6(4)(a) (2007) includes in relevant part: "A final conviction for an offense against a minor[.]"

It is clear that Defendant was not making any argument at the hearing that the definition of recidivist, or the standard by which recidivism must be proved, was unconstitutionally vague. The only mention of "recidivist" was in Defendant's double jeopardy argument, which seems to have been that finding recidivism based solely on prior convictions, not upon some undefined evaluation of Defendant's likelihood of re-offending, violated double jeopardy.

In fact, Defendant admitted that his conduct constituted recidivist behavior as defined by the statute. Having admitted at the hearing that he was a recidivist as defined under the statute, Defendant may not now argue before this Court that the provisions for determining recidivism are unconstitutionally vague. N.C.R. App. P. 10(b)(1); *Valentine*, 357 N.C. at 525, 591 S.E.2d at 857. This argument is dismissed.

[3] In Defendant's third argument, he contends that the trial court erred in ordering that Defendant "be punished further for the crimes for which he had already been sentenced in violation of his right to be free from double jeopardy." We disagree.

This Court has already held that the provisions of the satellite-based monitoring program are civil in nature, not punitive. *Bare*, 197 N.C. App. at 467, —— S.E.2d at ——. As this Court has held that

satellite-based monitoring does not constitute a punishment, it cannot constitute a violation of Defendant's right to be free from double jeopardy. *See State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986) (double jeopardy protects against multiple *punishments* for the same crime). This argument is without merit.

No error.

Judges JACKSON and ERVIN concur.

STATE OF NORTH CAROLINA v. KELCIE LEE ANDREW MORTON

No. COA08-1020

(Filed 21 July 2009)

1. Search and Seizure— defendant approached by officers—no force or show of authority—no seizure

Defendant was not seized within the context of the Fourth Amendment where officers approached defendant and asked to speak with him about an investigation, but had not raised their guns or turned on their blue lights. Defendant submitted to questioning without physical force or a show of authority.

2. Search and Seizure— frisk—no evidence that defendant armed—no evidence of criminal activity

The purpose of a *Terry* search is not to discover evidence, and the trial court erred by denying defendant's motion to suppress scales and cocaine found during a frisk where none of the evidence would support a reasonable suspicion by the officers that defendant was armed or engaged in criminal activity.

Judge Robert C. HUNTER concurring in part and dissenting in part.

Appeal by defendant from order entered 25 April 2008 by Judge W. Osmond Smith, III in Person County Superior Court. Heard in the Court of Appeals 25 February 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert T. Hargett, for the State.

Mercedes O. Chut for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Kelcie Lee Andrew Morton ("defendant") appeals from a denial of his motion to suppress a digital pocket scale and cocaine that resulted in his indictment and subsequent conviction for possession of drug paraphernalia and possession of cocaine with the intent to sell or deliver. For the reasons mentioned herein, we reverse and vacate defendant's convictions.

I. Background

On 2 July 2006, Detectives R.V. Hughes ("Detective Hughes") and Mark Massey ("Detective Massey")[1] of the Roxboro Police Department were on routine patrol in Person County in an unmarked police vehicle when they observed defendant walking on the sidewalk from the direction of the Food Mart toward his grandmother's house. Having been informed by a confidential informant that defendant may have been involved in a recent drive-by shooting on Burch Avenue ("Burch Avenue shooting") and by several confidential informants and members of the community that he was selling drugs in the area, the detectives stopped defendant to speak with him about the Burch Avenue shooting.

At the motion to suppress hearing, the detectives could not remember the "exact" time the confidential information was provided to them with regard to the shooting and defendant's rumored drug dealing. Detective Hughes testified that "maybe a day or two" before seeing defendant, he received information from a confidential informant that defendant was involved in the Burch Avenue shooting. He said that the informant was reliable and had previously provided information to the police department. Additional confidential informants, as well as "concerned citizens," also reported that defendant

> would be frequenting the area of Weatherly Heights[,] which would be the apartment complex that's right beside the [F]ood [M]art. He would frequent that area, walk over to the [F]ood [M]art and make [drug] sales at that area which is also in close proximity to his grandmother's house, so that he could get back and forth to his drug stash.

That information had been provided to police by "several" sources about two to four months before he stopped defendant, although he did not believe it had been two full months since the last report.

Detective Hughes said that when defendant saw the patrol car coming towards him, "[h]e got into a quick pace, walking almost in a jog, heading toward his grandmother's house." When the detectives pulled over, defendant was attempting to insert his key into the door at his grandmother's house, and "was so nervous that he couldn't get the key in." Detective Massey told defendant that they needed to speak with him. As defendant walked toward the detectives, Detec-

1. Testimony indicated that "Lieutenant Wade" was also present in the patrol car; however, it would appear that he played no role in the pat-down or arrest of defendant, and he did not testify at the motion to suppress hearing.

tive Hughes ordered defendant to take his hand out of his pocket, and defendant complied. Detective Hughes had spoken with defendant several times in the past to discuss other information he had received, but had never arrested defendant.

Detective Massey's testimony about the events was similar to that of Detective Hughes, with some additional information and inconsistencies. Detective Massey, a gang analyst, believed defendant to be "involved in a subset of a blood gang affiliated with the south side of Roxboro" because of red pants defendant was wearing the day he was stopped. Although Detective Massey received information sometime in the last month from a confidential reliable informant and from Crime Stopper reports that defendant was dealing drugs, he had not seen defendant engage in any suspicious activity. While Detective Hughes said that they had received information about defendant's involvement in the Burch Avenue shooting within the past few days, Detective Massey remembered only that it was received within the last month. Detective Massey was unsure why the police did not question defendant about the Burch Avenue shooting immediately after receiving the informant's tip. No testimony was elicited with regard to the factual basis for why the detectives said the informants' tips were reliable and no prior pattern of reliability was established.

When defendant approached the patrol car, Detective Hughes told him that they wanted to discuss the Burch Avenue shooting, but that for officer safety, he wanted to pat him down for weapons first. During the pat-down, Detective Hughes felt a hard rectangular object in defendant's pocket, which based on his prior training and experience, he believed to be a digital scale used for weighing drugs. When asked by Detective Hughes if he had a scale on his person, defendant replied that he did, and Detective Hughes removed the scale from defendant's pocket.[2] Detective Massey arrested defendant for possession of drug paraphernalia and searched defendant, retrieving 6.3 grams of crack cocaine from defendant's front left pocket.

Defendant was indicted for possession of drug paraphernalia and possession with intent to sell and deliver cocaine.[3] Defendant filed a motion to suppress and a hearing was held on 23 and 24 April 2008. In its order denying the motion to suppress, the trial court concluded,

2. On cross examination, Detective Hughes stated that he could not remember if he removed the scale from defendant's pocket or if defendant did it himself.

3. The indictment for possession of drug paraphernalia is not included in the record.

that under the totality of the circumstances, it was "reasonable and justified to approach the defendant and request to speak with him regarding their investigation" and to frisk him for the presence of weapons. The court further concluded that it was "reasonable and justified" for Detective Hughes to seize the scale from defendant and "[t]hough, upon the arrest of the defendant for possession of drug paraphernalia, the officers determined that the subsequent search of the defendant was incident to an arrest, *it does not appear to this Court that the officers had probable cause to arrest the defendant only upon the discovery of the scales*." (Emphasis added.) However, the court found that the continued search of defendant was proper because the digital scale gave the police probable cause to believe that defendant had drugs on his person. The court then determined that "[i]t would have been unreasonable and impracticable to detain/delay the defendant while seeking a search warrant."

On 25 April 2008, defendant was found guilty of both charges and sentenced to 6 to 8 months' imprisonment. Defendant now appeals the denial of his motion to suppress and asks us to vacate his convictions.

II. Issues

Defendant assigns error to three of the findings of fact arguing that they were not supported by the evidence. He contends that the trial court erred in denying his motion to suppress on the grounds that (1) the detectives did not have a legal basis to stop defendant; (2) there was not reasonable suspicion to pat-down defendant; (3) there was no justification to continue searching defendant after the pat-down, because no weapons were found; and (4) the discovery of the digital scale did not create probable cause for an additional search.

III. Standard of Review

"[T]he scope of appellate review of [a denial of a motion to suppress] is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). The trial court's conclusions of law are reviewed *de novo* by this Court. *State v. Branch*, 194 N.C. App. 173, 176, 669 S.E.2d 18, 20 (2008).

IV. Analysis

A. Initial Questioning

[1] Defendant asserts that the trial court erred in failing to suppress the evidence seized from his person because the police did not have a legal basis to stop and question him. This Court recognizes a defendant's right to be free from unreasonable search and seizure under the Fourth Amendment with regard to an investigatory stop.

> The right to be free from unreasonable searches and seizures applies to seizures of the person, including brief investigatory stops. "An investigatory stop must be justified by 'a *reasonable suspicion*, based on objective facts, that the individual is involved in criminal activity.' " Whether an officer had a reasonable suspicion to make an investigatory stop is evaluated under the *totality of the circumstances*.
>
> 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 [the officer's] experience and training. The only requirement is a minimal level of objective justification, something more than an "unparticularized suspicion or hunch."

In re J.L.B.M., 176 N.C. App. 613, 619-20, 627 S.E.2d 239, 243 (2006) (citations omitted) (emphasis added).

"Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons." *Terry v. Ohio*, 392 U.S. 1, 20 n.16, 20 L. Ed. 2d 889, 905 n.16 (1968). "A seizure of a person occurs only when (1) an officer has applied actual physical force to the person or, (2) absent physical force, the defendant submits to an officer's show of authority." *State v. Fleming*, 106 N.C. App. 165, 169, 415 S.E.2d 782, 784 (1992).

> "Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature."

State v. Campbell, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005) (citation omitted) (quoting *Florida v. Bostick*, 501 U.S. 429, 115 L. Ed. 2d 389,

398 (1991)). Furthermore, "[l]aw enforcement officers have the right to approach a person's residence to inquire whether the person is willing to answer questions." *State v. Wallace*, 111 N.C. App. 581, 585, 433 S.E.2d 238, 241, *disc. review denied*, 335 N.C. 242, 439 S.E.2d 161 (1993).

In the present case, Detectives Hughes and Massey wished to speak with defendant about a drive-by shooting, of which he was suspected. The detectives also had information which led them to believe that defendant was selling drugs at the nearby shopping area and using his grandmother's house as a base to store the controlled substance. Detective Hughes had spoken to defendant several times in the past in order to investigate information he had received on defendant.

The facts of this case show that defendant submitted to questioning by police absent physical force or a show of authority. The trial court found as fact, "[a]s the officers approached the defendant, Detective Hughes told the defendant that they wanted to talk with him. . . . The officers asked the defendant to step toward the patrol car. . . . The defendant . . . approached the officers. . . . Detective Hughes told the defendant that they wanted to speak with him regarding the (shooting) on Burch Avenue." The detectives did not have their weapons raised, nor did they activate the police car's blue lights. At this point, the detectives had not seized defendant in the context of the Fourth Amendment. They had not physically detained defendant or asserted their authority such that defendant would feel that the questioning was not consensual. Accordingly, the trial court did not err in concluding that "it was reasonable and justified [for the detectives] to approach the defendant and request to speak with him regarding their investigation of the recent drive-by shooting." No constitutional violation occurred when the detectives sought to question defendant.

B. Frisk of Defendant

[2] Defendant contends that the trial court erred in denying his motion to suppress by concluding that there was reasonable suspicion to frisk him for weapons. We agree.

The United States Supreme Court has held that a protective pat-down or frisk for weapons may be performed by an officer, if he has reason to believe, based on " 'specific and articulable facts' . . . that defendant was, or was about to be, engaged in criminal activity and that defendant was 'armed and presently dangerous.' " *State v. Butler*,

331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) (quoting *Terry*, 392 U.S. at 21, 24, 20 L. Ed. 2d at 906, 908)). We review the totality of the circumstances in determining whether a reasonable suspicion exists. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). The requisite degree of suspicion must be high enough " 'to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.' " *State v. Murray*, 192 N.C. App. 684, 688, 666 S.E.2d 205, 208 (2008) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)); *see also Fleming*, 106 N.C. App. at 171, 415 S.E.2d at 785 (1992) (holding that "a generalized suspicion that the defendant was engaged in criminal activity" was not sufficient to support reasonable suspicion).

The purpose of a *Terry* search " 'is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.' " *In re Whitley*, 122 N.C. App. 290, 293, 468 S.E.2d 610, 612 (citations omitted), *disc. review denied*, 344 N.C. 437, 476 S.E.2d 132 (1996). " '[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.' " *State v. Rhyne*, 124 N.C. App. 84, 89, 478 S.E.2d 789, 792 (1996) (quoting *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909).

Defendant assigns error to the trial court's finding of fact that characterizes the detectives' source of information concerning the Burch Avenue shooting and defendant's drug sales as "confidential reliable informants" and "concerned citizens in the area that the officers deemed reliable." The evidence adduced at the hearing is not sufficient to support a finding that the sources were reliable. In addition, the order contains no conclusion of law on reliability.

An informant's tip can provide the needed reasonable suspicion as long as it exhibits sufficient "indicia of reliability." *Alabama v. White*, 496 U.S. 325, 330, 110 L. Ed. 2d 301, 309 (1990). We must review the "totality of the circumstances" when evaluating the informant's reliability. *Illinois v. Gates*, 462 U.S. 213, 233, 76 L. Ed. 2d 527, 545, *reh'g denied*, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983). The fact that an informant has provided accurate information in the past can provide sufficient evidence of his reliability. *Adams v. Williams*, 407 U.S. 143, 146-47, 32 L. Ed. 2d 612, 617-18 (1972).

In the case *sub judice*, the trial court did not have sufficient evidence to conclude that the confidential informants here or "con-

cerned citizens" are reliable. Although Detective Hughes testified that the confidential informant who provided information about the Burch Avenue shooting was reliable, the Fourth Amendment requires "objective proof as to why this informant was reliable and credible[.]" *State v. Hughes*, 353 N.C. 200, 204, 539 S.E.2d 625, 628 (2000).

Detective Hughes testified that the confidential informant who supplied information about the Burch Avenue shooting, had provided information to the police in the past, but did not indicate whether that information was accurate. It is unclear from the record who provided tips that defendant was dealing drugs and whether the informants had a history of providing credible information. Detective Hughes stated only that "concerned citizens" and "confidential reliable sources" said that defendant was dealing drugs. The record does not show whether the "concerned citizens" disclosed their names or made anonymous reports. *See State v. Maready*, 362 N.C. 614, 620, 669 S.E.2d 564, 567-68 (2008) (concluding that when an informer willingly places her anonymity at risk, it weighs in favor of deeming her tip reliable).

"[A] tip that is somewhat lacking in reliability may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration." *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630 (citing *Florida v. J.L.*, 529 U.S. 266, 270, 146 L. Ed. 2d 254, 260 (2000)). Our Court has found reasonable suspicion to exist when there was a short amount of time between the informant's tip and the police officer's observations. In *State v. Allison*, 148 N.C. App. 702, 559 S.E.2d 828 (2002), an informant approached the police officer and told him that, within the past few minutes, she saw four African-American males seated in a restaurant passing around a handgun and discussing plans to rob the place. *Id.* at 703, 559 S.E.2d at 829. The police officer independently corroborated the tip by going to the restaurant immediately and observing four African-American males seated in the restaurant, one of which had something that appeared to be dragging his pants down. *Id.*

The same type of specific and articulable facts were present in *State v. Buie*, 297 N.C. 159, 254 S.E.2d 26, *cert. denied*, 444 U.S. 971, 62 L. Ed. 2d 386 (1979), where a woman reported to the police that she awoke in her motel room to find a man standing over her bed. *Id.* at 162, 254 S.E.2d at 28. Approximately twenty minutes after the woman made her police report, the police officer saw a man near the motel who fit the physical description of the suspect, was fumbling with his pockets, and appeared as if he had been running. *Id.*

Unlike the circumstances in *Allison* and *Buie* where the police officer was able to observe the defendant within an hour of receiving the informant's tip, there is a significant amount of time between when the detectives received the information on defendant and when they saw him on 2 July 2006. The tips that defendant was dealing drugs were received two to four months prior, and the tip that defendant was involved in the Burch Avenue shooting was received sometime within that last month.

Furthermore, the detectives here were not able to sufficiently corroborate the informants' tips about defendant. The fact that defendant was walking from the general direction of the Food Mart to his grandmother's house was not sufficient to corroborate the tips that defendant was dealing drugs in the area. *See Hughes*, 353 N.C. at 210, 539 S.E.2d at 632 (holding that the fact that defendant was "headed in [the] general direction" that informant indicated did not support a finding of reasonable suspicion).

In *Rhyne*, 124 N.C. App. at 91, 478 S.E.2d at 793, we held that the pat-down of the defendant "was an unreasonable intrusion upon defendant's Fourth Amendment right to personal security and privacy." *Id.* at 91, 478 S.E.2d at 793. In that case, the officers received "an anonymous tip that several men were dealing drugs in the breezeway in which the defendant was sitting." *Id.* at 90, 478 S.E.2d at 792. When officers arrived at the location, they found the defendant sitting on the steps of the breezeway of an apartment building. *Id.* at 86, 478 S.E.2d at 790. The defendant complied with the officer's request for identification, which showed that defendant was a resident of the apartment building. *Id.* When an officer asked the defendant if he could search him or allow a specially trained dog to sniff for drugs, the defendant refused. *Id.* At this point, the officer frisked defendant for weapons and felt something which he suspected to be cocaine. *Id.* In holding that the pat-down of the defendant was not justified, we reasoned that (1) "[o]ther than being nervous, [the defendant] exhibited no other behavior that would indicate that he was engaged in criminal activity"; (2) the defendant generally cooperated with law enforcement; and (3) the officer was able to ascertain that the defendant lived in the apartment complex. *Id.* at 90, 478 S.E.2d at 792.

None of the evidence in the case *sub judice* enables the conclusion that defendant was armed or engaged in criminal activity on the day he was frisked. The informants' tips that defendant was involved in the Burch Avenue shooting and was dealing drugs were neither reliable nor could they be independently corroborated. When the detec-

tives observed defendant, he was walking towards his grandmother's house and attempting to unlock the door. Defendant was acting nervous; however, the detectives did not see defendant engaged in suspicious activity nor did they testify that they believed defendant to be armed. *See State v. Myles*, 188 N.C. App. 42, 50, 654 S.E.2d 752, 758 (reiterating that nervousness alone is not enough to constitute reasonable suspicion), *aff'd*, 362 N.C. 344, 661 S.E.2d 732 (2008).

Similar to the defendant in *Rhyne*, defendant, in the present case, also voluntarily agreed to speak with the police, who were able to ascertain that defendant was at his grandmother's house. Defendant cooperated with Detective Hughes' request to remove his hand from his pocket. Furthermore, Detective Hughes had spoken with defendant several times in the past, and did not indicate that defendant had ever previously carried a weapon or posed a danger to a police officer's safety. Given Detective Hughes' past relationship with defendant and his full cooperation at the time, under the totality of the circumstances, it was not reasonable to believe that defendant was armed or dangerous on the day he was stopped.

The record does not support the trial court's factual finding that the information received from confidential informants and concerned citizens was reliable. The remaining findings of fact about the detectives' observations and defendant's actions lack objective facts upon which a court could conclude that it was reasonable to pat-down defendant for weapons. Under the exclusionary rule, all evidence seized from the point that defendant was frisked must be excluded. *Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090, *reh'g denied*, 368 U.S. 871, 7 L. Ed. 2d 72 (1961) (barring admission of evidence obtained in violation of the Fourth Amendment in state criminal trials).

IV. Conclusion

The trial court erred in denying defendant's motion to suppress the evidence thereby obtained as a result of frisking defendant, as there was not reasonable suspicion that he was armed and dangerous. Because we are reversing this motion, we need not address defendant's additional assignments of error. We reverse the denial of defendant's motion to suppress and vacate the judgments against defendant.

Reversed and vacated.

Judge CALABRIA concurs.

Judge HUNTER, Robert C., concurs in part and dissents in part with a separate opinion.

HUNTER, Robert C., Judge, concurring in part and dissenting in part.

After careful review, I respectfully concur in part and dissent in part from the majority opinion. I agree with the majority that defendant was not seized when the detectives approached defendant outside of his grandmother's house in order to question him about a recent drive-by shooting. However, unlike the majority, I would further find that under the totality of the circumstances, the detectives in this case had reasonable suspicion to frisk defendant for officer safety.

I. Frisk of Defendant

A. Reasonable Suspicion Based on the Totality of the Circumstances

When the detectives in this case frisked defendant, a temporary seizure occurred. " 'A police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway.' " *State v. Williams*, 195 N.C. App. 554, 557, 673 S.E.2d 394, 396 (2009) (quoting *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007), *aff'd*, 362 N.C. 244, 658 S.E.2d 643, *cert. denied*, —— U.S. ——, 172 L. Ed. 2d 198 (2008)). "Reasonable articulable 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.' " *Id.* (quoting *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994)). Officers may conduct a "Terry" frisk of a person suspected of committing a crime to ensure that the individual is not armed; however, "[t]he scope of a search conducted pursuant to *Terry v. Ohio* is limited. The purpose 'is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.' " *Matter of Whitley*, 122 N.C. App. 290, 293, 468 S.E.2d 610, 612 (1996) (quoting *Adams v. Williams*, 407 U.S. 143, 146, 32 L. Ed. 2d 612, 617 (1972)).

In the case *sub judice*, the detectives had a reasonable suspicion to believe that criminal activity was afoot and that defendant could be armed. Under the totality of the circumstances, the detectives were aware of the following: 1) at least one confidential reliable informant

who had provided information in the past had implicated defendant in a recent drive-by shooting; 2) several informants and anonymous tipsters had reported that defendant sold drugs in that area; 3) defendant was traveling in the path from the Food Mart to his grandmother's house as the informants and tipsters claimed he would; 4) defendant picked up his pace when he saw the detectives looking in his direction; 5) defendant was visibly nervous when the detectives attempted to question him; and 6) defendant was wearing red pants, which indicated to Detective Massey that defendant may be affiliated with a local gang. Any one of these factors alone may not justify reasonable suspicion; however, the totality of the circumstances, " 'as viewed through the eyes of a reasonable, cautious officer' " suggested that a pat down for weapons would be prudent for officer safety as criminal activity may have been afoot. *Williams*, 195 N.C. App. at 558, 673 S.E.2d at 396 (quoting *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70); *see also State v. Garcia*, 197 N.C. App. 522, 529, 677 S.E.2d 555, 559 (2009) ("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. However, none of those factors are sufficient independently.").

I firmly believe that the detectives in this case had reasonable suspicion to believe defendant could be armed based solely on the confidential informant's tip that defendant was involved in a recent drive-by shooting and was wearing gang colors. A reasonable officer under the circumstances would think that defendant could be in possession of a weapon since he was reportedly involved in a drive-by shooting. The other evidence presented at the hearing, including defendant's actions and the tips that defendant was dealing drugs in the area, were merely additional factors leading to reasonable suspicion under the totality of the circumstances. Accordingly, I would hold that the trial court did not err in concluding as a matter of law that "it was reasonable and justified to frisk the defendant for the presence of weapons."

B. Confidential Reliable Informants and Anonymous Tipsters

While I find the tips to be reliable in this case, reasonable suspicion did not hinge solely on the reliability of the tips received by the detectives. First, an informant who Detective Hughes stated had provided reliable information in the past told Detective Hughes that defendant was involved in a drive-by shooting. This tip formed the basis of the detectives' decision to speak with defendant, which the majority correctly holds did not invoke Fourth Amendment scrutiny.

Second, the information supplied to the detectives by other informants and anonymous tipsters that defendant was selling drugs in the area merely provided additional factors in the totality of the circumstances that would lead the detectives to believe a frisk was necessary for officer safety. In other words, the tips did not form the sole basis for reasonable suspicion. However, our Supreme Court has stated:

> We reiterate that the overarching inquiry when assessing reasonable suspicion is always based on the *totality* of the circumstances. 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. The potential indicia of reliability include all "the facts known to the officers from personal observation," including those that do not necessarily corroborate or refute the informant's statements.

State v. Maready, 362 N.C. 614, 619, 669 S.E.2d 564, 567 (2008) (quoting *Alabama v. White*, 496 U.S. 325, 330, 110 L. Ed. 2d 301, 309 (1990)).

Here, the trial court made the following findings of fact, which were supported by the testimonies of Detectives Hughes and Massey:

> 8. Prior to that time [2 July 2006], Detective Hughes and Detective Massey had received information from confidential and reliable informants and concerned citizens in the area that the officers deemed reliable and tending to indicate that the defendant had been involved in a recent drive-by shooting on Burch Avenue in Roxboro and further tending to indicate that the defendant had been dealing in illegal drugs in the area.
>
> . . . .
>
> 14. The information within the knowledge of the officers as to the defendant's involvement in the shooting and in the involvement of dealing in controlled substances had come from multiple sources and was fairly fresh, some having come within a day or two before July 2, 2006 and some as recent as two-four months prior. The last information provided to Detective Hughes as to the defendant's involvement in the illegal sales of drugs was not as old as two months.

It appears from the detectives' testimony that some of the information came from confidential and reliable informants used in the past and some from anonymous tipsters. Unlike the majority, for the following reasons I find that there was sufficient evidence to support the finding that the informants were confidential and reliable, and thus properly served as a basis for reasonable suspicion: 1) the detectives testified that they had utilized these informants in the past and they were reliable; 2) the information was sufficiently detailed; 3) the anonymous tips corroborated the statements made by the informants; and 4) defendant acted in conformity with the tips. However, assuming, *arguendo*, that the trial court erred in finding the informants to be reliable, I would still find that there was reasonable suspicion to justify the detectives' actions based on the totality of the circumstances.

Furthermore, not only were there reliable informants that indicated defendant was involved in a drive-by shooting and selling drugs in the area, there were additional anonymous tipsters that also claimed defendant was selling drugs in the area. "An anonymous informant's tip may form the basis for reasonable suspicion, but it must exhibit 'sufficient indicia of reliability.' 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.' " *Garcia*, 197 N.C. App. at 529, 677 S.E.2d at 559-60 (quoting *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630 (2000)). In *Garcia*, "[the] [d]efendant argue[d] 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*." *Id.* at 529, 677 S.E.2d at 560 (emphasis added).[4] This Court addressed defendant's argument and stated:

> 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.

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4. While *Garcia* deals with an investigatory detention, not a frisk, the analysis pertaining to anonymous tipsters forming the basis for reasonable suspicion is applicable here.

Id. The Court found that defendant acted in a manner consistent with the tipster's claims and went on to say, "[e]ven 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" through a background check and surveillance of the defendant. *Id.*

In the case *sub judice*, there was no evidence that the detectives independently corroborated the tips, but there was evidence that defendant acted in conformity with the tips. Like *Garcia*, the tipsters in this case named defendant, the specific crime he was committing, and the path he would be on from the Food Mart to his grandmother's house where he stored the drugs. Unlike *Garcia*, defendant did not act in an otherwise innocent manner. Here, defendant picked up his pace when he saw the officers, was wearing clothing consistent with gang affiliation, and acted nervously when the detectives approached.

Assuming, *arguendo*, that the various tips alone were not sufficient to create reasonable suspicion, these additional factors, coupled with the tips, were sufficient to create reasonable suspicion for the frisk. The majority cites to cases such as *State v. Hughes* and *State v. Rhyne* to support its argument, but in those cases a single anonymous tipster gave a vague description of the defendant, and the tip was the sole basis for the officers' reasonable suspicion. *Hughes*, 353 N.C. at 208-09, 539 S.E.2d at 631; *Rhyne*, 124 N.C. App. 84, 90-91, 478 S.E.2d 789, 792-93 (1996). Here, the tips came from multiple sources (some from confidential and reliable informants and some from anonymous tipsters), were specific, and were only factors in the totality of the circumstances.

Based on the foregoing, I disagree with the majority's analysis and would hold that the frisk of defendant for officer safety was based on reasonable suspicion. I will now address the remainder of defendant's arguments.

II. Removal of the Scales

Defendant argues that the detectives' search impermissibly exceeded a pat down for weapons and became a reconnaissance for contraband. Specifically, defendant contends that Detective Hughes unlawfully removed the scale from defendant's pocket upon feeling it during the pat down.

> [A] protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be

> strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.

Minnesota v. Dickerson, 508 U.S. 366, 373, 124 L. Ed. 2d 334, 344 (1993) (quoting *Terry v. Ohio*, 392 U.S. 1, 26, 20 L. Ed. 2d 889, 908 (1968)). However, "officers, at least under certain circumstances, may seize contraband detected during the lawful execution of a *Terry* search." *Id.* at 374, 124 L. Ed. 2d at 344.

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified . . . .

Id. at 375-76, 124 L. Ed. 2d at 346.

The officer must have probable cause to believe the item he or she feels is contraband. *See State v. Shearin*, 170 N.C. App. 222, 226, 612 S.E.2d 371, 376 ("Evidence of contraband, plainly felt during a pat-down or frisk, may also be admissible, provided the officer had probable cause to believe that the item was in fact contraband."), *appeal dismissed and disc. review denied*, 360 N.C. 75, 624 S.E.2d 369 (2005). " 'Probable cause exists if the facts and circumstances within the knowledge of the officer were sufficient to warrant a prudent man in believing that the suspect had committed or was committing the offense.' " *State v. Bowman*, 193 N.C. App. 104, 109, 666 S.E.2d 831, 834-35 (2008) (quoting *State v. Hernandez*, 170 N.C. App. 299, 306, 612 S.E.2d 420, 425 (2005)).

Here, Officer Hughes testified that upon feeling the dimensions of the scale, he immediately knew what it was due to his experience and training. Under N.C. Gen. Stat. § 90-113.21 (2007), a scale is considered illegal contraband if used to weigh or measure a controlled substance. Officer Hughes testified that individuals selling drugs on the street will often carry a scale in his or her pocket to weigh the controlled substance before distribution. Furthermore, Detective Hughes asked defendant if there was a scale in his back pocket, and defendant confirmed it. Because Detective Hughes immediately identified the scale upon touching it, without manipulation, and based on his

experience he believed the scale to be contraband, the trial court did not err in concluding that "Detective Hughes was reasonable and justified in seizing said scales from the defendant."

III. Continued Search of Defendant

Defendant next argues that the trial court improperly concluded that the detectives had probable cause to search defendant further upon finding the scale. Defendant claims that the following conclusion of law was erroneous[5]:

> 6. However, the officers had reasonable and justified suspicion to speak with the defendant and justification for a "Terry" frisk for weapons. Upon the discovery of the scales and with all of the other circumstances and information, the officers had probable cause under exigent circumstances to search the defendant for the presence of evidence of crime involving controlled substances.

Defendant strictly argues that the trial court erred in concluding that discovery of the digital scale provided probable cause for the continued search of defendant's person, but defendant makes no argument concerning the trial court's conclusion that exigent circumstances formed the basis for the warrantless search of defendant's other pockets subsequent to the pat down.

Here, Detective Hughes testified that based on his experience in law enforcement, he immediately ascertained that the object he felt in defendant's pocket was a scale due to its clearly ascertainable dimensions. He further testified that in his personal experience, drug dealers often carry scales. These facts, coupled with information that defendant was selling drugs in the area, led him to believe that the scale was being used to weigh drugs prior to distribution, which meant that the scale constituted drug paraphernalia pursuant to N.C. Gen. Stat. § 90-113.21.[6] The fact that defendant was coming from the area in which the informants claimed he was selling drugs, and his nervous behavior, are additional factors leading to the detectives' belief that defendant was involved in illegal activity. Based on these facts and circumstances, I would find no error in the trial court's con-

5. Defendant amended his assignments of error to include additional conclusions of law, but he did not seek to amend his brief or file a response brief in order to make arguments concerning these new assignments of error, thus they are abandoned. N.C. R. App. P. 28(b)(6).

6. I do not address the trial court's contention that the scale alone was insufficient evidence to arrest defendant for possession of drug paraphernalia.

clusion that the scale provided probable cause to believe that defendant was also in possession of drugs.

After finding that probable cause existed to believe defendant was in possession of additional contraband, the next step would be to determine whether there were exigent circumstances to justify a warrantless search. *See State v. Yates*, 162 N.C. App. 118, 122-23, 589 S.E.2d 902, 904-05 (2004). However, defendant in this case does not argue that the trial court erred in finding exigent circumstances as the basis for the warrantless search; thus I decline to address that issue. N.C. R. App. P. 28(b)(6).

IV. Findings of Fact

Defendant also takes issue with findings of fact eight, ten, and fourteen, claiming that these findings were not supported by competent evidence.

Finding of fact eight characterizes the detectives' source of information concerning the drive-by shooting and defendant's drug sales as "confidential and reliable informants." Based on the enumerated factors discussed *supra*, I would find that this finding of fact was supported by competent evidence. Again, assuming, *arguendo*, that the trial court erred in finding the informants to be reliable, I would still find that there was reasonable suspicion for the detectives' actions.

Finding of fact ten states that "[f]or his safety and that of his fellow officer, Detective Hughes conducted a pat down of the defendant as a frisk for weapons." As discussed *supra*, I find that there was justification for the pat down. This finding is not erroneous as it was based on the evidence presented by the detectives that they believed defendant to be involved in criminal activity and potentially armed.

The trial court, in finding number fourteen stated that the information from the informants was "fairly fresh." The evidence tended to show that the information concerning the drive-by was relayed to Detective Hughes approximately two days before 2 July, and the information concerning the drug sales was received between two to four months prior. There was competent evidence that the information was "fairly fresh." Accordingly, I find no error in the trial court's findings of fact.

Based on the above reasoning, I would affirm the trial court's denial of defendant's motion to suppress. Accordingly the judgment in this case should be affirmed.

NANCY COCHRAN, PLAINTIFF v. ROBERT L. COCHRAN, DEFENDANT

No. COA08-697

(Filed 21 July 2009)

1. Divorce— equitable distribution—valuation of State Retirement System pension—total contribution method—Bishop five-step method

The trial court did not err in an equitable distribution case by failing to value defendant husband's State Retirement pension based on the total contribution method which uses the total value of contributions made to the plan by or on behalf of the employee because: (1) our Supreme Court has held that the State Retirement System pension is a defined benefit plan; and (2) defined benefit plans should be valued for the purposes of equitable distribution according to a specific five-step method set out in *Bishop*, 113 N.C. App. 725 (1994), rather than the total contribution method.

2. Divorce— equitable distribution—valuation of State Retirement System pension—Bishop five-step method

The trial court erred in part in an equitable distribution case by its valuation of defendant husband's State Retirement system pension using the five-step method under *Bishop*, 113 N.C. App. 725 (1994), and the case is remanded for further findings of fact regarding step four because: (1) in regard to the first step, defendant's argument that N.C. Gen. Stat. § 135-5(f) should be used as the basis for calculating his "earliest retirement" date was rejected since the plain language of the statute allows for the return of accumulated contributions only if the State employee terminates his service with the State for reasons other than death or retirement; (2) in regard to the second step determining the employee spouse's life expectancy as of the date of separation and use of this figure to ascertain the probable number of months the employee spouse will receive benefits under the plan, the methodology of plaintiff's expert, a C.P.A. accredited in business valuation and a certified valuation expert, was appropriate when the mortality and interest tables used by the expert were those presently required by the federal government under ERISA, the use of probable life expectancy was a more accurate predictor of actual life expectancy than a mere average, and the expert performed the calculations on a year-by-year basis until there would be no further life expectancy; (3) in regard to the third and fourth steps for the discount rate used in reducing the pension

benefits to present value, the trial court's order must be remanded for further findings since it was unclear whether it performed these two steps that are necessary when defendant's earliest retirement date post-dated the date of separation; and (4) in regard to the fifth step requiring the trial court to take into account contingencies such as involuntary or voluntary employee spouse termination and insolvency of the pension plan, defendant failed to show how the trial court abused its discretion since defendant pointed to no evidence suggesting the possibility of any contingencies that could affect the value of defendant's pension.

3. Divorce— equitable distribution—State Retirement System pension—immediate offset method

The trial court did not err in an equitable distribution case by using the immediate offset method in distributing defendant husband's pension because: (1) the pension benefits did not represent a disproportionate part of the marital estate when defendant's pension constituted only 41% of the marital estate; (2) ample assets existed to divide the estate and immediately distribute the pension; (3) the trial court awarded defendant all of his pension benefits and then awarded plaintiff a larger portion of the remaining assets as permitted by N.C.G.S. § 50-20.1(a); and (4) defendant was fully vested and currently eligible for early retirement.

4. Divorce— equitable distribution—unequal division of divisible property

The trial court did not err in an equitable distribution case by awarding an unequal division of the divisible property because: (1) the trial court made separate specific findings of fact that addressed each of the statutory factors under N.C.G.S. § 50-20(c); (2) the fact that defendant's pension, when received, will constitute taxable income was not a tax consequence resulting from the ordered equitable distribution; and (3) in regard to the evidence that plaintiff would not be taxed on any gain received upon a sale of the marital home, the evidence presented was merely a speculative tax consequence since there was no evidence that any such sale would be necessary or was imminent. In regard to the finding of fact that plaintiff contributed $70,000 of her separate property when the marital home was purchased, the trial court is free on remand to revisit this issue and determine whether this evidence should be considered as a distributional factor.

5. Divorce— equitable distribution—separate checking account—failure to rebut presumption of marital property

The trial court did not err in an equitable distribution case by classifying a checking account held in defendant husband's name only as marital property because defendant failed to rebut by the greater weight of the evidence the presumption that it was marital property.

Judge WYNN concurring.

Appeal by defendant from order entered 20 December 2007 by Judge Laura Powell in Rutherford County District Court. Heard in the Court of Appeals 27 January 2009.

Taylor & Brown, P.A., by Lee F. Taylor, for plaintiff-appellee.

Dameron, Burgin, Parker & Jackson, P.A., by Phillip T. Jackson and Aaron G. Walker, for defendant-appellant.

GEER, Judge.

Defendant Robert L. Cochran appeals from the trial court's equitable distribution order. On appeal, Mr. Cochran primarily contends that the trial court erred in valuing his pension. According to Mr. Cochran, the trial court failed to follow the five-step procedure for pension valuation mandated by *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994). Although we hold that the trial court complied with certain steps set out in *Bishop*, we are unable to determine from the trial court's order or the record whether it complied with other steps. We, therefore, vacate the order and remand for further proceedings.

Facts

Plaintiff Nancy Cochran and Mr. Cochran married in 1989, separated in 2005, and divorced in 2006. Mr. Cochran worked as a State Highway Patrolman, and as of the date of separation, had participated in the Teachers' and State Employees' Retirement System ("State Retirement System") for 17.1287 years.

Following an equitable distribution hearing, the trial court entered an order classifying, valuating, and distributing the parties' marital estate. The trial court concluded that an unequal division was equitable in the case. Under the order, Ms. Cochran received $256,561.00, including the marital residence (valued at $131,548.69), the divisible property resulting from the increase in the value of the marital residence (amounting to $20,400.00), Mr. Cochran's 401(k) (valued at

$97,385.75), her own 401(k) (valued at $15,527.10), and various items of personal property. Mr. Cochran received $241,898.00, composed of his pension through the State Retirement System (valued at $203,324.00), life insurance policies (valued at $23,775.17), a checking account (containing $3,389.21), and other items of personal property. The trial court ordered Ms. Cochran to pay Mr. Cochran a distributive award in the amount of $14,663.00.

Subsequently, on 20 December 2007, the trial court entered an amended equitable distribution order that corrected a "calculation error" in determining the amount of Mr. Cochran's distributive award and reduced that award to $7,331.00. Mr. Cochran timely appealed from the amended equitable distribution order.

Discussion

"A trial judge is required to conduct a three-step analysis when making an equitable distribution of the marital assets. These steps are: (1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner." *Beightol v. Beightol*, 90 N.C. App. 58, 63, 367 S.E.2d 347, 350, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). On appeal, Mr. Cochran contends the trial court erred (1) in its valuation of Mr. Cochran's pension, (2) in using the immediate offset method to distribute Mr. Cochran's pension, (3) in awarding an unequal distribution of marital property, and (4) in determining that a checking account in Mr. Cochran's name was marital property.

I

[1] Mr. Cochran first argues that the trial court erred by not valuing his pension based on the total value of contributions made to the plan by or on behalf of the employee—a valuation approach called the "total contribution method." We disagree.

Generally, there are two types of pension plans: defined contribution plans and defined benefit plans. "In a defined benefit plan the employee's pension is determined without reference to contributions [by the employee] and is based on factors such as years of service and compensation received." *Seifert v. Seifert*, 82 N.C. App. 329, 333, 346 S.E.2d 504, 506 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987). Conversely, a defined contribution plan is "essentially an annuity funded by periodic contributions" from the employee, the employer, or both. *Id.* at 332, 346 S.E.2d at 505.

Our Supreme Court has held that the State Retirement System pension is a defined benefit plan. *Bailey v. State*, 348 N.C. 130, 136, 500 S.E.2d 54, 57 (1998) (classifying the State Retirement System as part of the mandatory benefit system). In *Bishop*, this Court held that defined benefit plans should be valued for the purposes of equitable distribution according to a specific five-step method rather than the "total contribution method" advocated by Mr. Cochran. Indeed, this Court has consistently applied the *Bishop* method in valuing pension plans for the purposes of equitable distribution. *See, e.g.*, *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Surrette v. Surrette*, 114 N.C. App. 368, 442 S.E.2d 123 (1994). Accordingly, we hold that the trial court did not err in declining to use the total contribution method in valuing Mr. Cochran's pension.

II

[2] Mr. Cochran next argues that the trial court erred in its valuation of his State Retirement System pension by not properly following the five-step method set out in *Bishop*. This Court in *Bishop* set out the following requirements for valuing a "defined benefit" pension plan:

> *First*, the trial court must calculate the amount of monthly pension payment the employee, assuming he retired on the date of separation, will be entitled to receive at the later of the earliest retirement age or the date of separation. This calculation must be made as of the date of separation and "shall not include contributions, years of service or compensation which may accrue after the date of separation." N.C.G.S. § 50-20(b)(3). The calculation will however, include "gains and losses on the prorated portion of the benefit vested at the date of separation." *Id. Second*, the trial court must determine the employee-spouse's life expectancy as of the date of separation and use this figure to ascertain the probable number of months the employee-spouse will receive benefits under the plan. *Third*, the trial court, using an acceptable discount rate, must determine the then-present value of the pension as of the later of the date of separation or the earliest retirement date. *Fourth*, the trial court must discount the then-present value to the value as of the date of separation. In other words, determine the value as of the date of separation of the sum to be paid at the later of the date of separation or the earliest retirement date. This calculation requires mortality and interest discounting. *See* [3 William M. Troyan, et al., *Valuation & Distribution of Marital Property*] § 45.23. The mortality and interest tables of the Pension Benefit Guaranty

> Corporation, a corporation within the United States Department of Labor, are well suited for this purpose. *Id. Finally*, the trial court must reduce the present value to account for contingencies such as involuntary or voluntary employee-spouse termination and insolvency of the pension plan. This calculation cannot be made with reference to any table or chart and rests within the sound discretion of the trial court.

Bishop, 113 N.C. App. at 731, 440 S.E.2d at 595-96 (emphasis added).

A. *First Step*

With respect to the first step of *Bishop*, Mr. Cochran argues initially that the trial court did not properly determine his earliest retirement date. This date is critical to subsequent steps. The trial court found that "[t]he earliest retirement age under the plan is 50 years therefore the years to earliest retirement as of the date of separation is 1.97 years."

Mr. Cochran contends that the correct "earliest retirement" date is 60 days from the date of separation or 12 September 2005. In making this argument, Mr. Cochran points to N.C. Gen. Stat. § 135-1(20) (2007), which defines " '[r]etirement' [to] mean[] the termination of employment and the complete separation from active service with no intent or agreement, express or implied, to return to service." Mr. Cochran then argues that under N.C. Gen. Stat. § 135-5(f), if a member of the pension plan ceases to be a State employee, he or she may receive, no sooner than 60 days after ceasing to be a State employee, his or her contributions and, if vested, the interest accumulated on those contributions. Mr. Cochran concludes that given the definition of "retirement," set out in N.C. Gen. Stat. § 135-1(20), N.C. Gen. Stat. § 135-5(f), which discusses return of contributions upon termination of employment, should be understood as specifying the earliest retirement date.

Mr. Cochran has, however, overlooked the actual language of N.C. Gen. Stat. § 135-5(f), which explicitly states:

> Should a member cease to be a teacher or State employee *except by death or retirement* under the provisions of this Chapter, he shall upon submission of an application be paid, not earlier than 60 days from the date of termination of service, his contributions, and if he has attained at least five years of membership service or if termination of his membership service is involuntary as certified by the employer, the accumulated regular interest thereon, provided that he has not in the meantime returned to service.

(Emphasis added.) Thus, the plain language of section 135-5(f) allows for the return of accumulated contributions only if the State employee terminates his service with the State for reasons *other than* death or retirement.

Accordingly, we reject Mr. Cochran's argument that N.C. Gen. Stat. § 135-5(f) should be used as the basis for calculating his "earliest retirement" date. The trial court properly determined Mr. Cochran's earliest retirement date for purposes of valuing the State Retirement System pension.

B. *Second Step*

Defendant next contends that the trial court violated the second step's mandate that the trial court "determine the employee-spouse's life expectancy as of the date of separation and use this figure to ascertain the probable number of months the employee-spouse will receive benefits under the plan." *Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 595-96. Defendant argues that "[t]here is no finding of fact or conclusion of law in the Order in which the trial court states what it determined 'the employee-spouse's life expectancy [to be] as of the date of separation' " or any "finding of fact or conclusion of law in which the trial court determined the 'probable number of months the employee-spouse will receive benefits under the plan' as required by Step 2 of the *Bishop* methodology."

At bottom, defendant's arguments rest on a rather literal reading of *Bishop*. According to defendant, the trial court must calculate life expectancy in only one manner such that a specific finding of fact may be made regarding the likely number of months that an employee-spouse will receive pension benefits. We are not convinced that the *Bishop* standard must be so inflexibly and mechanically applied without consideration of the ultimate focus of the process outlined in *Bishop*.

The first four steps of *Bishop* provide a method for determining a lump sum present value of the stream of payments that the employee-spouse will likely receive under the pension plan from the earliest date of his retirement through his projected life expectancy (determined as of the date of separation). The fifth step allows the trial court to further reduce this figure "to account for contingencies such as involuntary or voluntary employee-spouse termination and insolvency of the pension plan." *Id.*, 440 S.E.2d at 596. Thus, only the first four steps relate to the present value calculation that Mr. Cochran is challenging on appeal. This Court summarized, with respect to these four steps, that "[t]his cal-

culation requires mortality and interest discounting. The mortality and interest tables of the Pension Benefit Guaranty Corporation, a corporation within the United States Department of Labor, are well suited for this purpose." *Id.* (internal citation omitted).

For purposes of valuing the State Retirement System pension, the trial court in this case relied upon the testimony and report of Ms. Cochran's expert, Foster Shriner, a C.P.A. accredited in business valuation and a certified valuation analyst. Mr. Shriner explained generally in his written report that his method of valuing the pension "incorporat[ed] those factors relevant to discount rates and mortality as prescribed by Section 2619 of the Employers Retirement Security Act of 1974, Section 3(2) (P.L. 93-406) (ERISA), the amendments provided by the Uruguay Round Agreements Act (P.L. 103-465) (GATT) and the Pension Funding Equity Act of 2004." In the section of the report setting out the precise methodology that he used, Mr. Shriner wrote: "To determine the actuarial present value, a combination of factors must be employed. First, an appropriate discount rate must be utilized, and secondly, mortality tables must be incorporated." Mr. Shriner similarly testified that when faced with a stream of payments over time, to value it, "you have to have a discount rate and a mortality table."

Thus, Mr. Shriner's methodology specifically relied upon the two factors identified by this Court in *Bishop* as necessary for calculating the value of the pension: "mortality and interest discounting." *Id.* Moreover, Mr. Shriner, in applying the mortality and interest discounting, relied upon the tables currently mandated for use under ERISA in valuing pensions. The "mortality and interest tables of the Pension Benefit Guaranty Corporation" referenced in *Bishop*, *id.*, were adopted for use in connection with ERISA plans. The tables in existence as of the date of *Bishop* have been, as explained by Mr. Shriner, superceded, for purposes of ERISA pension plan valuation, by the tables upon which Mr. Shriner relied through the enactment of federal legislation.

We do not believe that *Bishop* intended to preclude pension valuers from using updated and more sophisticated tables adopted by the Department of Labor for use with ERISA plans. *Bishop* cannot mean that for purposes of pension valuation, North Carolina is frozen in 1994. Instead, we hold that by approving use of the Pension Benefit Guaranty Corporation's mortality and interest tables, the Court pointed pension valuers to the tables being used for ERISA valuations.

Consistent with *Bishop*, Mr. Shriner used the tables presently required by the federal government under ERISA. In using those tables,

Mr. Shriner specifically determined Mr. Cochran's life expectancy. Although Mr. Cochran contends that the reference to "life expectancy" means average life expectancy rather than "probable life expectancy," as determined in the tables relied upon by Mr. Shriner, nothing in *Bishop* precludes use of probable life expectancy—a more accurate predictor of actual life expectancy than a mere average. Indeed, the *Bishop* opinion requires that the court use the life expectancy to "ascertain the *probable* number of months the employee-spouse will receive benefits under the plan." *Id.* (emphasis added). That is precisely what Mr. Shriner did in using the federal GATT mortality table, called the "1994 Group Reserving Table" or "94 GAR."

Nonetheless, Mr. Cochran urges that, under *Bishop*, the trial court was required to come up with a specific number of months, multiply it by the expected benefit, and then discount the overall amount to determine present value. Mr. Shriner, however, looked at each year's pension payments, starting with the earliest retirement date, multiplied those payments by a mortality factor (the probability of life expectancy for that year), and then reduced that year's payments to present value with a discounting factor. In other words, Mr. Shriner performed precisely the calculations mandated by *Bishop* on a year-by-year basis until there would be no further life expectancy.

Nothing in *Bishop* precludes this approach as opposed to the more generalized approach urged by Mr. Cochran. Indeed, Mr. Shriner's approach actually resulted in a lower life expectancy and lower projected stream of payments. The increase in the value of the pension determined by Mr. Shriner was due to the discounting interest rate used by Mr. Shriner and not his calculation of life expectancy.

We note that Mr. Cochran's expert witness, Ronald Carland, agreed that the ERISA approach, using GATT and GAR, is "an established incontrovertible way to value a pension plan." We believe such an approach complies with the intent of this Court in *Bishop*, especially in light of the Court's approval of the Pension Benefit Guaranty Corporation's tables and the opinion's expressed "belie[f] that consistency in valuation methods is important."[1] *Id.*, 440 S.E.2d at 595. We, therefore, hold that the trial court properly applied Step two of *Bishop* when adopting Mr. Shriner's methodology. We further hold that the trial court's finding of fact setting out this methodology is sufficient to comply with *Bishop*.

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1. Mr. Cochran's expert witness also confirmed that the GATT rate and mortality tables were "more science than art," while his own approach was "more art than science."

C. *Steps Three and Four*

Mr. Cochran next challenges the discount rate used in reducing the pension benefits to present value. The trial court, relying upon Mr. Shriner's testimony, adopted the GATT rate of 5.6% as the appropriate discount rate for present value purposes. The court then, however, based on Mr. Shriner's testimony, reduced that rate based on the assumption that Mr. Cochran would annually receive a 2.0% cost of living adjustment ("COLA"), which resulted in a COLA adjusted GATT rate of 3.5%.

Mr. Cochran points to the provision in N.C. Gen. Stat. § 50-20.1(d) (2007), relating to the award in equitable distribution of pension and retirement benefits, that "[t]he award shall be based on the vested and nonvested accrued benefit, as provided by the plan or fund, calculated as of the date of separation, *and shall not include contributions, years of service, or compensation which may accrue after the date of separation.*" (Emphasis added.) Mr. Cochran, however, overlooks the next sentence in N.C. Gen. Stat. § 50-20.1(d): "The award shall include gains and losses on the prorated portion of the benefit vested at the date of separation."

Here, the COLA, which Mr. Shriner determined conservatively to be 2.0% a year, amounts to an increase in the pension benefit being received. The COLA is not a contribution to the plan or compensation being paid after the date of separation. It is instead a gain on the benefit vested at the time of separation. The trial court was, therefore, required to take it into account under N.C. Gen. Stat. § 50-20.1(d). *See also Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 595 (noting that calculation of amount of monthly payments to be received in future must include any gains and losses on portion of benefit vested at date of separation). Mr. Cochran does not make any argument that the court erred in taking the COLA into account through the discount rate as opposed to using it in calculating the expected benefits and, therefore, we do not address that issue.

Step three of *Bishop* requires that the trial court, using the discount rate, determine present value "of the pension as of the later of the date of separation or the earliest retirement date." Step four then adds the final step of discounting that present value figure "to the value as of the date of separation." Mr. Cochran's earliest retirement date post-dated the date of separation and, therefore, *Bishop* required that the trial court perform both Step three and Step four. Because it is not apparent from the trial court's order that it did so, we must remand for further findings of fact.

The trial court's order finds: "Using the 94 Group Annuity Reserving Table, which the court finds is an appropriate method of determining life expectancy[,] the court finds that the actuarial present value of the defined benefit plan of $1,016.12 per month beginning on the earliest retirement date of July 25, 2007 is $215,225." This finding of fact does not specifically state whether the present value was being determined as of the earliest retirement date or the date of separation. Mr. Shriner's testimony and report, on which this finding of fact is based, suggests that the $215,225 constituted the present value as of the date of separation. If that was the intended finding of the trial court—something as to which we can only speculate—then the trial court skipped Step three of *Bishop* and may have calculated an incorrect value as of the date of separation. If the finding is really the trial court's determination as of the date of earliest retirement, then the trial court never found a value as of the date of separation.

Because *Bishop* is controlling, it does not matter whether Mr. Shriner or other valuation experts would not usually include these two steps. While Mr. Shriner was asked by counsel to determine the present value as of the date of separation, the trial court, under *Bishop*, should have determined it as of the earliest retirement date—Step three of *Bishop*. Then, that figure would have to be reduced to present value as of the date of separation—Step four of *Bishop*. Because the trial court did not clearly comply with the third and fourth steps of *Bishop*, we must remand for further findings of fact. We leave to the discretion of the trial court whether to receive more evidence on this issue.

D. *Step Five*

Finally, with respect to the valuation, Mr. Cochran contends that the trial court failed to follow Step five of the *Bishop* methodology, requiring that the trial court take into account contingencies such as involuntary or voluntary employee-spouse termination and insolvency of the pension plan. *Bishop* holds that "[t]his calculation cannot be made with reference to any table or chart and rests within the sound discretion of the trial court." 113 N.C. App. at 731, 440 S.E.2d at 596. Mr. Cochran must, therefore, demonstrate that the trial court abused its discretion in not reducing the present value based on such contingencies.

Mr. Cochran, however, points to no evidence in the record suggesting the possibility of any contingencies that could affect the value of Mr. Cochran's pension. Since Mr. Cochran was fully vested in his pension, the possibility of termination was immaterial. Further, Mr. Cochran made no showing and has made no argument that a risk of insolvency

exists for the State Retirement System pension plan. Accordingly, Mr. Cochran has failed to demonstrate that the trial court abused its discretion in not further reducing the pension value to account for contingencies of the type discussed in Step five of *Bishop*.

III

[3] Mr. Cochran next contends that the trial court erred in using the immediate offset method in distributing his pension. In support of this argument, he relies exclusively on *Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987). In *Seifert*, the Supreme Court held:

> [I]f the marital estate contains adequate property other than the pension and retirement benefits, an in kind or monetary distribution of these assets may be made which takes into account the anticipated pension and retirement benefits. This is impermissible only when the value of the pension or retirement benefits is so disproportionate in relation to other marital property that an immediate distribution would be inappropriate.

Id. at 370, 354 S.E.2d at 509. In that case, the Court determined that the trial court should on remand, after calculating the percentage of the pension benefits to which the plaintiff wife was entitled, then "order a deferred award of such benefits payable when defendant-husband actually begins to receive them." *Id.* at 372, 354 S.E.2d at 510.

Mr. Cochran contends that the value of the pension, in this case, was such a disproportionate part of the marital estate that the trial court erred in immediately distributing it. This case does not, however, present the problem present in *Seifert*, where the pension benefits represented a disproportionate share of the marital assets. In *Seifert*, the marital estate contained four assets: $27,000.00 in home equity, $15,475.00 in personal property, the wife's pension valued at $43,284.07, and the husband's pension valued at $108,491.60. *Id.* at 368, 354 S.E.2d at 507-08. As a result, the husband's pension exceeded the value of all other marital assets combined by more than $22,000.00. As a result, there was no way to equally divide the estate and immediately distribute the pension. *Id.* at 371-72, 354 S.E.2d at 510. Here, however, Mr. Cochran's pension constituted only 41% of the marital estate. Ample assets existed to divide the estate and immediately distribute the pension.

Mr. Cochran, however, argues that the pension benefits represent over 80% of the marital assets distributed to him and that the value

awarded to him is a contingent one that may never be received. He points to the Court of Appeals' observation in *Seifert* that

> [t]he major disadvantage of the present value method is that the employee spouse bears the risk of paying the nonemployee spouse for rights that may never mature. Additionally, the employee spouse may feel cheated because he or she receives only an expectancy of benefits while the nonemployee spouse gets present "real" assets such as home equity, stocks or cash payment.

Seifert, 82 N.C. App. at 336, 346 S.E.2d at 507-08 (internal citation omitted).

Mr. Cochran overlooks the fact that this portion of the opinion discussed both the advantages and disadvantages of allowing immediate distribution of a pension. Although this Court ultimately determined that the disadvantages outweighed the advantages and that deferred distribution was preferrable, *id.* at 337, 346 S.E.2d at 508, our legislature revisited the issue subsequent to *Seifert* and adopted N.C. Gen. Stat. § 50-20.1(a), which authorizes the result reached in the order entered in this case:

> (a) The award of vested pension, retirement, or other deferred compensation benefits may be made payable:
>
> (1) As a lump sum by agreement;
>
> (2) Over a period of time in fixed amounts by agreement;
>
> (3) By appropriate domestic relations order as a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits; or
>
> (4) *By awarding a larger portion of other assets to the party not receiving the benefits and a smaller share of other assets to the party entitled to receive the benefits.*

(Emphasis added.)

The trial court, here, awarded Mr. Cochran all of his pension benefits and then awarded Ms. Cochran a larger portion of the remaining assets, precisely as permitted by the statute. Especially since Mr. Cochran is fully vested and, in fact, currently eligible for early retirement, we cannot conclude that the trial court erred in making an immediate distribution of the pension benefits.

IV

[4] Mr. Cochran further contends that the trial court erred in awarding an unequal division of the divisible property. Although the trial court awarded the parties an equal portion of the marital assets, it distributed solely to Ms. Cochran the increase in the value of the marital home from the date of separation to the date of distribution. This divisible property was valued at $20,400.00.

As an initial matter, Mr. Cochran contends that the trial court's findings of fact are inadequate because the trial court simply restated the statutory factors set out in N.C. Gen. Stat. § 50-20(c)(1), (3), (4), and (11a) (2007). In the finding cited by Mr. Cochran, finding of fact 75, the trial court stated: "The court considered all of the distributional factors as set out in N.C.G.S. 50-20 and finds that the factors listed below are present and relevant in this case." The court then listed the statutory factors identified in N.C. Gen. Stat. § 50-20(c)(1), (3), (4), and (11a) and added a final one: "The plaintiff contributed $70,000 of her separate property when the marital home was purchased."

As this Court has held, the trial court must "make specific findings of fact regarding each factor specified in N.C. Gen. Stat. § 50-20(c) . . . on which the parties offered evidence." *Embler v. Embler*, 159 N.C. App. 186, 188, 582 S.E.2d 628, 630 (2003). We agree with Mr. Cochran that finding of fact 75, standing alone, would not be sufficient. *See Daetwyler v. Daetwyler*, 130 N.C. App. 246, 249-50, 502 S.E.2d 662, 665 (1998) ("We note that a finding which merely states that 'due regard' has been given to the section 50-20(c) factors, without supporting findings as to the ultimate evidence presented on these factors, is insufficient as a matter of law because such a general finding does not present enough information to allow an appellate court to determine whether evidence presented on each of the section 50-20(c) factors was duly considered by the trial court[.]" (internal citations omitted)), *aff'd per curiam*, 350 N.C. 375, 514 S.E.2d 89 (1999). Finding of fact 75 was not, however, the only finding regarding the distributional factors set out in N.C. Gen. Stat. § 50-20(c). Instead, the trial court made separate, specific findings of fact that addressed each of the statutory factors listed in finding of fact 75 that the trial court found "present and relevant in this case."

Mr. Cochran, however, further argues that the trial court should have made findings of fact regarding distributional factor N.C. Gen. Stat. § 50-20(c)(11), which requires the trial court to consider "[t]he tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible prop-

erty had been sold or liquidated on the date of valuation." The sole evidence regarding tax consequences, however, was elicited from Mr. Cochran's expert witness, who testified that if the marital home were sold, the gain received in the sale would not be taxable under certain circumstances. He further testified that Mr. Cochran's pension benefits would be subject to taxation when received.

This Court has, however, construed N.C. Gen. Stat. § 50-20(c)(11) "as requiring the court to consider tax consequences that will result from the distribution of property that the court actually orders." *Weaver v. Weaver*, 72 N.C. App. 409, 416, 324 S.E.2d 915, 920 (1985). The fact that Mr. Cochran's pension, when received, will constitute taxable income is not a tax consequence resulting from the ordered equitable distribution. *See also Smith v. Smith*, 111 N.C. App. 460, 504, 433 S.E.2d 196, 222 (1993) ("[E]ven when evidence pursuant to [N.C. Gen. Stat. § 50-20(c)(11)] is presented, the court is only required to consider the tax consequences that will result from the distribution the court actually orders."), *reversed in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

As for the evidence that Ms. Cochran would not be taxed on any gain received upon a sale of the marital home, since there is no evidence that any such sale would be necessary or is imminent, the evidence presents merely a speculative tax consequence as to which the trial court *may not* make a finding of fact. *See*, *e.g.*, *Dolan v. Dolan*, 148 N.C. App. 256, 258-59, 558 S.E.2d 218, 220 (holding that trial court erred in making finding as to tax consequences if parties sold rental property because consequences "were hypothetical and speculative" in the absence of finding that parties would be required to liquidate property), *aff'd per curiam*, 355 N.C. 484, 562 S.E.2d 422 (2002); *Crowder v. Crowder*, 147 N.C. App. 677, 683, 556 S.E.2d 639, 643 (2001) ("Valuation of marital property may include tax consequences from the sale of an asset *only* when the sale is imminent and inevitable, rather than hypothetical or speculative.").

Finally, Mr. Cochran argues that the trial court's finding that Ms. Cochran contributed $70,000 of her separate property when the marital home was purchased is not supported by the evidence. We agree that this finding, as set out, is not supported by the evidence. The evidence indicates that Ms. Cochran deposited $125,000.00 of her separate funds into the parties' joint bank account. Mr. Cochran admitted that when the parties purchased their first marital home, the $70,000.00 down payment was obtained substantially from Ms. Cochran's sepa-

rate funds. The parties sold their first home, and $65,236.41 of the proceeds were used to purchase the marital home at issue in the equitable distribution hearing. This evidence does not support a finding that Ms. Cochran contributed $70,000.00 of her separate funds to the purchase of the marital home being distributed in the equitable distribution hearing. The trial court is, however, free on remand to revisit this issue and determine whether this evidence should be considered as a distributional factor.

V

[5] Finally, we consider Mr. Cochran's argument that the trial court erred by classifying a checking account held in his name only as marital property. As of the date of separation, the parties had two checking accounts: (1) a marital account that had been "divided equally between the parties by stipulation"; and (2) an account solely in Mr. Cochran's name, used by Mr. Cochran after separation, with a value of $3,389.21 at the date of separation.

Under North Carolina law, property acquired "after the date of marriage" and "before the date of separation" is presumed to be marital for the purpose of equitable distribution. N.C. Gen. Stat. § 50-20(b)(1) (2007). To rebut this presumption, the party seeking to classify the property as separate must show, by the greater weight of the evidence, that the property is not marital but separate property, as defined in N.C. Gen. Stat. § 50-20(b)(2). *See* N.C. Gen. Stat. § 50-20(b)(1).

Here, Mr. Cochran asserts that the only funds transferred into this account were his portion of the funds from the marital joint account that the parties had by agreement split equally during the week they separated. Ms. Cochran, however, presented evidence that the bank account in question was opened on 9 July 2005, five days before the parties separated, with an initial deposit of $4,032.55. Ms. Cochran presented further evidence that the only checks written from the joint account to Mr. Cochran were a check dated 7 July 2005 for $1,000.00 and a check dated 14 July 2005 for $2,100.00. Both checks were made out to "cash." The 14 July 2005 check could not have been the source of funds in the account, since the account balance on 13 June 2005 was $3,389.21. Given this evidence, we hold that the trial court did not err in determining that Mr. Cochran failed to rebut, by the greater weight of the evidence, the presumption that the checking account was marital property. Accordingly, we uphold the trial court's classification of the account.

Affirmed in part; reversed and remanded in part.

Judge ERVIN concurs.

Judge WYNN concurs in a separate opinion.

WYNN, Judge, concurring.

I concur with the majority's holding vacating the trial court's equitable distribution order and remanding for further proceedings. However, I write separately to discourage deviation from the *Bishop* methodology, absent a high level of scrutiny and exacting analysis of the type demonstrated in today's opinion.

In *Bishop*, this Court reviewed different valuation methods developed by "accountants and actuaries and accepted by the courts" and thoughtfully crafted a five-step approach for valuating defined benefit plans. *Bishop*, 113 N.C. App. at 730, 440 S.E.2d at 595. Specifically, the second step of the "*Bishop* method" requires the trial court to "determine the employee-spouse's life expectancy as of the date of separation and use this figure to ascertain the probable number of months the employee-spouse will receive benefits under the plan." *Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 595-96.

In this case, the trial court made the following finding regarding the valuation of Mr. Cochran's pension plan:

> 7. . . . The court used the following relevant factors when determining the valuation of the plan. The Defendant participant was born on July 26, 1957 and his age at the date of separation was 48.03 years. The Defendant's date of employment, in regards to this plan, was May 28, 1988. As of the date of separation the Defendant has been a participant in the plan for 17.1287 years and was still employed. The earliest retirement age under the plan is 50 years therefore the years to earliest retirement as of the date of separation is 1.97 years. The unreduced monthly benefit as of the date of separation was $1,270. The reduced benefit at earliest retirement is $1016. . . . Using the 94 Group Annuity Reserving Table, which the court finds is an appropriate method of determining life expectancy the court finds that the actuarial present value of the defined benefit plan of $1,016.12 per month beginning on the earliest retirement date of July 25, 2007 is $215,225. . . .

The evidence presented at trial and the resulting findings of fact indicate that, rather than determining a life expectancy and number of

probable months that Mr. Cochran would receive benefits as required by *Bishop*, the trial court adopted the alternative valuation method presented by Plaintiff's expert, Mr. Shriner. By his own admission, Mr. Shriner testified that he did not determine a life expectancy for Mr. Cochran that could be expressed as a number of years. He explained that, rather than using a static calculation of "life expectancy" based on averages, he used actuarial math to determine the probability of mortality. Further, neither the trial court's findings nor Mr. Shriner's testimony offered a probable number of months that Mr. Cochran would receive benefits from his pension plan. Thus, the method used in this case was not the specific method approved by *Bishop*.

Nonetheless, I agree that the method employed by Mr. Shriner, adopted by the trial court, and affirmed by our decision today, was an alternate method that was consistent with *Bishop*. Yet, while it does appear to be reasonable not to be "frozen in 1994[,]" the method prescribed by *Bishop* remains valid. Because "consistency in valuation methods is important," it would be prudent for our trial courts to weigh with great care any efforts to deviate from the specific method prescribed in *Bishop*. *Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 595.

ALLISON QUETS, PLAINTIFF v. KEVIN NEEDHAM & DENISE NEEDHAM, DEFENDANTS

No. COA08-857

(Filed 21 July 2009)

1. Collateral Estoppel and Res Judicata— revocation of consent to adoption—Florida action

The trial court did not err by concluding that a surrogate mother's action to revoke her consent to adoption on the basis of fraud was barred by *res judicata* and by dismissing that action. Plaintiff based her claim on a Florida Open Adoption Agreement (OAA) that she thought was binding, but a subsequent Florida termination of parental rights order was a final judgment for *res judicata* purposes, the parties were the same in the North Carolina and Florida actions, and the substance of the North Carolina and Florida claims was the same. All three elements of *res judicata* were present.

2. Adoption— Florida Open Adoption Agreement—specific enforcement action—best interest of children not considered—Agreement not enforceable

The trial court properly dismissed a surrogate mother's claim to specifically enforce a Florida Open Adoption Agreement (OAA) where the subsequent adoption judgment referred to the OAA but contained no indication that the Florida court considered the children's best interest. The Florida court therefore did not intend that the OAA become an enforceable judgment subject to full faith and credit, and it remained a contract that was not enforceable in North Carolina because it was directly contrary to N.C.G.S. § 48-3-610.

3. Adoption— surrogate mother—Open Adoption Agreement—not enforceable in North Carolina—no right to seek custody or visitation

A Florida Open Adoption Agreement (OAA) was not enforceable in North Carolina and was not sufficient to restore a surrogate mother's right to seek custody or visitation with children after she consented to their adoption.

4. Pleadings— Rule 11 sanctions—question of first impression

The trial court erred by imposing Rule 11 sanctions where plaintiff's complaint raised a question of first impression, even though dismissal of the complaint was upheld.

Appeal by plaintiff from orders entered on or about 22 January 2008, 19 March 2008 and 21 April 2008 by Judge Anne Salisbury in Wake County District Court. Heard in the Court of Appeals 26 March 2009.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for plaintiff-appellant.

Sandlin & Davidian, P.A., by Deborah Sandlin and Debra A. Griffiths, for defendant-appellees.

STROUD, Judge.

Plaintiff appeals from the order dismissing her claims and the orders imposing sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. Plaintiff presents four questions for this Court's consideration: (1) whether a failed challenge to a consent to adoption in another State based on fraud operates as *res judicata* to

bar a similar challenge in this State, (2) whether a private agreement for postadoption communication and visitation entered into in another State may be enforced in this State, (3) whether a birth parent who has consented to the adoption of her children has standing to sue for custody of or visitation with the subsequently adopted children, and (4) whether those three claims were so groundless in law and in fact that Rule 11 sanctions against plaintiff were appropriate. For the following reasons, we affirm as to all claims for relief in plaintiff's complaint, but reverse as to the Rule 11 sanctions.

I. Background

In November 2004, plaintiff became pregnant with twins by means of *in vitro* fertilization using donor eggs and donor sperms. While still pregnant, plaintiff began to consider placing the twins for adoption. Plaintiff gave birth to twins Hannah and Tom[1] ("the children") in Orange County, Florida, on 6 July 2005.

On or about 18 July 2005, plaintiff began discussing adoption of the children with defendants, relatives of plaintiff's boyfriend. Plaintiff insisted that she continue to have contact with the children as a condition of giving them up for adoption. Around the end of July 2005, defendants hired Michael A. Shorstein, of Shorstein & Kelly, Attorneys at Law, P.A., to represent them in the adoption proceedings.

On 13 August 2005, plaintiff signed an Open Adoption Agreement ("the OAA"), which was signed by defendants on 16 August 2005. In the OAA, "[t]he parties agree[d] that the Birth Mother [should] have six visits per year with the Children" and agreed to various forms of communication and sharing of information regarding the children. The OAA also contained a provision that

> the Birth Mother and the Adoptive Parents consent that this Agreement is binding upon them and will be referenced in the Final Judgment of Adoption and the parties will comply with the terms and conditions thereof.
>
> (a) After the Final Judgment of Adoption is entered by the Court, the adoption cannot be set aside due to the failure of the Adoptive Parents, the Birth Mother or the Children to follow the terms of the agreement or a later change to this agreement.
>
> (b) A disagreement between the parties or litigation brought to enforce or modify this agreement shall not affect the validity of

1. Pseudonyms are used to protect the identity of the minor children.

> the adoption and shall not serve as a basis for orders affecting the custody of the Children.

Furthermore, "[t]he Parties agree[d] that all issues relating to this Agreement shall be within the exclusive and sole jurisdiction and venue of the Circuit Court, Fourth Judicial Circuit, In and For Duval County, Florida."

On 16 August 2006, plaintiff executed a Consent to Adoption before a notary public which stated, in pertinent part:

> [1.] I, ALLISON QUETS, do hereby permanently relinquish, of my own free will all rights to and custody of the children to Michael A. Shorstein, Esquire, Shorstein & Kelly, Attorneys at Law, P.A., referred to sometimes hereafter as the "Adoption Entity[,]" for subsequent adoptive placement and do consent to the entry of a Court Order terminating my parental rights and finalizing the adoption. I believe it is in the best interest of the children to release them to the Adoption Entity for subsequent adoption. I understand that in signing this consent, I am permanently and forever giving up all of my parental rights to, and interest in, the children.
>
> . . . .
>
> [2.] I acknowledge my intent to place said children with the prospective adoptive parents immediately upon the execution of this document.
>
> [3.] I hereby waive notice of any and all hearings and proceedings for this adoption and the Termination of my Parental Rights. . . .
>
> [4.] . . . I have carefully reviewed this Consent and that [T]his Consent is executed freely and voluntarily, is not given under fraud or duress and is done so by the undersigned without requiring the complete identification of the adoptive parents.
>
> . . . .
>
> [5.] This consent is subject to the Open Adoption Agreement Between the Birth Mother, Allison Quets and Adoptive Parents, Kevin and Denise Needham, executed by the birth mother on August 13, 2005, and the adoptive parents on August 16, 2005.

(Internal brackets in original omitted.)

On 19 August 2005, three days after executing the Consent to Adoption, plaintiff filed a Motion for Revocation of Consent in the

Circuit Court, Fourth Judicial Circuit, In and For Duval County, Florida ("Duval County Family Court"). The motion requested that plaintiff be allowed to revoke her consent and have the minor children returned to her

> on the grounds that she has given written notice of the revocation within three (3) days of signing it; the Birth Mother was under extreme duress and mental anguish at the time and incapable of giving a knowing and voluntary consent; and the Birth Mother was given the impression from the conversations with persons involved herein, taken as a whole, that her rights under the open adoption agreement could *never* be modified or terminated.

(Emphasis in original).

Shorstein & Kelly filed a petition to terminate plaintiff's parental rights on 25 August 2005. On or about 9 September 2005, plaintiff filed Birthmother's [sic] Verified Motion to Set Aside Consent to Adoption ("the verified motion") in Duval County Family Court. The verified motion averred duress as grounds for setting aside the Consent to Adoption and included detailed factual allegations regarding plaintiff's fragile physical condition after the twins' birth and defendants' kinship to plaintiff's sixty-seven year-old boyfriend. On or about 16 February 2006, plaintiff filed Birth Mother's *Second Amended* Motion to Set Aside Consent to Adoption ("the amended motion"). In addition to duress, the amended motion averred that plaintiff's Consent to Adoption was void because of defendants' fraud in procuring the OAA.

The petition to terminate plaintiff's parental rights and plaintiff's motions to set aside consent were consolidated for trial in Duval County Family Court. On 29 June 2006, after a nine-day trial, the trial court entered a twenty-six page order ("the termination order"). The termination order made detailed findings of fact and concluded (1) "by clear and convincing evidence that Quets was not under any duress[,]" (2) "[a] complete lack of evidence exist[ed] that fraud occurred as it relate[d] to the validity of Quets's consent[,]" and (3) "[a]ll the elements [of the relevant Florida statutes for consent to adoption] ha[d] been met[.]" Accordingly, the trial court denied plaintiff's motion to withdraw her Consent to Adoption and granted the petition to terminate plaintiff's parental rights. The trial court "ordered and adjudged" that it "retain[ed] jurisdiction over the subject matter and over the minor children until a final judgment [was] entered on the adoption."

Plaintiff timely appealed the termination order to the Florida First District Court of Appeal. On 13 July 2006, plaintiff moved to suspend the termination of her parental rights and secure visitation rights during the pendency of the appeal. On 19 July 2006, the Duval County Family Court found that "[t]he parties have always intended for Quets to have some involvement in the children's lives as evidenced by the Open Adoption Agreement and to continue to do so will benefit the children . . . ." Accordingly, the trial court granted plaintiff visitation rights

> every third weekend . . . in the vicinity of the Needham's North Carolina home, from 6:00 p.m. on Friday until 6:00 p.m. Sunday evening; this visitation schedule shall remain in effect until the appeal process is complete or upon further order of this Court. Except as otherwise agreed to by the Needhams, the children shall not be removed from the general vicinity of the Needham's home.

On Friday, 22 December 2006, the children visited plaintiff as provided in the 19 July 2006 order. However, rather than return the children to defendants as scheduled on Sunday, 24 December 2006, plaintiff left the United States with the children.

On or about 27 December 2006, defendants filed a motion in Duval County Family Court requesting that (1) plaintiff's visitation rights to the children be terminated, (2) plaintiff be ordered to return the children immediately, (3) and plaintiff be adjudicated in contempt for violating the temporary visitation order of 19 July 2006. Defendants' motion was granted on 27 December 2006 and plaintiff was ordered to show cause why she should not be held in contempt.

Plaintiff and the children were located in Canada on 29 December 2006. Defendants flew to Canada and brought the children back to their home in North Carolina. Plaintiff was arrested and charged with kidnaping the children. Plaintiff subsequently pled guilty, was fined and placed on probation.

On or about 3 January 2007, defendants moved to dismiss plaintiff's appeal of the termination order on the grounds that a fugitive from justice is not entitled to seek relief from an appellate court. On 9 January 2007, plaintiff filed a brief with the Florida First District Court of Appeal in response to defendants' motion. In the brief plaintiff argued that her parental rights should not have been terminated because

> her consent to adoption was not knowingly voluntarily, and unequivocally given. . . . [T]he Mother argues that her consent was void *ab initio* because her belief that the OAA was enforceable rendered her consent unknowing and involuntary. The OAA is not legally enforceable under either Florida law, where the adoption proceedings were to be held, or North Carolina law, where the Children would reside post-adoption. The Mother also argues that the consent was void because it was contingent upon the OAA and, therefore, not unequivocal. . . . Finally, the Mother argues that the Consent was procured by fraud because the Law Firm represented to her that the OAA is legally enforceable when it is not legally enforceable in either Florida or North Carolina.

On 6 June 2007, the termination order was affirmed *per curiam* by the Florida First District Court of Appeal. 961 So. 2d 935 (Fla. 1st Dist. Ct. App. 2007).

On 17 September 2007, the Duval County Family Court entered a Final Judgment of Adoption ("the adoption judgment") declaring the children to be "the legal children" of defendants. The adoption judgment also "ordered and adjudged" that "[t]he parties have entered into an Open Adoption Agreement that has previously been entered into evidence at the hearing terminating the birth mother's parental rights[,]" but did not expressly "incorporate" the OAA or make any findings as to whether postadoption contact with plaintiff would be in the best interest of the children. The adoption judgment was silent as to the retention of jurisdiction for the purpose of entering further orders related to custody and visitation, impliedly giving up jurisdiction per the termination order in which the Duval County Family Court expressly reserved jurisdiction only until entry of a final adoption judgment.

On 20 November 2007, plaintiff filed the complaint *sub judice* in Wake County District Court. The complaint asserted three alternative claims: (1) the children be returned to plaintiff on the grounds that plaintiff's consent to adoption was obtained by fraud, (2) specific performance of the OAA, or (3) visitation rights over and above those granted by the OAA on the grounds that plaintiff was "a qualified 'other person' under N.C.G.S. § 50-13.1" and that "the children's best interests [would be] met by having a continuing relationship with the Plaintiff."

While plaintiff's 20 November 2007 complaint was pending before Wake County District Court, defendants filed a motion on or about 2

January 2008 for declaratory judgment in Duval County Family Court. Defendant's motion requested that the OAA be permanently set aside. The record contains no trial court order disposing of the declaratory judgment motion.

On 22 January 2008, Wake County District Court Judge Anne Salisbury entered an order dismissing the complaint *sub judice*. The trial court order concluded, as a matter of law, that plaintiff lacked standing to bring an action for custody or visitation because a natural parent who consents to the adoption of her child forfeits standing to bring an action for custody or visitation in the future. The trial court also concluded that the existence of an OAA did not create a cause of action by itself and furthermore was not sufficient to trump the forfeiture of standing arising from the consent to adoption. Finally, the trial court ruled that plaintiff's claim to set aside the Consent to Adoption on the basis of fraud should be dismissed because of the *res judicata* effect of the termination order.

On or about 6 February 2008, defendants filed a motion for attorneys' fees in Wake County District Court. The trial court held a hearing on the motion 19 February 2008. The trial court concluded that plaintiff's "complaint was not well grounded in law or in fact and [did] not set forth a good faith basis for the extension, modification or reversal of existing law" at the time she filed it. Accordingly, the trial court sanctioned plaintiff pursuant to Rule 11 of the North Carolina Rules of Civil Procedure, ordering plaintiff to pay defendants' attorney fees in the amount of seven thousand four hundred eighty-two dollars and fifty cents ($7,482.50). Plaintiff appeals from the order dismissing her claims and from the order imposing Rule 11 sanctions.

II. Standard of Review for 12(b)(6) Dismissal

The standard of review for the dismissal of a complaint pursuant to Rule 12(b)(6) is well settled:

> In ruling upon a Rule 12(b)(6) motion, the trial court should liberally construe the complaint and should not dismiss the action unless it appears to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim.

Arroyo v. Scottie's Professional Window Cleaning, 120 N.C. App. 154, 158, 461 S.E.2d 13, 16 (1995), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996). "On appeal from a motion

to dismiss under Rule 12(b)(6), this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief may be granted." *Farrell v. Transylvania Cty. Bd. of Educ.*, 175 N.C. App. 689, 695, 625 S.E.2d 128, 133 (2006) (citation, quotation marks and ellipses omitted). This includes not only dismissal based on the purported substantive claims raised in the complaint; "[*r*]*es judicata* is . . . a procedural question of law to be reviewed *de novo* pursuant to North Carolina law." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 679, 657 S.E.2d 55, 62, *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008).

III. Revocation of Consent

[1] Plaintiff contends:

> [T]he trial court's conclusion that the Florida proceeding and order was *res judicata* as to Ms. Quets's . . . claim for relief [on the grounds of fraud] is erroneous, because the Florida trial court never litigated any issues concerning the OAA. This is substantiated not only by a review of the Florida trial court's own orders but also by the admissions made by [defendants] in subsequent pleadings filed in Florida where [defendants] themselves admitted that issues concerning the OAA had not been litigated.
>
> . . . .
>
> The trial court in Florida entered a twenty-six page order which does not contain any discussion as to the parties' respective rights and obligations under the OAA.
>
> . . . [Plaintiff's] counsel repeatedly asked [defendants'] counsel to point out where in the Florida trial court's order was there any holding that the OAA was not procured through fraud. [Defendants] to this day have yet to make such a showing.
>
> [Defendants] have been unable to make any showing as to the alleged *res judicata* [e]ffect of the Florida trial court order with respect to the OAA because [defendants] by their own subsequent pleadings filed in Florida admit that issues concerning the OAA **were not litigated in Florida**.

(Emphasis in original.) We disagree with plaintiff.

> The doctrine of *res judicata* serves the
>
> the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial econ-

> omy by preventing needless litigation. . . . [W]here the second action between two parties is upon the same claim, the doctrine of *res judicata* allows the prior judgment to serve as a bar to the relitigation of all matters that were or should have been adjudicated in the prior action.

City of Asheville v. State, 192 N.C. App. 1, 17, 665 S.E.2d 103, 117 (2008) (citations, quotation marks and brackets in original omitted), *appeal dismissed and disc. review denied*, 363 N.C. 123, 672 S.E.2d 685 (2009).

"The essential elements of *res judicata* are: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in the prior suit and the present suit; and (3) an identity of parties or their privies in both suits." *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 138, 502 S.E.2d 58, 61, *disc. rev. denied*, 349 N.C. 228, 515 S.E.2d 700 (1998). The pleadings are compared to determine if the causes of action in the two suits are in fact the same claim. *See Bockweg v. Anderson*, 333 N.C. 486, 492-93, 428 S.E.2d 157, 162 (1993) ("The only issue presented by the pleadings in the prior action was plaintiffs' claim based on defendants' negligent failure to provide . . . appropriate nutrition [leading to brain damage]. Therefore, the judgment in the prior action is not *res judicata* to the present action involving defendants' negligent diagnosis and treatment of the pelvic infection.").

In Florida, "an order of termination of parental rights permanently deprives the parents or legal guardian of any right to the child[;]" hence, it is a final judgment for purposes of *res judicata*. *Stefanos v. Rivera-Berrios*, 673 So. 2d 12, 13 (Fla. 1996) (citing § 39.469(2)(b), Fla. Stat. (1991), which was renumbered as § 39.811 and amended by 1998 Fla. Laws, c. 98-403, § 93, eff. Oct. 1, 1998); *accord* N.C. Gen. Stat. § 7B-1112 (2007) ("An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the juvenile and of the juvenile to the parent arising from the parental relationship[.]").

There is no dispute that the parties were the same in the two actions. Turning to the factual allegations in the pleadings filed in the earlier action in Florida, the amended motion to set aside consent alleged:

> 23. The Birth Mother contends fraud was committed due to the alleged signing and notarization of the Open Adoption Agreement (which was contingent on the Consent[] for Adoption). The Open

> Adoption Agreement was not fully executed by all parties despite the notary jurat declaring that it had been signed by all in her presence on the stated dates. In fact, the Birth Mother informed the adoptive parents and Shorstein and Kelly that she was not consenting to the adoption and notified them accordingly before the adoptive parents actually signed the Open Adoption Agreement.
>
> 24. The Birth Mother contends there was never a "meeting of the minds" for an Open Adoption Agreement to be entered into.

Similarly, the complaint *sub judice* pled "Plaintiff would not have consented to Defendants' adoption of the minor children but for the Defendants' consent to Plaintiff maintaining a continuing relationship with the minor children after adoption and incorporation of the Open Adoption Agreement into the terms of any final order of adoption." Additionally, the complaint *sub judice* alleged that "[t]he defendants took advantage of [the fact that they were cousins of plaintiff's boyfriend] in gaining the Plaintiff's consent to the adoption of the minor children."

Both claims, in North Carolina and Florida, sought to set aside the consent to adoption based on fraud in the procurement of the OAA. Furthermore, the allegations about defendants' kinship to plaintiff's boyfriend were pled in much greater detail in the verified motion filed in Duval County Family Court as the basis of a cause of action for duress. We conclude the substance of the two claims was the same, sufficient to satisfy the identity of the claims element of *res judicata*.

Because all three elements of *res judicata* are present *sub judice*, we conclude the trial court did not err in dismissing plaintiff's action to revoke her Consent to Adoption on the basis of fraud. Accordingly, this assignment of error is overruled.

IV. Specific Performance of the OAA

[2] The trial court concluded:

> The Open Adoption Agreement was never incorporated into the final adoption decree, even though the trial judge was aware of its existence and references it in the decree but does not incorporate it. Therefore, it is not incorporated into a judgment, decree or other order providing for visitation of a child.
>
> . . . .

> [The] Open Adoption Agreement is a contract between the birth [mother] and the adoptive parents, not unlike a separation agreement between divorcing parents with provisions for custody and visitation. Like a separation agreement, the terms for custody and visitation are not enforceable by specific performance but, rather, by a Chapter 50 custody action of which, as previously noted, visitation is a component.

Plaintiff argues:

> North Carolina law does not govern the parties' rights under the OAA—Florida law does. North Carolina is required under the full faith and credit provisions of the federal constitution to enforce the OAA consistent with the law under which the OAA was adopted. This is Florida law. Since Florida law *clearly*[2] permits parties to enter into enforceable OAAs, [plaintiff] pled valid claims for the enforcement of the OAA, and her complaint should not have been dismissed.

(Emphasis and footnote added.) It appears that plaintiff has confused the legal status of private contracts with that of public judicial proceedings.

The Full Faith and Credit provision of the United States Constitution by its terms applies to "public Acts, Records, and judicial Proceedings" of other States, not to private contracts. U.S. Const. art. IV, § 1. More specifically, pursuant to the authority granted by the Full Faith and Credit Clause, Congress enacted the Parental Kidnaping Prevention Act ("PKPA") to prescribe the effect of child custody and visitation orders entered into in other States. U.S. Const. art. IV, § 1; 28 U.S.C. § 1738A (2006). The PKPA states, "[t]he appropriate authorities of every State shall enforce according to its terms, . . . any custody determination or visitation determination made" by a State with proper jurisdiction. 28 U.S.C. § 1738A(a) (2006). A " 'visitation determination' means a *judgment*, *decree*, *or other order of a court* providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications." 28 U.S.C. § 1738A(b)(9) (emphasis added).

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2. It is far from clear that OAAs are enforceable in Florida. Plaintiff cited no cases so holding and we found none either for or against. Indeed, defendants' adoption attorney believed that OAAs were enforceable, but plaintiff's appellate brief in the termination action asserted that they were not. We assume for our purposes that an OAA is enforceable in Florida.

In contrast, enforcement of private contracts entered into in other States is a matter of comity. *Davis v. Davis*, 269 N.C. 120, 125, 152 S.E.2d 306, 310 (1967) ("The extent to which the law of one [S]tate will be recognized and enforced in another depends upon the rule of comity. . . . It is thoroughly established as a broad general rule that foreign law or rights based thereon will not be given effect or enforced if opposed to the settled public policy of the forum." (Citations and quotation marks omitted.)). Comity, unlike full faith and credit, is voluntary and subject to four broad exceptions[3] in North Carolina. *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 517, 157 S.E. 860, 863 (1931) (outlining exceptions because "the rule of comity is not a right of any State or country, but is permitted and accepted by all civilized communities"); *Gooch v. Faucett*, 122 N.C. 270, 272-73, 29 S.E. 362, 363 (1898) (explaining that comity is a "voluntary act" whereby North Carolina courts "have always expounded and executed [contracts] according to the laws of the place in which they were made, provided that law was not repugnant to the laws or policy of" North Carolina) (quoting *Bank* [*of Augusta*] *v. Earle*, [38 U.S.] 13 Pet. 519, 589 (1839)).

Plaintiff's confusion is understandable. In Florida, as in North Carolina, private contracts between parties in domestic matters such as property settlement and child support are sometimes incorporated into a judgment or order of the court. *See*, *e.g*, *Eaton v. Eaton*, 238 So. 2d 166, 168 (Fla. 4th Dist. Ct. App. 1970) ("[O]nce such an agreement is approved by the court and by reference expressly made a part of the final decree of divorce, the provisions relating to custody and support of the minor child or children are no longer merely in the status of an agreement of the parties, but become elevated to the dignity and effect of a court decree."); *Smart v. State*, 198 N.C. App. ——, ——, —— S.E.2d ——, —— (2009). Upon incorporation the contract loses its status as a contract and becomes an

3. *Bundy v. Commercial Credit Co.* outlined the exceptions to the rule of comity as follows:

> The general doctrine that a contract, valid where it is made, is valid also in the courts of any other country or State, where it is sought to be enforced, even though had it been in the latter country or State it would be illegal and hence unenforceable, is subject to several exceptions: (1) When the contract in question is contrary to good morals; (2) when the State of the forum, or its citizens, would be injured by the enforcement by its courts of contracts of the kind in question; (3) when the contract violates the positive legislation of the State of the forum, that is, contrary to its Constitution or statutes[;] and (4) when the contract violates the public policy of the State of the forum.

200 N.C. 511, ——, 157 S.E. 860, 863 (citation and quotation marks omitted).

enforceable order of the court. *Walsh v. Walsh*, 388 So. 2d 240, 242 (Fla. 2d Dist. Ct. App. 1980) ("On incorporating the agreement the court elevated it to the dignity and effect of a court decree, which it then had continuing jurisdiction to enforce."); *accord Cavenaugh v. Cavenaugh*, 317 N.C. 652, 659, 347 S.E.2d 19, 24 (1986) ("A court approved separation agreement is enforceable by the contempt power of the court and may be modified like other judgments in domestic relations cases. . . . By incorporating the separation agreement of the parties into the judgment of divorce the trial judge made that agreement an order of the court . . . .").

Because the adoption judgment makes reference to the OAA, but does not use any specific language expressly "incorporating" the OAA into the adoption judgment or ordering the parties to comply with it, we find it necessary to determine whether the OAA is a judgment, subject to full faith and credit, or merely a contract, subject to the rule of comity and the four broad exceptions set forth in *Bundy*, 200 N.C. at 517, 157 S.E. at 863. This appears to be a case of first impression because we have been unable to find a case in Florida or North Carolina, considering what, if any, particular language must be used in a trial court order for an underlying domestic contract to be given the force of a judgment of a court.

Generally, a domestic contract is incorporated into a judgment of the court if (1) the parties express the intent to incorporate within the four corners of the contract, *Cavenaugh*, 317 N.C. at 660, 347 S.E.2d at 24, and (2) the contract is approved by the court, *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983). However, contracts or agreements affecting custody or visitation of minor children are always subject to the additional proviso that the trial court consider the best interest of the children before entering an order. *Morrow v. Morrow*, 103 N.C. App. 787, 789, 407 S.E.2d 286, 287 (1991) (" '[P]arents cannot in a separation agreement, or any other contract, enter into an agreement dealing with the custody and support of their children which will deprive the court of its inherent as well as statutory authority to protect the interests and provide for the welfare of minors.' " (Quoting 2 R. Lee, *N.C. Family Law* § 189 (1980).)). Florida adoption law is consistent with these general principles. "If the court determines that the *child's best interests will be served by post-adoption communication* or contact, the court shall so order, stating the nature and frequency for the communication or contact. This order shall be made a part of the final adoption order[.]" Fla. Stat. § 63.0427(1)(d) (2005).

Although the OAA stated that "the Birth Mother and the Adoptive Parents consent that this Agreement . . . will be referenced in the Final Judgment of Adoption" and the adoption judgment does refer to the OAA, the adoption judgment contains no indication that the trial court considered whether postadoption contact with plaintiff would be in the children's best interest. Accordingly, we conclude that the trial court did not intend for the OAA to become an enforceable order of the court subject to full faith and credit. The OAA remains a mere contract.

In order to decide if the OAA is enforceable in North Carolina as a contract, we must consider if it is subject to one of the four exceptions of the rule of comity. *Bundy*, 200 N.C. at 517, 157 S.E. at 863. The third exception to the rule of comity is "when the contract violates the positive legislation of the State of the forum, that is, contrary to its Constitution or statutes[.]" *Id.*

The OAA *sub judice* is contrary to N.C. Gen. Stat. § 48-3-610, which states:

> If a person executing a consent and the prospective adoptive parent or parents enter into an agreement regarding visitation, communication, support, and any other rights and duties with respect to the minor, this agreement shall not be a condition precedent to the consent itself, failure to perform shall not invalidate a consent already given, and *the agreement itself shall not be enforceable.*

N.C. Gen. Stat. § 48-3-610 (2007) (emphasis added). Because the OAA is a contract directly contrary to a North Carolina statute, it may not be enforced in this State.[4] *Bundy*, 200 N.C. at 517, 157 S.E. at 863. Accordingly, we conclude the trial court properly dismissed plaintiff's claim to specifically enforce the OAA.

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4. We are *not* holding that a *court order* for postadoption visitation by a birth parent, entered in one of the growing number of states which allow postadoption contact in adoption judgments and orders, would be unenforceable in North Carolina. *See, e.g.*, Minn. Stat. § 259.58 (2007) (allowing a trial court to include an agreement for postadoption visitation in an adoption order upon a finding that such visitation is in the child's best interests); Rev. Code Wash. § 26.33.295(2) (2005) (same); *In re Guardianship of K.H.O.*, 736 A.2d 1246, 1259 (N.J. 1999) (listing states which recognize postadoptive communication agreements and discussing reasons for and against recognizing such agreements). Failure to enforce a *court order* for postadoption visitation by a birth parent would be contrary to the PKPA, which states, "[t]he appropriate authorities of every State shall enforce according to its terms" any "judgment, decree, or other order of a court providing for the visitation of a child[.]" 28 U.S.C. § 1738A.

V. Standing to Seek Modification

[3] The trial court concluded that "once plaintiff's parental rights were terminated, she no longer has standing to bring an action for custody, of which visitation is a component, even as a third party." Plaintiff argues that the OAA gives her standing. We disagree with plaintiff.

"A person seeking custody under N.C. Gen. Stat. § 50-13.1 must be able to claim a right to such custody. . . . [A natural parent] los[es] that right when he consent[s] to the adoption of [his] children." *Kelly v. Blackwell*, 121 N.C. App. 621, 622, 468 S.E.2d 400, 401, *disc. review denied*, 343 N.C. 123, 468 S.E.2d 782 (1996). In other words, "the right of [a child's] natural mother [to seek custody] after she has permitted the child's adoption by others, is no greater than that of a stranger to the child." *Rhodes v. Henderson*, 14 N.C. App. 404, 407-08, 188 S.E.2d 565, 567 (1972) (internal parentheses omitted).

Plaintiff lost her right to seek custody of or visitation with the children when she consented to their adoption. The OAA, being unenforceable in this State, was not sufficient to restore that right. Accordingly, this argument is without merit.

VI. Rule 11 Sanctions

[4] Plaintiff contends the trial court erred when it imposed sanctions against her pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. We agree.

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner v. Duke University, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

"Rule 11 sanctions are inappropriate where the issue raised by a plaintiff's complaint is one of first impression." *Herring v. Winston-Salem/Forsyth Cty. Bd. of Educ.*, 188 N.C. App. 441, 453, 656 S.E.2d 307, 315 (2008). *Herring* reversed a trial court order imposing Rule 11 sanctions on the grounds that sanctions were

> unsupported because at the time Plaintiff filed the complaint, no case had specifically held that [plaintiff's legal position was incorrect]. Although we reach that conclusion in the present case, it is not appropriate to sanction Plaintiff's attorneys for filing the complaint in the present case when no case had specifically held so at that time. Accordingly, we hold that the trial court's conclusion of law [imposing Rule 11 sanctions] was unsupported.

Id.

Plaintiff's complaint, as we noted *supra* Part IV, raised a question of first impression. Even though we have upheld dismissal of plaintiff's complaint on all the substantive issues raised therein, the trial court's imposition of Rule 11 sanctions against plaintiff was error. Accordingly, the trial court order imposing sanctions is reversed.

VII. Conclusion

Res judicata bars plaintiff's claim to set aside her consent to adoption based on fraud. The OAA is a contract and not an enforceable order of the Florida court. Plaintiff has no standing to file an action for custody of the children. Accordingly, we affirm the order of the trial court dismissing plaintiff's complaint. However, Rule 11 sanctions were not appropriate in this case, and the order imposing Rule 11 sanctions is reversed.

Affirmed in part; reversed in part.

Judges JACKSON and STEPHENS concur.

STATE OF NORTH CAROLINA v. KERRY JAMES WADE

No. COA08-1414

(Filed 21 July 2009)

1. Evidence— testimony—inconsistencies between suppression hearing and trial—additional pertinent information

The trial court did not abuse its discretion in a felonious possession of cocaine and possession of drug paraphernalia case by failing to consider trial testimony of two officers allegedly containing additional pertinent information not included in their tes-

timony at the suppression hearing when deciding defendant's renewed motion to suppress the evidence obtained during the search of his person during his detention by the investigating officers because: (1) a review of the record revealed there was no additional pertinent information discovered during the trial that necessitated a reopening of the record or a reconsideration of the trial court's initial decision to deny defendant's suppression motion; (2) a number of the alleged inconsistencies in testimony do not involve contradictions of the type claimed by defendant; (3) even if the record reflected the existence of the inconsistencies between the testimony of the two officers at the suppression hearing and at trial, these inconsistencies did not constitute additional pertinent information of the type contemplated under N.C.G.S. § 15A-975(c); (4) defendant's trial counsel cross-examined the investigating officers concerning the alleged inconsistencies; and (5) contrary to defendant's assertion, the record reflected that the trial court understood that one of its functions at the suppression hearing was to make any necessary credibility determinations.

2. Search and Seizure— warrantless search—motion to suppress—person in need of immediate aid or need to protect or preserve life or prevent serious injury

The trial court's decision to deny defendant's suppression motion in a felonious possession of cocaine and possession of drug paraphernalia case was not subject to reversal on appeal because: (1) warrantless searches are permissible when officers believe that persons in the premises to be searched are in need of immediate aid or where there is a need to protect or preserve life or prevent serious injury; and (2) although defendant contends the investigating officers exceeded the scope of the investigative activities that they were allowed to undertake in light of the "be on the lookout" message, the mere fact that investigating officers saw no indication that the pertinent individual had sustained personal harm or that he was under direct physical restraint at the time that he exited the vehicle simply did not suffice to render further investigative activities inappropriate given the concerns relayed to investigating officers that the individual might have been at risk of harm or consorting with individuals with illegal drug involvement.

3. Search and Seizure— informing jury that officers had probable cause to search—harmless error

Although the trial court erred in a felonious possession of cocaine and possession of drug paraphernalia case by allowing the prosecutor to disclose the trial court's finding that investigating officers had probable cause to search defendant to the jury at trial, the error was not prejudicial because it cannot be concluded that there was a reasonable possibility that the jury would have reached a different result at trial had the prosecutor not made the challenged comment given the overwhelming evidence of defendant's guilt including the admission of the cocaine base and pipe seized at the time of the investigative stop.

Appeal by Defendant from judgment entered 3 June 2008 by Judge William C. Griffin, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 6 May 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel S. Johnson, for State.

Kevin P. Bradley, for defendant.

ERVIN, Judge.

On 15 September 2007, the Burlington Police Department issued a "be on the lookout" alert for the owner of a green Saturn bearing a specific license plate number and registered to Aaron Daniel Zachary, a twenty-six-year-old white male (Zachary). Zachary had been reported as missing by his parents, who did not know where he was and believed that he was in danger.

While investigating an unrelated incident on South Mebane Street, Officer Tom Meisenbach of the Burlington Police Department (Officer Meisenbach) observed a green Saturn bearing the license plate number specified in the missing person report drive by. As a result of the fact that Zachary's photograph had been distributed earlier that day, Officer Meisenbach knew that the missing person was a white male. At the hearing conducted for the purpose of addressing Defendant's suppression motion, Officer Meisenbach testified that, when he saw the green Saturn drive by:

> I noticed it was being driven by a black male and there was a white male in the back passenger seat . . . [and] a white female in the front right passenger seat . . . . And I remember thinking it was

> really odd because Mr. Zachary was a white male and it was his tag. . . . And I thought it was kind of odd that the vehicle was being driven by a black male, especially. And so I got on the radio and called for any officer in the area. . . . Corporal White answered up.

Officer Meisenbach acknowledged that he did not suspect illegal activity when he initially spotted the vehicle. Although Officer Meisenbach did not have any indication that Zachary was at risk, he stated that "it did cross my mind" that he might be in some sort of trouble.

Meanwhile, Corporal Billy White of the Burlington Police Department (Corporal White) pulled behind the green Saturn. Officer White noted that the "[vehicle] was in the place where [Zachary] was reported missing." Though Zachary did not appear to be subject to any sort of restraint, Officer White decided to detain the driver, who turned out to be the defendant, Kerry James Wade, and investigate further. At trial, Officer White testified that:

> I observed Mr. Zachary in the back getting out.[1] Observed Mr. Wade getting out. I asked Mr. Wade for some identification. He asked me why. I told him that I was investigating a crime being involved—or reported for that car. I didn't tell him about Mr. Zachary at that minute.

As the driver exited the green Saturn, Corporal White testified that he saw the driver drop a tan rock-like substance. Corporal White believed the substance to be crack cocaine. When asked whether Defendant was free to leave prior to dropping the substance, Corporal White responded in the negative.

Upon Officer Meisenbach's arrival, Corporal White directed Defendant to the rear of the vehicle and instructed Officer Meisenbach to frisk Defendant for weapons and to detain him. At trial, Officer Meisenbach stated that:

> I don't remember exactly what Corporal White instructed me initially, but I went ahead and asked for consent to search him for any drugs or weapons or anything like that. He denied it and said I had no reason to. And then a minute later, Corporal White came back around the front of—to the back of the car where I was and told me to go ahead and frisk Mr. Wade.

---

1. Zachary claimed to have been outside the Saturn by the time that the officers arrived.

> At that time, I asked Mr. Wade to put his hands on the vehicle and I proceeded to do a pat-down on the exterior clothing, at which point Mr. Wade turned around and actually slapped my hands and became very verbally aggressive and stated I had no reason to frisk him.

After that, according to Officer Meisenbach's trial testimony:

> I asked him to put his hands on the car again. At that time, Corporal White came back to the back of the car again. And I honestly don't recall exactly where Corporal White was standing initially. But he came back and told Mr. Wade to put his hands on the car because we needed to frisk him for weapons. I started to do it and, again, Mr. Wade turned around and, quite literally, slapped my hands. At that point, Corporal White and I told him he was being detained. And after a brief struggle, we placed him in handcuffs at the back of the vehicle.

Corporal White noted that he observed a physical altercation between Defendant and Officer Meisenbach, so he assisted Officer Meisenbach in handcuffing Defendant.

While Officer Meisenbach continued to pat Defendant down, Corporal White picked up the substance that had been dropped on the ground and placed it into his pocket. Corporal White reported submitting the substance retrieved from Defendant's pocket to Officer Meisenbach. Officer Meisenbach, on the other hand, testified:

> A. Again, I don't remember the specific wording, but as [Officer White] approached, he came back and said, well, he's under arrest now. He dropped a crack rock over there.
>
> Q. Right. He told you this stuff.
>
> A. Yes.
>
> Q. He didn't show you where the rock was.
>
> A. No.
>
> Q. He didn't show you the rock.
>
> A. No.
>
> Q. You don't know where the rock is.
>
> A. No.

During the pat down, Officer Meisenbach seized a plastic bag containing what appeared to be cocaine and a glass smoking pipe from

Defendant's pants pocket. Sheila Bayler, a chemist employed by the State Bureau of Investigation, analyzed the substance retrieved from Defendant's pocket and testified that it contained cocaine base weighing 0.7 grams.

On 15 September 2007, a warrant charging Defendant with felonious possession of cocaine and possession of drug paraphernalia was issued. On 22 January 2008, the Alamance County grand jury indicted Defendant for felonious possession of cocaine and possession of drug paraphernalia. In addition, the grand jury returned a bill of indictment charging Defendant with having attained the status of an habitual felon.

Prior to trial, Defendant filed a motion to suppress the cocaine and glass smoking pipe seized from his person. In his suppression motion, Defendant asserted that the "search and seizure was not incident to an arrest or inventory. . . [and] was without probable cause or legal justification." After an evidentiary hearing held prior to the selection of a jury, the trial court denied Defendant's suppression motion. In its order denying Defendant's suppression motion, which was dictated into the record after the jury had begun its deliberations, the trial court found as fact that:

> 1. On September 15, 2008, before going on patrol, Officer Meisenbach of the Burlington Police Department received a "be on the lookout" for a green Saturn automobile which included a specific license plate number and a photograph of a person reported to be missing that was connected with this automobile.
>
> 2. While out of his patrol car investigating an unrelated matter at Garden Apartments on South Mebane Street, Officer Meisenbach saw a vehicle matching the description given to him before he went on his shift and also recognized one of the passengers from a photograph previously provided.
>
> 3. He radioed for assistance for some other officer to check the vehicle he had seen.
>
> . . . .
>
> 4. Officer White responded to the call and pulled in behind the green Saturn as it parked in a parking lot. The Defendant Wade was the driver and a white female was in the front passenger seat, a white male in the rear passenger seat.
>
> During an interaction with the driver, that is, the Defendant Wade, about the identification, Officer White saw the defendant

drop what he knew to be a cocaine "crack rock." Put crack rock in quotes.

Next number. By the time Officer Meisenbach had arrived, he was asked by Officer White to pat down the Defendant Wade for weapons. During the pat down a plastic bag containing what appeared to be cocaine was found along with a glass smoking pipe.

Defendant—thereafter, Defendant Wade was arrested for possession.

Based upon these findings of fact, the trial court concluded as a matter of law that, "based upon the 'be on the lookout' the officers had authority to make a brief investigative stop of the vehicle described;" that, "as a consequence of the stop[,] Officer White personally observed the defendant in violation of the state law with regard to the possession of cocaine;" that, "[a]t that point[,] Officer White had authority to arrest the Defendant Wade based upon his personal observation;" and that "[n]one of the defendant's Constitutional rights with regard to search and seizure were violated by the brief investigatory stop that led to his arrest."

After the trial court denied Defendant's motion to suppress, the case came on for trial before a jury. As soon as the jury was allowed to begin its deliberations and immediately prior to the dictation of the trial court's findings of fact and conclusions of law concerning Defendant's motion to suppress, the following colloquy occurred between Defendant's trial counsel and the trial court:

MR. MARTIN: Judge, I would make a further motion at this time to adopt the trial testimony as part of the evidence provided in the motion to suppress in that the evidence of the second police report—supplemental police report of Officer Meisenbach had been provided to me in between the time of the motion and the trial and there was additional cross-examination, additional testimony which could go to the question in front of the Court. I would just ask that the Court adopt that as part of the evidence.

THE COURT: I don't think—its in the record. Whether I adopt it or not I don't think makes any difference. I—it does not affect my ruling—

MR. MARTIN: I understand.

At that point, the trial court dictated its findings of fact and conclusions of law addressing the issues raised by Defendant's suppression motion into the record.

On 3 June 2008, the jury convicted Defendant of felonious possession of cocaine and possession of drug paraphernalia. After finding that Defendant had a Prior Record Level of VI and after accepting Defendant's admission to having attained habitual felon status, the trial court sentenced Defendant to a minimum term of 168 months and a maximum term of 211 months imprisonment in the custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment.

Renewed Motion to Suppress

[1] In his first argument, Defendant contends that the court erred by failing to consider the trial testimony in deciding his renewed motion to suppress the evidence obtained during the search of his person during his detention by the investigating officers.[2] In support of this contention, Defendant relies on N.C. Gen. Stat. § 15A-975(c), which provides that, "upon a showing by the defendant[] that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, he may permit the defendant to renew the motion . . . ." After careful consideration of Defendant's contentions, we conclude that the trial court did not err.

According to established North Carolina law, a trial judge may allow a defendant to renew an unsuccessful pretrial suppression motion in the event that the defendant shows that he or she has discovered additional pertinent information that could not have been obtained through the exercise of due diligence by the time of the trial court's ruling on the defendant's pretrial suppression motion. *State v. Blackwood*, 60 N.C. App. 150, 152, 298 S.E.2d 196, 198 (1982); N.C. Gen. Stat. § 15A-975(c). A trial court's ruling on a request to renew a pretrial motion to suppress is subject to appellate review under an

2. According to the record, the motion that Defendant actually made at trial was that the trial court "adopt" the evidence received at trial as part of the evidentiary record on the basis of which Defendant's suppression motion would be decided. However, both Defendant and the State have addressed this issue on appeal as if it involved a request to renew Defendant's suppression motion pursuant to N.C. Gen. Stat. § 15A-975(c). As a result, we will examine the arguments advanced by Defendant in support of this assignment of error as if his "adoption" request was a request to renew his suppression motion as authorized by N.C. Gen. Stat. § 15A-975(c).

abuse of discretion standard. *State v. Marshall*, 94 N.C. App. 20, 32, 380 S.E.2d 360, 367 (1989). As a result, the issue before this Court is whether the trial court abused its discretion by concluding that the testimony of Corporal White and Officer Meisenbach at trial contained "additional pertinent information" not included in their testimony at the hearing held for the purpose of considering Defendant's pretrial suppression motion.

According to Defendant, the evidence received at trial "revealed significant new information calling into question both the Superior Court's finding of fact that Officer White saw [Defendant] drop a crack rock while interacting with [Defendant] regarding the identification of [Zachary] and the Superior Court's conclusion of law that none of [Defendant's] constitutional rights were violated by the investigatory stop." More particularly, Defendant contends that, during the pretrial hearing on his suppression motion, Officer White provided testimony that he immediately saw Defendant drop a "crack rock" as he approached the vehicle to inquire about the missing person. Defendant further contends that Corporal White contradicted this statement during his trial testimony by testifying that he was already aware that the male passenger was the missing person at the time that he approached the green Saturn and that Defendant discarded the crack rock after being informed that the officer was conducting a criminal investigation involving the car. Defendant further notes that, at the pretrial suppression hearing, Corporal White testified that he "asked Officer Meisenbach to frisk [Defendant] for any weapons because he was going to be detained." Officer Meisenbach, on the other hand, stated that he initially sought Defendant's consent to search and that Officer White subsequently "came back to the car . . . [and] at that time. . . informed [him] that [Defendant] was under arrest. . . [because] he had dropped a crack rock when he got out of the vehicle." Finally, despite Corporal White's testimony to the contrary, Defendant contends that the evidence received at trial indicates that Corporal White never showed the alleged dropped crack rock to Officer Meisenbach or presented the alleged crack rock for admission into evidence. As a result, Defendant contends that the testimony received at trial constituted additional pertinent information that the trial court should have considered in ruling upon the admissibility of the cocaine and the pipe seized from Defendant's person.

After carefully reviewing the record, we have not identified any additional pertinent information discovered during the trial that necessitated a reopening of the record or a reconsideration of the

trial court's initial decision to deny Defendant's suppression motion. As we understand Defendant's argument, the additional pertinent information upon which Defendant relies consists of alleged inconsistencies between the testimony received at the pretrial suppression hearing and at trial concerning the point in time at which Defendant allegedly dropped a crack rock, the reason that Corporal White gave for detaining Defendant, and the extent to which Corporal White did or did not show the alleged dropped crack rock to Officer Meisenbach coupled with the State's failure to seek the admission of the alleged dropped crack rock into evidence. Although Defendant's argument is not entirely clear, it appears that he is contending that the alleged inconsistencies between the testimony offered by the investigating officers at the pretrial suppression hearing and at trial constituted "additional pertinent information" because they cast serious doubt upon the investigating officers' credibility.

After careful consideration of the record and briefs, we conclude that a number of the alleged inconsistencies do not involve contradictions of the type claimed by Defendant. For example, despite Defendant's claim that Corporal White testified at the suppression hearing that he did not know that the rear seat passenger was Zachary while testifying at trial that he knew Zachary was the passenger, the record does not actually indicate at any point that Corporal White definitely knew that Zachary was in the rear passenger seat at the time that he approached the car. Similarly, the record does not reflect that Corporal White ever testified during the suppression hearing that the events that he described at trial as having occurred at the time that he approached the green Saturn and began his interactions with Defendant did not occur. Moreover, Corporal White never testified at trial that he did not put the crack rock that Defendant allegedly dropped "into evidence;" instead, he simply stated at trial that he did not have the substance in the courtroom. Finally, Defendant has not pointed us to any portion of Corporal White's testimony at either the suppression hearing or at trial in which he claimed to have given the crack rock that Defendant allegedly dropped (as compared to the cocaine base later seized from Defendant's person) to Officer Meisenbach. As a result, it is not clear to us that the alleged inconsistencies upon which Defendant relies actually involved differences between the investigating officers' testimony at the suppression hearing and during the trial.

Even if the record does, in fact, reflect the existence of the inconsistencies between the testimony of Corporal White and Officer

Meisenbach at the suppression hearing and at trial as Defendant contends, we do not believe that these inconsistencies sufficed to constitute additional pertinent information of the type contemplated by N.C. Gen. Stat. § 15A-975(c). At best, the inconsistencies upon which Defendant relies were relatively minor and did not implicate the basic facts upon which the trial court relied in denying Defendant's pretrial motion to suppress, which were that the investigating officers initially stopped the green Saturn to investigate a missing person report, that Defendant was asked to get out of the vehicle as part of the investigating officers' response to the missing person report, that Defendant dropped what Corporal White believed to be a crack rock as he exited the green Saturn, and that a search incident to arrest following the discovery of the dropped crack rock resulted in the discovery of cocaine base and a pipe on Defendant's person. Although actual inconsistencies between the investigating officers' testimony at the pretrial suppression hearing and at trial relating to the central issues that the trial court was required to decide in ruling upon Defendant's pretrial suppression motion upon which Defendant relies in this Court might have constituted "additional pertinent information" under N.C. Gen. Stat. § 15A-975(c), none of the alleged inconsistencies upon which Defendant appears to rely are material in and of themselves. Furthermore, after hearing the investigating officers' trial testimony, the trial court specifically stated on the record that the additional testimony did not impact its previous decision to deny the motion. Finally, Defendant's trial counsel cross-examined the investigating officers concerning alleged inconsistencies between their testimony at the suppression hearing and information contained in a written police report. *State v. Bracey*, 303 N.C. 112, 124, 277 S.E.2d 390, 397 (1981) (stating that "cumulative or corroborative evidence" does not require the reopening of a suppression hearing pursuant to N.C. Gen. Stat. § 15A-975(c)); *Marshall*, 94 N.C. App. at 32, 380 S.E.2d at 367 , *disc. review denied* 325 N.C. 275, 384 S.E.2d 526 (1989) (stating that where "[a]ll of the information [in a supplemental report alleged to constitute material newly discovered evidence] was brought out through testimony of the officers at the pre-trial suppression hearing," there was no basis for reopening a suppression hearing pursuant to N.C. Gen. Stat. § 15A-975(c)). As a result, for all of these reasons, we are unable to say that the trial court abused its discretion by concluding that the alleged inconsistencies upon which Defendant relies did not constitute "additional pertinent information" of the type contemplated by N.C. Gen. Stat. § 15A-975(c).

In addition, we are not persuaded by Defendant's assertion that the trial court "misunder[stood] the suppression determination to be a sufficiency of the evidence determination rather than a determination of credibility, weight of the evidence, and proof . . . ." On the contrary, the record clearly reflects that the trial court understood that one of its functions at the suppression hearing was to make any necessary credibility determinations. During a colloquy that occurred prior to the suppression hearing, the following exchange took place:

THE COURT: Put them on [sic] stand and see what they say.

MR. MARTIN: Yes, sir.

THE COURT: And the motion alleges that there was no basis for the traffic stop; is that essentially what this is about?

MR. MARTIN: Judge, yes, that there's no basis for the traffic stop and also that there was no basis for the personal search of my client. There are—we have inconsistent reports between the officers.

THE COURT: Well, forget the reports. We're going to find out—

MR. MARTIN: I understand.

THE COURT: —we're going to find out under oath here what went on.

MR. MARTIN: Yes, sir, I understand. But upon information and belief—

THE COURT: You know, the trouble with all this discovery business is this. You can talk to a witness five times; you get five different stories, you know.

MR. MARTIN: Yes, sir.

Although the trial court did, at one point, sustain the State's objection to cross-examination questions intended to show inconsistencies between the testimony of Corporal White and information contained in certain police reports by stating "I'm not a jury," that comment does not in any way tend to show anything more than the trial court's preference that Defendant's trial counsel "[m]ove on to something else" rather than a statement that the trial court did not believe that it had the responsibility of making a credibility determination as part of the process of deciding Defendant's suppression motion. Similarly, the trial court's statements that the "Officer's testified he saw it drop,"

that "I'm going to let you have at him in front of the jury," and that "there's sufficient evidence to warrant going forward with the case" cannot be fairly read as a disclaimer of any obligation on the part of the trial court to make needed credibility determinations. On the contrary, the trial court's statement is nothing more than an announcement that the trial court was satisfied that the evidence supported allowing the jury to hear the testimony of the investigating officers concerning their search of Defendant, which is an entirely different matter. As a result, Defendant's challenge to the trial court's refusal to reopen the suppression hearing cannot be sustained.

Motion to Suppress

[2] Next, Defendant challenges the trial court's refusal to suppress the evidence seized from Defendant's person during the investigatory stop. After careful consideration, we conclude that the trial court's decision to deny Defendant's suppression motion is not subject to reversal on appeal.

"When reviewing [an appellate challenge to the denial of a] motion to suppress, the trial court's findings of fact are conclusive and binding on appeal if supported by competent evidence." *State v. Fields*, 195 N.C. App. 740, 742-43 673 S.E.2d 765, 767 (2009) (citing *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648, *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007)). On the other hand, a trial court's conclusions of law in an order denying a motion to suppress are subject to *de novo* review. *Edwards*, 185 N.C. App. at 702, 649 S.E.2d at 648 (quoting *State v. Chadwick*, 149 N.C. App. 200, 202, 560 S.E.2d 207, 209 (2002)). As a result of the fact that Defendant has not challenged any of the trial court's findings of fact, we must decide the issues raised by Defendant's challenge to the trial court's order denying his motion to suppress on the basis of the facts found by the trial court.

In challenging the trial court's decision to deny his suppression motion, Defendant essentially argues that the investigating officers had unlawfully detained Defendant prior to the point at which Defendant allegedly dropped the crack rock and that the discovery of the cocaine base and the pipe were the fruits of this unlawful detention.[3] After careful consideration of Defendant's arguments on appeal, we disagree.

3. After a careful review of the record, it is not clear to us that the events surrounding the dropping of the crack rock occurred in precisely the order outlined in Defendant's brief. In addition, the exact order of the events that occurred immediately before and after Defendant dropped the crack rock is not delineated in the trial court's

Warrantless searches are presumed to be unreasonable and therefore violative of the Fourth Amendment of the United States Constitution. *State v. Logner*, 148 N.C. App. 135, 139, 557 S.E.2d 191, 194 (2001). However, there are "a few specifically established and well-delineated exceptions," *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576, 585 (1967). When, for example, officers believe that persons in the premises to be searched are in need of immediate aid or where there is a need to protect or preserve life or prevent serious injury, a warrantless search of the location in question does not violate the Fourth Amendment. *State v. Phillips*, 151 N.C. App. 185, 192, 565 S.E.2d 697, 702 (2002) (citations omitted).

According to the trial court's findings, the initial stop of the green Saturn which Defendant was driving stemmed from the "be on the lookout" message provided to officers of the Burlington Police Department. Having received such a missing person report regarding Zachary, it was perfectly appropriate for Officer Meisenbach and Officer White to temporarily prevent the green Saturn from being driven off, detain the occupants, and make sure that Zachary was not in any danger of harm. Although Defendant does not appear to dispute the appropriateness of the officers' initial decision to prevent the green Saturn from being driven off, he contends that the fact that Zachary did not appear, at the time that he exited the vehicle, to have been battered or restrained against his will eliminated the necessity for further investigative activities and that all such activities should have ceased as soon as these facts became apparent. Thus, Defendant's ultimate complaint is that the investigating officers exceeded the scope of the investigative activities that they were allowed to undertake in light of the "be on the lookout" message.

According to the "be on the lookout" report, Zachary's parents "believed him to be at risk," "had no idea where he was," and were concerned that "he was possibly frequenting drug areas within the city." At the time that Officer Meisenbach saw Zachary in the green Saturn, he was riding in the back seat of his own vehicle, which was being driven by Defendant. The mere fact that the investigating officers saw no indication that Zachary had sustained personal harm or that he was under direct physical restraint at the time that he exited the vehicle simply did not suffice to render further investigative activities inappropriate, given the concerns relayed to investigating offi-

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order denying Defendant's suppression motion. However, we have chosen to address the argument advanced in Defendant's brief on the basis of an assumption that the facts are as the Defendant has outlined them in his arguments to this Court.

cers that Zachary might have been at risk of harm or consorting with individuals with illegal drug involvement. For example, the investigating officers were entitled to make further inquiry as to whether Zachary was subject to some form of restraint other than direct physical confinement or whether he was in danger of harm as the result of drug consumption by himself or someone else, such as the driver of his automobile. For that reason, the actions of the investigating officers in continuing to look into the situation in which Zachary found himself after Zachary exited the vehicle did not exceed constitutional limitations. We therefore overrule this assignment of error.

Prosecutorial Question Concerning Trial Court's Finding of Probable Cause

[3] Finally, Defendant argues that the trial court erred by allowing the prosecutor to disclose the trial court's finding that investigating officers had probable cause to search Defendant to the jury at trial. During redirect examination, the prosecutor posed the following question to Officer White in the presence of the jury:

> Q. Okay. Now, with respect to the probable cause Mr. Martin's asked you about, are you aware that at a previous time in a court of law, a superior court judge had found probable cause?
>
> MR. MARTIN: Objection. Objection. Move to strike. Ask for mistrial.
>
> THE COURT: What was your question?
>
> MR. MARTIN: Judge, I'd like this to be made outside the hearing of the jury.
>
> THE COURT: Step up here, please.
>
> (There was a Bench conference with Mr. Boone and Mr. Martin in attendance.)
>
> THE COURT: Overruled. Motion denied.

According to Defendant, the trial court's failure to sustain his objection to this question impermissibly allowed the State to place the trial court's opinion that there was probable cause for the search of Defendant and the seizure of the cocaine base and pipe that underlay the State's charges against Defendant before the jury.

As a general proposition, "the trial judge's legal determination or opinion on the evidence made during a hearing properly held outside

the jury's presence" should not be disclosed to the jury. *State v. Allen*, 353 N.C. 504, 509, 546 S.E.2d 372, 375 (2001), *disc. review denied and appeal dismissed* 360 N.C. 66, 621 S.E.2d 878 (2005). As a result, "[p]arties in a trial must take special care against expressing or revealing to the jury legal rulings which have been made by the trial court, as such disclosures will have the potential for special influence with the jury." *Id.* at 509-10, 546 S.E.2d at 375. The Supreme Court reached this conclusion on the grounds that prosecutorial comments disclosing a trial judge's legal ruling, even though that ruling was not directly stated by the trial court, had "virtually the same effect" as an expression of the trial court's opinion as to the "credibility of evidence that was before the jury." *Id.* at 511, 546 S.E.2d at 375-76. Such conduct indirectly results in a violation of N.C. Gen. Stat. § 15A-1222, which provides that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury."

An examination of the relevant portion of the record establishes that the prosecutor's question impermissibly disclosed the trial court's finding that the investigating officers had probable cause to search Defendant to the jury. Although the prosecutor's assertion that the investigating officers had probable cause to search Defendant is not as direct an affirmation of the credibility of the evidence proffered by the State as the comment at issue in *Allen*, 353 N.C. at 508, 546 S.E.2d at 374 (" 'And you heard her words through Officer Barros, because the Court let you hear it, because the Court found that they were trustworthy and reliable.' "), we agree with Defendant that the prosecutor's assertion that a finding that the investigating officers had probable cause to search Defendant is difficult to distinguish from a favorable comment on the credibility of the State's witnesses given the facts of this case. As a result, the trial court erred by overruling Defendant's objection to and denying Defendant's motion to strike the prosecutor's comment.

Even so, the mere asking of a question, without more, does not ordinarily result in sufficient prejudice to a defendant to necessitate a new trial. *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979) (citing *State v. Barrow*, 276 N.C. 381, 172 S.E.2d 512 (1970)). In order to demonstrate that a trial court's error was prejudicial, a defendant must show that there is a reasonable possibility that a different result would have been reached in the absence of the trial court's error. N.C. Gen. Stat. § 15A-1443(a).

After careful consideration of the record, we cannot conclude that there is a reasonable possibility that the jury would have reached a different result at trial had the prosecutor not made the challenged comment. Unlike the situation in *Allen*, the comment was embodied in a question that was never answered. Moreover, unlike the situation in *Allen*, the challenged comment did not involve a direct assertion that the State's evidence was "trustworthy and reliable." In other words, despite the fact that Defendant clearly challenged the credibility of the account of the events that occurred at the time of the investigatory stop which led to Defendant's arrest, there is a material difference between the impact on the jury of evidence that a trial judge believed that the State's evidence was "trustworthy and reliable" and evidence that the actions of the investigating officers were supported by "probable cause." Finally, although Defendant clearly claims that the investigating officers' claim that Defendant dropped a crack rock during the investigatory stop was a complete fabrication, it does not appear to us that Defendant is contending that the officers' contention that cocaine base and drug paraphernalia were found on his person was a fabrication as well. Given our determination that the trial court did not err in admitting the cocaine base and pipe seized at the time of the investigative stop, the evidence of Defendant's guilt is simply overwhelming. As a result, for all of these reasons, we conclude that there is no reasonable possibility that the outcome at trial would have been different had the trial court sustained Defendant's objection and allowed Defendant's motion to strike the trial court's comment.

After careful consideration of the record and briefs, we conclude that Defendant received a fair trial, free from prejudicial error. Thus, we further conclude that Defendant is not entitled to any relief on appeal.

NO PREJUDICIAL ERROR.

Judges ELMORE and STROUD concur.

HOKE COUNTY BOARD OF EDUCATION, ET AL, PLAINTIFFS, AND ASHEVILLE CITY BOARD OF EDUCATION, ET AL, PLAINTIFF-INTERVENORS v. STATE OF NORTH CAROLINA; STATE BOARD OF EDUCATION, DEFENDANTS

No. COA08-1036

(Filed 21 July 2009)

1. Appeal and Error— appealability—interlocutory order—denial of attorney fees—public interest—heard under Rule 2

An appeal from the denial of attorney fees in a schools case was heard under Appellate Rule 2 even though it was interlocutory because this case is of great public interest and import involving poor school districts and a sound basic education.

2. Costs— attorney fees—school performance—failure to act not an action by State

The trial court did not err by determining that N.C.G.S. § 6-19.1 did not apply in this case, which involved school performance. Although the State may have failed to act, its failure cannot be extrapolated into "state action" or viewed as the equivalent of pressing a claim against plaintiffs as envisioned by the statute.

3. Costs— attorney fees—common fund doctrine—school performance—general social grievance—people benefitting not easily identifiable

The trial court did not err by holding that the common fund doctrine was not applicable and that plaintiffs should not be awarded attorney fees in a case involving school performance where the benefits to the state's school children vindicated a general social grievance rather than individual complaints, the class of people benefitting was far from small and easily identifiable, the benefits could not be traced with accuracy, the costs cannot be shared among beneficiaries with much precision, and plaintiffs sought to procure a percentage of the common fund far in excess of the fees actually billed to them.

4. Costs— attorney fees—substantial benefit doctrine—not adopted in North Carolina

The trial court did not err by concluding that the substantial benefit doctrine was not applicable to a motion for attorney fees in a school performance case. The substantial benefit doctrine has not been adopted in North Carolina.

5. Costs— attorney fees—school performance—private attorney general doctrine—not applicable

The trial court did not err by holding that the private attorney general doctrine was not applicable to the award of attorney fees in a school performance case where there was no legislative authority for the doctrine.

Judge STEVENS concurring.

Appeal by plaintiffs from an order entered 5 May 2008 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 26 March 2009.

Parker Poe Adams & Bernstein, LLP, by Robert W. Spearman, Melanie Black Dubis and Scott E. Bayzle; and Armstrong Law, PLLC, by H. Lawrence Armstrong, Jr., for plaintiffs-appellants.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Thomas J. Ziko, for defendants-appellees.

JACKSON, Judge.

Plaintiffs—students, parents, and school boards from Hoke, Halifax, Robeson, Cumberland, and Vance Counties—appeal the trial court's order denying them attorneys' fees. For the reasons stated below, we affirm.

This case originated in 1994 and became a hallmark of education law in this State.[1] The North Carolina Supreme Court, in its first *Leandro* opinion, concluded that the North Carolina Constitution "guarantee[s] every child of this state an opportunity to receive a sound basic education in our public schools." *Leandro v. State of North Carolina*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (*Leandro I*). The Court remanded the case to the trial court to determine whether the State had failed in its constitutional duty to provide such sound basic education. *Id.* at 357-58, 488 S.E.2d at 261.

In its second *Leandro* opinion, the Court affirmed the trial court's conclusion that the State had failed in its constitutional duty to provide students in Hoke County with the opportunity to obtain a sound basic education. *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 647, 599 S.E.2d 365, 396 (2004) (*Leandro II*). It also affirmed the trial

1. Details of the underlying facts may be found in prior appellate opinions: *Leandro v. State of North Carolina*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997), and *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004).

court's ruling that the State must act to correct these deficiencies. *Id.* Proceedings as to the other rural school districts were to continue "in a fashion that is consistent with the tenets outlined in [the] opinion." *Id.* at 648, 599 S.E.2d at 397.

In the years since *Leandro II*, the trial court has continued to monitor the progress of the State's efforts to comply with *Leandro I* and *Leandro II*. The State has established the Disadvantaged Student Supplemental Fund ("DSSF") to assist at-risk children, and has fully funded the Low Wealth Schools Fund ("LWF"). Additionally, the State has allocated funds to (1) expand the More-at-Four program which provides education to at-risk four-year-olds; (2) reduce class size; (3) increase resources to the Hoke County school system, including increased teacher salaries and creation of Learn to Earn High Schools; and (4) create new programs to adequately train school superintendents and administrators.

Through 30 April 2007, plaintiffs' counsel had devoted in excess of 17,000 hours in the fourteen years of this litigation. Hourly rates were below those charged to other clients. Most of the legal fees were paid from local tax revenues of the five plaintiff school districts, based upon their respective student populations. Over $175,000.00 was paid by the North Carolina Low Wealth Schools Consortium, a group comprised of counties eligible for LWF funding. Total attorneys' fees billed and paid, excluding costs, totaled nearly $2.5 million.

On 19 December 2005, plaintiffs filed a motion seeking attorneys' fees and costs. Plaintiffs submitted several theories upon which to award attorneys' fees: (1) North Carolina General Statutes, section 6-19.1, (2) the common fund doctrine, (3) the substantial benefit doctrine, and (4) the private attorney general doctrine. The State was not required to respond until 2007. Plaintiffs filed a supplemental memorandum and affidavit in support of their motion on 7 June 2007. The State filed its response on 11 September 2007. The trial court held a hearing on the matter on 28 February 2008.

In its Memorandum of Decision and Order dated 5 May 2008, the trial court commended plaintiffs' counsel for their excellent work in the matter, noting, "Plaintiffs' counsel have performed a significant public service in this case that has resulted in a great contribution to the citizens of North Carolina and to the jurisprudence of this State—of that there can be no dispute." However, the trial court found no legal basis upon which to award attorneys' fees. Therefore, it denied plaintiffs' motion as to attorneys' fees. It left open the issue as to

whether costs should be awarded. Because it was an ancillary matter that would not affect the on-going proceedings, the trial court certified pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure that there was no just reason to delay any appeal of the matter. Plaintiffs appeal.

[1] The 5 May 2008 order does not dispose of the entire case; as noted above, the on-going proceedings may continue, unaffected by this ruling. The order also leaves open the issue of costs—another portion of the original motion. Therefore, the order is interlocutory in nature. *See Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." (citing *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231 (1916))). Interlocutory orders ordinarily are not subject to this Court's immediate review. *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, Rule 54(b) of the North Carolina Rules of Civil Procedure permits an immediate appeal when "(1) the order represents a final judgment as to one or more claims in a multi-claim lawsuit or one or more parties in a multi-party lawsuit," and (2) the trial court certifies that "there is no just reason to delay the appeal." *Harris v. Matthews*, 361 N.C. 265, 269 n.1, 643 S.E.2d 566, 569 (2007) (citing N.C. Gen. Stat. § 1A-1, Rule 54(b)).

We generally accord great deference to a trial court's certification that there is no just reason to delay the appeal. *See DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998). However, such certification "cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (citations and internal quotation marks omitted).

The burden to show that an appeal is proper is borne by the appellants. *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005) (per curiam). When an interlocutory order is the subject of the appeal, "the appellant[s] must include in [their] statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Id.* (quoting N.C. R. App. P. 28(b)(4)). The appellants must present more than a bare assertion that the order affects a substantial right; they must demon-

strate *why* the order affects a substantial right. *Id.* "Where the appellant fails to carry the burden of making such a showing to the [C]ourt, the appeal will be dismissed." *Id.* (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)).

Here, in their statement of grounds for appellate review, plaintiffs stated:

> The Order is a final judgment regarding Plaintiffs' claim for attorneys' fees. The trial court ruled, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, that there was no just reason to delay any appeal from that Order as it is an ancillary matter and will not affect the on-going remedy proceedings continuing in the trial court to enforce the constitutional rights of North Carolina school children.

Although this statement addresses why there is no just reason to delay the appeal, it fails to address what substantial right will be lost absent immediate appeal.

The trial court's certification stated that "there is no just reason for delay should the parties wish to appeal this decision to the Appellate Division as this is an ancillary matter and will not affect the on-going proceedings in this case[.]" The fact that "this is an ancillary matter and will not affect the on-going proceedings in this case" appears to be the exact opposite of what is necessary to establish a substantial right. A substantial right is generally something that does—or at least could—affect the on-going proceedings; it is something that goes to the very heart of the matter. Examples of what has been determined to affect a substantial right include: (1) the State's capacity to be sued, *RPR & Assocs. v. State*, 139 N.C. App. 525, 527-28, 534 S.E.2d 247, 250 (2000) (denial of motion to dismiss based upon the defense of sovereign immunity), *aff'd*, 353 N.C. 362, 543 S.E.2d 480 (2001) (per curiam); (2) the possibility of inconsistent verdicts for different parties, *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982) (grant of summary judgment for some but not all defendants); and (3) a class representative's discontinuance in a potentially meritorious suit, *Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 356 (1984) (denial of class certification).

> A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment. The right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to

> protect the substantial right affected by the order sought to be appealed. Our courts have generally taken a restrictive view of the substantial right exception. The burden is on the appealing party to establish that a substantial right will be affected.

Turner v. Norfolk S. Corp., 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (internal quotation marks and citations omitted).

When asked at oral argument what substantial right was affected by the order, plaintiffs responded that the attorneys' fees are being borne by five poor school districts that cannot afford such expenses, and that it was unjust to delay the appeal. The State conceded that it would benefit the parties to know whether future fees will be borne by the State or plaintiffs. We do not doubt that it is difficult for these poor school districts to pay their attorneys' fees. However, all fees have been paid for the time period involved in the trial court's ruling. We have found no case standing for the proposition that an appeal of the denial of attorneys' fees for the benefit of a party who is ill-equipped to pay such fees affects a substantial right justifying immediate appeal.

Notwithstanding the foregoing, Rule 2 of the North Carolina Rules of Appellate Procedure allows this Court to suspend its rules "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C. R. App. P. 2 (2007). There can be no doubt that this case is of both great public interest and import. Therefore, we elect to invoke our power pursuant to Rule 2 to hear this appeal notwithstanding the fact that the order is interlocutory.

[2] In its order, the trial court determined that there was no common law doctrine or statute that permitted a fee award. "Conclusions of law drawn by the trial judge . . . are reviewable *de novo* on appeal." *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

Plaintiffs first argue that the trial court erred in ruling that North Carolina General Statutes, section 6-19.1 was inapplicable. We disagree.

Section 6-19.1 provides in relevant part:

> In any civil action, . . . brought by the State or brought by a party who is contesting *State action* pursuant to G.S. 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing

> party to recover reasonable attorney's fees, . . . to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification *in pressing its claim* against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

N.C. Gen. Stat. § 6-19.1 (2007) (emphasis added). "Our legislature, in enacting [section] 6-19.1 . . . obviously sought to curb unwarranted, ill-supported suits *initiated by* State agencies. In order to further the legislature's purpose of reining in wanton, unfounded litigation, the *State's action*, for purposes of [section] 6-19.1, is measured by the phrase 'substantial justification.' " *Crowell Constructors, Inc. v. State ex rel. Cobey*, 342 N.C. 838, 844, 467 S.E.2d 675, 679 (1996) (emphasis added).

Plaintiffs contend that the statute does not require that the State be the party initiating the claim. They argue that they can recover attorneys' fees based upon the fact that they are contesting State action. However, we are not persuaded. Plaintiffs are correct that the statute does not require a recovering party to be a defendant in a suit against the State; it clearly contemplates a situation in which a party plaintiff brings an action against the State challenging an adverse agency decision. At oral argument, plaintiffs repeatedly referenced *Leandro II* for the proposition that Justice Orr found constitutional insufficiencies based upon State action and inaction. Our careful review of *Leandro II* reveals that although Justice Orr referenced the trial court's determinations of State "action and/or inaction" leading to the under-performance of Hoke County students, *Leandro II* does not stand for the proposition that the State acted in pressing a claim against plaintiffs.

Plaintiffs cite two cases in support of their claim to attorneys' fees pursuant to section 6-19.1: *Thornburg v. Consolidated Jud'l Ret. Sys. of N.C.*, 137 N.C. App. 150, 527 S.E.2d 351 (2000), and *Wiebenson v. Bd. of Trustees, State Employees' Ret. Sys.*, 138 N.C. App. 489, 531 S.E.2d 500 (2000). In *Thornburg*, the plaintiff was contesting the State's unconstitutional reduction of his retirement benefits. *Thornburg*, 137 N.C. App. at 150-51, 527 S.E.2d at 352. The State took action against the plaintiff by reducing benefits already earned.

Similarly in *Wiebenson*, after allowing the plaintiff to "job share" for years, as she was preparing to retire, the State informed her that

her job-sharing arrangement did not allow her to participate in the retirement system, notwithstanding the fact that the State previously had represented to her that her retirement would not be affected, deducted contributions from her paychecks, and provided her with annual statements reflecting one-half to two-thirds retirement credit each year. *Wiebenson*, 138 N.C. App. at 490-91, 531 S.E.2d at 502. In *Wiebenson*, the plaintiff contested the State's affirmative adverse action against her retirement benefits, taken in contravention of its earlier written documentation.

Here, the State took no such affirmative actions against plaintiffs. *Leandro II* noted that the trial court determined that the State "(1) failed to identify the inordinate number of 'at-risk' students and provide a means for such students to avail themselves of the opportunity for a sound basic education; and (2) failed to oversee how educational funding and resources were being used and implemented in Hoke County schools." *Leandro II*, 358 N.C. at 637, 599 S.E.2d at 390. Although the State may have failed to act, its failure to act in this instance cannot be extrapolated into "state action" or viewed as the equivalent of "pressing a claim against" plaintiffs as envisioned by the statute. Therefore, the trial court did not err in determining that section 6-19.1 does not apply to this case.

[3] Plaintiffs next argue that the trial court erred in holding that the common fund doctrine was inapplicable. We disagree.

Ordinarily, attorneys' fees are taxable as costs only when authorized by statute. *Horner v. Chamber of Commerce*, 236 N.C. 96, 97, 72 S.E.2d 21, 22 (1952) (citations omitted). However, the "common fund doctrine" serves as an exception to the general rule that every litigant is responsible for his or her own attorney's fees. *Id.* at 97-98, 72 S.E.2d at 22. Pursuant to this doctrine, a court in its equitable jurisdiction may award attorneys' fees "to a litigant who at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property, or who has created at his own expense or brought into court a fund which others may share with him." *Id.* (citation omitted).

The rule is founded upon the principle that "where one litigant has borne the burden and expense of the litigation that has inured to the benefit of others as well as to himself, those who have shared in its benefits should contribute to the expense." *Id.* at 98, 72 S.E.2d at 22 (citation omitted). It has been applied appropriately "in cases (1) where the classes of persons benefitting from the lawsuit were small

and easily identifiable, (2) where the benefits could be traced accurately, and (3) where the costs could be shifted to those benefitting with some precision." *Bailey v. State of North Carolina*, 348 N.C. 130, 161, 500 S.E.2d 54, 72 (1998) (citing *Alyeska Pipeline Serv. v. Wilderness Soc.*, 421 U.S. 240, 264 n. 39, 44 L. Ed. 2d 141, 157-58 (1975)). "If the benefit reaped by the representative plaintiffs merely 'vindicates a general social grievance,' or redounds to the benefit of the public at large, then the common-fund doctrine will not operate to shift the burden of attorney's fees." *Id.* (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479, 62 L. Ed. 2d 676, 682 (1980)). Although not strictly limited to class-action suits, the common fund doctrine is applicable

> when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf. Once the class representatives have established the defendant's liability and the total amount of damages, members of the class can obtain their share of the recovery simply by proving their individual claims against the judgment fund. . . . Although the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery.

Boeing Co. v. Van Gemert, 444 U.S. 472, 479, 62 L. Ed. 2d 676, 682 (1980).

Here, plaintiffs contend that they are entitled to a percentage of the DSSF as attorneys' fees. However, the benefits the State's school children have reaped due to plaintiffs' pursuit of this case have vindicated a general social grievance, rather than their individual complaints. The class of persons benefitting is far from small and easily identifiable; the benefits cannot easily be traced with accuracy; and the costs cannot be shared among beneficiaries with much precision. Plaintiffs do not seek to collect their share of attorneys' fees from the common fund, each in proportion to its individual damage award; plaintiffs seek to procure a percentage share of the common fund, far in excess of the attorneys' fees actually billed to them. This is not a case to which the common fund doctrine is applicable. Therefore, the trial court did not err in reaching that conclusion.

[4] Plaintiffs also argue that the trial court erred in concluding that the substantial benefit doctrine was inapplicable. We disagree.

Pursuant to this doctrine—which has not been adopted in North Carolina—"a prevailing party [i]s entitled to attorney's fees if that party ha[s] conferred a 'substantial benefit' upon the community at large." *Bd. of Water Com'rs, Laconia Water Works v. Mooney*, 660 A.2d 1121, 1126 (N.H. 1995) (citation omitted). Our Supreme Court has stated unequivocally that " 'all costs are given in a court of law in virtue of some statute[,] [and the] simple but definitive statement of the rule is: [C]osts in this State are entirely creatures of legislation, and without this they do not exist.' " *Stephenson v. Bartlett*, 177 N.C. App. 239, 244-45, 628 S.E.2d 442, 445, *disc. rev. denied*, 360 N.C. 544, 635 S.E.2d 58 (2006) (alterations in original) (quoting *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972)). Accordingly, the trial court did not err in concluding the substantial benefit doctrine was an inapplicable theory upon which to award attorneys' fees.

[5] Finally, plaintiffs argue that the trial court erred in holding that the private attorney general doctrine was inapplicable. We disagree.

Pursuant to this doctrine, "which serves as an incentive for the initiation of public interest litigation by a private party, a court may award attorney fees to a party vindicating a right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance." *Id.* at 244, 628 S.E.2d at 445 (citation omitted). As discussed in *Stephenson*, a majority of our sister states have rejected this theory for awarding attorneys' fees. *Id.* As noted *supra*, in our discussion of the substantial benefit doctrine, as there is no legislative authority for the private attorney general doctrine, plaintiffs' argument must fail.

Because none of the theories upon which plaintiffs rely support an award of attorneys' fees, the trial court's order was without error. Accordingly, we affirm.

Affirmed.

Judge STROUD concurs.

Judge STEPHENS concurs in a separate opinion.

STEPHENS, Judge, concurring.

I concur completely with the majority's opinion that the trial court correctly denied Plaintiffs' motion for attorneys' fees. However,

because I believe that our review of this appeal is mandatory, and, thus, that we need not have invoked our power pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure to hear this appeal, I write separately to concur in the result only.

The order of the superior court denying Plaintiffs' motion for attorneys' fees did not dispose of all the claims in the case, making it interlocutory. *See Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.") Ordinarily, an interlocutory order is not immediately appealable. *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). However, an interlocutory order is immediately appealable in at least two instances: first, pursuant to N.C. Gen. Stat. §§ 1-277 and 7A-27(d), an immediate appeal may be taken from an interlocutory order which affects a substantial right. *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998). Second, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), in an action involving multiple parties or multiple claims, if the trial court enters a final judgment as to a party or a claim and certifies there is no just reason for delay in reviewing such judgment, that judgment is immediately appealable. *Id.*

The trial court's denomination of its decree as a "final judgment"[2] does not make it so if it is not such a judgment and, thus, this Court must initially determine if the Rule 54(b) certification is proper. *Tridyn Indus., Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 446 (1979). However, where the trial court's judgment is final, "[t]he rule provides, 'Such judgment shall then be subject to review by appeal . . . .' " *DKH Corp.*, 348 N.C. at 585, 500 S.E.2d at 668 (quoting N.C. Gen. Stat. § 1A-1, Rule 54(b)). Accordingly, the North Carolina Supreme Court held in *DKH Corp.* that "this language *requires* the appellate court to hear the appeal." *Id.* (emphasis added); *see also Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) ("When the trial court certifies its order for immediate appeal under Rule 54(b), appellate review is mandatory.").

In *Martin Marietta Techs. v. Brunswick Cty.*, 126 N.C. App. 806, 487 S.E.2d 145, *cert. granted*, 347 N.C. 400, 494 S.E.2d 413 (1997), *rev'd and remanded*, 348 N.C. 688, 500 S.E.2d 665 (1998), the trial

2. "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be determined between them[.]" *Cagle v. Teachy*, 111 N.C. App. 244, 246-47, 431 S.E.2d 801, 803 (1993).

court granted summary judgment in favor of plaintiff on four of plaintiff's eight claims and certified the order for immediate review pursuant to Rule 54(b). On appeal, this Court acknowledged the Rule 54(b) certification, but stated,

> Nevertheless, it is the duty of this Court to determine whether an appeal is interlocutory. *See Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984) ("[R]uling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.")[.] Thus, a certification by a trial court is still reviewable by this Court on appeal.

Id. at 809, 487 S.E.2d 146. In a unanimous opinion, this Court dismissed defendant's appeal, explaining, "After reviewing the record, we fail to see how any substantial right of the [defendant] has been affected by the trial court's grant of summary judgment." *Id.* at 809, 487 S.E.2d 147.

The North Carolina Supreme Court granted plaintiff's petition for discretionary review as to the following issue: "Does the Rule 54(b) certification contained in the trial court's June 11, 1996 order together with a final determination on [plaintiff's] First through Fourth Causes of Action confer appellate jurisdiction pursuant to Rule 54(b)?" *Id.*, 347 N.C. at 400, 494 S.E.2d at 413. In accordance with the Supreme Court's decision in *DKH Corp.*, the Supreme Court reversed this Court's decision, and remanded the case to this Court to hear the appeal and decide the case on its merits. *Id.*, 348 N.C. at 688, 500 S.E.2d at 665.

In the present case, the trial court's order denying Plaintiffs' motion for attorneys' fees decided the issue of attorneys' fees as to all the parties, leaving nothing more to be determined between them on that issue. Thus, the trial court's order was a "final judgment" as to the attorneys' fees issue. Furthermore, pursuant to Rule 54(b), the trial court certified that "there is no just reason for delay" of an appeal of that issue. Accordingly, as mandated by the North Carolina Supreme Court's decisions in *DKH Corp.* and *Martin Marietta Techs.*, I believe we are *required* to hear Plaintiff's appeal and it is unnecessary for Plaintiffs to demonstrate that this interlocutory appeal affects a substantial right.

For these reasons, I would not inquire into whether the trial court's order affected a substantial right, nor would I invoke Rule 2 to hear this appeal.

IN RE D.L.H.

[198 N.C. App. 286 (2009)]

IN THE MATTER OF: D.L.H.

No. COA08-1019

(Filed 21 July 2009)

1. Appeal and Error— mootness—juvenile confinement and probation—expiration of time—authority of district court—issue likely to recur

An appeal in a juvenile delinquency proceeding was not dismissed as moot, even though the juvenile's probation had expired, where the issues concerned the scope of the statutory authority of the district court and were likely to recur.

2. Juveniles— predispositional confinement—credit for time served

The trial court erred in a juvenile proceeding by not giving the juvenile credit for time served in secure custody before her dispositional hearing, so that she served 69 days on a 14-day sentence. N.C.G.S. § 15-196.1 is applicable to juvenile commitments.

3. Juveniles— secure custody—applicable statute

N.C.G.S. § 7B-1903(c) applied to authorize secure custody of a juvenile where the juvenile had previously been adjudicated delinquent, admitted to subsequent probation violations, and the trial court had good cause to continue the dispositional hearing. N.C.G.S. § 7B-1903(b) and (d) apply only while the allegations of a violation are pending and not where there has been an admission and adjudication of the conduct.

4. Juveniles— secure custody—hearings at intervals

A juvenile confined to secure custody pending disposition or placement is entitled to a hearing at intervals of no more than 10 calendar days to determine whether continued secure custody is warranted. The trial court here failed to entertain the juvenile's motion for review of a secure custody order.

5. Juveniles— confinement—Level 2 disposition—28 days

The trial court can impose up to and no more than 28 days confinement in an approved juvenile detention facility for a Level 2 disposition under N.C.G.S. §§ 7B-2510(e), 7B-2506 and 7B-2508, read in *pari materia*, and the trial court was authorized to activate this juvenile's suspended 14-day sentence and impose an additional suspended 14-day confinement based on her admitted

probation violation, with credit for time served. Furthermore, a trial court has the discretion to impose any of the alternative dispositions in N.C.G.S. § 7B-2506(1)-(23) in addition to the 28 day confinement.

6. Juveniles— probation—extension—findings

The trial court's findings of fact were sufficient to support the extension of a juvenile's probation under N.C.G.S. § 7B-2510(c).

Appeal by juvenile from orders entered 13 December 2007, 14 January 2008, 29 January 2008, and 25 February 2008 by Judges Sherry F. Alloway, Polly D. Sizemore, and Lawrence C. McSwain in Guilford County District Court. Heard in the Court of Appeals 12 February 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Janette Soles Nelson, for the State.

Leslie C. Rawls, for juvenile-appellant.

STEELMAN, Judge.

Where juvenile was confined to a detention facility pursuant to N.C. Gen. Stat. § 7B-2506(20) on a Level 2 disposition, juvenile was entitled to receive credit for time served prior to the dispositional hearing. Where the trial court had previously found juvenile to be delinquent and juvenile subsequently admitted to probation violations, the trial court properly ordered juvenile into secure custody pending her dispositional hearing pursuant to N.C. Gen. Stat. § 7B-1903(c). Upon being confined to secure custody, juvenile was entitled to a hearing to determine if continued custody was necessary pursuant to N.C. Gen. Stat. § 7B-1906(b). The trial court had authority to impose confinement for up to twice the period authorized by statute for a Level 2 disposition and extend juvenile's probation for one year pursuant to N.C. Gen. Stat. §§ -2508, -2510(c) and (e).

I. Factual and Procedural Background

On 28 June 2007, a juvenile petition was filed, which alleged that D.L.H. ("juvenile") had engaged in an affray in violation of N.C. Gen. Stat. § 14-33 on 21 May 2007. On 6 July 2007, juvenile admitted to the affray and was adjudicated delinquent by Judge McSwain in Guilford County District Court. Disposition was continued until 2 August 2007. Juvenile was to remain in the Guilford County Juvenile Detention Center pending disposition. On 21 August 2007, Judge Burch entered

a disposition order arising out of the 2 August 2007 hearing. Juvenile was placed on "Level 2 probation" until 31 January 2008 under a number of terms and conditions. In addition, she was sentenced to fourteen days in the Guilford County Juvenile Detention Center. This sentence was stayed upon the condition that juvenile cooperate and complete the terms of her probation. Juvenile was released from the Guilford County Juvenile Detention Center to her mother's custody.

On 9 November 2007, a motion for review was filed alleging that juvenile had been suspended from school for fighting. A second motion alleged that juvenile violated the terms of her probation by repeated absences from school. On 3 December 2007, a hearing was held on these motions before Judge Alloway. The State dismissed the first motion, and juvenile admitted the allegations in the second motion. She was ordered to serve the fourteen days in the Guilford County Juvenile Detention Center, which had been stayed by Judge Burch's order of 21 August 2007. Disposition was continued until 3 January 2008. This order was filed on 13 December 2007. On 3 January 2008, a hearing was held before Judge McSwain. He held that juvenile was delinquent and would benefit from probation. Disposition was continued to 31 January 2008. Pending disposition, juvenile was placed in the Guilford County Juvenile Detention Center. This order was filed on 14 January 2008.

On 10 January 2008, juvenile filed a motion seeking her release from custody. The motion asserted that Judge McSwain was without authority to order juvenile to be held in the Guilford County Juvenile Detention Center pending disposition. In the alternative, juvenile sought a secure custody hearing pursuant to N.C. Gen. Stat. § 7B-1906. On 29 January 2008, Judge Sizemore entered a written order stating that she was without authority to modify previous orders and continuing the motion for hearing by Judge McSwain. On 31 January 2008, juvenile appeared before Judge McSwain. A Level 2 disposition order was entered on 25 February 2008. Juvenile's probation was extended for twelve months through 31 January 2009. A fourteen-day sentence at the Guilford County Juvenile Detention Center was stayed upon compliance with special and general conditions of probation. The matter was set for further review on 28 February 2008.

On 26 February 2008, juvenile appealed the order entered on 13 December 2007 by Judge Alloway; the order entered on 14 January 2008 by Judge McSwain; the order entered on 29 January 2008

by Judge Sizemore; and the order entered on 25 February 2008 by Judge McSwain.

II. Mootness

[1] As an initial matter, we must determine whether juvenile's assignments of error are moot and should be dismissed. Our Supreme Court has stated, "[w]henever, during the course of litigation it develops . . . 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." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978) (citations omitted), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). However, there are long-standing exceptions to dismissals based upon the doctrine of mootness, including cases which are "capable of repetition, yet evading review[.]" *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703 (quotation omitted), *disc. review denied*, 356 N.C. 297, 571 S.E.2d 221 (2002). For this particular exception to apply, two elements are required: "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* at 654, 566 S.E.2d at 703-04 (quotation and alterations omitted).

In the instant case, juvenile's notice of appeal is dated 26 February 2008. Her appeal was calendared for hearing before this Court on 12 February 2009, approximately one year later. Juvenile concedes in her brief that this Court cannot give juvenile "back the days she was wrongfully confined" and we further note that the extension of juvenile's probation until 31 January 2009 has expired at this time. Therefore, our holding in this case would be moot as to juvenile. However, since the issues in this case concern the scope of statutory authority of the district court, we address the merits of juvenile's appeal as the matters in controversy are likely to recur. *See In re Doe*, 329 N.C. 743, 748-49 n.7, 407 S.E.2d 798, 801 n.7 (1991).

III. Credit for Time Served

[2] In her first argument, juvenile contends that the trial court erred by failing to give her credit for the time she served in secure custody prior to her dispositional hearing. We agree.

Juvenile argues that when she received the fourteen-day sentence in August 2007, she received no credit for the twenty-seven days that

she spent in detention awaiting the dispositional hearing. When the fourteen-day sentence was activated in December 2007, she received no credit for time already served. In January 2008, she was held in detention pending a dispositional hearing for twenty-eight additional days. Defendant argues that she served sixty-nine days on a fourteen-day sentence, and that under the provisions of N.C. Gen. Stat. §§ 7B-2508 and -2510, the maximum sentence she could have received for a Level 2 disposition was fourteen days.

In support of her contention, juvenile cites N.C. Gen. Stat. § 15-196.1, which provides:

> The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

N.C. Gen. Stat. § 15-196.1 (2007). We note that there is not a similar statute found within the Juvenile Code. However, the application of this statute in the context of juvenile proceedings was addressed in the case of *In re Allison*, 143 N.C. App. 586, 547 S.E.2d 169 (2001) and in the unpublished decision of *In re R.T.L.*, 183 N.C. App. 299, 644 S.E.2d 269 (2007) (unpublished).

In *In re Allison*, the juvenile was committed to a residential training school facility for an indefinite term, not to exceed 450 days. She was subsequently released from the training school without having served the entire term, but with conditions. She immediately violated those conditions and the trial court placed her in detention pending the procurement of a placement in an inpatient treatment facility. Ultimately, such a placement could not be procured, and the juvenile was recommitted to the Division of Youth Services "to finish the commitment term of an indefinite term not to exceed 450 days . . . ." *In re Allison*, 143 N.C. App. at 590, 547 S.E.2d at 172. In the meantime, the juvenile had committed additional delinquent acts, for which the trial

court committed her to training school for a minimum of six months. *Id.* at 588-90, 547 S.E.2d at 170-72.

On appeal, the juvenile first argued that she had received punishments greater than an adult would have received for a similar offense. This argument was rejected by this Court, holding "there exists a rational basis for the legislature's disparate treatment of adults and children, and that G.S. § 7B-2513(a) was not unconstitutionally applied to [the juvenile] . . . in derogation of her equal protection rights." *Id.* at 596, 547 S.E.2d at 175 (citations omitted).

The juvenile further argued that she was not given credit for time served. We rejected this argument for two reasons. First, the language of the first commitment, "to finish the commitment term[,]" expressly gave juvenile credit for time served pending her dispositional hearing. Second, the credit was not applicable to the second commitment under the terms of the last sentence of N.C. Gen. Stat. § 15-196.1: "Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject." *Id.* at 600, 547 S.E.2d at 177.

In *In re R.L.T.*, this Court held that the juvenile was "entitled to a sentencing credit for the number of days he spent in detention prior to the adjudicatory hearing." *In re R.L.T.*, No. COA06-1089, 2007 N.C. App. LEXIS 1025, at *7 (N.C. Ct. App. 2007) (citing *In re Allison*, 143 N.C. App. at 586, 547 S.E.2d at 169).

In re Allison expressly holds that the provisions of N.C. Gen. Stat. § 15-196.1 are applicable to juvenile commitments. We are unable to distinguish the instant case from *In re Allison*, and under the case of *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), we are bound by that holding. It was error for the trial court not to give credit to juvenile in this case for time spent in detention towards her fourteen-day sentence.

IV. Secure Custody Pending Disposition

[3] In her second argument, juvenile contends that the trial court erred by ordering her into secure custody after her admission of probation violations because under the facts of this case, detention was not authorized pending disposition. We disagree.

Juvenile contends that this issue is controlled by N.C. Gen. Stat. § 7B-1903(d), and in the alternative § 7B-1903(b). Subsection (d) provides that "[t]he court may order secure custody for a juvenile who is

alleged to have violated the conditions of the juvenile's probation or post-release supervision, but only if the juvenile is alleged to have committed acts that damage property or injure persons." N.C. Gen. Stat. § 7B-1903(d) (2007) (emphasis added). By its express language, this provision is only applicable while the allegations of a violation are pending. *See State v. Bates*, 348 N.C. 29, 34, 497 S.E.2d 276, 279 (1998) (stating the intent of the legislature is first ascertained by the plain language of the statute), *cert. denied*, 538 U.S. 1061, 155 L. Ed. 2d 1113 (1999).

In the instant case, juvenile was ordered into secure custody after her admission of the violations at an adjudication hearing. N.C. Gen. Stat. § 7B-1903(d) is inapplicable to this case.

Based upon the same reasoning, N.C. Gen. Stat. § 7B-1903(b) is not applicable to this case. That subsection provides "[w]hen a request is made for secure custody, the court may order secure custody only where the court finds there is a *reasonable factual basis to believe that the juvenile committed the offense as alleged in the petition* . . . ." N.C. Gen. Stat. § 7B-1903(b) (2007) (emphasis added). This provision, by its express terms, applies prior to a determination as to whether the juvenile committed the acts alleged in the petition, and not where there has been an admission and adjudication of the conduct.

This issue is controlled by N.C. Gen. Stat. § 7B-1903(c), which provides that "[w]hen a juvenile has been adjudicated delinquent, the court may order secure custody pending the dispositional hearing or pending placement of the juvenile pursuant to G.S. 7B-2506." N.C. Gen. Stat. § 7B-1903(c) (2007). In this case, juvenile was adjudicated as delinquent on 17 July 2007 by Judge McSwain. On 3 December 2007, juvenile admitted she violated the terms of her probation by repeatedly being absent from school. Judge Alloway activated juvenile's suspended fourteen-day sentence, which had previously been stayed and continued further disposition until 3 January 2008 in order for Judge McSwain to determine whether there were "any other conditions that he want[ed] imposed on her."

On 3 January 2008, Judge McSwain continued the dispositional hearing until 31 January 2008 and placed juvenile at the Guilford County Juvenile Detention Center until that time. We note Judge McSwain continued the dispositional hearing because it was necessary for the court counselor and juvenile's mother to determine whether out-of-home placement was appropriate for juvenile, which

was permissible pursuant to N.C. Gen. Stat. § 7B-2406. *See* N.C. Gen. Stat. § 7B-2406 (2007) (providing that a trial court may continue a hearing "for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery.").

Because juvenile had previously been adjudicated as delinquent, admitted to subsequent probation violations, and the trial court had good cause to continue the dispositional hearing, the trial court properly ordered juvenile be confined to secure custody pending disposition pursuant to N.C. Gen. Stat. § 7B-1903(c). This assignment of error is without merit.

V. Authority to Modify Secure Custody

[4] In her third argument, juvenile contends that the trial court erred by refusing to consider her pending motion for release from secure custody. We agree.

On 10 January 2008, juvenile filed a motion seeking her release from custody and asserted that Judge McSwain was without authority to order juvenile to be held in the Guilford County Juvenile Detention Center pending disposition. In the alternative, juvenile sought a secure custody hearing pursuant to N.C. Gen. Stat. § 7B-1906(b). Following a hearing on 11 January 2008, Judge Sizemore entered an order on 29 January 2008, concluding that:

1. The undersigned judge does not have authority to modify the orders entered by Judge Alloway and Judge McSwain.

2. Any request to modify the secure custody prior to the hearing date of January 31, 2008 should be brought before Judge McSwain.

As set forth in Section IV of this opinion, juvenile's first contention within her motion to release is without merit. We now turn to whether juvenile was entitled to a secure custody hearing pursuant to N.C. Gen. Stat. § 7B-1906(b).

Whether the requirements of N.C. Gen. Stat. § 7B-1906(b) apply to the imposition of secure custody pursuant to N.C. Gen. Stat. § 7B-1903(c) is an issue of first impression. "The cardinal principle of statutory construction is to discern the intent of the legislature. In discerning the intent of the General Assembly, statutes *in pari mate-*

ria should be construed together and harmonized whenever possible." *State v. Jones*, 359 N.C. 832, 835-36, 616 S.E.2d 496, 498 (2005) (internal citations omitted). Further, "[a]ll parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable interpretation." *State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990) (citation omitted).

Both N.C. Gen. Stat. §§ 7B-1903 and -1906 appear in Article 19 entitled "Temporary Custody; Secure and Nonsecure Custody; Custody Hearings" in Division 2 of Chapter 7B of the Juvenile Code. As stated above, N.C. Gen. Stat. § 7B-1903 sets forth the criteria that must be met in order for a trial court to impose secure or nonsecure custody. N.C. Gen. Stat. § 7B-1906(b) (2007) provides, in relevant part, that "[a]s long as the juvenile remains in secure or nonsecure custody, further hearings to determine the need for continued secure custody *shall* be held at intervals of no more than 10 calendar days." (Emphasis added). Further, N.C. Gen. Stat. § 7B-1906(e) (2007) provides that "[t]he court shall be bound by criteria set forth in G.S. 7B-1903 in determining whether continued custody is warranted."

Applying the rules of statutory construction and construing the provisions of N.C. Gen. Stat. §§ 7B-1903, -1906(b) and (e) *in para materia*, we hold that a juvenile confined to secure custody pending disposition or placement is entitled to a hearing at intervals of no more than 10 calendar days to determine whether continued secure custody is warranted.

Because N.C. Gen. Stat. § 7B-1903 provides for secure custody during both pre-adjudication and post-adjudication, pending disposition, there is no reason that N.C. Gen. Stat. § 7B-1906(b) hearings should be limited to pre-adjudication confinement. The trial court erred by failing to entertain juvenile's 11 January 2008 motion to review the order of secure custody under N.C. Gen. Stat. § 7B-1906(b).

VI. Reinstatement of Confinement and Extension of Probation

[5] In her fourth argument, juvenile contends that the trial court had no authority to "reinstate[] a sentence already served and extend[] her probation" at the 31 January 2008 hearing.[1] Juvenile also con-

1. Juvenile is referring to the 25 February 2008 order, in which the trial court imposed an additional 14-day suspended sentence and extended her probation for one year, after she had served the fourteen-day sentence that was suspended pursuant to the trial court's 21 August 2007 order.

tends the trial court erred when it failed to enter the "statutorily-mandated findings of fact" to support the extension of her probation. We disagree.

If the trial court finds, by the greater weight of the evidence, that the juvenile has violated his or her probation, the trial court may (1) continue the original conditions of probation, (2) modify the conditions of probation, or (3) order a new disposition at the next higher level. N.C. Gen. Stat. § 7B-2510(e) (2007). "A court shall not order a Level 3 disposition for violation of the conditions of probation by a juvenile adjudicated delinquent for an offense classified as minor under G.S. 7B-2508." N.C. Gen. Stat. § 7B-2510(f) (2007).

In the instant case, the offenses that constituted violations of juvenile's probation were minor and could not be the basis for a Level 3 disposition. *See* N.C. Gen. Stat. § 7B-2510(f). The trial court could either continue the original conditions of probation or modify those conditions. N.C. Gen. Stat. § 7B-2510(e) allows the trial court to impose an order of confinement for up to twice the amount of time authorized by statute. N.C. Gen. Stat. § 7B-2506(20) (2007) allows the trial court to order a juvenile who has been adjudicated delinquent to be confined in an approved juvenile detention facility for a term of up to 14 24-hour periods. *See also* N.C. Gen. Stat. § 7B-2508(d) (2007) (providing that "a Level 2 disposition . . . shall provide for at least one of the intermediate dispositions authorized in subdivisions (13) through (23) of G.S. 7B-2506."). Reading N.C. Gen. Stat. § 7B-2510(e) in conjunction with N.C. Gen. Stat. §§ 7B-2506 and -2508, we hold the trial court can impose up to and no more than twenty-eight days confinement in an approved juvenile detention facility for a Level 2 disposition. Therefore, the trial court was authorized to activate juvenile's suspended fourteen-day sentence in the 2 August 2007 order and impose an additional suspended fourteen-day period of confinement based on her admitted probation violation at the 3 December hearing, for a total of twenty-eight days confinement. However, based upon the facts of this case and our holding in Section I of this opinion, juvenile was entitled to credit for time served in detention prior to the dispositional hearing.

Further, a trial court has the discretion to impose any of the alternative dispositions contained in N.C. Gen. Stat. § 2506(1)-(23) in addition to the twenty-eight day confinement permitted by N.C. Gen. Stat. §§ 7B-2506(20) and -2510(e), including placing the juvenile on probation under the supervision of a juvenile court counselor. *See* N.C. Gen. Stat. § 7B-2508(d); N.C. Gen. Stat. § 7B-2506(8).

[6] N.C. Gen. Stat. § 7B-2510(c) (2007) provides that prior to the expiration of an order of probation, a trial court is permitted to extend a juvenile's probation for an additional period of one year after a hearing, "if the court finds that the extension is necessary to protect the community or to safeguard the welfare of the juvenile."

In the order filed 25 February 2008, the trial court made sixteen findings of fact, which detailed juvenile's adjudicatory and dispositional history. The trial court found the following: (1) juvenile was repeatedly absent from school; (2) juvenile's mother informed the court that juvenile "comes and goes as she pleases" and "ignores curfews[;]" (3) on 3 January 2008 juvenile's mother was not willing to have juvenile placed at home; (4) the court counselor saw juvenile become disrespectful to the school resource officer; and (5) juvenile received fifteen risk points on the Risk and Needs Assessment. The trial court concluded that "juvenile will benefit from being extended on probation under the supervision of the Court" and it "would be in the best interest of the juvenile for Step By Step to be involved with the family." The trial court extended juvenile's probation for a period of one year and imposed several special terms and conditions. We hold the trial court's findings of fact are sufficient to support the extension of juvenile's probation.

Juvenile's remaining assignment of error brought forward in the record on appeal, but not argued in her brief, is deemed abandoned. N.C.R. App. P. 28(b)(6) (2008).

VII. Conclusion

When a juvenile has been previously adjudicated delinquent and admits violations of his or her probation at an adjudication hearing, the juvenile may be ordered into secure custody pending disposition pursuant to N.C. Gen. Stat. § 7B-1903(c). When a trial court orders a juvenile into secure custody pending disposition, the juvenile is entitled to a hearing at intervals of no more than 10 calendar days to determine whether continued secure custody is warranted pursuant to N.C. Gen. Stat. § 7B-1906(b). Credit for time served in secure custody pending disposition should be applied to the sentence imposed at the juvenile's dispositional hearing.

Pursuant to N.C. Gen. Stat. §§ 7B-2506, -2508, and -2510(e), the trial court can impose up to twenty-eight days confinement in an approved juvenile detention facility for a Level 2 disposition. If the trial court finds that the extension of a juvenile's probationary period

is necessary to protect the community or to safeguard the welfare of the juvenile, the trial court is permitted to extend the probation for an additional period of one year after a hearing.

AFFIRMED IN PART and REVERSED IN PART.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA v. GREGORY LEON CARTER

No. COA08-960

(Filed 21 July 2009)

1. Appeal and Error— preservation of issues—failure to argue

The ten assignments of error that defendant failed to raise in his brief are deemed abandoned under N.C. R. App. P. 28(b)(6).

2. Rape— first-degree rape—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the three first-degree rape charges even though defendant contends the State presented insufficient evidence to establish every element of the offenses and to establish the identity of the perpetrator because giving the State the benefit of all reasonable inferences revealed that: (1) the combined testimony from victim and defendant provided substantial evidence for each essential element of first-degree rape such that a reasonable mind might accept as adequate to support a conclusion that defendant had vaginal intercourse with the victim, the victim was under thirteen years of age, defendant was at least twelve years of age, and defendant was at least four years older than the victim; and (2) testimony from the victim and defendant provided substantial evidence for each essential element of statutory rape as adequate to support a conclusion that throughout the relevant times, defendant had vaginal intercourse or performed sexual acts with the victim; the victim was thirteen, fourteen, and fifteen years of age; defendant was at least six years older than the victim; and defendant was not lawfully married to the victim. N.C.G.S. §§ 14-27.2(a), 14-27.7A(a).

3. Indecent Liberties; Rape— multiple counts—continuous course of conduct theory not recognized in North Carolina

The trial court did not err by denying defendant's motion to dismiss two of the three first-degree rape charges and one of the indecent liberties with a child charges on the grounds that the associated acts were in the nature of a continuous transaction rather than separate, distinct crimes because: (1) defendant failed to provide support for the argument that first-degree rape or statutory rape should be treated as a continuous offense and differently from forcible rape or incest; and (2) North Carolina law does not recognize the continuous course of conduct theory for rape.

4. Evidence— uncorroborated testimony—sexual offenses

The trial court did not err by denying defendant's motion to dismiss all charges including three for first-degree rape, two for indecent liberties with a child, and three for statutory rape even though defendant contends the State merely presented uncorroborated testimony of the victim because: (1) the unsupported testimony of the prosecutrix in a prosecution for rape has been held in many cases sufficient to require submission of the case to the jury; (2) the testimony of a single witness is adequate to withstand a motion to dismiss when that witness has testified to all the required elements of the crimes at issue; and (3) the victim testified as to all the required elements of the crimes at issue, and it is the duty of the jury to weigh a witness's credibility.

5. Jury— failing to conduct jurors back into courtroom after jurors requested copies of written statements previously admitted into evidence—no showing of prejudice

Although the trial court erred and violated N.C.G.S. § 15A-1233 in a multiple first-degree rape, indecent liberties with a child, and statutory rape case by failing to conduct the jurors back into the courtroom after the jurors requested copies of written statements previously admitted into evidence, it did not commit plain error because defendant failed to meet his burden of proof to show prejudice.

6. Indecent Liberties— failure to require State to identify alleged acts—identifying acts in instructions—plain error analysis

The trial court did not commit plain error by failing to require the State to identify the alleged acts forming the bases for the

indecent liberties charges and then identifying those acts as the bases for the charges in its instructions because: (1) our Supreme Court has held that when instructing on indecent liberties, the judge is under no requirement to specifically identify the acts that constitute the charge; and (2) a defendant may be unanimously convicted of indecent liberties even if the indictments lacked specific details to identify the specific incidents.

Appeal by defendant from judgments entered 21 February 2008 by Judge William C. Griffin, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 28 January 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Chris Z. Sinha, for the State.

William D. Spence, for defendant-appellant.

JACKSON, Judge.

On 4 June 2007, Gregory Leon Carter ("defendant") was indicted on three counts of first-degree rape, two counts of indecent liberties with a child, and three counts of statutory rape. All of the charged offenses involved defendant's step-daughter ("K.B.") and are alleged to have occurred on various dates from May 1996 until December 2000.

On 21 February 2008, a jury found defendant guilty on all charges. For the counts of first-degree rape and indecent liberties with a child, defendant was sentenced to 240 to 297 months imprisonment. For the counts of statutory rape, defendant was sentenced to 192 to 240 months imprisonment to run consecutively with the prior sentences. Defendant appeals from his convictions. For the reasons set forth below, we hold no error.

Defendant was born on 30 January 1969. K.B. was born on 28 December 1984. On 14 February 1992, K.B.'s mother, Sandra Carter ("Carter"), married defendant. At the time, K.B. lived with her maternal grandparents. In June or July of 1996, K.B. moved into a trailer on Shirley Farm Road in Beaufort County, North Carolina to live with defendant, Carter, and K.B.'s younger step-brother, Javon.

When K.B. began sixth grade in August 1996, Carter worked evenings, leaving Javon and K.B., then twelve years old, alone with defendant. Starting at that time, defendant established a pattern of sexual activity with K.B. that regularly occurred several times a week from August 1996 until December 2000.

Defendant first would talk to K.B. to gain her trust. He then would lead K.B. to her bedroom, where he would touch her on her breasts and between her legs through her clothing. Defendant would tell K.B. that he was preparing her for outside life. Then defendant would remove K.B.'s clothes, and touch her exposed breasts and between her exposed legs. He then would direct K.B. to cover her head. After K.B. covered her head, Defendant would put his penis inside her vagina and have intercourse with her. Initially, defendant pulled his penis out of K.B.'s vagina and ejaculated onto her stomach.

In December 1996, the family moved away from the Shirley Farm Road location and into a trailer on Free Union Church Road in Beaufort County. By the time the family moved, defendant had put his penis inside of K.B.'s vagina seven or eight times. K.B. knew that sexual activity with defendant was wrong, but she also knew defendant was the authority figure in the household. Defendant would punish K.B. with beatings by belt or switch if she disobeyed. Carter saw bruises on her daughter's back and buttocks from defendant's beatings. Defendant forbade K.B. to tell anyone about the sexual activity between the two of them, warning her that if she told anyone, he would hurt her grandparents. While the family lived on Free Union Church Road, defendant engaged in his pattern of sexual activity with K.B. twice a week. K.B. was thirteen years old.

The family again moved in April or May of 1997, onto a two-lane section of Highway 264 in Beaufort County. At the new trailer, defendant continued his pattern of sexual touching and intercourse with his step-daughter. Defendant would send K.B. to her room "for what was going to follow," two or three times a week, throughout the following year.

Only when K.B. was menstruating would defendant refrain from engaging in sexual activity with her. Defendant began to make K.B. keep track of her menstrual cycle, marking her period on a calendar.

Early in 1999, K.B. was fourteen years old and living at the Highway 264 address when defendant's pattern of sexual intercourse with her changed; defendant ceased withdrawing his penis from K.B.'s vagina during intercourse. Still early in 1999, upon learning that K.B. had missed her menstrual cycle, defendant had her take a pregnancy test. The test revealed that K.B. was pregnant. At that time, K.B. had never had sex with anyone other than with defendant. K.B. heard defendant tell Carter about the pregnancy, whereupon Carter

screamed. Defendant admitted to her that he was the father, claiming he had sex with K.B. only once. Defendant told Carter that they would have to arrange an abortion. Apart from overhearing defendant and Carter, K.B. was not involved in discussions regarding the pregnancy. Defendant directed K.B. to have an abortion. Defendant told K.B. that no one could know about the pregnancy.

In May of 1999, defendant and Carter took K.B. to a clinic named "A Woman's Choice" in Raleigh, North Carolina. Defendant filled out the paperwork, so K.B. never knew what name he used to register her at the clinic. K.B. had an abortion. Back at home, defendant made his step-daughter write a note to Carter, accepting blame for the pregnancy. K.B. began exhibiting behavioral issues at school, ultimately failing ninth grade.

After the abortion, defendant resumed his pattern of sexual gratification and intercourse with K.B. On 28 December 1999, K.B. turned fifteen years old. Defendant continued to put his penis inside her vagina and have intercourse with her.

In August 2000, the family moved from Beaufort County to Martin County, North Carolina. In 2004, defendant and Carter separated over defendant's affair with another woman. Defendant left the home of Carter, K.B., and Javon. The divorce was finalized in January 2006.

Notwithstanding defendant's departure, K.B. continued to experience emotional issues related to the abortion and defendant's sexual activities with her. In 2007, K.B. spoke with her pastor regarding her experiences with defendant. Based upon advice from the pastor, she contacted law enforcement. On 31 January 2007, K.B. went to the Beaufort County Sherriff's Office, where she gave a statement to Investigator Dwight Williams ("Williams") about defendant's sexual touching and sexual intercourse with her. On 1 February 2007, K.B. continued her statement to Williams. Carter also gave a statement to Williams that day. Carter confirmed that she had seen the positive pregnancy test, and she heard defendant tell her that he was the father.

On 28 February 2007, defendant voluntarily came in to the Sherriff's Office, at Williams' request. After Williams told defendant that he was not under arrest, Williams asked defendant if he would discuss an incident that reportedly had taken place between defendant and K.B. Defendant acted unsurprised, replying that the incident had been so long ago that nothing could be done about it anyway.

In his statement to Williams, defendant admitted first having sexual intercourse with K.B. in her bedroom in 1996, after she teased him by wearing very little clothing, showing him her breasts or buttocks, and putting something into his drink to make him have sex with her. Defendant reported having sex with K.B. three weeks later. When defendant found out K.B. was pregnant, he stated that he told Carter he would turn himself into law enforcement, but that Carter told him she did not want anyone to know about the pregnancy. Defendant told Williams that defendant and Carter took K.B. to Raleigh for an abortion in May 1997. Defendant reported that he and Carter separated in 2002.

After recording defendant's statement, Williams read the statement back to defendant, whereupon defendant corrected a misspelled word on page two. Defendant then signed both pages of his statement and left. On 1 March 2007, Williams obtained a warrant for defendant's arrest, which was served by a deputy in the Beaufort County Sheriff's Office.

At trial, defendant denied ever assaulting, touching inappropriately, or having sexual intercourse with K.B. He denied ever beating K.B. with a belt or switch. Defendant denied that any statutory rape occurred, and he denied telling Williams that defendant and Carter took K.B. to Raleigh for an abortion. He denied that Williams ever read defendant's statement back to him. Additionally, defendant testified that he did not understand from Williams' questions that K.B. accused defendant of having sex and impregnating her. Defendant stated in court that Williams' must have made up portions of defendant's statement in which defendant admitted having sex with K.B. Nevertheless, defendant testified that he did understand why he was in court and the charges he was facing.

[1] Initially, we note that defendant raised thirty assignments of error on appeal. Of those, defendant brought forward only twenty assignments of error in his brief. Pursuant to the North Carolina Rules of Appellate Procedure, the remaining ten assignments of error are deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2007).

[2] In defendant's first six assignments of error, he argues that the trial court erred in denying his motion to dismiss the first-degree rape charges because the State presented insufficient evidence to establish every element of the offenses and to establish the identity of the perpetrator. We disagree.

"The standard of review for a motion to dismiss in a criminal trial is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense." *State v. Norman*, 196 N.C. App. 779, 785, 675 S.E.2d 395, 400 (2009) (citations omitted) (internal quotations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *State v. Kraus*, 147 N.C. App. 766, 769, 557 S.E.2d 144, 147 (2001)) (citations omitted) (internal quotation marks omitted). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Id.* (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citations omitted) (internal quotations omitted)). "Contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *State v. Cortes-Serrano*, 195 N.C. App. 644, 652, 673 S.E.2d 756, 761 (quoting *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citations omitted) (internal quotations omitted)), *disc. rev. denied*, 363 N.C. 376, 679 S.E.2d 138 (2009).

To prove first-degree rape, pursuant to section 14-27.2(a)(1) of the North Carolina General Statutes, the State must show (1) defendant had vaginal intercourse with the victim, (2) the victim was under thirteen years of age, (3) defendant was at least twelve years of age, and (4) defendant was at least four years older than the victim. N.C. Gen. Stat. § 14-27.2(a)(1) (2007).

To prove defendant guilty of the statutory rape of a person thirteen, fourteen, or fifteen years old, pursuant to section 14-27.7A(a) of the North Carolina General Statutes, the State must show (1) defendant engaged in vaginal intercourse or a sexual act with victim, (2) the victim was thirteen, fourteen, or fifteen years of age, (3) defendant was at least six years older than the victim, and (4) defendant was not lawfully married to the victim. N.C. Gen. Stat. § 14-27.7A(a) (2007).

Defendant contends that the State presented evidence that was both contradictory and insufficient to prove specific dates where defendant engaged in vaginal intercourse with K.B., whether the defendant penetrated K.B.'s vagina with his penis, and whether K.B. saw defendant engage in vaginal intercourse with her. We disagree.

At trial, K.B. testified that her birth date was 28 December 1984 and that in August of 1996, when K.B. was between twelve and

thirteen years of age, she started sixth grade. K.B. stated specifically that in August 1996, defendant first engaged in sexual activity with her. K.B. testified that defendant touched her in inappropriate places, removed her clothing, then directed her to cover her head so that defendant could not be seen. After covering her head as directed, she felt defendant push his penis inside her vagina, then move up and down, eventually ejaculating onto her stomach. K.B. testified that defendant put his penis inside of her seven or eight times from August 1996 through November 1996, and two or more times each week from December 1996 through March 1997, and from April 1997 through December 1997. K.B. further testified that defendant had sex with her two or three times a week during 1997 and 1998, while she was thirteen. Additionally, K.B. stated that defendant stopped pulling out of her vagina to ejaculate onto her stomach, and impregnated her in February or March of 1999, when she was fourteen years old. K.B. further testified that from the time of her abortion in 1999 to the time her family moved outside of Beaufort County in 2000, defendant had sex with her both before and after she turned fifteen.

During trial, K.B. used both specific and general terms in her testimony to represent the act of defendant inserting his penis into her, including: "he put his private part inside of me," "put his penis inside of me," "molestation," "having sex," and "his penis felt like a hard stick going inside me[.]" Further, defendant testified at trial that his birth date was 30 January 1969. Defendant testified at trial that he married Carter on 14 February 1992 and remained married until at least 12 November 2004.

Giving the State the benefit of all reasonable inferences, the combined testimony from victim and defendant provides substantial evidence for each essential element of first-degree rape such that a reasonable mind might accept as adequate to support a conclusion that (1) defendant had vaginal intercourse with victim, (2) the victim was under thirteen years of age, (3) defendant was at least twelve years of age, and (4) defendant was at least four years older than the victim. *See* N.C. Gen. Stat. § 14-27.2(a) (2007). Additionally, giving the State the benefit of all reasonable inferences, testimony from the victim and defendant provides substantial evidence for each essential element of statutory rape as adequate to support a conclusion that throughout the relevant times, (1) defendant had vaginal intercourse or performed sexual acts with victim, (2) the victim was thirteen, fourteen, and fifteen years of age, (3) defendant was at least six years older than the victim, and (4) defendant was not lawfully married to

the victim. *See* N.C. Gen. Stat. § 14-27.7A(a) (2007). Therefore, as the State provided substantial evidence for each essential element of both first-degree rape and statutory rape of the victim, and for the proposition that defendant was the perpetrator, the trial court was correct in denying defendant's motion to dismiss on the ground of insufficient evidence. *See Norman*, 196 N.C. App. at 785, 675 S.E.2d at 400.

[3] In assignments of error numbered 9 through 11, defendant argues that the trial court erred in denying his motion to dismiss two of the three first-degree rape charges, two of the three statutory rape charges, and one of the indecent liberties with a child charges, on the grounds that the associated acts were in the nature of a continuous transaction rather than separate, distinct crimes. We disagree.

Defendant attempts to distinguish prior cases from the facts here by contending that the instant case does not involve a forcible rape or incest charge, yet defendant fails to provide support for the argument that first-degree rape or statutory rape should be treated as a continuous offense and differently from forcible rape or incest.

> Furthermore, we have previously noted that North Carolina law does not recognize the "continuous course of conduct" theory:
>
> > In *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 363 (1987), the Supreme Court cited with approval language from *State v. Small*, 31 N.C. App. 556, 230 S.E.2d 425 (1977): 'Generally rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense.' The General Assembly has criminalized each act of statutory rape, not a course of conduct. Any changes in the manner in which a course of criminal conduct is punished must come from the legislative branch and not from the judicial branch."

Cortes-Serrano, 196 N.C. App. at 654, 673 S.E.2d at 762 (quoting *State v. Bullock*, 178 N.C. App. 460, 473, 631 S.E.2d 868, 877 (2006)). As such, defendant's argument is without merit and these assignments of error are overruled.

[4] In assignments of error numbered 20 through 27, defendant argues that the trial court erred in denying his motion to dismiss all charges because the State presented the uncorroborated testimony of K.B.—evidence insufficient to carry any of the charges to the jury or to support the verdicts. We disagree.

"The unsupported testimony of the prosecutrix in a prosecution for rape has been held in many cases sufficient to require submission of the case to the jury." *State v. Bailey*, 36 N.C. App. 728, 730, 245 S.E.2d 97, 99 (1978). *See State v. Hines*, 286 N.C. 377, 211 S.E.2d 201 (1975); *State v. Shaw*, 284 N.C. 366, 200 S.E.2d 585 (1973); *State v. Carthens*, 284 N.C. 111, 199 S.E.2d 456 (1973); *State v. Miller*, 268 N.C. 532, 151 S.E.2d 47 (1966); *State v. Raye*, 73 N.C. App. 273, 326 S.E.2d 333 (1985), *disc. rev. denied*, 313 N.C. 609, 332 S.E.2d 183 (1985), *State v. Williams*, 31 N.C. App. 588, 229 S.E.2d 839 (1976). "It is equally well-settled that the testimony of a single witness is adequate to withstand a motion to dismiss when that witness has testified to all the required elements of the crimes at issue." *State v. Whitman*, 179 N.C. App. 657, 670, 635 S.E.2d 906, 914 (2006) (citing *State v. Lester*, 294 N.C. 220, 225-26, 240 S.E.2d 391, 396 (1978) ("The unsupported testimony of an accomplice, if believed, is sufficient to support a conviction.")). Because K.B. testified as to all the required elements of the crimes at issue, and because the duty of the jury is to weigh a witness' credibility, the trial court properly denied defendant's motion to dismiss.

[5] In assignment of error number 28, defendant argues that the trial court committed plain error and violated section 15A-1233 of the North Carolina General Statutes by failing to conduct the jurors back into the courtroom after the jurors requested copies of written statements previously admitted into evidence. We agree, but we hold no prejudice resulted from the violation.

Section 15A-1233(a) of the North Carolina General Statutes requires that, "[i]f the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom." N.C. Gen. Stat. § 15A-1233(a) (2007). In the instant case, the trial court allowed the jury to take previously admitted evidence into the jury room during deliberations. Defendant did not object during trial to the judge sending the information to the jurors; nevertheless, defendant is not precluded from raising the issue on appeal. *See State v. Ashe*, 314 N.C. 28, 40, 331 S.E.2d 652, 659 (1985). Because defendant failed to object during trial, the plain error standard of review applies. *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). Plain error exists when the trial court has committed a " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done' " or "which amounts to a denial of a fundamental right of the accused," or has " 'resulted in a miscarriage of justice or in the denial to appellant of a

fair trial[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (emphasis in original) (footnote call numbers omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

Under the plain error standard, "[i]n order to be entitled to a new trial, defendant must demonstrate that there is a reasonable possibility that a different result would have been reached had the trial court's error not occurred." *State v. Nobles*, 350 N.C. 483, 506, 515 S.E.2d 885, 899 (1999) (citing *State v. McLaughlin*, 320 N.C. 564, 570, 359 S.E.2d 768, 772 (1987)). In his brief, defendant relied upon *Ashe*, 314 N.C. at 34, 331 S.E.2d at 656, and *State v. Helms*, 93 N.C. App. 394, 400, 378 S.E.2d 237, 240 (1989), for support. The cases cited for support are inapposite. Both cases cited involved the failure to exercise judicial discretion to determine whether the jury could review evidence during deliberations. In the instant case, a different issue exists.

Here, unlike the issues presented in *Ashe* and *Helms*, the trial court exercised judicial discretion in sending requested information to the jury. However, before sending that information, the trial court here offered the prosecutor and defense counsel an opportunity to object to the decision. Notwithstanding the opportunity expressly offered by the court, defendant failed to object. When the information was sent to the jury, the record shows the trial court, the prosecutor, and defendant in agreement as to the decision. Defendant provides no support for the contention that the violation of section 15A-1233 resulted in prejudice. Therefore, because defendant failed to meet his burden of proof by not demonstrating prejudice as a result of the trial court's neglecting to follow section 15A-1233 of the North Carolina General Statutes, this assignment of error is overruled.

[6] In assignments of error numbered 29 and 30, defendant argues that the trial court committed plain error in not requiring the State to identify the alleged acts that formed the basis of the indecent liberties charges and in subsequently identifying and using those acts a basis in the jury instructions. We disagree.

Defendant failed to object during trial to the trial court's failure to require the State to identify the alleged acts forming the bases for the indecent liberties charges. Defendant, however, failed to object during trial when those alleged acts were identified as the bases for the charges in the trial court's instructions. Because defendant failed to object during trial, the plain error standard applies. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

Defendant contends that the trial court must require the State to identify clearly to the jury the acts presented during trial that form the bases for the indecent liberties charges. Notwithstanding defendant's contention, our Supreme Court recently held in *State v. Smith*, 362 N.C. 583, 669 S.E.2d 299 (2008), that "[w]hen instructing on indecent liberties, the judge is under no requirement to specifically identify the acts that constitute the charge." *Smith*, 362 N.C. at 596-97, 669 S.E.2d at 308 (citing *State v. Hartness*, 326 N.C. 561, 563-67, 391 S.E.2d 177, 178-81 (1990)). Further, "a defendant may be unanimously convicted of indecent liberties even if . . . the indictments lacked specific details to identify the specific incidents." *State v. Lawrence*, 360 N.C. 368, 375, 627 S.E.2d 609, 613 (2006) (citing *Hartness*, 326 N.C. at 564, 391 S.E.2d at 179; *State v. Lyons*, 330 N.C. 298, 412 S.E.2d 308 (1991)). Therefore, because defendant may be convicted of an indecent liberties charge even when the indictment lacks details identifying specific incidents, and because the judge is under no requirement to identify specifically the acts that constitute the charge, the trial court did not commit plain error by not requiring the State to identify the alleged acts forming the bases for the indecent liberties charges and then identifying those acts as the bases for the charges in its instructions.

For the foregoing reasons, we hold no error in the trial court's actions.

No error.

Judges McGEE and HUNTER, Jr., Robert N. concur.

MURDOCK v. CHATHAM CNTY.

[198 N.C. App. 309 (2009)]

ROBERT MURDOCK, JR., BEVERLY MURDOCK, DAVID W. KEESEE, SUSAN H. KEESEE, ELAINE J. FOSTER, AND JAMES FOSTER, PLAINTIFFS v. CHATHAM COUNTY, A NORTH CAROLINA COUNTY AND A BODY CORPORATE AND POLITIC, AND ITS MEMBERS IN THEIR OFFICIAL CAPACITIES: BUNKEY MORGAN, TOMMY EMERSON, PATRICK BARNES, MICHAEL CROSS, AND CARL H. OUTZ, THE CHATHAM COUNTY BOARD OF ADJUSTMENT AND THE MEMBERS THEREOF IN THEIR OFFICIAL CAPACITIES: CARL E. THOMPSON, GEORGE LUCIER, PATRICK BARNES, ALLEN MICHAEL CROSS, AND TOM VANDERBECK, DEFENDANTS v. LEE-MOORE OIL COMPANY, INTERVENOR

No. COA08-809

(Filed 21 July 2009)

1. Zoning— subject matter jurisdiction—failure to plead—waivability of ordinance

The trial court did not err in a rezoning case by granting plaintiffs' motion for summary judgment in case 06 CVS 924 because: (1) even though intervenor contends the trial court lacked subject matter jurisdiction to consider plaintiffs' argument that the thirty-day provision of Section 17.3(A) has been violated, the time within which an act is to be done is computed in the manner prescribed by N.C.G.S. § 1A-1, Rule 6(a); the county Board of Commissioners conducted a public hearing less than thirty days after the filing of the rezoning request in violation of provisions of the county zoning ordinance when the time is computed in accordance with Rule 6(a); a planning board or official had no authority to modify the provisions of a state statute by interpretation, and plaintiffs were not required to appeal this interpretation to the Board of Adjustment; (2) although intervenor contends that the trial court erred in invalidating the rezoning since plaintiffs failed to plead a violation of the thirty-day provision until their trial brief, an affidavit was filed on 4 June 2007 placing the planning department calendar and the rationale for setting the filing deadline of 21 August 2006 before the trial court, and it has long been the law in North Carolina that in granting or denying a motion for summary judgment under N.C. Gen. Stat. § 1A-1, Rule 56, the trial court may consider the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits which are before the court; and (3) although intervenor contends the county could waive compliance with the thirty-day filing deadline since the provision was adopted solely for the convenience of the planning department, the ordinance has the force of law and cannot be waived by the county, the language in the ordinance as to the

thirty-day provision was mandatory, and the county could not amend its zoning ordinance.

2. Cities and Towns— standing—change in property boundaries

Plaintiffs had standing in a zoning case to challenge the decision of county commissioners sitting as the Board of Adjustment upholding the decision of the planning director to modify the official zoning map in case 06 CVS 821 because: (1) plaintiffs' first amended petition in case 06 CVS 821 alleged that petitioners were aggrieved parties who have and will suffer special damages distinct from the community at large from the decision of the Planning Director in the form of injuries to their property values and to their use and enjoyment of their properties, and these allegations were sufficient to meet the requirements of notice pleading; and (2) even though intervenor contends the Planning Director property modified the official zoning map since the metes and bounds description of the pertinent twenty-acre tract was rezoned to B-1 in 1974 and contained manifest errors, both the enabling legislation and the county zoning ordinance explicitly stated that the Board of Adjustment was to interpret the zoning maps and not the Planning Director acting alone, and Section 17.1 of the Ordinance further stated that a zoning amendment was required to extend the boundary of an existing zoning district or to rezone an area to a different zoning district.

3. Appeal and Error— cases inextricably linked—issue not reached

A conditional use permit (CUP) case in 06 CVS 925 was not reached because as the trial court stated, and intervenor conceded, the rezoning case and the CUP case were inextricably linked. Without the rezoning of the property from B-1 to CU-B-1, there could be no CUP issued.

Appeal by Intervenor from judgment and orders entered 14 August 2007 by Judge Kenneth C. Titus in Chatham County Superior Court. Heard in the Court of Appeals 29 January 2009.

Lewis, Anderson, Phillips & Hinkle, PLLC, by J. Dickson Phillips, III; Bagwell, Holt, Smith, Tillman & Jones, P.A., by Nathaniel C. Smith; and The Brough Law Firm, by Robert E. Hornik, Jr., for plaintiffs-appellees.

Smith Moore Leatherwood LLP, by James G. Exum, Jr., Thomas E. Terrell, Jr., and Travis W. Martin, for intervenor-appellant.

STEELMAN, Judge.

Chatham County's Zoning Ordinance has the force of law; therefore, its provisions cannot be waived. A county planning board or official has no authority to modify the provisions of the Zoning Ordinance by interpretation. Chatham County was required to follow the correct procedural specifications, which required a thirty-day period between the filing of a proposed amendment and the hearing dates in amending its Zoning Ordinance. Plaintiffs had standing to challenge the Chatham County Board of Commissioners decision because they have presented sufficient evidence as to the specific manner in which they would suffer damages distinct or unique from the community at large. The Chatham County Planning Director had no authority to unilaterally amend the zoning map.

I. Factual and Procedural Background

Intervenor-Appellant, Lee-Moore Oil (LMO), owns a sixty-three acre tract in Chatham County. Plaintiffs own tracts of land directly adjacent to, or located in proximity to, the sixty-three acres. Since 1974, approximately twenty acres of the property was zoned for General Business (B-1), with the remaining acreage zoned Residential-Agricultural (RA-40). On 21 August 2006, LMO filed a request with Chatham County to rezone 29.37 acres of the property from General Business (B-1) and Residential-Agricultural (RA-40) to Conditional Use General Business (CU-B-1), and to rezone 3.78 acres from General Business (B-1) to Residential-Agricultural (RA-40). On the same date, LMO filed a request for a conditional use permit (CUP) for the 29.37 acre portion of their property for a "home improvement center and other retail stores and personal service shops[.]"

Approximately twenty acres of LMO's property was zoned B-1 since 1974. At that time, the official zoning map of Chatham County was based upon 1955 aerial photos. In 1988, Chatham County adopted a new zoning map based upon a series of aerial photographs with property boundaries and zoning district lines superimposed upon the photographs. This was the official zoning map as of 2006. In reviewing LMO's 2006 requests, the Planning Director for Chatham County determined that the legal descriptions of the B-1 portion of LMO's property contained in the 1974 original zoning application did not match the official zoning map. After discussing the matter with a representative of LMO, the Planning Director modified the official zoning map to conform with the legal description contained in the 1974 zoning application. This resulted in an increase in the acreage of the por-

tion of LMO's property zoned as B-1 to about thirty acres. LMO subsequently modified the maps contained in its 2006 rezoning and CUP requests to reflect this modification.

On 19 September 2006, the Board of Commissioners held a public hearing on LMO's requests. The Planning Director announced the change to Chatham County's official zoning map and that LMO had amended its requests the previous day to conform to the new zoning map. Plaintiffs contended that the requests for rezoning and a conditional use permit were received less than thirty days prior to the hearing, and they had no notice of the change to the official zoning map.

Plaintiffs appealed the Planning Director's change to the official zoning map to the Board of Adjustment on 17 October 2006. In Chatham County, the Board of Commissioners serves as the Board of Adjustment. On 6 November 2006, the Board of Adjustment rejected this appeal.

On 20 November 2006, the Board of Commissioners approved LMO's requests for rezoning and granted a conditional use permit. Plaintiffs sought a review of the Board of Adjustment decision by Petition for Writ of Certiorari to the Superior Court in case number 06 CVS 821. Plaintiffs appealed the Board of Commissioners decisions to Superior Court, by Petition for Writ of Certiorari with respect to the CUP in case number 06 CVS 925 and a declaratory judgment action challenging the rezoning decision in case number 06 CVS 924. The record shows that by order dated 15 February 2007, LMO was allowed to intervene in case 06 CVS 925.

On 14 August 2007, the trial court filed its rulings in each of the three cases. In the Board of Adjustment case (06 CVS 821), the trial court held that under the provisions of the Chatham County Zoning Ordinance, the Planning Director was not authorized to unilaterally modify the official zoning map. In the rezoning case (06 CVS 924), the trial court granted plaintiffs' motion for summary judgment, holding that Chatham County conducted the public hearing less than thirty days after filing of the request, in violation of the provisions of the Chatham County Zoning Ordinance. In the CUP case (06 CVS 925), the trial court set aside the CUP for failure of Chatham County to make findings of fact to support the issuance of the permit and because the zoning ordinance did not permit LMO to use the RA-40 portions of its property for sewer and storm water facilities.

On 22 August 2007, LMO filed amended motions requesting that the trial court reconsider each of its rulings. On 31 December 2007, the trial court denied each of these motions.

Intervenor appeals.

II. Summary Judgment in the Rezoning Case

[1] In its first argument, LMO contends that the trial court erred in granting plaintiffs' motion for summary judgment in case 06 CVS 924. We disagree.

A. 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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). The moving party bears the burden of demonstrating the lack of triable issues of fact. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). On appeal from summary judgment, "[w]e review the record in the light most favorable to the non-moving party." *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 165, 557 S.E.2d 610, 612 (2001) (citing *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975)), *aff'd*, 355 N.C. 485, 562 S.E.2d 422 (2002)).

B. Subject Matter Jurisdiction

LMO contends that the trial court lacked subject matter jurisdiction to consider plaintiffs' argument that the thirty-day provision of Section 17.3(A) had been violated.

This issue is raised for the first time on appeal. "Although our Rules of Appellate Procedure require an appellant to list assignments of error in the record on appeal, N.C.R. App. P. 10(c)(1), the issue of subject matter jurisdiction may be raised at any time, even on appeal." *Huntley v. Howard Lisk Co.*, 154 N.C. App. 698, 700, 573 S.E.2d 233, 235 (2002) (citation omitted), *disc. review denied*, 357 N.C. 62, 579 S.E.2d 389 (2003).

LMO argues that in December of 2005, the Chatham County Planning Board adopted a calendar for 2006, which set forth dates for the submission of requests to the Planning Department in order for matters to be scheduled for public hearing before the County Commissioners. This calendar indicated that for matters to be con-

sidered at the 18 September 2006 meeting, they had to be filed with the Planning Department by 21 August 2006.

Section 17.3(A) provides:

> All applications for amendments to this Ordinance shall be in writing, signed and filed with the Planning Department.
>
> . . .
>
> Completed applications shall be received a minimum of 30 days prior to the public hearing at which the proposed amendment is scheduled to be heard[.]

LMO contends that the "calendar" constituted an "interpretation" of the provisions of the Zoning Ordinance, and that prior to filing their complaint in Superior Court, plaintiffs were required to appeal this "interpretation" to the Chatham County Board of Adjustment pursuant to section 16.4 of the Chatham County Zoning Ordinance. This argument, of necessity, must be based upon the flawed premise that the Planning Board and staff are free to "interpret" the time requirements for filing to mean whatever they want it to mean: in this case, that thirty days can mean twenty-eight days.

The affidavit of Keith Megginson (Megginson), Planning Director for Chatham County, was filed with the trial court explaining why the Planning Board set Monday, 21 August 2006, as the filing date for matters to be heard by the Commissioners on 18 September 2006. The rationale was that thirty days would have fallen on a Saturday, 19 August 2006, and the filing date was moved up to the next Monday.

The manner in which time is to be computed in North Carolina is set forth by statute. "The time within which an act is to be done, as provided by law, shall be computed in the manner prescribed by Rule 6(a) of the Rules of Civil Procedure." N.C. Gen. Stat. § 1-593 (2007). Rule 6(a) provides:

> The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday when the courthouse is closed for transactions, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions.

N.C. Gen. Stat. § 1A-1, Rule 6(a) (2007).

This Rule is to be applied by counting backward from the day when an act must be performed. *Harris v. Latta*, 298 N.C. 555, 558,

259 S.E.2d 239, 241 (1979). Thirty days from 18 September 2006 is 19 August 2006. Because that date fell on a Saturday, the filing had to be on 18 August 2006 to meet the requirement of thirty days. A planning board or official has no authority to modify the provisions of a state statute by "interpretation." Plaintiffs were not required to appeal this "interpretation" to the Board of Adjustment. The trial court had jurisdiction to hear this matter.

This argument is without merit.

B. Plaintiffs Failure to Plead

Next, LMO contends that the trial court erred in invalidating the rezoning because plaintiffs failed to plead a violation of the thirty-day provision contained in Section 17.3(A). LMO contends that plaintiffs did not raise this issue until their trial brief.

The affidavit of Megginson was filed on 4 June 2007 in opposition to plaintiffs' motion for summary judgment. This affidavit placed the Planning Department calendar, and the rationale for setting the filing deadline of 21 August 2006, before the trial court. At the hearing on plaintiffs' motion for summary judgment, all parties argued the merits of the violation of the thirty-day provision. LMO also briefed the issue to the trial court, and plaintiffs specifically consented to its submission.

"It has long been the law in North Carolina that in granting or denying a motion for summary judgment under N.C. Gen. Stat. § 1A-1, Rule 56, the trial court may consider 'the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits . . .' which are before the court." *Harter v. Vernon*, 139 N.C. App. 85, 95, 532 S.E.2d 836, 842 (2000) (citation omitted), *disc. review denied*, 353 N.C. 263, 546 S.E.2d 97 (2000), *cert. denied*, 532 U.S. 1022, 149 L. Ed. 2d 757 (2001). It was proper in this case for the trial court to consider this issue in deciding plaintiffs' motion for summary judgment.

This argument is without merit.

C. Waivability of Section 17.3(A)

LMO next contends that Chatham County could waive compliance with the thirty-day filing deadline because the provision was adopted solely for the convenience of the Planning Department.

Municipal ordinances have the force of law. N.C. Gen. Stat. § 153A-47 (2007); *see also Jackson v. Board of Adjustment*, 275 N.C.

155, 162-63, 166 S.E.2d 78, 83 (1969) (the North Carolina General Assembly may confer upon county boards the power to adopt zoning ordinances). Because the Ordinance has the force of law, it cannot be waived by Chatham County. In amending its zoning ordinance, a county is required to follow its own procedures. *Thrash Ltd. P'ship v. County of Buncombe*, 195 N.C. App. 727, 732-33, 673 S.E.2d 689, 693-94 (2009). The language in the Chatham County Zoning Ordinance as to the thirty-day provision was mandatory. *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 662 (1978) ("ordinarily, the word 'must' and the word 'shall,' in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory"). The trial court properly invalidated Chatham County's amendment of its Zoning Ordinance because it did not comply with the thirty-day provision contained in the Ordinance.

This argument is without merit.

III. The Board of Adjustment Case

[2] In its second argument, LMO contends that plaintiffs did not have standing to challenge the decision of the Chatham County Commissioners, sitting as the Board of Adjustment, upholding the decision of the Planning Director to modify the official zoning map in case 06 CVS 821. We disagree.

The Board concluded as a matter of law that plaintiffs were not "parties aggrieved by the decision and determination of the Planning Director and they do not have standing to pursue an appeal therefrom." The trial court held that this conclusion was error, stating that although plaintiffs' properties did not adjoin the original or modified B-1 parcels, they did adjoin LMO's 63.3 acre tract, which encompassed the property zoned B-1. The effect of the Board's decision was to increase the size of the area zoned B-1 from twenty to thirty acres.

A. Plaintiffs' Standing

LMO contends that plaintiffs do not have standing to challenge the Board's decision because they failed to demonstrate that they would suffer damages distinct or unique from the community at large; that they failed to demonstrate loss of value to their properties; and that they failed to plead their damages with any reasonable degree of specificity.

The general standard for civil pleadings in North Carolina is "notice pleading." N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2007). Pleadings

should be construed liberally and are sufficient if they give notice of the events and transactions and allow the adverse party to understand the nature of the claim and to prepare for trial. *Smith v. N.C. Farm Bureau Mutual Ins. Co.*, 84 N.C. App. 120, 123, 351 S.E.2d 774, 776 (1987) (citing *Henry v. Deen*, 310 N.C. 75, 310 S.E.2d 326 (1984)), *aff'd*, 321 N.C. 60, 361 S.E.2d 571 (1987). In zoning cases, this has been interpreted to mean that a petitioner must allege that he stands to suffer special damages distinct from those suffered by the community at large amounting to a reduction in the value of his own property. *Heery v. Zoning Board of Adjustment*, 61 N.C. App. 612, 613, 300 S.E.2d 869, 870 (1983).

While solely alleging that plaintiffs either own property immediately adjacent to or in close proximity to the subject property is not enough, "it does bear some weight on the issue of whether the complaining party has suffered or will suffer special damages distinct from those damages to the public at large." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 669 S.E.2d 279, 283 (2008).

Plaintiffs' first amended petition in case 06 CVS 821 alleged that "[p]etitioners are aggrieved parties who have and will suffer special damages distinct from the community at large from the decision of the Planning Director complained of below in the form of injuries to their property values and to their use and enjoyment of their properties." We hold that this allegation is sufficient to meet the requirements of notice pleading, as set forth above.

This issue is restricted to the Board of Adjustment case and does not affect the CUP case because as discussed below, we are not deciding any issues stemming from the CUP case. Plaintiffs presented sufficient evidence as to the specific manner in which their properties would be affected at the Board of Commissioners hearing. Plaintiffs submitted the affidavits of an appraiser and a realtor who both testified that the County's actions would make plaintiffs' properties less attractive to potential buyers, which would amount to a reduction in property value. Mr. Foster stated that the rezoning would adversely affect his property because "the lights from the building and parking lot and the noise from the loading docks, dumpsters, loudspeakers, roof air conditioning would be a dramatic intrusion into [his] life[.]" Mrs. Murdock stated her property would be subject to large amounts of polluted run-off. Mrs. Keesee also stated that "her most major concern is the inadequate drainage and stormwater runoff plan," and how it will adversely impact her vegetation. We find this evidence is suffi-

cient to show special damages "separate and apart from the damage the community as a whole might suffer." *Mangum*, 362 N.C. at 645, 669 S.E.2d at 283; *see also Heery*, 61 N.C. App. at 613-14, 300 S.E.2d at 870.

This argument is without merit.

B. Amendment of the Official Zoning Map

LMO next contends that because the metes and bounds description of the twenty-acre tract, which was rezoned to B-1 in 1974, contained manifest errors, the Planning Director properly modified the official zoning map. We disagree.

The official zoning map for Chatham County is composed of a series of aerial photographs with the zoning district lines superimposed. Section 6 of the Ordinance states: "The boundaries of such districts as are shown upon the maps adopted by this Ordinance are hereby adopted . . . ." The official zoning map which existed in 2006 had been adopted as part of the Ordinance, and the zoning map controlled the boundaries of the various zoning districts.

N.C. Gen. Stat. § 153A-345(c) provides:

> (c) The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in specified classes of cases or situations as provided in subsection (d) of this section, not including variances in permitted uses, and that the board may use special and conditional use permits, all to be in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance. *The ordinance may also authorize the board to interpret zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar questions that may arise in the administration of the ordinance.* The board shall hear and decide all matters referred to it or upon which it is required to pass under the zoning ordinance.

N.C. Gen. Stat. § 153A-345(c) (2007) (emphasis added). The authority to interpret boundaries is prescribed in section 8.5 of the Chatham County Zoning Ordinance:

> Where uncertainty exists as to boundaries of any district shown on said maps the following rules shall apply:
>
> . . .

> 4. In case any further uncertainty exists, the Board of Adjustment shall interpret the intent of the map as to the location of such boundary.

Both the enabling legislation and the Chatham County Zoning Ordinance explicitly state that the Board of Adjustment is to interpret the zoning maps; not the Planning Director, acting alone. Section 17.1 of the Ordinance further states that a zoning amendment is required "to extend the boundary of an existing zoning district or to rezone an area to a different zoning district . . . ." We conclude that the trial judge was correct in reversing the decision of the Board of Adjustment.

This argument is without merit.

IV. The CUP Case

[3] We do not reach the issue of the CUP case (06 CVS 925) because as the trial court stated, and LMO concedes, the rezoning case and the CUP case are inextricably linked. Without the rezoning of the property from B-1 to CU-B-1, there can be no conditional use permit issued. Because we have affirmed the trial court in the rezoning case, we are required to affirm the trial court in the CUP case.

V. Conclusion

We affirm the trial court's grant of summary judgment in favor of plaintiffs in the rezoning case (06 CVS 924). We further affirm the trial court in the Board of Adjustment case (06 CVS 821) and conclude that the Planning Director did not have authority to unilaterally amend the zoning map.

In light of the above holdings, we need not reach Intervenor's remaining arguments.

AFFIRMED.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA v. LORENZO PAYTON

No. COA08-1315

(Filed 21 July 2009)

1. Criminal Law— requested instruction—improper statement of law

The trial court did not err in a first-degree burglary, double robbery with a dangerous weapon, and double second-degree kidnapping case by failing to give defendant's requested jury instruction regarding the fingerprint evidence because: (1) the requested instruction concerned a subordinate feature of the case since it did not relate to elements of the crime itself nor to defendant's criminal responsibility; and (2) the requested instruction was not a correct statement of law.

2. Kidnapping— second-degree kidnapping—motion to dismiss—sufficiency of evidence—removal and restraint separate and apart from armed robbery

The trial court erred by denying defendant's motion to dismiss the second-degree kidnapping charges because: (1) the State failed to show that the removal and restraint of the victims was separate and apart from the armed robbery when the movement of the victims from the bathroom area to the bathroom was a technical asportation; and (2) requiring the victims to lie on the floor while the robbery was taking place did not place the victims in greater danger than the robbery itself.

Appeal by defendant from judgments entered 15 February 2008 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 April 2009.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Grady L. Balentine, for the State.

Constance E. Widenhouse and Staples Hughes, for defendant-appellant.

HUNTER, ROBERT C., Judge.

Lorenzo Payton ("defendant") appeals from judgments entered 15 February 2008 in Mecklenburg County Superior Court subsequent to jury convictions finding him guilty of first degree burglary, two counts

of robbery with a dangerous weapon, and two counts of second degree kidnapping. After careful review we find no error in part, reverse in part, and remand for resentencing.

Background

At approximately 7:00 p.m. on 19 December 2005, Jackie Mizenheimer ("Jackie") and her daughter, Jennifer Mizenheimer ("Jennifer"), were on the top floor of Jackie's home. The women heard a "dinging" sound coming from the security alarm, which indicated that a door had been opened. Jackie assumed that the wind had blown open a door and chose not to investigate.

Approximately twenty to thirty minutes later, Jackie went to her bedroom on the second floor and discovered that her jewelry had been rifled through. Jennifer then joined her mother on the lower level and realized that she had not heard another "ding," meaning that the intruder(s) had not left the house. Jackie and Jennifer then started to exit the "bathroom area," which was described as a foyer leading from the bathroom to the bedroom, when they saw three black men heading toward them. One man was holding a handgun and one was holding a kaleidoscope, though at the time the women were not certain what this latter object was.

The men instructed the women to move into the bathroom, lie on the floor, and not look at them. Jennifer, being eight months pregnant at the time, had trouble lying on her stomach and was told by one of the men to sit on the floor and turn her face away. Jackie was questioned about where her husband was, when he would return home, and where she kept money in the house. Jackie told the men that she had $40 in her purse and that her husband would be home any minute. The man with the gun remained outside the bathroom while the other two men retrieved the women's purses. Upon their return, the men demanded more money, which Jackie claimed she did not have.

The men ordered the women not to look at them and then left, closing the bathroom door. The women heard the men remove a plasma television from the bedroom and leave the house. Jackie estimated that she and her daughter were in the bathroom for ten to fifteen minutes. After waiting and listening to ensure that they were alone in the house, Jackie and Jennifer went upstairs to call the police. Finding that the kitchen phone was missing, they used a cellular phone to call 911.

Jackie noticed at that time that her decorative kaleidoscope was on the kitchen counter, which was not its usual location. Jennifer indicated at trial that one of the intruders was in fact holding the kaleidoscope when they first approached the women. A single fingerprint taken from the kaleidoscope matched defendant's left thumb.

Not long before the break in, cable television servicemen, pest control workers, and installers of the plasma television had been in the Mizenheimer home; however, Jackie testified that she had not seen any of these people holding the kaleidoscope and that none of them would have been in the room where the kaleidoscope was typically kept. Jackie and Jennifer claimed that they did not know defendant, and to their knowledge, he had never been in their home prior to the robbery. Jennifer testified at trial that none of the men wore gloves. She further testified that she had a clear look at the person holding the kaleidoscope for a brief moment before she was told to look away. She stated that she identified defendant in a photographic line-up, but admitted that she told police she was not "100 percent sure." Detective Ware, who organized the photographs for the line-up but did not actually administer the line-up, testified that Jennifer did not correctly identify defendant. Jennifer's mother, Jackie, was not shown a photographic line-up. When questioned by officers, defendant denied any involvement in the robbery. Defendant was indicted on one count of first degree burglary, two counts of robbery with a dangerous weapon, and two counts of second degree kidnapping. The trial in this matter began on 11 February 2008 and continued through 13 February 2008. On 14 February 2008, a jury convicted defendant of all charges. Judgment was entered on 15 February 2008, and defendant was sentenced to three consecutive sentences of 77 to 102 months imprisonment.

Analysis

I.

[1] Defendant first argues that the trial court erred in failing to give the following requested jury instruction:

> The defendant has been charged with Robbery with a Dangerous Weapon, 2nd Degree Kidnapping and 1st Degree Burglary. The State relies upon fingerprint evidence in this case. *For you to find the defendant guilty, the State must prove beyond a reasonable doubt*:

1. That the fingerprints found at the scene of the crime correspond with those of the Defendant, and if so,

2. That the fingerprints could have been impressed only at the time the crime was committed.

"Defendant's requested instruction concerned a subordinate feature of the case since it did not relate to elements of the crime itself nor to defendant's criminal responsibility therefore." *State v. Bradley*, 65 N.C. App. 359, 363, 309 S.E.2d 510, 513 (1983). However, our Supreme Court has held that "[i]f a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance." *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993); *see also State v. Haywood*, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45 (2001) ("A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence."). Here, the requested jury instruction was not correct in itself, and therefore, the trial court did not err in refusing to give it.

The strongest evidence presented by the State was the fact that defendant's fingerprint was on the kaleidoscope, accompanied with the victims' claim that one of the robbers was holding the kaleidoscope without wearing gloves during the robbery. However, in order for the jury to return a verdict of guilty, the State did not have to prove beyond a reasonable doubt a subordinate feature of the case, that the fingerprint found was defendant's and that defendant left the print during the robbery. While the fingerprint identification was the State's most solid evidence, the jury could have chosen to disregard it and rely solely on Jennifer's testimony that she identified defendant as one of the robbers and that he did in fact commit the crimes alleged. Though there was conflicting evidence regarding her identification, as the finder of fact, the jury is responsible for "[o]bserving the parties and the witnesses in order to assess credibility and determine the weight to give to the evidence . . . ." *State v. Kirby*, 187 N.C. App. 367, 377, 653 S.E.2d 174, 181 (2007).

In the case of *State v. Moore*, 79 N.C. App. 666, 340 S.E.2d 771 (1986), where the defendants were alleged to constructively possess marijuana found in a residence,

> [t]he defendants . . . assign[ed] error to the failure of the court to give their requested jury instructions that as to each defendant his silence was not to be construed as evidence that his fingerprints could only have been impressed at the time the crime was

> committed and that neither of them had to explain the presence of his fingerprints.

Id. at 673-74, 340 S.E.2d at 777. This Court found no error since

> [t]he [trial] court instructed the jury that the defendants' silence was not to be considered against them in any way. It also instructed the jury that *they could not consider the fingerprint evidence* unless they were satisfied beyond a reasonable doubt as to each defendant that the fingerprints were his and could have been impressed only while the marijuana was in the house. We hold that this instruction substantially complied with the defendants' request and was not prejudicial to either of them.

Id. at 674, 340 S.E.2d at 777 (emphasis added).

In *Moore*, the defendants' initial request was a correct statement of law. Though the court did not give the requested instruction verbatim, the trial court instructed the jury on how to properly consider the fingerprint evidence. *Id.* If the jury determined that the defendants did not leave their fingerprints during a particular time period, then the jury was not to consider the fingerprints as evidence of guilt. *Id.*

In the case at bar, defendant's request did not go to the proper consideration of the evidence; rather, defendant's requested instruction would have required the jury to return a verdict of not guilty if it found the fingerprint evidence to be unreliable. That instruction is simply not a correct statement of law where there was additional evidence, albeit contradicted by further testimony, that defendant was present on the night of the robbery. Had defendant requested an instruction, such as that seen in *Moore*, which pertained to the consideration of the evidence, the trial court would have been required to give that instruction in substance, but that is not the case here. *See Bradley*, 65 N.C. App. at 363, 309 S.E.2d at 513 (holding that the trial court committed prejudicial error by failing to give a requested instruction on the probative value of fingerprint evidence where the State relied primarily on that evidence).

In sum, because the requested instruction was not a correct statement of law, we find that the trial court did not err in refusing to give it, either verbatim or in substance.

II.

[2] Next, defendant argues that the trial court erred in denying defendant's motion to dismiss the second degree kidnapping charges

due to insufficiency of the evidence. Specifically, defendant argues that the State failed to show that the removal and restraint of the victims was separate and apart from the armed robbery. We agree.

"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).

> 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.

Id. at 99, S.E.2d at 117.

N.C. Gen. Stat. § 14-39(a) (2007) states in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony . . . .

Our Supreme Court has examined these terms and reasoned,

> [the] term "confine" connotes some form of imprisonment within a given area, such as a room, a house or a vehicle. The term "restrain," while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement.

State v. Fulcher, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978).

With regard to convictions for both kidnapping and armed robbery, it is well established that

> there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another

> felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony. Such independent and separate restraint need not be, itself, substantial in time . . . .

Id. at 524, 243 S.E.2d at 352. Likewise, to support a separate kidnapping conviction, the removal element must be "separate and apart from that which is an inherent, inevitable part of the commission of another felony." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981).

However, "[i]t is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim." *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351.

> The key question here is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping "exposed [the victim] to greater danger than that inherent in the armed robbery itself, . . . [or] is . . . subjected to the kind of danger and abuse the kidnapping statute was designed to prevent."

State v. Pigott, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (quoting *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446).

Our Courts have upheld convictions for armed robbery and kidnapping where the restraint and/or removal was deemed to be a separate act. *See, e.g.*, *State v. Johnson*, 337 N.C. 212, 221-22, 446 S.E.2d 92, 98 (1994) (The defendant threatened to kill victim-husband, forcibly removed him from the bedroom to the living room, bound his hands, and struck him with a lug wrench in front of victim-wife who was also bound.); *State v. Ly*, 189 N.C. App. 422, 428, 658 S.E.2d 300, 305 (2008) (The "defendants bound and blindfolded each victim as he or she entered the home, forced them to lie on the floor, and left the victims bound. In addition, one of the victims attempted to escape, but was brought back to the house at gunpoint, and was bound and blindfolded."); *State v. Morgan*, 183 N.C. App. 160, 167, 645 S.E.2d 93, 99 (2007) ("[T]hree robbers bound the victims with duct tape, took money and cellular telephones, and left the victims bound when they left the hotel room."); *State v. Raynor*, 128 N.C. App. 244, 250, 495 S.E.2d 176, 180 (1998) (The defendant and his accomplice restrained and moved the victim from the front door of his residence to the bedroom where they took money from his wallet, then moved the victim

to the kitchen to take his car keys, and finally attempted to tie up the victim.); *State v. Davidson*, 77 N.C. App. 540, 543, 335 S.E.2d 518, 520 (1985) (In order "to remove the victims from the view of passersby who might have hindered the commission of the crime[,]" the victims were forced at gunpoint to walk from the front of the store to the back of the store where they were confined in a dressing room while the defendants robbed the victims and the store.).

Our Courts have also held that a kidnapping conviction was not justified because the restraint and/or removal was an inherent part of the armed robbery. *See, e.g.*, *State v. Ripley*, 360 N.C. 333, 334-35, 626 S.E.2d 289, 290 (2006) (As the victims were attempting to leave a hotel they feared was being robbed, the defendant and his accomplices ordered the victims to enter the motel lobby and lie on the floor where they were robbed.); *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446 (Defendants performed a "technical asportation" when they removed the victim from the front of a store to the back of the store at knifepoint in order for the victim to open a safe.); *State v. Taylor*, 191 N.C. App. 561, 564, 664 S.E.2d 375, 378 (2008) (The victims were forced at gunpoint to lie down on the floor of a restaurant while another robber went to the safe in the back of the restaurant.); *State v. Cartwright*, 177 N.C. App. 531, 537, 629 S.E.2d 318, 323 (2006) (Defendant committed a "mere asportation" when he moved the victim from the kitchen to the den and then to her bedroom.); *State v. Featherson*, 145 N.C. App. 134, 139, 548 S.E.2d 828, 832 (2001) (The victim was loosely bound to the defendant, an employee of the restaurant who helped the robbers gain access to the restaurant, and forced to the floor while the robbery took place.).

Our Supreme Court in *State v. Beatty*, 347 N.C. 555, 495 S.E.2d 367 (1998) upheld the convictions of kidnapping and armed robbery of one victim who was bound at the wrists, forced to lie on the floor, and kicked twice in the back. *Id.* at 559, 495 S.E.2d at 370. However, the Court reversed the conviction of kidnapping of the other victim who was held at gunpoint during the robbery, but not bound or physically harmed. *Id.* at 560, 495 S.E.2d at 370.

Upon surveying the case law, there is consistency in the Courts' opinions where the evidence tended to show that a victim was bound and physically harmed by the robbers during the robbery. Clearly that type of restraint creates " 'the kind of danger and abuse the kidnapping statute was designed to prevent.' " *Pigott*, 331 N.C. at 210, 415 S.E.2d at 561 (quoting *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446). The case law does not provide a "bright line" rule for situations where a

victim is merely ordered to move to another location while the robbery is taking place, but is not bound or physically harmed. The present case presents such a factual scenario.

Here, Jackie and Jennifer were ordered at gunpoint to move from the "bathroom area" to the bathroom and to maintain a submissive posture, but neither was bound or physically harmed. After being questioned about where money could be located in the house, the door to the bathroom was closed. The women were in the bathroom for ten to fifteen minutes total while the three men completed the robbery.[1] Under these particular facts and circumstances, we find that the removal and restraint of Jackie and Jennifer was an inherent part of the robbery and did not expose the victims to a greater danger than the robbery itself.

We find that the movement of the women from the "bathroom area" to the bathroom was a "technical asportation," such as seen in *Irwin*, *Ripley*, and *Cartwright*. The women were then asked to lie on the floor in the bathroom, and they remained in that position until the robbery was complete. As seen in *Taylor* and *Beatty*, requiring the victims to lie on the floor while the robbery is taking place does not place the victims in greater danger than the robbery itself. Unlike *Davidson*, the victims in this case were not confined in another room in order to keep passersby from hindering the commission of the crime. In sum, we find the circumstances in this case to be more like *Irwin* than *Davidson*.

We would like to note that if the facts of this case support a conviction for kidnapping, then essentially any non-violent movement of a victim could result in a kidnapping conviction, which we do not believe was the intent of the legislature in enacting the kidnapping statute.

Because the State presented insufficient evidence with regard to the second degree kidnapping charges, the trial court erred in denying defendant's motion to dismiss those charges.

Conclusion

For the foregoing reasons, the trial court did not err in refusing to give defendant's requested jury instruction, but erred in denying defendant's motion to dismiss the two counts of second de-

1. While the women were confined in a room, according to *Fulcher*, this "restriction upon freedom of movement by confinement" also qualifies as a restraint. *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351.

gree kidnapping. Accordingly, we must vacate the convictions of second degree kidnapping and remand this case to the trial court for resentencing.

No error in part, reversed in part, and remanded for resentencing.

Judges McGEE and BEASLEY concur.

STATE OF NORTH CAROLINA v. ROY DEAN WORLEY

No. COA08-1532

(Filed 21 July 2009)

1. Sexual Offenders— registration—change of address—homeless individuals

The trial court did not err by denying defendant's motion to dismiss a charge of failure to comply with sex offender registration change of address requirements. Although defendant's contention rests on the apparent assumption that individuals with no permanent abode are not required to provide change of address information until they obtain a new permanent address, the registration statutes operate on the premise that everyone does at all times have an address of some sort, even if it is a homeless shelter, a location under a bridge or some similar place.

2. Appeal and Error— preservation of issues—constitutional arguments—not raised below—not considered

Constitutional arguments that sexual offender registration statutes were void for vagueness that were not raised at trial were not considered on appeal.

Appeal by Defendant from judgment entered 8 July 2008 by Judge J. Marlene Hyatt in Buncombe County Superior Court. Heard in the Court of Appeals 20 May 2009.

Attorney General Roy Cooper, by Assistant Attorney General Jane Ammons Gilchrist, for the State.

Daniel J. Clifton, for Defendant.

ERVIN, Judge.

Roy Dean Worley (Defendant) appeals from a judgment entered 8 July 2008 following his conviction for willfully failing to comply with the change of address requirements applicable to registered sex offenders in violation of N.C. Gen. Stat. § 14-208.11(a)(2) that sentenced him to a term of 107 to 138 months imprisonment in the custody of the North Carolina Department of Correction.[1] After careful consideration of Defendant's challenges to his conviction, we find no error.

At trial, the State presented evidence which tended to show that Defendant pled guilty to four counts of taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1. Judgment was entered against Defendant on the basis of these guilty pleas on 15 April 2006. Defendant was thereafter required to register as a sex offender pursuant to N.C. Gen. Stat. § 14-208.7(a). According to N.C. Gen. Stat. § 14-208.9(a), "[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the tenth day after the change to the sheriff of the county with whom the person had last registered."[2]

Detective Courtney Mumm (Detective Mumm) of the Buncombe County Sheriff's Department oversaw the sex offender registration program in Buncombe County from the beginning of 2005 through February 2008. In 2004, Defendant received an address verification notice sent to him by the State Bureau of Investigation (SBI) at an address in the Lee Walker Heights Apartments in Asheville, North Carolina (Lee Walker Heights).[3] Defendant returned the letter, indicating that he had moved to Candler Knob Road in Asheville, North Carolina (Candler Knob), on 14 September 2004.

On 19 May 2005, Defendant submitted a notice of change of address indicating that he had moved back to Lee Walker Heights. At

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1. Although Defendant's brief and the judgment and commitment entered against Defendant indicate that Defendant was also convicted of having attained the status of an habitual felon, no verdict sheet reflecting the jury's determination of Defendant's habitual felon status was included in the record on appeal.

2. Effective 1 December 2008, N.C. Gen. Stat. § 14-208.9(a) requires a sex offender to "report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered." However, at the time of Defendant's conviction, the statute prior to the 1 May 2009 amendment applied.

3. Lee Walker Heights is a public housing facility operated by the Asheville Housing Authority (Housing Authority).

this time, Defendant lived with Laura Thomen (Thomen), despite the fact that Housing Authority rules and Thomen's lease prohibited registered sex offenders from residing there. As a result of this violation of the terms and conditions of her lease, Thomen and everyone living in her Lee Walker Height's apartment, including Defendant, were evicted.

After Detective Mumm mentioned that Defendant was living with Thomen despite his status as a convicted sex offender, Cornelia Battle, the manager of Lee Walker Heights (Battle), called Thomen in for a conference and told her that her lease would be cancelled. A notice instructing Thomen to vacate the Lee Walker Heights apartment was sent in July. The Housing Authority obtained the issuance of a Magistrate's Summons against Thomen on 29 July 2005. The court date specified in the Magistrate's Summons was 11 August 2005. According to one of Battle's records dated 30 August 2005, Thomen left her key in the drop box on 10 August 2005. After the court date, the locks on Thomen's apartment were changed. Defendant stopped living in Lee Walker Heights after the Housing Authority changed the locks.

The SBI sent an address verification notice to Defendant at his Lee Walker Heights address in 2005, but it was returned unclaimed. After becoming concerned that Defendant had left Lee Walker Heights without updating his address, Detective Mumm went to the Candler Knob address in an unsuccessful attempt to locate him. Detective Mumm had no contact with Defendant until he completed a change of address notice on 16 September 2005, in which Defendant stated that he had moved back to Candler Knob. On the form which he submitted to the Sheriff's Department at that time, Defendant stated that the effective date of his change of address was 16 September 2005.

In his own testimony, Defendant acknowledged that he had been convicted of a reportable offense in Haywood County and that he understood that he was required to register as a sex offender. After being placed on the registry, Defendant has changed his address ten or fifteen times. Defendant admitted knowing that, when he moved, he had ten days within which to notify the Sheriff's Department of his new address.

Defendant stated that after leaving Lee Walker Heights, he went back to Candler Knob. He then moved from Candler Knob to Kenilworth. Defendant testified that he had been homeless for three and one-half years, that he stayed in a van that resembled a camper,

and that Detective Mumm was not able to locate him at Candler Knob because he was staying in the camper rather than the house.

Defendant went to the Sheriff's Department after he left Lee Walker Heights and changed his address to Candler Knob. At that time, Defendant did not talk to Detective Mumm; instead, he filled out some paperwork and gave it to the officer at the front desk, who said that the paperwork would be given to Detective Mumm. Although Defendant did not give a specific date when he went to the Sheriff's Department, he testified that he might have gone on 16 September 2005.[4]

On 19 October 2005, a warrant charging Defendant with failure to notify the Sheriff's Department of his change of address was issued. On 7 August 2006, the Buncombe County grand jury returned an indictment charging Defendant with failing to provide written notice of his change of address within the required ten day period. On 8 July 2008, a jury convicted Defendant of failing to comply with the sex offender registration law.[5] On the same date, the trial court entered judgment sentencing Defendant to a term of 107 to 138 months imprisonment in the custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment.

I: Motions to Dismiss

[1] Defendant initially contends that the trial court erred by denying his motions to dismiss at the close of the State's evidence and at the close of all evidence.[6] We disagree.

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4. Although Defendant's trial counsel sought and obtained the entry of two orders requiring that Defendant be examined for the purpose of determining his competence to stand trial, both examinations resulted in determinations that Defendant was, in fact, competent.

5. As noted above, Defendant was evidently convicted of having attained habitual felon status as well.

6. According to well-established North Carolina law, if a defendant "introduces evidence" after the denial of a motion to dismiss made at the close of the State's evidence, "he thereby waives [the] motion . . . made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." *State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985) (quoting *State v. Leonard*, 300 N.C. 223, 231, 266 S.E.2d 631, 636, *cert. denied*, 449 U.S. 960 (1980)). As a result of the fact that Defendant offered evidence following the denial of his motion to dismiss at the close of the State's evidence, the correctness of the trial court's decision to deny that motion is not properly before us. For that reason, the discussion in the body of this opinion focuses on Defendant's contention that the trial court erroneously denied Defendant's motion to dismiss at the close of all of the evidence.

When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the record evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995). "The State is entitled to every reasonable intendment and inference to be drawn from the evidence, and any contradictions and discrepancies are to be resolved in favor of the State." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983). The only issue before the trial court in such instances is " 'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.' " *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996) (internal citation omitted)). " 'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' " *Turnage*, 362 N.C. at 493, 666 S.E.2d at 755 (quoting *Crawford*, 344 N.C. at 73, 472 S.E.2d at 925). As long as the evidence permits a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also "permits a reasonable inference of the defendant's innocence." *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 140 (2002).

The North Carolina Sex Offender and Public Protection Registration Programs require every individual who has been convicted of a reportable offense as defined by N.C. Gen. Stat. § 14-208.6(4), a category which includes offenses against minors and "sexually violent offenses," to register as a convicted sex offender with the sheriff of the county in which the person resides. N.C. Gen. Stat. § 14-208.7(a). According to the relevant statutory provisions, the sheriff in each of North Carolina's one hundred counties is required to obtain certain information from registering sex offenders, including the individual's full name, physical description, current photograph, fingerprints, driver's license number, home address, and the "type of offense for which the person was convicted, the date of conviction, and the sentence imposed." N.C. Gen. Stat. § 14-208.7(b). "If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the tenth day after the change to the sheriff of the county with whom the person had last registered." N.C. Gen. Stat. § 14-208.9(a).

The General Assembly has imposed criminal penalties upon individuals who are required to register and fail to either register or take

some other action required by law. N.C. Gen. Stat. § 14-208.11. More particularly, N.C. Gen. Stat. § 14-208.11 provides that:

> (a) A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:
>
> . . . .
>
> (2) Fails to notify the last registering sheriff of a change of address as required by this Article.

N.C. Gen. Stat. § 14-208.11. "The crime of failing to notify the appropriate sheriff of a sex offender's change of address under N.C. Gen. Stat. § 14-208.11(a) is a strict liability offense." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citing *State v. Bryant*, 359 N.C. 554, 562, 614 S.E.2d 479, 484 (2005)). A conviction for violating N.C. Gen. Stat. §§ 14-208.9(a) and 14-208.11(a)(2) requires proof beyond a reasonable doubt that: "(1) the defendant is 'a person required . . . to register,' N.C. Gen. Stat. § 14-208.11(a); (2) the defendant 'change[s]' his or her 'address,' N.C. Gen. Stat. § 14-208.11(a)(2); and (3) the defendant '[f]ails to notify the last registering sheriff of [the] change of address,' . . . 'not later than the tenth day after the change,' N.C. Gen. Stat. § 14-208.9(a)." *Abshire*, 363 N.C. at 324, ––– S.E.2d at –––.

"[T]he statute describes a change of address as a discrete event and not as a nebulous process." *Id.*, 363 N.C. at 329, ––– S.E.2d at –––. Although "[t]he word 'address' is not explicitly defined by statute," "the Legislature is," in such instances, "presumed to have used the words of a statute to convey their natural and ordinary meaning." *Id.*, 363 N.C. at 329, ––– S.E.2d at ––– (citing *Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2004) (citations and internal quotations omitted)). "To whatever degree the meaning of address may be ambiguous," courts must "refer to the purpose of the statute and the intent of the legislature in order to derive an appropriate interpretation." *Id.*, 363 N.C. at 330, ––– S.E.2d at ––– (quotation omitted). " 'The best indicia of [the legislature's] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.' " *Id.*, 363 N.C. at 330, ––– S.E.2d at ––– (quoting *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted)).

The purpose of the sex offender registration program is "to assist law enforcement agencies and the public in knowing the whereabouts

of sex offenders and in locating them when necessary." *Id.*, 363 N.C. at 330, —— S.E.2d at ——. The Supreme Court rejected this Court's description of a registered sex offender's address as "a place where a registrant resides and where that registrant receives mail or other communication," *State v. Abshire*, 363 N.C. App. 322, 330, 666 S.E.2d 657, 663 (2008), *rev.* —— N.C. ——, —— S.E.2d —— (2009), since such an "interpretation . . . would thwart the intent of the legislature" by allowing a sex offender "to actually live at a location other than where he or she was registered and not be required to notify the sheriff of that new address as long as he or she continued to receive United States Postal Service mail at the registered address." According to the Supreme Court, such a definition would "enable sex offenders to elude accountability from law enforcement and . . . expose the public to an unacceptable level of risk." *Abshire*, 363 N.C. at 330, —— S.E.2d at ——. For that reason, the Supreme Court has concluded that the term "address" as used in the sex offender registration statutes should be understood as "describing or indicating the location where someone lives." *Id.*, 363 N.C. at 331, —— S.E.2d at ——. As a result, "a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary." *Id.*, 363 N.C. at 331, —— S.E.2d at ——.

In this case, Deputy Clerk of Superior Court Elizabeth Whittenberger testified at trial that judgment was entered against Defendant on 15 April 1996 based on his plea of guilty to four counts of taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1. Thus, the undisputed record evidence clearly establishes that Defendant was subject to the registration regimen set out in N.C. Gen. Stat. § 14-208.7(a). For that reason, the only two issues that were in dispute at trial were whether Defendant had changed "the actual place of abode where he or she lives, whether permanent or temporary," and, if so, whether he gave proper notice to the Buncombe County Sheriff's Department within ten days of any such change of address.

Battle testified that she hand wrote a statement on 30 August 2005 indicating that Thomen left her keys in the drop box and vacated her apartment at Lee Walker Heights on 10 August 2005 as a result of her eviction, which stemmed from a breach of her lease resulting from her decision to allow Defendant, a registered sex offender, to live there. Despite the fact that Thomen returned her keys, the locks on the doors to her apartment were changed be-

cause "sometimes" evicted residents "come back[.]" When asked whether Defendant "stopped living there" after the Housing Authority obtained a judgment against Thomen on 11 August 2005, Battle responded, "[h]e had to because we changed the locks." Detective Mumm testified that Defendant completed a change of address form indicating that he had moved from Lee Walker Heights to Candler Knob on 16 September 2005. After receiving notice of Thomen's eviction, Mumm had attempted to "ascertain whether the defendant still lived" at Lee Walker Heights and did not see him there. When she asked the apartment manager whether Thomen and her roommates still lived in the apartment, the manager answered, "[n]o, she had been evicted."

Defendant testified that he moved out of Lee Walker Heights in late July or early August and that he knew that he only had ten days to notify the Sheriff's Department of his move. However, Defendant admitted that "I have a tendency to forget sometimes[.]" Defendant described himself as a "drifter" and attested that "it's [sometimes] difficult for the Sheriff's Office to keep up" with him. Defendant testified that he went to the Sheriff's Department and said, "I'm here to register." An officer "gave him a piece of paper to change my address from Lee Walker to Candler Knob[,]" and Defendant submitted the form. The form was dated 16 September 2005. When asked whether the "meeting at the Sheriff's Office . . . happened [in] mid September 2005[,]" Defendant replied, "I'm not sure, but I think it is, yes."

In seeking to overturn his conviction on appeal, Defendant argues that he had not established a new "address" after leaving Lee Walker Heights until the date upon which he submitted his notice of change of address to the Buncombe County Sheriff's Department despite the fact that he had been evicted from Lee Walker Heights more than a month earlier. In essence, Defendant appears to argue that no change of address has occurred until he had obtained a new permanent residence or abode. In order to provide a factual predicate for this argument, Defendant testified that, after leaving Lee Walker Heights:

> Well, I went back to Candler Knob, and I moved from Candler Knob to 41 Kenilworth, and when they come (sic) to check on me I wasn't there at the time because I move around a lot. I have a lot of friends that I stay with off and on. I have been homeless for about three and a half years. I stayed in the van the biggest part of the day time. I didn't stay in the house, but I stayed in the van

> that was like a camper, and I came to town a lot. I rode the bus a lot into town back and forth, and that's why they couldn't keep up with me. I'm a hard person—I'm a drifter, you know as they say, but drifting from one town to the next, you know, one address to the next, you know. . . .

As we understand his testimony, Defendant's van was located at the Candler Knob address, which he gave as his new address in his 16 September 2005 filing with the Sheriff's Department after he left Lee Walker Heights. After careful consideration, we do not find Defendant's argument persuasive.

At an absolute minimum, the record contains evidence tending to show that Defendant left Lee Walker Heights on or before 10 August 2005 and failed to report a new address until 16 September 2005. According to his own testimony, Defendant claims that, like many individuals, he traveled from place to place within his hometown. In addition, Defendant stated that he spent nights at the homes of friends and may have even traveled to different towns. Even so, there is substantial evidence tending to show that Defendant "reside[d]" at Candler Knob after he left Lee Walker Heights. Defendant himself stated that after he left Lee Walker Heights, "[w]ell, I went back to Candler Knob . . . . I stayed in the van the biggest part of the day time. I didn't stay in the house, but I stayed in the van that was like a camper[.]" When taken in the light most favorable to the State, this evidence is, if believed, sufficient to establish that Defendant changed his "actual place of abode where he or she lives, whether permanent or temporary," *Abshire*, 363 N.C. at 331, —— S.E.2d at ——, from Lee Walker Heights to Candler Knob by no later than 10 August 2005 and that he failed to report his new address to the Buncombe County Sheriff's Department until 16 September 2005. As a result, we believe that the record contains evidence tending to show both that Defendant changed his "address," as that term is used in N.C. Gen. Stat. §§ 14-208.9(a) and 14-208.11(a)(2), and that he failed to notify the Buncombe County Sheriff's Department of this development within ten days after it occurred.

Defendant's challenge to the sufficiency of the evidence to support his conviction for violating N.C. Gen. Stat. §§ 14-208.9(a) and 14-208.11(a)(2) rests on the apparent assumption that individuals with no permanent abode are not required to provide change of address information until such time as they obtain a new permanent residence. The reference in the Supreme Court's opinion in *Abshire*, 363 N.C. 331, —— S.E.2d ——, to a "temporary" residence coupled with

the factual analysis in the Supreme Court's decision[7], confirms that the sex offender registration statutes operate on the premise that everyone does, at all times, have an "address" of some sort, even if it is a homeless shelter, a location under a bridge or some similar place. In the event that we were to accept the argument that "drifters" such as Defendant have no "address" as defined by N.C. Gen. Stat. §§ 14-208.9(a) and 14-208.11(a)(2), then such individuals would be effectively immune from the registration requirements found in current law as long as they continued to "drift." The adoption of such an understanding of the relevant statutory provisions would completely thwart the efforts of "law enforcement agencies and the public [to] know the whereabouts of sex offenders and [to] locate them if necessary." *Abshire*, 363 N.C. at 330, —— S.E.2d at ——. Thus, we reject Defendant's contention that there are occasionally times when a registered sex offender lacks a reportable "address" for purposes of N.C. Gen. Stat. §§ 14-208.9(a) and 14-208.11(a)(2).

As a result, since Defendant did not intend to return, nor was it possible for him to return, to Lee Walker Heights, his "address" as defined in *Abshire* undoubtedly "change[d]" following Thomens' eviction. Furthermore, there is substantial evidence in the record tending to show that Defendant changed his "address" from Lee Walker Heights to Candler Knob more than ten days prior to 16 September 2005. At an absolute minimum, Defendant had a "place of abode" of some nature after his departure from Lee Walker Heights on or before 10 August 2005 which was not reported to the Buncombe County Sheriff's Department on or before 20 August 2005.[8] Thus, we conclude there was ample record support for the jury's verdict convicting Defendant of failing to provide timely notice of his change of address in violation of N.C. Gen. Stat. § 14-208.11(a)(2). For that reason, the

7. The essential argument advanced on appeal in *Abshire* was that, since the defendant continued to receive mail at the residence of her boyfriend's father and returned there periodically, the fact that she had been staying temporarily at her parent's residence while she got "her emotions together" did not constitute a change of address for purposes of the sex offender registration statutes. By concluding that the evidence was sufficient to permit a reasonable inference "that defendant was indicating a change in her actual place of abode, even for just a temporary period," and that this evidence sufficed to support a conviction, *Abshire*, 363 N.C. at 333, —— S.E.2d at ——, the Supreme Court necessarily rejected the basic thrust of Defendant's argument on appeal.

8. Thus, even if Defendant moved from Lee Walker Heights to Laural Knob and stayed there less than ten days before moving to Kenilworth, he was still required to have provided address information of some nature by no later than 20 August 2005, a legal obligation which he totally failed to honor.

trial court did not err by denying Defendant's motion to dismiss at the close of all evidence. This assignment of error is overruled.

II: Void for Vagueness Challenge to Change of Address Statutes

[2] Defendant also contends that the trial court erred by not declaring N.C. Gen. Stat. §§ 14-208.9(a) and 14-208.11(a)(2) unconstitutionally void for vagueness given the absence of a statutory definition of "address" or "change of address" that suffices to provide adequate guidance to someone in Defendant's unique situation. We note that Defendant did not raise his void for vagueness challenge to N.C. Gen. Stat. §§ 14-208.9(a) and 14-208.11(a)(2) before the trial court. As a result, we need not consider Defendant's constitutional arguments on the merits and decline to do so. *See* N.C. R. App. P. 10(b)(1); *see also State v. Raines*, 362 N.C. 1, 18, 653 S.E.2d 126, 137 (2007); *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988). This assignment of error is overruled.

For all of the reasons set forth above, we conclude that Defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges McGEE and JACKSON concur.

BRIAN JAMES AND JULIUS A. FULMORE, PLAINTIFFS v. JERRY BLEDSOE; WILLIAM EDWARD DAVIS HAMMER, INDIVIDUALLY AND AS PRESIDENT OF HAMMER PUBLICATIONS, INC.; JOHN HAMMER, INDIVIDUALLY, AS SECRETARY OF HAMMER PUBLICATIONS, INC. AND EDITOR-IN-CHIEF OF THE RHINOCEROS TIMES; AND HAMMER PUBLICATIONS, INC. D/B/A THE RHINOCEROS TIMES, DEFENDANTS

No. COA08-1386

(Filed 21 July 2009)

Appeal and Error— interlocutory—denial of motion to compel discovery—substantial right not affected

An appeal from the denial of a motion to compel discovery was dismissed as interlocutory even though plaintiffs argued that a substantial right was affected through defendants' assertion of a statutory privilege and the highly material nature of the information being sought. Plaintiffs provided no legal argument for the contention that plaintiffs' substantial right was affected by

defendants' assertion of a statutory privilege, and even though some relevant and material evidence might be contained in the requested notes and recordings, plaintiffs are not entitled to a fishing expedition to locate it.

Appeal by plaintiffs from order entered 1 August 2008 by Judge Vance Bradford Long in Guilford County Superior Court. Heard in the Court of Appeals 8 June 2009.

Forman Rossabi Black, P.A., by Amiel J. Rossabi, for plaintiffs-appellants.

Smith, James, Rowlett & Cohen, L.L.P., by Seth R. Cohen, for defendants-appellees.

MARTIN, Chief Judge.

Greensboro police officers Brian James and Julius A. Fulmore ("plaintiffs") appeal from the superior court's 1 August 2008 Order denying their 2 April 2008 Motion to Compel Discovery Responses from the following named defendants: investigative journalist Jerry Bledsoe ("Bledsoe"); president of Hammer Publications, Inc. and publisher of *The Rhinoceros Times* William Edward Davis Hammer ("William Hammer"); secretary of Hammer Publications, Inc. and editor-in-chief of *The Rhinoceros Times* John Hammer ("John Hammer"); and Hammer Publications, Inc. d/b/a *The Rhinoceros Times* ("Hammer Publications"). For the reasons stated, we dismiss plaintiffs' appeal.

In light of our disposition of this appeal, our recitation of the facts and procedural history of the case is abbreviated. On 19 November 2007, plaintiffs filed a Complaint against defendants alleging defamation and civil conspiracy. Plaintiffs alleged that twenty-three false and defamatory statements about either or both plaintiffs were authored by defendant Bledsoe and published in *The Rhinoceros Times* in a series entitled "Cops in Black and White." Defendant Bledsoe's series began in late summer 2006 and has included more than fifty installments, although the twenty-three allegedly defamatory statements appear in only ten of those articles. Plaintiffs also alleged that defendants "formed a scheme" in which defendants William Hammer and Hammer Publications knowingly published both defendant Bledsoe's "Cops in Black and White" series and defendant John Hammer's editorial commentary on defendant Bledsoe's series, which were "rife with defamatory statements," in order to "make

money," "achieve improper and immoral results," and "deceive the citizens of Guilford County."

Defendants filed their Answer to plaintiffs' Complaint on 18 January 2008 in which they asserted thirteen defenses. Plaintiffs sent each defendant a First Set of Interrogatories and Request For Production of Documents ("Plaintiffs' First Interrogatories"), in which plaintiffs sought, among other things, "[a]ny and all documents and electronic data that relate to [p]laintiffs," and "[a]ny and all documents and electronic data that relate to communications with individuals or entities that supplied information either" "to be used in" or "to lead to the discovery of information to be used in the Series and/or the Editorials." After the court granted defendants' Motion for Extension of Time to answer Plaintiffs' First Interrogatories, each defendant sent plaintiffs their Answers to Plaintiffs' First Interrogatories.

On 17 March 2008, plaintiffs' counsel sent letters to each defendant asserting that defendants' Answers to Plaintiffs' First Interrogatories were "totally and completely inadequate" and "completely nonresponsive," and stated, "[w]ith respect to the document production, the documents produced in no way satisfy the requests for production served upon [defendants]." Plaintiffs' counsel demanded that defendants supplement their responses to Plaintiffs' First Interrogatories by 24 March 2008. On 2 April 2008, plaintiffs filed a Motion to Compel Discovery Responses from Defendants, in which they prayed for defendants "to answer and fully respond to [p]laintiffs' discovery requests without objections." Before plaintiffs' Motion to Compel was heard, each defendant sent plaintiffs their Supplemental Answers to Plaintiffs' First Interrogatories.

Plaintiffs' Motion to Compel was heard on 19 May 2008 and 11 June 2008. In its Order entered on 1 August 2008, the trial court concluded that "defendants shall supplement within 30 days of the entry of this Order their Answers to plaintiffs' [First Interrogatories] by lifting their objection as to their fact checking procedures in general, and in particular as to the specific allegations of alleged defamation in paragraph 12 of their Complaint." The court further concluded that "defendants shall supplement their Answers and disclose all intercourse of any type between Mr. Bledsoe and either of the Hammers as to how the Series came about." Plaintiffs' Motion to Compel was denied. Plaintiffs timely appealed from the trial court's order.

Plaintiffs concede that the trial court's 1 August 2008 Order is interlocutory. An appeal from an interlocutory 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). "Generally, an order compelling discovery is not immediately appealable." *Doe 1 v. Swannanoa Valley Youth Dev. Ctr.*, 163 N.C. App. 136, 138, 592 S.E.2d 715, 717 (citing *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999)), *disc. review and supersedeas denied*, 358 N.C. 376, 596 S.E.2d 813 (2004). However, an interlocutory order denying discovery has been held to affect a substantial right when: (A) " 'a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial,' " *id.* (quoting *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581), or (B) "the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is highly material to a determination of the critical question to be resolved in the case." *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 447-48, 271 S.E.2d 522, 523 (1980). Plaintiffs contend the trial court's interlocutory order denying their Motion to Compel discovery affects a substantial right based on (A) defendants' assertion of the statutory privilege under N.C.G.S. § 8-53.11, and (B) the rule of *Dworsky v. Travelers Insurance Co.* We disagree.

A.

In its 1 August 2008 Order, the trial court found that defendants asserted a qualified privilege under N.C.G.S. § 8-53.11 and concluded that "N.C.G.S. § 8-53.11 applies and that the plaintiffs have failed to establish their need for the information pursuant to the requirements of this statute; therefore, defendants' objections are sustained, and plaintiffs' Motion to Compel is denied." On appeal, plaintiffs contend the trial court's recognition of *defendants'* assertion of this statutory privilege entitles *plaintiffs* to immediate appellate review of the trial court's interlocutory order. To support their contention, plaintiffs rely on the following cases: *Sharpe v. Worland*, 351 N.C. 159, 522 S.E.2d 577 (1999); *Evans v. United Services Automobile Ass'n*, 142 N.C. App. 18, 541 S.E.2d 782, *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001); and *Miles v. Martin*, 147 N.C. App. 255, 555 S.E.2d 361 (2001) (citing *Lockwood v. McCaskill*, 261 N.C. 754, 136 S.E.2d 67 (1964)).

Plaintiffs first cite *Sharpe's* oft-repeated rule that, when "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right." *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581. Contrary to plaintiffs' assertions, however, we conclude that *Sharpe* does not mandate appellate review of an interlocutory order upholding a statutory privilege asserted by a party from whom discovery is sought.

In *Sharpe*, the plaintiff initiated a medical malpractice action against the defendants for personal injuries, and served a notice of deposition upon the defendant-hospital in which the plaintiff requested that the defendant-hospital "produce '[a]ll documents related to all complaints and incident reports' and '[a]ll minutes of any meeting or hearing of the Board of Trustees' relating to Dr. Worland." *Id.* at 160, 522 S.E.2d at 578 (alterations in original). The defendant-hospital moved for a protective order, asserting that "certain documents pertaining to Dr. Worland's participation . . . were privileged and, therefore, protected from disclosure." *Id.* at 160-61, 522 S.E.2d at 578. The trial court denied the motion for a protective order and ordered the defendant-hospital to produce all documents concerning defendant Worland's participation. *Id.* at 161, 522 S.E.2d at 578. The defendants appealed from the trial court's denial of their motion. *See id.*

In addressing the issue of whether the denial of the defendant-hospital's motion for a protective order affected a substantial right, the Court wrote: It "suffices to observe that, if the [defendant-h]ospital is required to disclose the very documents that it alleges are protected from disclosure by the statutory privilege, then a right materially affecting those interests which a [person] is entitled to have preserved and protected by law—a substantial right—is affected." *Id.* at 164, 522 S.E.2d at 580 (second alteration in original) (internal quotation marks omitted). In other words, the Court recognized that *a party asserting a privilege* which it "is entitled to have preserved and protected by law" will lose that right if the trial court's order requiring that it disclose the documents it alleges are protected "is not reviewed before entry of a final judgment." *Id.* at 164-65, 522 S.E.2d at 580-81. Thus, *Sharpe* gives no support to plaintiffs' contention in the present case that the trial court's recognition of *defendants'* assertion of a statutory privilege affects a substantial right of *plaintiffs*.

Similarly, in *Evans*, the plaintiff brought an action against the defendants for breach of contract, bad faith, and unfair and deceptive trade practices, and sought to obtain a complete copy of the defendants' claims file relating to "the incident in question, including copies of reports generated as the result of defendants' investigation, legal opinions obtained by defendants from both in-house and private counsel, and the substance of discussions among defendants' personnel (including their attorneys) who participated in the decision to deny coverage to the plaintiff." *Evans*, 142 N.C. App. at 22, 541 S.E.2d at 785. The defendants declined to produce those documents which they alleged were protected by the attorney-client privilege. *See id.* at 22-23, 541 S.E.2d at 785. The plaintiff moved to compel discovery of the material the defendants alleged was privileged. *See id.* at 23, 541 S.E.2d at 785. The trial court partially granted the plaintiff's motion to compel, and the parties appealed. *See id.*

"Plaintiff move[d] to dismiss defendants' appeal as interlocutory, while defendants argue[d] that, because the trial court's orders require[d] that they produce material protected by the attorney-client privilege, their appeal involve[d] a substantial right." *Id.* at 23, 541 S.E.2d at 786. This Court stated that it "agree[d] with defendants' contention," and found that "the trial court's order *affects a substantial right of defendants* under the holding of our Supreme Court in *Sharpe*." *Id.* at 23-24, 541 S.E.2d at 786 (emphasis added). In other words, this Court decided to hear the appeal in *Evans* because *the party asserting the protection of the privilege* sought to have the issue heard before having to disclose the information it sought to protect.

Because the appeals heard in *Miles* and *Lockwood* likewise arose from circumstances similar to those described above in *Sharpe* and *Evans*—in which the appellate court granted immediate review to the party asserting a statutory privilege after the trial court entered an interlocutory order compelling discovery against the party who asserted such a privilege, *see Miles*, 147 N.C. App. at 256, 258-59, 555 S.E.2d at 362, 363-64 (allowing immediate appellate review for defendant asserting attorney-client privilege after the trial court's interlocutory order granted plaintiffs' motion to compel production of defendant's client/investor documents); *Lockwood*, 261 N.C. at 755-57, 136 S.E.2d at 68-69 (allowing immediate appellate review for plaintiff asserting physician-patient privilege after the trial court's interlocutory order granted defendants' motion to compel plaintiff's psychiatrist to submit to a deposition regarding plaintiff's medical

treatment history), we conclude that the cases upon which plaintiffs rely are distinguishable from the present case. Since plaintiffs have provided no legal argument supporting their contention that the trial court's denial of plaintiffs' Motion to Compel based on *defendants'* assertion of a statutory privilege affects a substantial right of *plaintiffs* and requires immediate appellate review, we conclude that plaintiffs' appeal is not properly before this Court on this ground.

B.

Plaintiffs also seek immediate appellate review of the trial court's interlocutory order based on their contention that the court's denial of their Motion to Compel affects a substantial right under the rule in *Dworsky v. Travelers Insurance Co.*, 49 N.C. App. 446, 271 S.E.2d 522 (1980). Again, we disagree.

As mentioned above, in *Dworsky*, this Court stated that an interlocutory order denying discovery affects a substantial right which would be lost if the ruling were not reviewed before final judgment (1) "if the information desired is highly material to a determination of the critical question to be resolved in the case," and (2) if "the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense." *Dworsky*, 49 N.C. App. at 447-48, 271 S.E.2d at 523.

Plaintiffs contend the information desired is "highly material" because "[t]he requested discovery goes to the critical issue of [defendant] Bledsoe's knowledge of the truth or falsity of the statements he published." Plaintiffs assert that they "produced evidence at the hearing that [defendants] (or some of them) knew or should have known that some statements in the articles were false, [and that] therefore, a review of the notes and recordings is highly material to a determination of whether [defendants] published false statements with actual malice." In support of this assertion, plaintiffs direct this Court's attention to portions of the transcript from the 11 June 2008 hearing on plaintiffs' Motion to Compel, which contain the testimony of two witnesses—Mr. Coman and Mr. Jones. However, it is not apparent from these excerpts that defendants "knew or should have known that some statements in the articles were false."

In the transcript pages referenced by plaintiffs, Mr. Coman testified that defendant Bledsoe said that David Wray had "been treated wrong, and [that defendant Bledsoe was] going to do everything [he

could] to help restore David Wray's good name." Mr. Coman also testified that defendant Bledsoe "didn't think much of Mitch Johnson" and "hoped that the outcome of the articles would be that Mitch Johnson would ultimately get fired." Mr. Jones testified that he spoke with defendant Bledsoe "to tell him about some folks that [Mr. Jones] thought would have had *a different opinion* about [plaintiff] Fulmore," (emphasis added), but that defendant Bledsoe did not contact some of the persons to whom Mr. Jones referred him. Nonetheless, plaintiffs have not shown by these excerpts that defendant Bledsoe's notes and recordings are "highly material to a determination of whether [defendants] published false statements with actual malice." Rather, "the record in the instant case offers [this Court] no clue as to what relevant and material information, if indeed there is any, is sought." *See Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 524. Accordingly, even though some relevant and material evidence *might* be contained in the requested notes and recordings, plaintiffs are "not entitled to a fishing expedition to locate it." *See id.* Therefore, because "plaintiffs have not shown that the information sought is so crucial to the outcome of this case that it would deprive them of a substantial right and thus justify an immediate appeal," *see id.*, plaintiffs' appeal from the trial court's interlocutory 1 August 2008 Order denying plaintiffs' Motion to Compel is dismissed.

Dismissed.

Judges STEPHENS and HUNTER, JR. concur.

PINEWILD PROJECT LTD. P'SHIP v. VILLAGE OF PINEHURST

[198 N.C. App. 347 (2009)]

PINEWILD PROJECT LIMITED PARTNERSHIP; WILLIAM BRUFF; JEAN BRUFF; TOM CLARK; TERRY CLARK; RICHARD DAVIS; NANCY DAVIS; STEVE DESATNICK; MERRY DESATNICK; JOHN FLACK; DOROTHY FLACK; TERRY GANSE; KAREN GANSE; FRANCIS GREGORY; MARY GREGORY; SANDI GRUIN; JOHN HEALY; GWENDOLINE HEALY; JAMES W. HINDE, TRUSTEE FOR THE JAMES W. HINDE TRUST; EARLE HIGHTOWER, LAURENE HIGHTOWER; JOHN JARRETT; LINDA JARRETT; WILLIAM JELOCHEN; RICHARD JOHNSON; BARBARA JOHNSON; PHILLIP KEEL; NANCY KEEL; GERALD LALLY; TATYANA LALLY; JIM MELLIOS; FRAN MELLIOS; CHARLIE MARDIGIAN; SANDI MARDIGIAN; JAMES MCGILLAN; KATHLEEN MCGILLAN; JC NORMAN; CONNIE NORMAN; ROBERT NORMAN; VERN PIKE; RENNY PIKE; DANIEL POSSON; PONI POSSON; JIM PRYOR; LOUISE PRYOR; WALT SANTILLI; DIANA SANTILLI; KOICHI SATO; DON SCHNEIDER; MARY SCHNEIDER; DENNIS STRONJY; GAY STROJNY; DAVID TREMBLAY; SANDRA TREMBLAY; DAVID WALKER; LYNN WALKER; WILLIAM WENDT; HOPE WENDT; WILLIAM WRIGHT; SUZANNE WRIGHT, PETITIONERS-APPELLANTS v. VILLAGE OF PINEHURST, A NORTH CAROLINA MUNICIPALITY, RESPONDENT-APPELLEE

No. COA08-1288

(Filed 21 July 2009)

1. Cities and Towns— involuntary annexation—sufficiency of street maintenance and police and waste collection

The trial court did not err by granting summary judgment in favor of respondent municipality even though petitioners contend an annexation ordinance was improperly adopted by respondent when the report allegedly did not properly address how respondent would extend street maintenance and police and waste collection services to the area to be annexed as required by N.C.G.S. § 160A-47(3) when the streets of the pertinent gated community are privately owned and access to these streets may only be obtained through permission of the property owners because: (1) the requirements of N.C.G.S. § 160A-47(3) were met since respondent maintains public streets at its expense and private streets are maintained by their owners, respondent gave petitioners the option to either dedicate their streets to respondent and receive the same level of maintenance provided other public streets or keep petitioners' streets private and continue to maintain their streets at their expense, and both of these options were substantially consistent with how respondent currently treated public and private streets within its village limits; (2) in regard to police and waste management services, the General Assembly did not intend for N.C.G.S. § 160A-47(3) to provide private communities with an avenue to defeat annexation by denying ac-

cess to municipal employees when all other requirements of that statute are met; and (3) whether petitioners choose to avail themselves of the offered services was a different matter not germane to this argument.

2. Cities and Towns— involuntary annexation—meaningful extension of services

The trial court did not err by granting summary judgment in favor of respondent municipality even though petitioners contend respondent's plan to extend services into the annexed area was conditioned on access which was not addressed in the annexation report and that an annexation plan must provide a meaningful extension of services because: (1) the issue of whether the report revealed an improper purpose for the annexation could not be reviewed on appeal since the Court of Appeals was constrained upon review to the specific issues stated in N.C.G.S. § 160A-50(f); (2) although petitioners contend the services in the annexation plan are not meaningful since petitioners might not allow respondent access to the private streets in order for respondent to provide the services outlined in the annexation plan, this argument has already been rejected by the Court of Appeals; (3) although petitioners contend the annexation plan does not adequately describe the current level of services in respondent's corporate limits and does not adequately describe whether or how such services are provided in similarly situated areas, petitioners abandoned this argument by failing to make further argument in support of this contention, and they provide no citations to legal authority in support of the contention that the annexation plan is statutorily required to include this information; and (4) a review of the annexation plan revealed it met the statutory requirements for the services respondent proposed to offer petitioners.

3. Cities and Towns— involuntary annexation—public policy arguments

Although petitioners contend the involuntary annexation of their gated community was inconsistent with public policy and with the involuntary annexation statutes, the review of the Court of Appeals was limited by N.C.G.S. § 160A-50(f) to a review of whether the annexation plan substantially complied with the annexation statutes enumerated in N.C.G.S. § 160A-50(f), petitioners made no arguments that the annexation was inconsistent

with the statutes, and petitioners' public policy arguments may not be addressed.

Appeal by Petitioners from order entered 15 November 2007 by Judge Gary E. Trawick and order entered 27 March 2008 by Judge Lindsay R. Davis, in Superior Court, Moore County. Heard in the Court of Appeals 8 April 2009.

The Brough Law Firm, by Robert E. Hornik, Jr., for Petitioners-Appellants.

Van Camp, Meacham & Newman, PLLC, by Michael J. Newman; and Parker, Poe, Adams & Bernstein, L.L.P., by Anthony Fox and Benjamin Sullivan, for Respondent-Appellee.

McGEE, Judge.

Respondent, a North Carolina municipality, adopted a resolution on 9 November 2005 to consider annexing Pinewild Country Club of Pinehurst (Pinewild), a gated community bordering the corporate limits of Respondent. Respondent created an "Annexation Area Services Plan for the Village of Pinehurst[,] Moore County, North Carolina[,]" dated 23 January 2007, detailing its plans for annexing Pinewild. Respondent adopted an annexation ordinance to involuntarily annex Pinewild on 15 June 2007. This annexation was to be effective on 30 June 2008. Petitioners, property owners in the Pinewild community, filed a petition for review of the annexation ordinance in Superior Court in Moore County on 9 August 2007, alleging, *inter alia*, that Petitioners would "suffer material injury by the failure of [Respondent] to comply with the applicable requirements of the annexation statutes[.]" Certain claims of Petitioners were voluntarily dismissed, and certain other claims were dismissed by order of the trial court on 15 November 2007. Respondent filed a motion for summary judgment on all remaining claims on 24 January 2008. The trial court granted Respondent's motion for summary judgment by order entered 27 March 2008. Petitioners appeal.

I.

Standard of Review

Within 60 days following the passage of an annexation ordinance under authority of this Part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedure set forth in this Part or to meet the

> requirements set forth in G.S. 160A-48 as they apply to his property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board.

N.C. Gen. Stat. § 160A-50(a) (2007). When a petitioner contests the passage of an annexation ordinance:

> The review shall be conducted by the [trial] court without a jury. The [trial] court may hear oral arguments and receive written briefs, and may take evidence intended to show either
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> (1) That the statutory procedure was not followed, or
>
> (2) That the provisions of G.S. 160A-47 were not met, or
>
> (3) That the provisions of G.S. 160A-48 have not been met.

N.C. Gen. Stat. § 160A-50(f) (2007).

> The scope of judicial review of an annexation ordinance adopted by the governing board of a municipality is prescribed and defined by statute. . . . These statutes limit the court's inquiry to a determination of whether applicable annexation statutes have been substantially complied with. When the record submitted in superior court by the municipal corporation demonstrates, on its face, substantial compliance with the applicable annexation statutes, then the burden falls on the petitioners to show by competent and substantial evidence that the statutory requirements were in fact not met or that procedural irregularities occurred which materially prejudiced their substantive rights. "In determining the validity of an annexation ordinance, the court's review is limited to the following inquiries: (1) Did the municipality comply with the statutory procedures? (2) If not, will the petitioners suffer material injury thereby? (3) Does the area to be annexed meet the requirements of G.S. 160A-48 . . .?"

Huyck Corp. v. Town of Wake Forest, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987) (citations omitted); *see also Norwood v. Village of Sugar Mountain*, 193 N.C. App. 293, 297-98, 667 S.E.2d 524, 527-28 (2008).

> G.S. 160A-50(f) provides that a court, in reviewing annexation proceedings, may take evidence intended to show either that the statutory procedure set out in G.S. 160A-49 was not followed, or that the provisions of either G.S. 160A-47 or 160A-48 were not

> met. The statutory procedure outlined in G.S. 160A-49 requires notice of a public hearing and sets out guidelines for the hearing which is to be held prior to annexation. G.S. 160A-47 requires the annexing city to prepare maps and plans for the services to be provided to the annexed areas. G.S. 160A-48 sets out guidelines for the character of the area to be annexed.
>
> The North Carolina Supreme Court and the Fourth Circuit Court of Appeals have made it clear that *G.S. 160A-50(f) limits the scope of judicial review to the determination of whether the annexation proceedings substantially comply with the requirements of the statutes referred to in G.S. 160A-50(f)*.

Forsyth Citizens Opposing Annexation v. Winston-Salem, 67 N.C. App. 164, 165, 312 S.E.2d 517, 518 (1984) (citations omitted) (emphasis added); *see also In re Annexation Ordinance # D-21927 etc.*, 303 N.C. 220, 229-30, 278 S.E.2d 224, 230-31 (1981).

Petitioners argue that the annexation ordinance was improperly adopted by Respondent, and that the trial court erred by granting summary judgment in favor of Respondent on this issue. Petitioners make numerous arguments on appeal, but our review is limited to whether the trial court correctly determined as a matter of law that Respondent substantially complied with the requirements of N.C. Gen. Stat. § 160A-50(f), or, in the alternative, as a matter of law whether there was any material prejudice to Petitioners as a result of any failure of substantial compliance on the part of Respondent.

> 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." On a motion for summary judgment, "[t]he evidence is to be viewed in the light most favorable to the nonmoving party." When determining whether the trial court properly ruled on a motion for summary judgment, this court conducts a *de novo* review.

Brown v. City of Winston-Salem, 171 N.C. App. 266, 270, 614 S.E.2d 599, 602 (2005) (internal citations omitted).

II.

[1] In Petitioners' first argument, they contend that the report was insufficient in that it did not properly address how Respondent would

extend street maintenance and police and waste collection services to the area to be annexed, as required by N.C. Gen. Stat. § 160A-47(3), because the streets of Pinewild are privately owned, and access to these streets may only be obtained through permission of the Pinewild property owners. We disagree.

N.C. Gen. Stat. § 160A-47(3) (2007) states in relevant part:

> (3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation [shall be provided]. Specifically, such plans shall:
>
> a. Provide for extending police protection, fire protection, solid waste collection and street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.

According to the report, Respondent owns and maintains approximately 105 miles of the 150 miles of streets currently contained within the village limits of Respondent. Certain streets contained within the village limits of Respondent are privately owned, and Respondent is not responsible for their maintenance. The report provides details concerning Respondent's resurfacing guidelines for the paved streets it currently owns. The report states:

> Currently, the streets in the annexation area are private streets and will be treated as other private streets within the Village. If the annexation area elects to dedicate the streets to the Village and the Village accepts them, the additional street mileage will increase the costs to the Village for materials and maintenance, but will not require the addition of new employees. The dedication of the streets would require the annexation area to remove the gates in order for the roads to become public. If [Petitioners' homeowners' association] petitions the Village to accept existing streets into its system within 30 days of the effective date of annexation, the Village would not require the existing streets to be brought to Village standards for newly constructed streets. If the private streets are not dedicated to the Village pursuant to the aforementioned 30 day period, the Village will not incur any costs to maintain them nor shall there be any obligation for the Village to accept the streets in the future.

The report further states:

> On the effective date of annexation, all residents, businesses and property owners in the annexation area will be provided Village services on substantially the same basis and in the same manner as such services are provided within the rest of the Village before the annexation.

Both public and private streets are contained within the village limits of Respondent. Respondent maintains public streets at its expense, and private streets are maintained by their owners. Respondent is giving Petitioners the option to either dedicate their streets to Respondent and receive the same level of maintenance provided other public streets, or keep Petitioners' streets private and continue to maintain their streets at their expense. Both of these options are substantially consistent with how Respondent currently treats public and private streets within its village limits. We hold that the requirements of N.C. Gen. Stat. § 160A-47(3) were met by the report on this issue.

Petitioners next argue that the report fails the requirements of N.C. Gen. Stat. § 160A-47(3) because the report does not explain how Respondent could provide police and waste management services if Petitioners refuse to dedicate their streets to Respondent. Pinewild is currently a gated community, and access is limited to property owners and invitees of property owners. Petitioners argue that, absent express invitation, police and waste management workers would have no legal right of access to Pinewild and, therefore, Respondent cannot prove that it could extend police and waste management services to Petitioners.

Were we to adopt Petitioners' argument, a gated community—and theoretically any community with restrictions on access to its private roads—could not be annexed by a municipality if its residents simply refused to allow police, firefighters, waste collection workers, administrative officials or certain other municipal employees access to their private streets. We do not believe the General Assembly intended N.C. Gen. Stat. § 160A-47(3) to provide private communities with an avenue to defeat annexation by denying access to municipal employees, when all other requirements of that statute are met. This would create unacceptable inequities between the rights of citizens in private communities and those living on public roads.

Pinewild may choose to keep their streets private, and maintain their gates, but they may not, if annexed by Respondent, prevent

Respondent's employees from using the streets of Pinewild to perform their public duties. If Petitioners elect to keep their streets private, then Respondent shall treat Pinewild in substantially the same manner that Petitioner treats other private streets. That may mean that Respondent does not provide police or waste management services to Petitioners, and that Petitioners continue to contract for those services. Petitioners state in their brief:

> In other residential communities with private roads . . . [Respondent's] Police Department has been allowed access for patrol services. In [one community], [Respondent's] Police Department does not provide patrol services because [that community] has its own private "police."
>
> Respondent included in its report
>
> [a] statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation . . . on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.

N.C. Gen. Stat. § 160A-47(3). This is all that is required by the statute. Whether Petitioners choose to avail themselves of the offered services is a different matter not germane to this argument. Petitioners' first argument fails to show that the annexation report does not comply with N.C. Gen. Stat. § 160A-47(3). This argument is without merit.

III.

[2] In Petitioners' second argument, they contend the grant of summary judgment in Respondent's favor was improper because Respondent's "plan to extend services into the annexation area is conditioned on access, which has not been addressed in the annexation report[.]" We disagree.

Petitioners first argue that the report "reveals an improper purpose for the annexation and fails to satisfy the requirements of N.C. Gen. Stat. § 160A-47(3)[.]" As we are constrained upon review to the specific issues stated in N.C. Gen. Stat. § 160A-50(f), *supra*, whether or not the report reveals an improper purpose for the annexation is not an issue we may review on appeal. *Forsyth Citizens*, 67 N.C. App. at 165, 312 S.E.2d at 518; *see also In re Annexation Ordinance*, 303 N.C. at 229-30, 278 S.E.2d at 230-31 ("statements of policy [] should

not be treated as part of the procedure under G.S. 160A-50(a) and G.S. 160A-50(f)(1)").

Petitioners next argue that our Supreme Court's opinion in *Nolan v. Village of Marvin*, 360 N.C. 256, 624 S.E.2d 305 (2006), stands for the proposition that inherent in N.C. Gen. Stat. §§ 160A-45 and 160A-47 is the requirement that an annexation plan must provide a "*meaningful* extension of services." We note that the holding in *Nolan* was based on the fact that the *only* services proposed to be extended to the area to be annexed were administrative services. The Village of Marvin had no plan to extend police, fire, waste collection or other services to the area to be annexed. *Nolan*, 360 N.C. at 260, 624 S.E.2d at 308. Our Supreme Court held that the mere extension of administrative services provided no meaningful benefit to the area to be annexed.

> Our decision does not require an annexing municipality to provide all categories of public services listed in N.C.G.S. § 160A-35(3). We conclude only that the level of municipal services proposed in the Annexation Report prepared by the Village of Marvin is insufficient. Those part-time administrative services, such as zoning and tax collection, simply fill needs created by the annexation itself, without conferring significant benefits on the annexed property owners and residents.

Id. at 261-62, 624 S.E.2d at 308-09.

Petitioners contend that the services outlined in the annexation plan are not meaningful, because Petitioners might not allow Respondent access to Pinewild in order for Respondent to provide the services outlined in the annexation plan. We rejected this argument in our analysis of Petitioners' first argument, and find *Nolan* distinguishable, as Respondent's plan provides for the extension of all services enumerated in N.C. Gen. Stat. § 160A-35(3). *See Norwood*, 193 N.C. App. at 310-11, 667 S.E.2d at 535-36.

Petitioners further contend that the annexation plan does not adequately describe the current level of services in Respondent's corporate limits, and does not adequately describe "whether or how such services are provided in similarly situated areas[.]" Petitioners make no further argument in support of this contention, and they provide no citations to legal authority in support of the contention that the annexation plan is statutorily required to include this information. Petitioners have thus abandoned this argument. N.C.R. App. P.

28(b)(6); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008). Furthermore, we have reviewed the annexation plan, and we hold that it meets the statutory requirements for the services Respondent proposes to offer Petitioners. This argument is without merit.

IV.

[3] In Petitioners' third argument, they contend that "the involuntary annexation of Pinewild is inconsistent with public policy and with the involuntary annexation statutes." We disagree.

As noted *supra*, our review is limited by N.C. Gen. Stat. § 160A-50(f) to a review of whether the annexation plan substantially complies with the annexation statutes enumerated in N.C. Gen. Stat. § 160A-50(f). *See also In re Annexation Ordinance*, 303 N.C. at 229-30, 278 S.E.2d at 230-31 ("statements of policy [] should not be treated as part of the procedure under G.S. 160A-50(a) and G.S. 160A-50(f)(1)"); *Norwood*, 193 N.C. App. at 300-01, 667 S.E.2d at 527-28; *Huyck*, 86 N.C. App. at 15, 356 S.E.2d at 601. Petitioners make no arguments in this section of their brief, independent of their public policy arguments, that the annexation is inconsistent with the involuntary annexation statutes. We may not address Petitioners' public policy arguments. This argument is without merit.

In Petitioners' fourth argument, they contend that the legislative history of the involuntary annexation statutes supports their claim that Respondent's annexation of Pinewild would be contrary to public policy. We disagree.

As we have just held above, we may not review Respondent's annexation of Pinewild on public policy grounds. This argument is without merit.

Affirmed.

Judges HUNTER, Robert C. and BEASLEY concurred.

BROCK AND SCOTT HOLDINGS, INC., PLAINTIFF v. KIM D. WEST, DEFENDANT

No. COA08-1051

(Filed 21 July 2009)

Arbitration and Mediation— court-ordered arbitration—appeal waived

Plaintiff's appeal from the denial of its motion to set aside an arbitration award under N.C.G.S. § 1A-1, Rule 60(b) was dismissed because plaintiff had become bound by the Rules for Court-Ordered Arbitration when it did not seek relief from the arbitration referral order under Rule 1(c) of the Rules for Court-Ordered Arbitration. Since plaintiff failed to request a trial *de novo* under N.C.R. Arb. 5(a) following the arbitration award, plaintiff is precluded from seeking review on appeal.

Appeal by plaintiff from judgment entered 3 June 2008 by Judge James H. Faison, III in Pender County District Court. Heard in the Court of Appeals 24 February 2009.

Brock & Scott, PLLC, by Richard P. Cook, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

GEER, Judge.

When plaintiff Brock and Scott Holdings, Inc. failed to appear at a court-ordered arbitration, the arbitrator dismissed this action brought against defendant Kim D. West. Plaintiff subsequently filed a motion to set aside the arbitration award pursuant to Rule 60(b) of the Rules of Civil Procedure. Plaintiff appeals from the trial court's judgment and order dismissing the action in accordance with the arbitration award and denying plaintiff's Rule 60(b) motion. Under the North Carolina Rules for Court-Ordered Arbitration, however, plaintiff was required to demand a trial de novo under Rule 5 in order to preserve its right to appeal from the judgment entered on the arbitration award. Consequently, because plaintiff failed to request a trial de novo in this case, plaintiff waived its right to appeal from the trial court's judgment. We, therefore, dismiss the appeal.

Facts

Defendant opened a credit card account with Metris Companies, Inc. Plaintiff ultimately purchased defendant's credit account. On 28

January 2008, plaintiff filed suit in Pender County District Court alleging that "Defendant ha[d] defaulted under the [credit] agreement by failing, neglecting, and refusing to make payments to Plaintiff upon the credit account when due . . . ." Plaintiff sought to recover the unpaid balance due plus interest and attorney's fees as provided in the credit agreement—an amount totaling $10,385.29.

On 19 February 2008, plaintiff served defendant with the complaint and summons. On 20 March 2008, both plaintiff and defendant received notice that the case had been referred to court-ordered, nonbinding arbitration under N.C. Gen. Stat. § 7A-37.1 (2007) and the North Carolina Rules for Court-Ordered Arbitration. The notice stated that "[f]ailure to appear for the [arbitration] hearing may result in an adverse award and/or sanctions."

Plaintiff served a motion for entry of default and default judgment on 25 March 2008. The record does not, however, indicate that the motion was actually filed. The index to the Record on Appeal states that the motion was "served March 25, 2008," but contrary to other pleadings in the Record on Appeal specifies no "filed" date. In addition, the copy of the motion included in the Record on Appeal has no "filed" stamp or other notation demonstrating that it was filed. The trial court stated in its judgment that "Plaintiff has tendered to the clerk of this Court its motion for entry of default of Defendant and for entry of default judgment against Defendant." The court then noted that "[i]t appears the motion was not filed, no entry of default was entered and no judgment entered."

The arbitration hearing was held on 16 April 2008. Defendant attended the hearing, but plaintiff did not. The arbitrator entered an award providing that "plaintiff is awarded nothing from the defendant and this action is dismissed." The award also taxed plaintiff with the costs of the action.

Two days later, on 18 April 2008, plaintiff filed a Rule 60(b) motion to set aside the arbitration award on the ground that its claim is "ineligible for referral to mandatory non-binding arbitration" and thus the arbitration "[a]ward is a nullity and is void *ab initio*." Plaintiff's Rule 60(b) motion was set to be heard on 5 May 2008, but the trial court continued the case until 2 June 2008 so that defendant could retain counsel. On 30 May 2008, defendant filed a responsive pleading that included a motion to dismiss for failure to state a claim for relief, an answer denying plaintiff's claim, and a counterclaim.

After hearing plaintiff's Rule 60(b) motion on 2 June 2008, the trial court entered a judgment and order on 3 June 2008 finding that when the parties were given notice that the case was being referred to arbitration, neither party objected to the referral; that plaintiff had failed to appear for the arbitration hearing; that the arbitrator entered an award in favor of defendant, dismissing plaintiff's claim; and that neither party filed a written demand for a trial de novo within 30 days afterward. Based on these findings, the trial court determined that it had "jurisdiction of the subject matter of and parties to this action" and that "[t]he parties have by their conduct waived their right to object to the referral of this action to the arbitrator[.]" The court further concluded that judgment should be entered based on the arbitration award dismissing plaintiff's claim and that "[t]he motion of Plaintiff for entry of default and default judgment and the motion, answer and counterclaim of Defendant should be struck."

Plaintiff timely appealed to this Court. Although defendant also filed a timely notice of appeal, this Court dismissed defendant's appeal on 3 December 2008.

Discussion

Plaintiff argues that the trial court erred in denying its "Motion to Set Aside Arbitration Award Pursuant to Rule 60(b)" and by striking its motion for entry of default and default judgment against defendant as part of its entry of judgment on the arbitration award. Plaintiff has, however, waived its right to appeal from that judgment.

Rule 6(b) of the Rules for Court-Ordered Arbitration provides in part: "If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial de novo within 30 days after the award is served, the clerk or the Court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action." The commentary to Rule 6—adopted by the Supreme Court along with the rule—explains that "[a] judgment entered on the arbitrator's award is not appealable because there is no record for review by an appellate court. . . . *By failing to demand a trial de novo the right to appeal is waived.*" N.C.R. Arb. 6 cmt (emphasis added).

This Court has held, in light of this commentary, that the failure to demand a trial de novo constitutes a waiver of the right to appeal. *Taylor v. Cadle*, 130 N.C. App. 449, 453-54, 502 S.E.2d 692, 695 (1998) ("[I]f there is no demand for a trial *de novo* within the prescribed thirty-day time period, then the clerk or the court 'shall enter judg-

ment on the award, which shall have the same effect as a consent judgment in the action.' . . . A failure to demand such a review within thirty days constitutes a waiver of the right to appeal." (quoting N.C.R. Arb. 6(b))).

The commentary to Rule 6 is consistent with the plain language of the rule. N.C.R. Arb. 6(b) states that the trial court's judgment adopting the arbitration award "shall have the same effect as a consent judgment in the action." It is well-established that a consent judgment is not appealable. *See Wachovia Bank & Trust Co. v. Wilder*, 255 N.C. 114, 121, 120 S.E.2d 404, 409 (1961) (holding that defendant "consented to the judgment entered by the court below and is bound thereby"); *King v. Taylor*, 188 N.C. 450, 452, 124 S.E. 751, 751 (1924) (" '[A] [consent] decree or judgment is absolutely conclusive between the parties, and it can neither be amended nor in any way waived without a like consent, nor can it be appealed from or reviewed on a writ of error.' " (quoting 2 R. C. L., p. 31, sec. 9)); *Price v. Dobson*, 141 N.C. App. 131, 134, 539 S.E.2d 334, 336 (2000) ("By joining in a consent order, a party waives his right to appeal from the judgment and leaves the case with no unresolved issue to appeal."); *In re Foreclosure of Williams*, 88 N.C. App. 395, 396, 363 S.E.2d 380, 381 (1988) ("A duly agreed to and entered consent order in a judicial proceeding is a final determination of the rights adjudicated therein and generally is a waiver of a consenting party's right to challenge the adjudication by appealing therefrom.").

Thus, under the Rules for Court-Ordered Arbitration, when plaintiff failed to timely demand a trial de novo after issuance of the arbitration award, the trial court's judgment adopting the arbitration award became, in effect, a consent judgment. As such, plaintiff is precluded under Rule 6 from appealing from the trial court's judgment.

Plaintiff argues, however, that because the trial court had no authority to refer the case to arbitration under the Rules for Court-Ordered Arbitration, those rules are inapplicable, the court had no subject matter jurisdiction, the arbitrator's award is void, and thus "any action by the trial court upholding that void judgment is void." Plaintiff does not contend, however, that the trial court lacked subject matter jurisdiction to adjudicate the claim prior to its being referred to arbitration.

Plaintiff does not explain—nor cite any authority suggesting—how the trial court, which unquestionably had subject matter jurisdiction over the action, subsequently lost jurisdiction. To the

contrary, our Supreme Court has explained that " '[j]urisdiction is not a light bulb which can be turned off or on during the course of the trial. Once a court acquires jurisdiction over an action it retains jurisdiction over that action throughout the proceeding.' " *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978) (quoting *Silver Surprize, Inc. v. Sunshine Mining Co.*, 74 Wash. 2d 519, 523, 445 P.2d 334, 336-37 (1968)), *cert. denied sub nom. Peoples v. Judicial Standards Comm'n of N.C.*, 442 U.S. 929, 61 L. Ed. 2d 297, 99 S. Ct. 2859 (1979).

In any event, plaintiff's subject matter jurisdiction argument presumes that the trial court was divested of authority by failing to follow proper procedure. In fact, the Rules for Court-Ordered Arbitration anticipate what occurred here, and the trial court proceeded in accordance with those rules. The basis of plaintiff's jurisdictional argument is Rule 1(a), which lists the types of actions exempted from arbitration, including those actions "[i]n which the sole claim is an action on an account." N.C.R. Arb. 1(a)(1)(vii). This limitation on arbitration does not, however, necessarily render the Rules of Court-Ordered Arbitration inapplicable to such actions or preclude an arbitrator from entering an award.

Instead, Rule 1(c) specifically governs the situation in which a case exempted from arbitration has nonetheless been referred by the court to arbitration. Rule 1(c) provides: "The Court may exempt or withdraw any action from arbitration on its own motion, or on motion of a party, made not less than 10 days before the arbitration hearing and a showing that: (i) the action is excepted from arbitration under Arb. Rule 1(a)(1) or (ii) there is a compelling reason to do so."

It is implicit in Rule 1(c)—particularly given the rule's 10-day time limitation—that once the trial court has assigned the case to arbitration, participation in the arbitration process is mandatory unless the action is exempted or withdrawn under Rule 1(c). *See Mohamad v. Simmons*, 139 N.C. App. 610, 614, 534 S.E.2d 616, 619 (2000) (reasoning that "both the express and implied bases for the Rules would be subverted, if not completely eviscerated," if parties were permitted to not participate in mandatory arbitration process). *See also Hill v. Bechtel*, 336 N.C. 526, 532, 444 S.E.2d 186, 190 (1994) ("Matters implied by the language of a statute must be given effect to the same extent as matters specifically expressed.").

Consequently, if plaintiff objected to being referred to arbitration, it was required to file a motion for exemption not less than 10 days before the arbitration hearing. Plaintiff cites no authority—and we

have found none—that permitted it to ignore the Notice of Arbitration Hearing and wait until after the arbitration hearing and entry of the arbitration award to file its N.C.R. Civ. P. 60(b) motion contending that its action was exempt from arbitration. Because plaintiff failed to seek relief under Rule 1(c), the trial court properly concluded that plaintiff "waived [its] right to object to the referral of this action to the arbitrator[.]"

In arguing that it was not required to request a trial de novo under Rule 5 of the Rules of Court-Ordered Arbitration, plaintiff further claims that "[i]t would be disingenuous for Plaintiff to object to the Rules the court ha[d] improperly elected, then turn around and select only those Rules that benefit Plaintiff (i.e., Requesting a Trial de Novo)." Since, however, plaintiff failed to file a timely motion under Rule 1(c), it was required to proceed in accordance with Rule 5 and should have moved for a trial de novo under that rule. *See Taylor*, 130 N.C. App. at 453, 502 S.E.2d at 695 ("Rule 5(a) provides that a party who is dissatisfied with an arbitrator's award may appeal for a trial *de novo* with the court within thirty days from the date of the arbitrator's award.").

Further, plaintiff has not identified any prejudice—and we can conceive of none—that would have resulted from its complying with the hardly onerous task of moving for a trial de novo. In any event, once plaintiff failed to file a demand for a trial de novo within 30 days of the issuance of the arbitration award, the trial court was required by N.C.R. Arb. 6(b) to enter judgment on the arbitration award. *Taylor*, 130 N.C. App. at 455, 502 S.E.2d at 696 (holding that under N.C.R. Arb. 6(b), "after thirty days had elapsed, the chief district court judge was required to adopt the arbitrator's award").

Plaintiff insists, however, that Rule 60(b) of the Rules of Civil Procedure was the "appropriate method for challenging the referral and award of the arbitrator." Rule 60(b) provides: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a *final* judgment, order, or proceeding . . . ." (Emphasis added.) The Supreme Court has observed that "Rule 60(b) . . . has no application to *interlocutory* judgments, orders, or proceedings of the trial court. It only applies, by its express terms, to *final* judgments." *Sink v. Easter*, 288 N.C. 183, 196, 217 S.E.2d 532, 540 (1975). Thus a trial court may not grant relief pursuant to a Rule 60(b) motion when the underlying judgment or order is interlocutory. *See Hooper v. Pizzagalli Constr. Co.*, 112 N.C. App. 400, 408, 436 S.E.2d 145, 151 (1993) (concluding trial court properly denied party's

Rule 60(b) motion where underlying order was interlocutory), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 516 (1994).

Here, plaintiff's motion attempted to set aside and relieve it from the effect of the arbitration award. Plaintiff filed its N.C.R. Civ. P. 60(b) motion prior to the trial court's entering judgment on the arbitration award pursuant to N.C.R. Arb. 6(b). Until the trial court entered judgment on the arbitration award, there was no final judgment of the court from which plaintiff could seek relief. *See Bledsole v. Johnson*, 357 N.C. 133, 140, 579 S.E.2d 379, 383 (2003) ("Nothing in the arbitration rules assures a prevailing party that the arbitration award will become the judgment in the case. The nonprevailing party's right to seek a trial *de novo* is antithetical to such an assumption."). The arbitration award itself was interlocutory and thus could not be set aside pursuant to Rule 60(b). Plaintiff, moreover, did not renew its motion after the judgment was entered on the arbitration award. The trial court, therefore, did not err in denying plaintiff's Rule 60(b) motion.

In sum, plaintiff became bound by the Rules for Court-Ordered Arbitration when it failed to seek relief from the referral under Rule 1(c). Since plaintiff failed to request a trial de novo under N.C.R. Arb. 5(a) following the issuance of the arbitration award, plaintiff is precluded from seeking review on appeal. Accordingly, we dismiss this appeal.

Dismissed.

Judges McGEE and BEASLEY concur.

STATE OF NORTH CAROLINA v. LACY ELWOOD KILBY, DEFENDANT

No. COA08-655

(Filed 21 July 2009)

Sexual Offenses— satellite-based monitoring—level of supervision and monitoring

The trial court erred by finding that defendant required the highest possible level of supervision and monitoring in regard to his enrollment in satellite-based monitoring (SBM) after release

from prison for numerous sexual offenses because: (1) the State conceded that the trial court's findings of fact were insufficient to support its conclusion that defendant required the highest level of supervision and monitoring; (2) this case was controlled by N.C.G.S. § 14-208.40B since a SBM determination was not made when defendant was sentenced; (3) the DOC risk assessment found that defendant posed a moderate risk; and (4) a remand of the case was not necessary when the State presented no evidence which would tend to support a determination of a higher level of risk than the moderate rating assigned by the DOC.

Appeal by defendant from order entered on or about 21 February 2008 by Judge Henry E. Frye, Jr. in Superior Court, Wilkes County. Heard in the Court of Appeals 4 December 2008.

Attorney General Roy A. Cooper, III, by Associate Attorney General Oliver G. Wheeler, IV, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

STROUD, Judge.

Defendant was ordered to enroll in satellite-based monitoring for five to ten years after release from prison for numerous sexual offenses. Defendant appeals, arguing the trial court erred in (1) finding defendant "required the highest possible level of supervision and monitoring" as the evidence did not support this finding and (2) ordering defendant to enroll in satellite-based monitoring for an indefinite period of time. Defendant also claims ineffective assistance of counsel as his attorney failed to make a proper argument that ordering him to enroll in satellite-based monitoring violated the constitutional prohibition on *ex post facto* law. For the following reasons, we reverse.

I. Background

On or about 25 April 2002, defendant pled guilty to one count of second degree sexual offense and six counts of indecent liberties with a child. Defendant was sentenced to serve a minimum of 65 months and a maximum of 87 months in prison. Around August of 2007 defendant was released from prison and placed on post-release supervision for five years. On or about 21 February 2008, after a hearing the trial court found:

1. The defendant was convicted of a reportable conviction as defined by G.S. 14-208.6(4), but the sentencing court made no determination on whether the defendant should be required to enroll in satellite-based monitoring under Article 27A of Chapter 14 of the General Statutes.

2. The Department of Correction has made an initial determination that the offender falls into one of the categories requiring satellite-based monitoring under G.S. 14-208.40.

3. The Department of Correction scheduled a hearing in the county named above, which is the county of the defendant's residence, the Department provided notice to the defendant as required by G.S. 14-208.40B, and the hearing was not held sooner than 15 days after the date the Department mailed the notice.

4. The defendant

   a. falls into one of the categories requiring satellite-based monitoring under G.S. 14-208.40 in that

      . . . .

      the offense of which the defendant was convicted involved the physical, mental, or sexual abuse of a minor, that offense was not an aggravated offense, the defendant is not a recidivist, the Department of Correction has conducted a risk assessment of the defendant, and based on that assessment, the defendant requires the highest possible level of supervision and monitoring.[1]

Based upon its findings the trial court ordered defendant to enroll in satellite-based monitoring ("SBM") for five to ten years. Defendant appeals, arguing the trial court erred in (1) finding defendant "required the highest possible level of supervision and monitoring" as the evidence did not support this finding and (2) ordering defendant to enroll in SBM for an indefinite period of time. Defendant also claims ineffective assistance of counsel as his attorney failed to make a proper argument that ordering him to enroll in satellite-based monitoring violated the constitutional prohibition on *ex post facto* law. For the following reasons, we reverse.

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1. The trial court's order was on Form AOC-CR-616, New 12/07, and the findings are standard findings on this form.

II. Level of Supervision and Monitoring Required

Defendant contends that

> [t]he evidence presented in this case was not sufficient to support the trial court's finding that [defendant] required "the highest possible level of supervision and monitoring." . . .
>
> . . . .
>
> A moderate level risk assessment, without more, is simply not enough to establish that [defendant] was in need of the "highest possible level of supervision and monitoring."

Thus, defendant argues that "the trial court erred by finding that [he] required the 'highest possible level of supervision and monitoring' and by ordering him to enroll in satellite-based monitoring because the Department of Corrections' risk assessment determined that [defendant] was only a moderate level risk[.]" (Original in all caps.) The State concedes that the trial court's findings of fact were insufficient to support its conclusion that "[d]efendant required the highest possible level of supervision and monitoring[,]" but argues that we should remand the case to the trial court for further findings of fact.

A. Standard of Review

A trial court's determination as to the level of supervision and monitoring which a defendant requires in regards to SBM is an issue of first impression before this Court. N.C. Gen. Stat. § 14-208.40B(c) directs the trial court to "make findings of fact pursuant to G.S. 14-208.40A[,]" regarding the offender's qualification for SBM. N.C. Gen. Stat. § 14-208.40B(c) (2007). The standard of review for the trial court's findings of fact is well-established: The trial court's "findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001) (citations and quotation marks omitted).

However, the trial court's determination as to whether "the offender requires the highest possible level of supervision and monitoring[,]" is neither clearly a question of fact nor a conclusion of law. N.C. Gen. Stat. § 14-208.40B(c). A conclusion of law calls for the application of legal principles to the facts. *See State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997). N.C. Gen. Stat. § 14-208.40B provides no specific legal principles which define when "the highest

possible level of supervision and monitoring" must be required. N.C. Gen. Stat. § 14-208.40B(c).[2] N.C. Gen. Stat. § 14-208.40B(c) provides only for factual information which the trial court must consider, specifically, the Department of Correction's ("DOC") risk assessment of the offender. *See id.* As noted by the United States Supreme Court in *Thompson v. Keohane*, "the proper characterization of a question as one of fact or law is sometimes slippery." 516 U.S. 99, 110-11, 133 L. Ed. 2d 383, 393 (1995) (citations omitted); *cert. denied*, 525 U.S. 1158, 143 L. Ed. 2d 70 (1999). However, "we review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004) (citation, quotation marks, and brackets omitted); *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). We will therefore review the trial court's order to ensure that the determination that "defendant requires the highest possible level of supervision and monitoring" "reflect[s] a correct application of law to the facts found." *Id.*

B. SBM Hearing Procedure

The procedure for SBM hearings is set forth in N.C. Gen. Stat. §§ 14-208.40A and 14-208.40B. N.C. Gen. Stat. §§ 14-208.40A, -208.40B (2007). N.C. Gen. Stat. § 14-208.40A applies in cases in which the district attorney has requested that the trial court consider SBM during the sentencing phase of an applicable conviction. *See* N.C. Gen. Stat. § 14-208.40A(a). N.C. Gen. Stat. § 14-208.40B applies in cases in which the offender has been convicted of an applicable conviction and the trial court has not previously determined whether the offender must be required to enroll in SBM. *See* N.C. Gen. Stat. § 14-208.40B(a). This case is controlled by N.C. Gen. Stat. § 14-208.40B as a SBM determination was not made when defendant was sentenced.

The hearing procedure set forth in N.C. Gen. Stat. § 14-208.40B has two phases; N.C. Gen. Stat. § 14-208.40B(c), for purposes of convenience and clarity, we will refer to these two phases as the qualification phase and the risk assessment phase.[3] First, in the qualifica-

2. The "highest possible level of supervision and monitoring" simply refers to SBM, as the statute provides only for SBM and does not provide for any lesser levels or forms of supervision or monitoring of a sex offender. If SBM is imposed, the only remaining variable to be determined by the court is the duration of the SBM.

3. For offenders who fall under N.C. Gen. Stat. § 14-208.40(a)(1), the hearing has only one phase, which is the qualification phase, as SBM is mandatory. The two phase

tion phase, N.C. Gen. Stat. § 14-208.40B(c) requires the trial court to "determine if the offender falls into one of the categories described in G.S. 14-208.40(a)." *Id.* These categories are:

> (1) Any offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) and who is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense as those terms are defined in G.S. 14-208.6.
>
> (2) Any offender who satisfies all of the following criteria: (i) is convicted of a reportable conviction as defined by G.S. 14-208.6(4), (ii) is required to register under Part 2 of Article 27A of Chapter 14 of the General Statutes, (iii) has committed an offense involving the physical, mental, or sexual abuse of a minor, and (iv) based on the Department's risk assessment program requires the highest possible level of supervision and monitoring.

N.C. Gen. Stat. § 14-208.40(a)(1)-(2) (2007).[4]

The trial court is required to "make findings of fact pursuant to G.S. 14-208.40A." N.C. Gen. Stat. § 14-208.40B(c). Thus, the trial court must make findings of fact as to whether the offender falls into either of the two categories of offenders which may be subject to SBM under N.C. Gen. Stat. § 14-208.40(a). *See* N.C. Gen. Stat. § 14-208.40B(c); *see also* N.C. Gen. Stat. § 14-208.40(a); -208.40A(b). If the trial court finds that the offender falls into the first category, it is required to "order the offender to enroll in satellite-based monitoring for life." N.C. Gen. Stat. § 14-208.40B(c), *see* N.C. Gen. Stat. § 14-208.40(a)(1). However, if the offender falls into the second category by satisfying the first three criteria under N.C. Gen. Stat. § 14-208.40(a)(2), the hearing moves to the risk assessment phase, for consideration of the fourth criterion, which is whether the offender "requires the highest possible level of supervision

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hearing would apply to offenders, like defendant, who fall under N.C. Gen. Stat. § 14-208.40(a)(2). *See* N.C. Gen. Stat. § 14-208.40B(c); *see also* N.C. Gen. Stat. § 14-208.40(a)(1)-(2) (2007).

4. Effective 1 December 2008, the legislature has created a third category of individuals who may be subject to SBM; however, the 2007 version of the SBM statutes cited herein was in effect at the time of defendant's notice of his SBM hearing and the hearing itself.

and monitoring." N.C. Gen. Stat. §§ 14-208.40(a)(2); *see* N.C. Gen. Stat. § 14-208.40B(c).[5]

> At the risk assessment phase,
>
> the court shall order that the Department do a risk assessment of the offender. The Department shall have a minimum of 30 days, but not more than 60 days, to complete the risk assessment of the offender and report the results to the court. The Department may use a risk assessment of the offender done within six months of the date of the hearing. Upon receipt of a risk assessment from the Department, the court shall determine whether, based on the Department's risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.

N.C. Gen. Stat. § 14-208.40B(c).

C. Application to This Case

In the case before us, the DOC risk assessment found that defendant posed a "moderate" risk[6]; however, the trial court found that defendant "requires the highest possible level of supervision and monitoring." Although we cannot discern any direct correlation between the designation of low, moderate or high risk by the DOC assessment and the terminology of N.C. Gen. Stat. § 14-208.40B(c) which directs the determination of whether an offender may "require the highest possible level of supervision and monitoring," N.C. Gen. Stat. § 14-208.40B(c), the trial court made no findings of fact which could justify the conclusion that "defendant requires the highest possible level of supervision and monitoring." The trial court erred by

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5. We note that both "phases" of defendant's hearing occurred at the same time, which is entirely appropriate as the DOC had already performed the required risk assessment of defendant. We do not mean to imply that the hearing must be bifurcated; we describe the hearing as having two phases based upon the fact that the risk assessment phase could occur at a later time after the qualification phase based upon the wording of the statute. N.C. Gen. Stat. § 14-208.40B(c).

6. The DOC risk assessment of defendant was done more than six months prior to hearing, although N.C. Gen. Stat. § 14-208.40B(c) requires the assessment to be "done within six months of the date of the hearing." N.C. Gen. Stat. § 14-208.40B(c). However, defendant did not object to use of the DOC assessment at the hearing and did not argue this contention in his brief.

concluding that "defendant requires the highest possible level of supervision and monitoring." The findings of fact are insufficient to support the trial court's conclusion that "defendant requires the highest possible level of supervision and monitoring based upon a "moderate" risk assessment from the DOC.

We must now consider whether evidence was presented which could support findings of fact which could lead to a conclusion that "the defendant requires the highest possible level of supervision and monitoring." If such evidence was presented, it would be proper to remand this case to the trial court to consider the evidence and make additional findings, as requested by the State. However, the State presented no evidence which would tend to support a determination of a higher level of risk than the "moderate" rating assigned by the DOC.

Fletcher Reeves, defendant's supervising officer, testified regarding defendant's prior convictions and his DOC risk assessment. Mr. Reeves also testified that: defendant had been on post-release supervision since his release from prison in August of 2007; defendant would be on post-release supervision for five years; defendant was in group therapy at New River Mental Health; defendant was "complying with all measures of supervision at this time[;]" defendant had been employed at Tyson since shortly after his release from prison; defendant always called Mr. Reeves if he had questions about travel or was going to be late arriving home; and Mr. Reeves had no problems or violations with defendant as of the date of hearing, approximately six months after his post-supervision had begun.

The State did not present evidence which could support a finding that "defendant requires the highest possible level of supervision and monitoring." The DOC assessment of defendant rated him as a moderate risk. The State's other evidence indicated that defendant was fully cooperating with his post release supervision, which might support a finding of a lower risk level, but not a higher one. As no evidence was presented which tends to indicate that defendant poses a greater than "moderate" risk or which would demonstrate that "defendant requires the highest possible level of supervision and monitoring[,]" we need not remand this matter to the trial court for additional findings of fact as requested by the State. Consequently, we reverse the trial court's order.

As the DOC assessed defendant herein as a "moderate" risk and the State presented no evidence to support findings of a higher level of risk or to support the requirement for "the highest possible level of

supervision and monitoring[,]" the trial court's order is reversed. As the order requiring SBM is reversed, we need not consider defendant's remaining arguments.

III. Conclusion

We reverse the trial court's order requiring defendant to enroll in SBM.

REVERSED.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA v. MOSES ALFONZO HARRIS

No. COA08-1086

(Filed 21 July 2009)

1. Trials— mistrial—exclusion of prior arrest evidence—new trial unaffected by rulings in original trial

The trial court did not commit plain error or err in a possession with intent to sell or deliver cocaine case by allowing a detective to testify about defendant's 2005 arrest under N.C.G.S. § 8C-1, Rule 404(b) because: (1) although defendant contends the trial judge in the 2007 trial excluded the Rule 404(b) evidence and thus the trial judge in the 2008 trial was bound by that ruling, there can be no prior binding evidentiary rulings when defendant is tried again following a mistrial; and (2) neither the doctrine of collateral estoppel nor the one judge overruling another rule applied after the 2007 trial court declared a mistrial.

2. Trials— mistrial—failure to order complete recordation—new trial unaffected by rulings in original trial

The trial court did not commit plain error or err in a possession with intent to sell or deliver cocaine case by failing to order complete recordation of the 2008 trial even though defendant was granted this motion in the 2007 trial because a new trial is unaffected by rulings made during the original trial when a mistrial is declared and a new trial is ordered.

3. Costs— trial transcripts—indigent defendant

The trial court did not err as a matter of law in a possession with intent to sell or deliver cocaine case by ordering as a condition of post-release supervision that an indigent defendant was required to reimburse the State for its costs incurred in providing him with a transcript of the 2007 trial and any future transcripts because: (1) N.C.G.S. § 7A-455(b) provides that fees may be collected for the money value of services rendered by assigned counsel, the public defender, or the appellate defender, plus any sums allowed for other necessary expenses of representing the indigent person; and (2) N.C.G.S. § 7A-304 provides that the cost of necessary trial transcripts are included in costs that may be collected from a defendant who is convicted.

Appeal by defendant from judgment entered 24 April 2008 by Judge Judson D. DeRamus, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 25 March 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General T. Lane Mallonee, for the State.

Sofie W. Hosford for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendant appeals his conviction of possession with intent to sell or deliver cocaine. He argues that the trial court erred in admitting evidence, under N.C. Gen. Stat. § 8C-1, Rule 404(b), of his 2005 arrest for the same offense. For the reasons stated herein, we find no error.

I. Background

On the evening of 18 January 2007, Officers Michael C. Knight, Christopher Luper, and Richard Workman (collectively "the officers") of the Winston-Salem Police Department were on patrol in an unmarked vehicle in the Easton Community of Forsyth County. At approximately 11:45 p.m., the officers approached the intersection of Easton Drive and Louise Road, where defendant and another male were standing. Defendant, holding something in his left hand, walked towards the officers' vehicle, waived his right hand, and yelled, "Yo! Yo! I got it." When Officer Knight and Officer Workman stepped out of the car in their police uniforms, defendant looked "shocked" and ran away. While Officer Knight and Officer Workman ran after

defendant, they saw him throw something toward a nearby tree. Officer Workman stopped at the tree and discovered four plastic bags, which collectively contained 2 grams of cocaine base, otherwise known as crack cocaine. Officer Knight continued to chase the defendant until Officer Luper intercepted and placed defendant under arrest. Defendant was indicted on charges of possession with intent to manufacture, sell, or deliver cocaine in violation of N.C. Gen. Stat. § 90-95(a)(1), resisting a public officer in violation of N.C. Gen. Stat. § 14-223, and of attaining the status of an habitual felon in violation of N.C. Gen. Stat. § 14-7.1.

Defendant was assigned counsel on 22 January 2007. On 22 August 2007, Judge W. Douglas Albright granted defendant's motion to have his court-appointed counsel removed, and defendant waived his right to assigned counsel.

September 2007 Trial

Defendant appeared *pro se* for trial on 10 September 2007 ("2007 trial"), and Judge Henry E. Frye, Jr., presided. Judge Frye granted defendant's motion under N.C. Gen. Stat. § 15A-1241(b) to record all of the proceedings.

During the 2007 trial, the State tendered evidence of defendant's 2005 arrest for possession with intent to sell and deliver cocaine. The State presented the *voir dire* testimony of Detective T.D. James ("Detective James"), of the Winston-Salem Police Department, pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) ("Rule 404(b)"), to show defendant's intent to possess cocaine, knowledge of cocaine, and absence of mistake. Detective James testified that on 7 April 2005, he was working undercover about a block away from the intersection of Easton Drive and Louise Road, when he approached defendant and asked where he could get some crack. Defendant asked how much he needed, and Detective James told him he wanted, "a yard," a term used to describe $100.00 of crack cocaine. Defendant said, "I got it" and reached into his pockets, at which point Detective James identified himself and arrested defendant. Upon his arrest, the police seized four pieces of individually wrapped crack cocaine from defendant. Judge Frye, in his discretion, excluded Detective James' testimony and found that the circumstances of defendant's 2005 arrest were not sufficiently similar to the circumstances of the current case to be admitted for purposes of Rule 404(b). Judge Frye expressed his concern that the jury might misinterpret the evidence to show defendant's propensity to commit the crime.

The jury found defendant guilty of resisting a public officer but was deadlocked on the charge of possession with intent to sell or deliver cocaine. Judge Frye declared a mistrial on that charge and continued judgment for resisting a public officer.

April 2008 Trial

On 22 April 2008, defendant was retried on the charges of possession with intent to sell or deliver cocaine and attaining the status of an habitual felon. Judge Judson D. DeRamus, Jr., presided. Defendant appeared *pro se* and waived his right to court-appointed counsel.

The State introduced Detective James' *voir dire* testimony, which Judge Frye had excluded in the 2007 trial, and defendant objected. Judge DeRamus asked defendant what the basis of his objection was, and defendant replied, "It don't have nothing to do with this case." After reviewing the transcript of Detective James' testimony, Judge DeRamus allowed the evidence under Rule 404(b) to show intent, knowledge, and lack of mistake. At the end of the trial, Judge DeRamus gave the following instructions to the jury:

> [E]vidence has been received tending to show that on or about April 7, 2005, the defendant was arrested in a nearby area, near to the area involved in this particular matter, and was found in possession of cocaine and willing to sell or deliver it at that time. [T]his evidence was received solely for the purpose of showing that the defendant had the intent which is a necessary element of the crime charged in this case, and that the defendant had the knowledge which is a necessary element of the crime charged in this case, and that there was an absence of mistake.

On 23 April 2008, the jury found defendant guilty of possession with intent to sell or deliver cocaine and of attaining the status of an habitual felon. For sentencing purposes the trial court consolidated the charges with defendant's conviction for resisting a public officer. Judge DeRamus sentenced defendant to 130 to 165 months' imprisonment and ordered that, as a condition of post-release supervision, defendant must reimburse the State for the costs it incurred in providing defendant with the 2007 trial transcript as well as any future transcript or attorney expenses. Defendant appeals.

II. Rule 404(b) Evidence

[1] Defendant assigns error to Judge DeRamus's ruling that allowed Detective James to testify about defendant's 2005 arrest under Rule

404(b). First, defendant argues that Judge DeRamus was bound by Judge Frye's evidentiary ruling in the 2007 trial, excluding his 2005 arrest. Second, he claims that the evidence is barred under the doctrine of collateral estoppel. We do not agree.

A. Standard of Review

In order to preserve an evidentiary question for appellate review, the party must have presented the trial court with a timely request, objection, or motion, stating the specific grounds for the ruling sought, if the specific grounds are not apparent. N.C. R. App. P. 10(b)(1) (2009). Defendant objected to the admission of evidence of his 2005 arrest, but it was only on grounds of relevance. At trial, defendant did not argue collateral estoppel nor did he assert that one superior court judge cannot overrule another. These objections not being raised at the trial level cannot be raised for the first time on appeal. The objections have not been preserved.

We review only for plain error. N.C. R. App. P. 10(c)(4). Plain error has been defined as " '*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.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). We must apply the plain error rule "cautiously and only in the exceptional case where . . . the error ' "has resulted in a miscarriage of justice or in the denial to appellant of a fair trial[.]" ' " *State v. Morgan*, 315 N.C. 626, 645, 340 S.E.2d 84, 96 (1986) (citations omitted). Before there can be plain error, there must be an error of law in the admission of defendant's 2005 arrest. *See State v. Allen*, 360 N.C. 297, 310, 626 S.E.2d 271, 282, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

B. Judge Frye's Ruling

Defendant argues that, because Judge Frye excluded the Rule 404(b) evidence in the 2007 trial, Judge DeRamus was bound by that ruling in the 2008 trial. " '[N]o appeal lies from one Superior Court judge to another . . . one Superior Court judge may not correct another's errors of law . . . [and] may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.' " *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987) (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)). However, this rule does not apply to evidentiary rulings made prior to the declaration of a mistrial.

Defendant relies on *State v. Dial*, 122 N.C. App. 298, 470 S.E.2d 84, *disc. review denied*, *cert. denied*, 343 N.C. 754, 473 S.E.2d 620 (1996), in support of his contention. In *Dial*, the defendant was on trial for first-degree murder, and the issue of whether North Carolina had jurisdiction was submitted to the jury. *Id.* at 302, 470 S.E.2d at 87. The jury returned a special verdict finding that North Carolina had jurisdiction, but was deadlocked on the charge of first-degree murder. *Id.* The trial court entered the jury's verdict on jurisdiction and declared a mistrial on the first-degree murder charge. *Id.* At the defendant's second trial, his motion to set aside the verdict finding jurisdiction was denied, and he was found guilty of second-degree murder. *Id.* at 304-05, 470 S.E.2d at 88. The defendant appealed and argued that in his second trial, the trial court was not bound by the special verdict of jurisdiction from his previous trial. *Id.* at 305, 470 S.E.2d at 88. We concluded that principles of res judicata and collateral estoppel precluded the defendant from relitigating jurisdiction at his second trial, even though there was a mistrial on the issue of the defendant's guilt or innocence. *Id.* at 306, 470 S.E.2d at 89. However, the holding of *Dial* is limited to verdicts entered and does not apply to evidentiary rulings.

There can be no prior binding evidentiary rulings when defendant is tried again following a mistrial. When the trial court declares a mistrial, "in legal contemplation there has been no trial." *State v. Sanders*, 347 N.C. 587, 599, 496 S.E.2d 568, 576 (1998) (quoting *State v. Tyson*, 138 N.C. 627, 629, 50 S.E. 456, 456 (1905)), *appeal dismissed*, 230 F.3d 679 (4th Cir. 2000), *cert. denied*, 534 U.S. 862, 151 L. Ed. 2d 95 (2001). When a defendant's trial results in a hung jury and a new trial is ordered, the new trial is " '[a] trial *de novo*, unaffected by rulings made therein during the [original] trial.' " *Burchette v. Lynch*, 139 N.C. App. 756, 760, 535 S.E.2d 77, 80 (2000) (quoting *Goldston v. Wright*, 257 N.C. 279, 280, 125 S.E.2d 462, 463 (1962)); *see also Akzona, Inc. v. Southern Railway Co.*, 314 N.C. 488, 495, 334 S.E.2d 759, 763 (1985) (holding that upon a new trial, a plaintiff "is not bound by the evidence presented at the former trial.")

When Judge Frye declared a mistrial on the charge of possession with intent to sell or deliver cocaine, his evidentiary rulings on the 404(b) evidence no longer had legal effect. Accordingly, neither the doctrine of collateral estoppel nor the one judge overruling another rule can apply to this ruling. *See State v. Summers*, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (requiring that for collateral estoppel to apply the issue be "actually litigated in the prior action[.]") We hold that

Judge DeRamus's discretion was not limited, and he did not err by failing to follow Judge Frye's prior discretionary ruling on the admissibility of the Rule 404(b) evidence. Because we find no error of law, our plain error analysis need go no further.

III. MOTION FOR COMPLETE RECORDATION

[2] Defendant assigns error to Judge DeRamus's failure to order complete recordation of the 2008 trial. Prior to the 2007 trial, Judge Frye granted defendant's motion to record all proceedings, pursuant to N.C. Gen. Stat. § 15A-1241(b), specifically including jury selection, opening and closing arguments, and arguments of counsel on questions of law. *See* N.C. Gen. Stat. § 15A-1241(b) (2007). Defendant argues that Judge DeRamus was required to follow Judge Frye's order to record all of the proceedings. We do not agree.

As discussed above, when a mistrial is declared and a new trial is ordered, the new trial is unaffected by rulings made during the original trial. *Burchette*, 139 N.C. App. at 760, 535 S.E.2d at 80. As Judge DeRamus was not bound by any of Judge Frye's rulings in the 2007 trial, he did not err by failing to comply with Judge Frye's order for complete recordation. We overrule this assignment of error.[1]

IV. ORDER TO REIMBURSE THE STATE FOR TRANSCRIPTS

[3] Defendant contends that the trial court erred as a matter of law by ordering that as a condition of post-release supervision, defendant must reimburse the State for its costs incurred in providing him with a transcript of the 2007 trial and any future transcripts. Defendant argues that, as an indigent criminal defendant, he is entitled to a transcript at the expense of the State. We do not find error.

As a question of law, we review de novo. *State v. Wells*, 73 N.C. App. 329, 330, 326 S.E.2d 129, 131 (1985). "[T]he State must, as a matter of equal protection, provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." *Id.* (quoting *Britt v. North Carolina*, 404 U.S. 226, 30 L. Ed. 2d 400 (1971)).

Here, the State provided defendant with the transcript of the 2007 trial. Defendant's claim that the trial court lacks the authority to order an indigent defendant to reimburse the State for the costs of trial transcripts is incorrect. N.C. Gen. Stat. § 7A-455(b) provides that:

1. Because we overrule the assignment of error, we need not address whether defendant properly preserved this issue for appellate review.

> In all cases the court shall direct that a judgment be entered in the office of the clerk of superior court for the money value of services rendered by assigned counsel, the public defender, or the appellate defender, *plus any sums allowed for other necessary expenses of representing the indigent person*, including any fees and expenses that may have been allowed prior to final determination of the action to assigned counsel[.]

N.C. Gen. Stat. § 7A-455(b) (2007) (emphasis added). N.C. Gen. Stat. § 7A-304 provides that "[the] cost of necessary trial transcripts" are included in costs that may be collected from a defendant who is convicted. N.C. Gen. Stat. § 7A-304(a),(c) (2007). Accordingly, the trial court did not err in ordering defendant, as a condition of post-release supervision, to reimburse the State for its costs incurred for the 2007 trial transcript and any future transcripts.

V. CONCLUSION

For the abovementioned reasons, we find no error in defendant's trial.

No error.

Judges HUNTER, Robert C., and CALABRIA concur.

STATE OF NORTH CAROLINA v. TONY PERNELL ROUSE

No. COA09-56

(Filed 21 July 2009)

Assault— inflicting serious bodily injury—definition—permanent or protracted condition causing extreme pain—evidence sufficient

The trial court did not err by denying defendant's post-evidence motion to dismiss the charge of assault inflicting serious bodily injury where the trial court's instruction focused on a permanent or protracted condition causing extreme pain, and there was sufficient evidence that the victim suffered serious bodily injury under that instruction.

Appeal by defendant from judgments entered 30 July 2008 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 18 May 2009.

Roy Cooper, *Attorney General*, *by Robert M. Curran*, *Special Deputy Attorney General*, *for the State.*

Sue Genrich Berry, *for defendant-appellant.*

MARTIN, Chief Judge.

Tony Pernell Rouse ("defendant") appeals from judgments entered upon his conviction by a jury of first degree burglary, first degree rape, first degree sex offense, assault inflicting serious bodily injury, attempted common law robbery, and first degree kidnapping. For the reasons below, we find no error.

The State's evidence at trial tended to show that, sometime after midnight on 11 March 2007, M.J., a seventy-year-old woman living alone in Kinston, went to her back door to check the lock before going to bed. Looking out a back window, M.J. noticed a figure outside. As she reached to check the door, a fist came through the glass pane on the door and reached inside, trying to unlock the door. M.J. pushed against the door, but the intruder forced his way into her house and began hitting her, choking her, and threatening to kill her if she did not tell him where her money was. M.J. tried to fight him off, but the intruder grabbed her hair, tearing out a handful, and threw her to the kitchen floor. As he pressed her to the floor, M.J., who was struggling to breathe, told the intruder that although she did not have much money, what she did have was in her pocketbook in the kitchen. After taking the pocketbook, the intruder dragged M.J. into the bedroom and ordered her to take her clothes off while continuing to threaten and strike her.

The intruder forced M.J. to lie face down on the bed, then made her turn over while he penetrated her vagina with his fingers and penis. Afterwards, the intruder forced M.J. into the living room, where he made her lie face down on the sofa and tied her feet and hands behind her back. The intruder then threw a blanket over M.J. and told her not to move or he would kill her.

After some time, M.J. was able to free her hands and feet and call 911. Officers and paramedics were dispatched to M.J.'s home, and when they arrived, found M.J. "doubled over a lot, like she was in pain," with her face and hair covered in blood. There was also blood

on the floor throughout the house, and all over the bed. M.J. told officers what had happened and was then taken to the hospital, where she was treated for cuts on her hands, significant bruising, swelling and tenderness in her shoulder, abdominal pain, and a broken collarbone. Medical personnel treated M.J.'s cuts with stitches and placed her shoulder in a sling. A sexual assault examination and vaginal swab was performed by the nurse. M.J. received morphine and was prescribed additional pain medication, and later had to return to the emergency room due to an infection which developed in the sutured hand. M.J.'s regular doctor later prescribed medicine for anxiety suffered by M.J. since the home invasion.

After officers had determined that the intruder was no longer in the residence, a police K9 unit was dispatched to M.J.'s house. A tracking dog immediately picked up a scent at the back door and led his handler to the residence of defendant, a mere 60 yards from M.J.'s home. Pursuant to a consensual search of defendant's bedroom, officers found a pair of shoes, a jacket and a toboggan, all of which appeared to have blood on them. Defendant was placed under arrest and the Lenoir County Grand Jury later returned indictments alleging that defendant was a habitual felon and a violent habitual felon and charging defendant with first degree burglary, first degree rape, first degree sex offense, assault inflicting serious bodily injury, attempted common law robbery, and first degree kidnapping.

At trial, after the conclusion of the evidence, defendant made a motion to dismiss the charges for insufficiency of the evidence pursuant to N.C.G.S. § 15A-1227. The trial court excused the jury, addressed defendant's motion, and subsequently entered an order denying the motion to dismiss. On 30 July 2008, the jury returned its verdict finding defendant guilty on all charges. Defendant's motion to dismiss was renewed and again denied.

The trial court arrested judgment on the first degree kidnapping verdict, and imposed a judgment of second degree kidnapping. Defendant admitted his status as both a habitual felon and as a violent habitual felon. The trial court imposed four consecutive sentences of life imprisonment without parole in the first degree burglary, first degree rape, first degree sexual offense, and second degree kidnapping convictions, to be followed by two active sentences of 133 months to 169 months in the assault inflicting serious bodily injury and attempted common law robbery convictions.

Defendant has assigned several errors on appeal, but in his brief he abandons all but one. Defendant argues that the trial court erred by failing to dismiss the charge of assault inflicting serious bodily injury because there was insufficient evidence presented at trial that M.J. sustained a permanent or protracted condition that caused extreme pain. Defendant further contends that the trial court's failure to dismiss this charge was in violation of his rights under the 5th, 6th, and 14th Amendments to the United States Constitution and Article I, Sections 18, 19, 21, 23, 24 and 26 of the North Carolina Constitution. We disagree.

N.C.G.S. § 15A-1227 allows a defendant to move to dismiss a criminal charge when the evidence is not sufficient to sustain a conviction upon the close of all evidence and after return of a guilty verdict but before the entry of judgment. N.C. Gen. Stat. § 15A-1227(a)(2), (3) (2007). In ruling on a motion to dismiss for insufficiency of the evidence, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citing *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977); *Comm'r. of Ins. v. Fire Ins. Rating Bureau*, 292 N.C. 70, 231 S.E.2d 882 (1977)). Evidence is not substantial if it raises only a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it. *State v. Hamilton*, 145 N.C. App. 152, 155, 549 S.E.2d 233, 235 (2001). If substantial evidence supports a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. *State v. Mitchell*, 109 N.C. App. 222, 224, 426 S.E.2d 443, 444 (1993). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). The denial of a motion to dismiss for insufficient evidence is a question of law, *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991), which

we review *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

In the case at bar, defendant was charged and convicted of assault inflicting serious bodily injury, which "requires proof of two elements: (1) the commission of an assault on another, which (2) inflicts serious bodily injury." *State v. Hannah*, 149 N.C. App. 713, 717, 563 S.E.2d 1, 4 (citing *State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563 (2001)), *disc. review denied*, 355 N.C. 754, 566 S.E.2d 81 (2002).

> "Serious bodily injury" is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

N.C. Gen. Stat. § 14-32.4 (a) (2007). Serious bodily injury as defined in N.C.G.S. § 14-32.4 requires proof of more severe injury than the serious injury element in other assault offenses. *State v. Williams*, 150 N.C. App. 497, 503, 563 S.E.2d 616, 619-20 (2002).

In the case at bar, the trial court's instruction to the jury on the element of serious bodily injury was not identical to the statutory definition. Instead, the trial court defined serious bodily injury as "an injury that . . . creates or causes a permanent or protracted condition that causes extreme pain." The trial court also instructed the jury as to the lesser included offense of assault inflicting serious injury.

It is well settled that "a defendant may not be convicted of an offense on a theory of guilt different from that presented to the jury." *State v. Helton*, 79 N.C. App. 566, 568, 339 S.E.2d 814, 816 (1986) (quoting *State v. Smith*, 65 N.C. App. 770, 773, 310 S.E.2d 115, 117, *modified and aff'd*, 311 N.C. 145, 316 S.E.2d 75 (1984)). Had the trial court instructed the jury on the complete definition of "serious bodily injury" set out in N.C.G.S. § 14-32.4, defendant's conviction could be sustained on any one of the discrete portions of the definition. However, since the trial court limited its instruction in the way that it did, we must determine whether the record contains substantial evidence that M.J. suffered from "a permanent or protracted condition that causes extreme pain."

In *Williams*, this Court addressed the sufficiency of evidence of serious bodily injury where a jury instruction limited the definition of

serious bodily injury to "an injury that creates or causes a permanent or protracted condition that causes extreme pain." *Williams*, 150 N.C. App. at 503, 563 S.E.2d at 620. In that case, the State presented evidence that the victim suffered a broken jaw that was wired shut for two months, and suffered back spasms for eight months, which resulted in two visits to the emergency room because of difficulty breathing. *Id.* The treating physician testified the victim's injury was the type of injury that caused " 'quite a bit' of pain and discomfort." *Id.* at 503-04, 563 S.E.2d at 620. This Court concluded that "a reasonable juror could find this evidence sufficient to conclude that [the victim's] injuries created a 'protracted condition that cause[d] extreme pain.' " *Id.* at 504, 563 S.E.2d at 620.

In the case at bar, the emergency room physician testified that M.J. had dried blood on her lips and in her nostrils, abdominal pain, a large bruise and swelling over her left collarbone, which "was very tender and she couldn't move her left shoulder very much because she was in so much pain." The physician also testified that she examined the cuts in M.J.'s hand for injuries to the tendon before stitching her up, and that, after X-rays revealed that M.J.'s collarbone was broken, she put M.J.'s shoulder in a sling. The physician also testified that M.J. received morphine in the emergency room and was prescribed additional medicine for pain, then had to return to the emergency room two days later due to an infection which had developed in the sutured hand, pursuant to which the stitches were removed, the wounds drained and re-sutured, and M.J. was prescribed antibiotics. Later at trial, the emergency room nurse who gathered the rape kit testified she was unable to use a speculum because M.J. was in so much pain and that collecting a vaginal swab was "very painful" for her.

Viewing this evidence in the light most favorable to the State, we hold that there was sufficient evidence that M.J. suffered a "serious bodily injury" consistent with the instruction given to the jury. Because a reasonable juror could find this evidence sufficient to conclude that M.J.'s injuries created a "protracted condition that cause[d] extreme pain," we conclude the trial court did not err in denying defendant's motion to dismiss, and this assignment of error is overruled.

No error.

Judges STEPHENS and HUNTER, JR. concur.

ROBERT N. MOORES, PETITIONER v. GREENSBORO MINIMUM HOUSING STANDARDS COMMISSION AND CITY OF GREENSBORO, RESPONDENTS

No. COA08-1557

(Filed 21 July 2009)

Cities and Towns— housing commission—authority to order repair or demolishment of house

The superior court erred by ruling that the Greensboro Minimum Standards Housing Commission was not the "governing body" authorized to order petitioner's residence repaired or demolished because: (1) the Housing Commission is expressly empowered to make such orders under the Greensboro Minimum Housing Code; and (2) our appellate courts have previously adjudicated cases in which a commission, not the City Council, has given the final order to condemn or demolish property. N.C.G.S. § 160A-443.

Appeal by Respondents from order entered 13 October 2008 by Judge Lindsay R. Davis, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 19 May 2009.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for Petitioner.

Greensboro City Attorney's Office, by Becky Jo Peterson-Buie, for Respondents.

WYNN, Judge.

"[T]he governing body of the city is . . . authorized to adopt and enforce ordinances relating to dwellings within the city's territorial jurisdiction that are unfit for human habitation."[1] In this appeal, Respondents Greensboro Minimum Housing Standards Commission ("the Housing Commission") and City of Greensboro argue the Superior Court erred by ruling that the Housing Commission is not the "governing body" authorized to order Petitioner Robert Moore's residence repaired or demolished. Because the Housing Commission is expressly empowered to make such orders under the Greensboro Minimum Housing Code, we reverse the Superior Court's order.

Petitioner owns a single-family residence at 5002 Beale Avenue in Greensboro. A building inspector inspected the residence on 12 June

1. N.C. Gen. Stat. § 160A-443 (2007).

and 22 September 2006 for compliance with Greensboro's minimum housing standards. The inspector found multiple violations during the inspections, including rotted roof sheathing; unsanitary ceiling, fixtures and walls; untreated deteriorative surface; leaky and loose water closet; and weather permeable wall and exterior siding. On 12, 19 and 26 April 2007, the inspector gave notice of a hearing on the housing violations. The inspector held a hearing on 3 May 2007 and determined the house was unfit for human habitation.

On 4 May 2007, the inspector ordered the house repaired or demolished by 4 June 2007. Petitioner did not comply with this order. In compliance with the Greensboro Minimum Housing Code, the inspector sought review of his order and a mandate from the Housing Commission to proceed. Petitioner was given notice of a hearing before the Housing Commission set for 10 July 2007.

Petitioner appeared at the 10 July hearing and asserted that he was making efforts to comply with the inspector's order, including erection of a five foot fence at his residence. Ultimately, at Petitioner's request, the Housing Commission continued the hearing to 14 August 2007 to allow Petitioner time to obtain counsel. At the 14 August hearing, the case was again continued to 11 September 2007 to allow Petitioner's counsel to become familiar with the case.

At the September hearing, Petitioner gave testimony about measures he was taking to bring the residence into compliance with the Housing Code. He testified that he had erected a five foot fence around the perimeter of the property, replaced a broken pane of glass in a storm window, and replaced rotting fascia board. Petitioner opined that the inspector's list of violations affected between 1% to 10% of the house's total value. Moreover, Petitioner's position was that the listed violations did not threaten health or safety, but rather were routine maintenance shortcomings.

However, Petitioner admitted at the September hearing that several listed violations continued to exist. The violations included a faulty ceiling where Petitioner cut a hole to access plumbing; exposed wiring; insect and rodent issues; a loose handrail; rotting roof sheathing; dirty and/or unpainted fixtures, floors, walls and other surfaces; and a loose water closet. The building inspector expounded on the house's sanitary condition, stating: "It doesn't appear that anything has been cleaned up in quite a long time. . . . I believe at a certain point, on sanitary conditions, qualifies as one (1) of the individual violations that, all by itself, is adequate to . . . support the order to con-

demn the house, and I believe this house is to that point." On the other hand, Petitioner took the position that there should be no order to repair or demolish because conditions at the residence posed no threat to the public, health, safety or welfare. Thereafter, the Housing Commission voted 4-0 to uphold the inspector's order to repair or demolish the residence, and allowed Petitioner until 10 December 2007 to comply.

Petitioner filed a petition for writ of certiorari for the Superior Court to review the Housing Commission's order. The Superior Court granted the writ of certiorari, and after hearings, entered an order on 13 October 2008 prohibiting the Housing Commission and Greensboro from demolishing Petitioner's property and remanding to the Housing Commission. Specifically, the Superior Court ruled that the Housing Commission was not the "governing body" under N.C. Gen. Stat. § 160A-443(5), and therefore, had "no authority to cause the repair or demolition" of Petitioner's property. The Housing Commission and Greensboro appeal from that order, arguing the Superior Court erred by concluding that the Housing Commission lacked authority to order Petitioner's residence repaired or demolished.

The Superior Court's functions when reviewing the decision of a board sitting as a quasi-judicial body include: (1) reviewing the record for errors in law; (2) ensuring that the board followed procedures specified by statute and ordinance; (3) ensuring that the board protected the petitioner's due process rights; (4) ensuring that the board's decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensuring that the board's decision is not arbitrary and capricious. *Carolina Holdings, Inc. v. Housing Appeals Bd. of City of Charlotte*, 149 N.C. App. 579, 584, 561 S.E.2d 541, 544, *disc. review denied*, 356 N.C. 298, 570 S.E.2d 499 (2002). We review the Superior Court's determination that the Housing Commission committed an error of law *de novo*. *See id.* at 585, 561 S.E.2d at 544-45.

Here, the Superior Court ruled that the Housing Commission is not the "governing body" authorized to order Petitioner's property repaired or demolished under section 160A-443(5). Relevant portions of that statute provide:

> Upon the adoption of an ordinance finding that dwelling conditions of the character described in G.S. 160A-441 exist within a city, the governing body of the city is hereby authorized to adopt

and enforce ordinances relating to dwellings within the city's territorial jurisdiction that are unfit for human habitation. These ordinances shall include the following provisions:

. . .

(3) That if, after notice and hearing, the public officer determines that the dwelling under consideration is unfit for human habitation, he shall state in writing his findings of fact in support of that determination and shall issue and cause to be served upon the owner thereof an order,

. . .

(4) That, if the owner fails to comply with an order to repair, alter or improve or to vacate and close the dwelling, the public officer may cause the dwelling to be repaired, altered or improved or to be vacated and closed . . .

(5) That, if the owner fails to comply with an order to remove or demolish the dwelling, the public officer may cause such dwelling to be removed or demolished. *The duties of the public officer set forth in subdivisions (4) and (5) shall not be exercised until the governing body shall have by ordinance ordered the public officer to proceed to effectuate the purpose of this Article with respect to the particular property or properties which the public officer shall have found to be unfit for human habitation and which property or properties shall be described in the ordinance.* No such ordinance shall be adopted to require demolition of a dwelling until the owner has first been given a reasonable opportunity to bring it into conformity with the housing code. . . .

N.C. Gen. Stat. § 160A-443 (2007) (emphasis added). "Governing body" is defined in Chapter 160A as the "council, board of commissioners, or other legislative body, charged with governing a city or county." N.C. Gen. Stat. § 160A-442(3).

Additionally, several provisions codified throughout Chapter 160A are significantly deferential to local ordinances. For example, also within Part six, section 160A-450 states:

Nothing in this Part shall be construed to abrogate or impair the powers of the courts or of any department of any city to enforce any provisions of its charter or its ordinances or regulations, nor

> to prevent or punish violations thereof; and the powers conferred by this Part shall be in addition and supplemental to the powers conferred by any other law.

N.C. Gen. Stat. § 160A-450 (2007). Likewise, section 160A-3 states:

> (a) When a procedure that purports to prescribe all acts necessary for the performance or execution of any power, duty, function, privilege, or immunity is provided by both a general law and a city charter, the two procedures may be used as alternatives, and a city may elect to follow either one.
>
> (b) When a procedure for the performance or execution of any power, duty, function, privilege, or immunity is provided by both a general law and a city charter, but the charter procedure does not purport to contain all acts necessary to carry the power, duty, function, privilege, or immunity into execution, the charter procedure shall be supplemented by the general law procedure; but in case of conflict or inconsistency between the two procedures, the charter procedure shall control.

N.C. Gen. Stat. § 160A-3(a)-(b) (2007). Thus, the General Assembly affords local governments considerable leeway in exercising their police powers to maintain safe and suitable dwellings through their local ordinances. It follows that the Greensboro Minimum Housing Code should dictate the outcome of this case if it is consistent with state law.

Section 11-39 of the Greensboro Minimum Housing Code is a thorough, three-page ordinance governing condemnation procedure. Subsection (d) is the relevant provision in this appeal, and its language is nearly a mirror image of N.C. Gen. Stat. § 160A-443(5). Subsection (d) states:

> If the owner fails to comply with an order to repair or, upon his failure to do so, otherwise demolish the building, the inspector may cause such building to be demolished; provided, that *the duties of the inspector with respect to causing the repair, alteration, improvement or demolition set forth in subsections (c) and (d) shall not be exercised until the minimum housing standards commission shall by resolution or other decree order the inspector to proceed to effectuate the purposes of this chapter concerning the particular property or properties which the inspector shall have found to be unfit for human habitation or dangerous*, and which property or properties shall be described

> by the resolution or other decree. Such decree shall be recorded in the office of the register of deeds of Guilford County. . . .

Greensboro, N.C., Minimum Housing Code § 11-39(d) (2005). Therefore, under the Greensboro Minimum Housing Code, the Housing Commission is expressly empowered to make the final order or decree directing the building inspector to repair or demolish a building not brought into compliance pursuant to previous order.

Finally, both courts in our Appellate Division have adjudicated cases in which a commission, not the City Council, has given the final order to condemn or demolish property. *See Horton v. Gulledge*, 277 N.C. 353, 177 S.E.2d 885 (1970) (holding that Greensboro Housing Commission could not order property destroyed without giving the owner a reasonable opportunity to remove hazardous conditions threatening public safety and welfare), *overruled on other grounds by State v. Jones*, 305 N.C. 520, 530-31, 290 S.E.2d 675, 681 (1982); *Redevelopment Comm'n of Greensboro v. Johnson*, 129 N.C. App. 630, 632-33, 500 S.E.2d 118, 120 (1998) (Commission not required to articulate its reasons for condemning some but not all property in a given area).

We conclude that the Housing Commission's authority to make the final order to repair or demolish property is expressly provided in the Greensboro Minimum Housing Code, and confirmed by decisions from this Court and our Supreme Court. Accordingly, we must reverse the Superior Court's order.

Reversed.

Judges STROUD and BEASLEY concur.

WARREN R. FOLLUM, PETITIONER v. NORTH CAROLINA STATE UNIVERSITY, RESPONDENT

No. COA08-1291

(Filed 21 July 2009)

Process and Service— sufficiency of process—service on counsel of record

The superior court did not err by granting respondent university's motion to dismiss based on insufficiency of process and by dismissing a petition for judicial review with prejudice because:

(1) N.C.G.S. § 150B-46 provides that a petitioner seeking judicial review of an agency decision must serve his petition for judicial review upon all parties of record to the administrative proceedings within ten days of filing said petition with the trial court; (2) while defendant did not have to serve his petition for judicial review upon respondent's process agent, serving respondent's counsel of record was insufficient since she was not a party of record to the administrative proceedings when she was an employee of the Department of Justice and a member of the Attorney General's staff instead of the university; (3) the fact that the Attorney General's office only provided petitioner with a post office box for the university's process agent and not a physical address did not render the service of the petition for judicial review upon the university's counsel in compliance with N.C.G.S. § 150B-46; and (4) petitioner's service of the petition on respondent's process agent outside of the ten-day window did not comply with N.C.G.S. § 150B-46.

Appeal by respondent from an order entered 18 June 2008 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 8 April 2009.

Warren R. Follum, petitioner-appellant, pro se.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly D. Potter, for respondent-appellee.

HUNTER, Robert C., Judge.

Petitioner, Warren R. Follum ("petitioner") appeals *pro se* from an order entered 18 June 2008 by Judge Michael R. Morgan in Wake County Superior Court, which granted respondent North Carolina State University's "Motion to Dismiss" based on insufficiency of process and dismissed "Petitioner's Petition for Judicial Review" with prejudice. After careful review, we affirm.

I. Background

On 26 November 2007, petitioner filed a "Petition for Contested Case Hearing" in the Office of Administrative Hearings ("OAH") asserting that, in violation of the State Personnel Act, respondent North Carolina State University ("respondent" or "NCSU"): (1) demoted him without just cause in June and November 2006 respectively; and (2) failed to adequately post two employment positions for

Director of Capital Design and Director of Capital Design and Construction. Petitioner further alleged that respondent took these actions against him based on his age and sex.[1]

On 19 December 2007, respondent filed a "Motion to Dismiss and Motion to Stay Proceedings" based on: (1) lack of personal jurisdiction; (2) lack of subject matter jurisdiction; and (3) failure to state a claim. On 26 February 2008, Administrative Law Judge Joe L. Webster ("ALJ Webster") entered a "Final Decision Order of Dismissal[,]" which dismissed petitioner's Petition for Contested Case Hearing with prejudice "on the grounds set forth in [respondent's] Motion to Dismiss[.]" On the same date, OAH mailed a copy of ALJ Webster's final decision/order to petitioner and to respondent's attorney of record, Kimberly D. Potter ("Ms. Potter").

On 11 March 2008, petitioner filed a Petition for Judicial Review in Wake County Superior Court seeking review of ALJ Webster's 26 February 2008 final decision/order. On the same date, petitioner served the Petition for Judicial Review and a civil summons on Ms. Potter; however, he did not serve respondent's process agent nor any other individual employed by respondent.

On 1 April 2008, respondent filed a "Motion to Dismiss" the Petition for Judicial Review for insufficiency of process pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(4) (2007), asserting that petitioner had failed to properly serve the Petition for Judicial Review. On 2 April 2008, petitioner served the Petition for Judicial Review, the civil summons and a "General Civil Action Cover Sheet" on respondent's process agent, Mary Elizabeth Kurz ("Ms. Kurz").

On 30 May 2008, a hearing was held in which the parties solely addressed the insufficiency of process issue. Respondent asserted, *inter alia*, that N.C. Gen. Stat. § 1A-1, Rule 4 (2007) controlled this issue and that petitioner was required to serve his Petition for Judicial Review upon respondent's process agent, which he had failed to do in a timely manner. Petitioner contended that the issue was controlled by N.C. Gen. Stat. § 150B-46 (2007) and that he had complied with the statute by serving his Petition for Judicial Review upon Ms. Potter and Ms. Kurz. After extensively examining this Court's opinion

1. Recently, this Court filed an opinion affirming the denial of unemployment benefits for petitioner for a period of nine weeks because he was discharged from his employment at NCSU due to substantial fault. *Follum v. N.C. State Univ.*, 195 N.C. App. 785, 673 S.E.2d 884 (unpublished), *appeal dismissed and disc. review denied*, 363 N.C. 374, —— S.E.2d —— (2009).

in *Davis v. N.C. Dept. of Human Resources*, 126 N.C. App. 383, 485 S.E.2d 342, (1997), *aff'd in part and rev'd in part on other grounds*, 349 N.C. 208, 505 S.E.2d 77 (1998), the trial court concluded, *inter alia*, that: (1) section 150B-46, not Rule 4, controlled the issue of what constitutes proper service of a petition for judicial review of a final administrative/agency decision; (2) pursuant to section 150B-46 and *Davis*, Ms. Potter "was not an individual who could properly receive service"; and (3) pursuant to section 150B-46, the 2 April 2008 service upon Ms. Kurz was not timely. Consequently, the court entered an 18 June 2008 order granting respondent's motion to dismiss based upon petitioner's failure to properly serve his Petition for Judicial Review in accordance with section 150B-46. Petitioner appeals.

II. Analysis

On appeal, petitioner asserts that he properly served respondent with his Petition for Judicial Review in accordance with section 150B-46 and Rules 4 and 5 of the North Carolina Rules of Civil Procedure. Consequently, he contends that the trial court erred in granting respondent's motion to dismiss his Petition for Judicial Review. As discussed *infra*, we disagree.

This Court's opinion in *Davis* is clear that section 150B-46 controls the issue before us. *Id.* at 388, 485 S.E.2d at 345. In that case, this Court addressed whether the petitioner properly served the respondent agency, the North Carolina Department of Human Resources, with his petition for judicial review when he served said petition on the Secretary of the Department of Human Resources and not the agency's registered process agent. *Id.* The respondent asserted that, in accordance with Rule 4 of the North Carolina Rules of Civil Procedure, a petitioner seeking judicial review from a final agency decision was required to serve his petition for judicial review on the agency's process agent. *Id.* This Court disagreed and determined that section 150B-46, not Rule 4, was the controlling law. Specifically, this Court concluded:

> "[W]here one statute deals with a particular subject or situation in specific detail, while another statute deals with the subject in broad, general terms, the particular, specific statute will be construed as controlling, absent a clear legislative intent to the contrary." In the present case, G.S. 150B-46 deals with the service of a petition for judicial review of an agency decision, while Rule 4 applies generally to service in all civil matters. Therefore, since G.S. 150B-46 is more specific and there is no legislative intent to

> the contrary, its terms control. If the General Assembly had intended that petitions for judicial review be served only upon an agency's process agent, it could have put language mimicking that of Rule 4 in G.S. 150B-46. It did not.

Id. (alteration in original) (quoting *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 154-55, 423 S.E.2d 747, 751 (1992)).

Section 150B-46 provides in pertinent part:

> The petition [for judicial review] shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks. *Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings. Names and addresses of such parties shall be furnished to the petitioner by the agency upon request.* Any party to the administrative proceeding is a party to the review proceedings unless the party withdraws by notifying the court of the withdrawal and serving the other parties with notice of the withdrawal. Other parties to the proceeding may file a response to the petition within 30 days of service. Parties, including agencies, may state exceptions to the decision or procedure and what relief is sought in the response.

N.C. Gen. Stat. § 150B-46 (emphasis added). Hence, according to section 150B-46, a petitioner seeking judicial review of an agency decision must serve his petition for judicial review upon all "parties of record to the administrative proceedings" within ten days of filing said petition with the trial court. *Id.*

Respondent asserts that petitioner did not comply with section 150B-46 because: (1) Ms. Potter is neither an employee of NCSU nor a party to the administrative proceedings; and (2) petitioner did not serve any of respondent's employees until he served Ms. Kurz on 2 April 2008, which was outside the ten-day window mandated by section 150B-46. We agree.

In *Davis*, this Court determined that the petitioner had complied with section 150B-46 by serving his petition for judicial review "upon C. Robin Britt, Secretary of the Department of Human Resources, the person at the agency to whom the Office of Administrative Hearing sent copies of its orders during the administrative proceeding[.]" *Davis*, 126 N.C. App. at 388, 485 S.E.2d at 345-46. While *Davis* is

clear that, in the instant case, petitioner did not have to serve his Petition for Judicial Review upon respondent's process agent, Ms. Kurz, it is equally clear that in order to comply with section 150B-46, at the very least, petitioner did have to serve said petition upon a "person at the agency[,]" i.e., a person at the agency that was a party to the administrative proceedings. *Id.* at 388, 485 S.E.2d at 345. Here, as respondent's counsel of record, Ms. Potter was charged with representing respondent's interests; however, Ms. Potter is an employee of the Department of Justice and a member of the Attorney General's staff, not of NCSU. As such, as set out in *Davis*, Ms. Potter does not qualify as a "person at the agency[,]" and service of the Petition for Judicial Review upon her does not comply with section 150B-46. *Id.*

Nevertheless, petitioner asserts that the 11 March 2008 service of his Petition for Judicial Review upon Ms. Potter complied with section 150B-46 because when he requested the address for respondent's registered agent from the Attorney General's office, he was only provided with a post office box and not a physical street address. Petitioner notes that without a physical street address, he was unable to effectuate service via his preferred method of certified mail from a private letter carrier, such as Federal Express, because private letter carriers will not deliver certified mail to post office boxes. Petitioner claims, as he did below, that respondent denied him the right to serve his Petition for Judicial Review by certified mail via a private letter carrier. As a result, he contends that the service of the Petition for Judicial Review upon Ms. Potter, who is an assistant attorney general, complied with section 150B-46 because pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(j)(4)(c), where an agency fails to file with the Attorney General the name and address of an agent upon whom process may be served, service may be made upon the Attorney General or an assistant attorney general. We disagree.

At the outset, we note that petitioner does not cite any case law in support of his argument, nor does he base his argument upon section 150B-46; rather, he bases his argument entirely upon Rule 4. Nevertheless, section 150B-46 does provide that names and addresses of the parties of record to the administrative proceedings must be given "to the petitioner by the agency upon request." N.C. Gen. Stat. § 150B-46.

In the instant case, nothing in the record demonstrates that petitioner requested respondent's address directly from respondent or that respondent agency itself failed to provide him with it; rather,

petitioner requested the address of respondent's process agent from the Attorney General's office. In addition, while respondent concedes that a private letter carrier will not deliver certified mail to a post office box, a post office box is an address, and petitioner does not cite a single case to support the argument that either section 150B-46 or N.C.R. Civ. P. 4(j)(4) require an agency to provide a physical street address and/or that a petitioner's choice to effectuate service by certified mail via a private letter carrier renders the service of a petition for judicial review upon an agency's attorney of record in compliance with section 150B-46. Furthermore, as respondent notes and as indicated by the record, petitioner was aware of Ms. Kurz's physical street address as petitioner had written the physical street address for Ms. Kurz on his Petition for Contested Hearing and personally delivered said petition to this address prior to filing and serving his Petition for Judicial Review. Accordingly, we conclude that the fact that the Attorney General's office only provided petitioner with a post office box for Ms. Kurz and not a physical street address did not render the service of petitioner's Petition for Judicial Review upon Ms. Potter in compliance with section 150B-46.

In sum, we hold that petitioner's service of his Petition for Judicial Review upon Ms. Potter on 11 March 2008 did not comply with the mandates of section 150B-46 because Ms. Potter is not a party of record to the administrative proceedings, and that his 2 April 2008 service of said petition upon Ms. Kurz did not comply with section 150B-46 as it was served outside of the ten-day window mandated by the statute. Consequently, the trial court did not err by granting respondent's motion to dismiss and dismissing petitioner's Petition for Judicial Review.

Affirmed.

Judges McGEE and BEASLEY concur.

STATE OF NORTH CAROLINA v. RAMEL THEODORE TROY

No. COA08-1332

(Filed 21 July 2009)

Evidence— recording jailhouse telephone calls—implied consent

The trial court did not err by concluding that defendant gave his implied to consent to the recording of jailhouse telephone calls in which he made incriminating statements. Defendant argued that he had not heard the warning about monitoring and recording calls when these three-way calls were made, but he was aware from previous experience that telephone calls from the detention center were subject to being recorded. Furthermore, the warning was played every time an inmate made a call.

Appeal by defendant from judgments entered 5 September 2007 by Judge Gregory A. Weeks in Columbus County Superior Court. Heard in the Court of Appeals 22 April 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe, for the State.

Ann B. Petersen for defendant-appellant.

HUNTER, ROBERT C., Judge.

On 13 August 2007 Ramel T. Troy ("defendant") was tried for the armed robbery and first degree murder of nineteen-year-old Jonathan Chase Powell ("Powell"). On 5 September 2007 he was convicted by a jury of both charges.[1] Defendant was sentenced to life imprisonment without parole for the murder conviction and 117 to 150 months imprisonment for the robbery with a dangerous weapon conviction.[2] Defendant now appeals. After careful review, we find no error.

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1. Although the verdict sheets list 9 September 2007, the record indicates that the verdicts were actually rendered on 5 September 2007.

2. Defendant was convicted of first degree murder based on malice, premeditation, and deliberation, and pursuant to the felony murder rule. Accordingly, the trial court was not required to arrest judgment entered on the robbery with a dangerous weapon conviction. *State v. Bell*, 338 N.C. 363, 394, 450 S.E.2d 710, 727 (1994) ("[W]here defendant is convicted of first-degree murder based upon both premeditation and deliberation and felony murder, the underlying felony does not merge with the murder conviction and the trial court is free to impose a sentence thereon."), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995).

Background

The evidence at trial tended to show that Powell left his parents' home, where he resided, on the evening of 27 March 2002 and never returned. On 29 March 2002, Powell's Honda Accord was found on the side of Rosendale Road supported by cinder blocks, as it had no tires or rims in tact. Erica Paulette ("Paulette") testified at trial that she traveled this road to get to and from work every day, and that when she was on her way home on 27 March 2009 at approximately 6:00 p.m., the car was not there. On her way to work the following morning at around 6:00 a.m., the car was on the side of the road. Evidence collected from the car included Powell's blood, unidentified DNA on cigarettes found in the ash tray, and unmatched fingerprints on the car and papers inside the car.

Powell's body was found on 17 April 2002 in a wooded, rural area of Columbus County. His body was propped against the root of a fallen tree. Due to the decomposed condition of the body, the medical examiner was unable to ascertain a definite cause of death, though a lethal gunshot wound to the neck was not ruled out. The medical examiner reported that it was unlikely that Powell was shot in the head as there was no evidence of damage to the skull. A search of the surrounding area where Powell's body was found yielded no evidence.

In August 2003, Tera Thomas ("Thomas"), defendant's former girlfriend, told police that defendant admitted to her that he killed Powell. According to Thomas, in November 2002, defendant stated to her that Powell had been in his neighborhood trying to sell ecstacy pills. Defendant said that he and Pepe Powell ("Pepe") lured Powell to another location under the guise that they wanted to buy drugs from him. Defendant and Pepe then beat Powell, knocking out his teeth, shot him in the head, and left him next to a tree. They then took speakers and amplifiers from Powell's car. Defendant offered Thomas these items. He further claimed that he threw the gun from a bridge while traveling to Myrtle Beach, South Carolina. After receiving this information, in August 2003, the investigating officers returned to the crime scene to perform another search and found a 9 mm Winchester shell casing at the root of the tree where the body was originally located.

In December 2004, Acie Kelly ("Kelly") told police that in March 2002, defendant arrived at his home driving a Honda. Pepe was also present, but arrived in a separate car. Pepe asked Kelly to remove a stereo from the Honda. They then went to Kelly's cousin's house

where Kelly removed the stereo. Kelly stated that defendant and Pepe were in possession of speakers that came from the Honda and that there was a black back-pack in the trunk of the Honda that defendant took with him that evening. Kelly described the Honda to police as light in color, but at trial, he identified the dark blue Honda from photographs presented. Kelly testified that when he, defendant, and Pepe left his cousin's house, they went to Fishman's garage where Pepe attempted to sell the rims from the Honda to a man named Matt Shaw ("Shaw"). Shaw testified that Pepe came to the garage that night alone in the Honda. Kelly further testified that after they left the garage, they abandoned the Honda on the side of the road.

In late March 2002, defendant, Kelly, Pepe, and two other men traveled to Myrtle Beach, South Carolina. All of the men, with the exception of Pepe, were arrested for possession of marijuana and held at the J. Reuben Long Detention Center in Conway, South Carolina.

On 31 March 2002, while he was in the detention center, defendant called Thomas two times. He called her again on 1 April 2009. At the time these calls were made, defendant and Thomas both heard a recorded message which stated, "[t]his call is subject to being monitored and recorded. Thank you for using Evercom." These calls were played to the trial court at the motion to suppress hearing, but were not the subject of the motion; rather, defendant sought to exclude two other calls made on 2 April and 4 April 2002. Both calls were originally placed by Kelly to Latoya Drayton ("Drayton"). Kelly then asked Drayton to make a "three-way" call on behalf of defendant. On 2 April 2002, Drayton made a three-way call to defendant's mother, and this conversation was recorded. Defendant told his mother that in order to help raise bail money, she should call Pepe and tell him to sell defendant's speakers and amp. On 4 April 2002, Drayton again made a three-way call on defendant's behalf, this time calling Pepe. Defendant asked Pepe if he had the "book bag" and Pepe responded that it was in "the van." He asked defendant what was in the book bag and defendant responded that "the amp" was in it. Pepe inquired as to why defendant left the book bag in the van, and defendant replied that he left it there because "that dude got missing." At a motion to suppress hearing, defendant requested that these two telephone conversations be excluded from evidence because defendant was not provided with a recorded message that his conversation could be monitored or recorded. The trial court declined to exclude the evidence and concluded as a matter of law that:

> The defendant's use of the institutional telephone at J. Reuben Long Detention Center in Conway, South Carolina during his pretrial confinement on unrelated charges after being advised and warned that such telephone conversations were subject to being monitored and recorded constitutes implied consent to the monitoring and recording of such calls within the meaning of applicable Federal and State laws.

The sole issue on appeal is whether the trial court erred in refusing to exclude the 2 April and 4 April 2002 telephone conversations between defendant and his mother, and between defendant and Pepe.

Analysis

I. Standard of Review

"The standard of review in evaluating a trial court's ruling on a motion to suppress is whether the court's findings of fact are supported by competent evidence and if those findings of fact support the trial court's conclusions of law." *State v. Price*, 170 N.C. App. 57, 64, 611 S.E.2d 891, 896 (2005). The trial court's conclusions of law are reviewed *de novo* by this Court. *State v. Green*, 194 N.C. App. 623, 630, 670 S.E.2d 635, 640 (2009).

II.

Defendant argues that the trial court erred in concluding that he gave implied consent to the recording of the two telephone calls at issue in this case and therefore admitting these calls into evidence at trial violated federal and state law.[3]

North Carolina and federal wiretapping laws generally prohibit the interception of telephone conversations. 18 U.S.C. § 2511 (2009); N.C. Gen. Stat. § 15A-287 (2007). Consequently,

> [w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

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3. Defendant does not assign error to any of the trial court's findings of fact. *Price*, 170 N.C. App. at 65, 611 S.E.2d at 896 ("If error is not assigned to any of the trial court's particular findings of fact, those findings are presumed to be supported by competent evidence and are therefore binding on appeal.").

18 U.S.C. § 2515 (2009). However, there is an exception when one of the parties to a telephone conversation consents to the interception. 18 U.S.C. § 2511(2)(c) (2009); N.C. Gen. Stat. § 15A-287(a).

According to the precedent set out by this Court in *State v. Price*, the Evercom warning that calls may be monitored and recorded is sufficient to place a defendant on notice, and his or her continuation of the telephone call constitutes implied consent to the recording. *Price*, 170 N.C. App. at 66, 611 S.E.2d at 897 (holding the trial court did not err in failing to suppress recorded conversations between the defendant and his mother where the Evercom recorded warning was utilized).

Here, it is undisputed that defendant heard the Evercom message on 31 March and 1 April 2002, only days before the 2 April and 4 April 2002 three-way calls were made. Defendant argues that since he did not hear the Evercom warning when the three-way calls were made, he did not give consent to the recording of the two calls, which distinguishes this case from *Price*. This argument is without merit.

Defendant was aware from his previous experience making outgoing calls that telephonic communications from the detention center were subject to being recorded. This knowledge is sufficient to find implied consent by defendant. Furthermore, the Evercom warning was played every time an inmate placed a call. According to *Price*, Kelly and Drayton impliedly consented to their calls being recorded, and each three-way transmission was a part of the same call. Accordingly, the trial court did not err in concluding as a matter of law that defendant gave implied consent to the recording of these calls, and therefore the trial court did not err in denying defendant's motion to suppress the evidence.

No error.

Judges McGEE and BEASLEY concur.

SLUDER v. SLUDER

[198 N.C. App. 401 (2009)]

GARY MICHAEL SLUDER, PLAINTIFF v. CHRISTINA B. SLUDER, DEFENDANT

No. COA08-1188

(Filed 21 July 2009)

Divorce— separation agreement—not acknowledged before certifying officer

An agreement for support between separated spouses should have been evaluated pursuant to N.C.G.S. § 52-10.1 and was not enforceable because it was not acknowledged before a certifying officer.

Appeal by Plaintiff from judgment entered 27 May 2008 by Judge Gary S. Cash in District Court, Buncombe County. Heard in the Court of Appeals 5 May 2009.

Siemens Law Office, P.A., by Jim Siemens, for plaintiff-appellant.

No brief was filed for defendant-appellee.

WYNN, Judge.

In general, a written separation agreement is legally binding between husband and wife so long as the agreement is acknowledged by both parties before a certifying officer.[1] Here, Plaintiff Gary Michael Sluder handwrote and signed a statement that he would pay Defendant Christina B. Sluder $1000 per month in "post spousal support." Because the writing was made while the parties were separated and was not acknowledged before a certifying officer, the agreement was not enforceable under N.C. Gen. Stat. § 52-10.1.

Gary and Christina Sluder married on 14 May 1999, separated on 19 June 2004, and divorced on 30 December 2005. Before the entry of the divorce judgment, Christina filed *pro se* pleadings, which were dismissed by the trial court on 16 November 2006 for failure to assert a claim for equitable distribution or spousal support. However, the trial court allowed Christina's counterclaim for "Post-Separation Support based on contract."

In her counterclaim, Christina alleged that Gary agreed to give her $1,000 per month so that she would have the evidence of income she needed to rent an apartment for herself and her minor children.

1. N.C. Gen. Stat. § 52-10.1 (2007).

Christina provided the trial court with a statement to this effect, dated 10 January 2005, in Gary's handwriting, and with his signature. On 27 May 2008, the trial court heard evidence on the contract claim and entered judgment in favor of Christina, awarding her recovery from Gary in the amount of $11,000, or $1000 per month for eleven months.

Gary appeals, arguing that the trial court erred by concluding that the uncertified agreement between the parties was an enforceable agreement governed by N.C. Gen. Stat. § 52-10 (2007). Instead, he contends, their agreement concerned support rights made during separation which is governed by N.C. Gen. Stat. § 52-10.1. Because their agreement was not acknowledged by both parties before a certifying officer as required by section 52-10.1, Gary argues the agreement was unenforceable. We must agree.

"A separation agreement is a contract between spouses providing for marital support rights and . . . executed while the parties are separated or are planning to separate immediately." *Small v. Small*, 93 N.C. App. 614, 620, 379 S.E.2d 273, 277, *disc. review denied*, 325 N.C. 273, 384 S.E.2d 519 (1989) (internal quotation marks and citation omitted). Section 52-10.1 governs the execution of separation agreements stating:

> Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b).

See also Williams v. Williams, 120 N.C. App. 707, 710, 463 S.E.2d 815, 818 (1995), *aff'd per curiam*, 343 N.C. 299, 469 S.E.2d 553 (1996) (holding support agreements made in the context of separation are governed by § 52-10.1).

In contrast, section 52-10(a) of the North Carolina General Statues states:

> Contracts between husband and wife not inconsistent with public policy are valid, and any persons of full age about to be married and married persons may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar

> of any action or proceeding for the recovery of the rights and estate so released.

While both sections 52-10(a) and 52-10.1 govern agreements between spouses, our courts consistently have held that the statutes are distinguishable. Section 52-10(a) relates to the execution of agreements concerning rights in property that may be entered into at any time during marriage. *See Eubanks v. Eubanks*, 273 N.C. 189, 195, 159 S.E.2d 562, 567 (1968). On the other hand, section 52-10.1 relates to the execution of agreements concerning support rights made in contemplation of separation. *Williams*, 120 N.C. App. at 710, 463 S.E.2d at 818.

Here, the trial court made the following finding of fact and conclusions of law regarding the uncertified agreement between the parties:

> 7. In early January 2005, the Plaintiff agreed to give the defendant one thousand dollars ($1,000.00) per month so that the Defendant could have evidence of income she would need to rent an apartment for herself and her minor children.
>
> . . .
>
> 1. Pursuant to G.S. 52-10 the Plaintiff owes the Defendant the sum of one thousand dollars (1,000.00 [sic] per month for a reasonable time after promising the Plaintiff that he would do so.
>
> 2. That a reasonable period of time for the Plaintiff to pay the Defendant one thousand dollars ($1,000.00) per month would be eleven (11) months.

Additionally, the record indicates that the alleged agreement, signed and in the handwriting of Gary, stated in full, "I Gary M. Sluder pay to my wife Christina, the sum of One Thousands Dollars a month in *post spousal support*" (emphasis added). According to the trial court's own findings, the parties separated on 19 June 2004; the agreement at issue was made in January 2005, while the parties were separated; and the agreement concerned post-separation spousal support. Accordingly, the agreement between Christina and Gary was a separation agreement for spousal support, and should have been evaluated by the trial court pursuant to section 52-10.1, which requires that a "separation agreement must be in writing and acknowledged by both parties before a certifying officer . . . ." *See also* N.C. Gen. Stat. § 52-10(b) (2007) (defining a "certifying officer" as "a notary public,

or a justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice").

Here, the record shows no evidence that the agreement was acknowledged by either party before a certifying officer. Absent acknowledgment by both parties, Christina and Gary, before a "certifying officer[,]" the agreement is invalid and not enforceable as a matter of law. *See Greene v. Greene*, 77 N.C. App. 821, 823, 336 S.E.2d 430, 432 (1985); *Morton v. Morton*, 76 N.C. App. 295, 298, 332 S.E.2d 736, 738, *cert. denied*, 314 N.C. 667, 337 S.E.2d 582 (1985).

In sum, we reverse the trial court's award of recovery to Christina because the agreement was invalid under N.C. Gen. Stat. § 52-10.1.

Reversed.

Judges JACKSON and HUNTER, JR. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 JULY 2009)

ALLSTATE INS. CO. v. SHERRILL No. 07-1317	Mecklenburg (05CVS12239)	Affirmed
BURTON v. BARBEE No. 08-1325	Mecklenburg (07CVS19960)	Dismissed
DAVIS v. BARR No. 08-775	Union (02CVD1218)	Affirmed
DENNING v. INTERSTATE BRANDS CORP. No. 08-1544	Indus. Comm. (IC162550)	Affirmed
HELMS v. LANDRY No. 08-1256	Mecklenburg (01CVD13214CTM)	No Error
HILL v. TOWN OF ROBBINS No. 08-890	Moore (07CVS1312)	Affirmed
IN RE A.B. No. 08-1349	Buncombe (07JB323)	Affirmed
IN RE A.E.B.R. No. 09-285	Randolph (06JT226)	Affirmed
IN RE D.D., D.T., T.T., D.T., T.T. No. 09-60	Mecklenburg (05JT727) (05JT728) (05JT729) (05JT730) (06JT1132)	Affirmed
IN RE K.G. No. 09-287	Harnett (08J140)	Affirmed in Part and Reversed in Part
IN RE K.W. & J.W. No. 09-256	Lee (06J96) (06J97)	Affirmed
IN RE S.W. & D.W. No. 09-178	Mecklenburg (05JT1225) (05JT1226)	Affirmed
LEFEVER v. TAYLOR No. 08-1278	Watauga (08CVS206)	Affirmed
SPEARS v. TYSON FOODS, INC. No. 08-1320	Indus. Comm. (IC497087)	Affirmed
STATE v. ARRINGTON No. 08-1355	Halifax (07CRS4067) (07CRS56002)	No Error

STATE v. BROWN No. 08-1359	Jones (05CRS50678) (05CRS50679)	No error; remanded for a new sentencing hearing
STATE v. CHANDLER No. 08-885	Chatham (06CRS4956-75)	Vacated and Remanded
STATE v. CROSS No. 08-1474	Robeson (05CRS50555)	No Error
STATE v. CRUSE No. 08-1133	Lenoir (06CRS53341)	No Error
STATE v. GASKINS No. 09-43	Mecklenburg (07CRS50402)	No Error
STATE v. HODGES No. 09-17	Forsyth (07CRS60068)	No Error
STATE v. JAMES No. 08-1109	Wake (06CRS56806)	No Error
STATE v. NANCE No. 09-12	Randolph (06CRS52672)	No Error
STATE v. PEREZ No. 08-1274	Carteret (04CRS50247)	Affirmed
STATE v. WHITE No. 08-1558	Guilford (05CRS65886)	No Error
STATE v. WILSON No. 08-1536	Guilford (07CRS84057)	Affirmed
TEMPLETON PROPS. LP v. TOWN OF BOONE No. 08-1237	Watauga (07CVS302)	Remanded
UNIFUND CCR PARTNERS v. DOVER No. 08-1566	Gaston (07CVD5287)	Affirmed

LAUREN B. BATLLE F/K/A LAUREN B. SABATES, PLAINTIFF v. ARTURO SABATES, DEFENDANT

No. COA08-860

(Filed 4 August 2009)

1. Appeal and Error— timeliness—Rule 59 and 60 motions—tolling of time

Defendant's motion to dismiss plaintiff's appeal as untimely was denied where plaintiff's complaint had been dismissed as a discovery sanction, plaintiff had filed motions for relief under N.C.G.S. § 1A-1, Rules 59 and 60, that motion was denied and plaintiff appealed, and defendant argued that plaintiff's motions were not sufficient and that they did not toll the time for noting an appeal. Plaintiff's Rule 59 motion essentially challenged the trial court's balancing of the equities in choosing a dismissal as a discovery sanction, which was a potentially valid basis for granting a motion to alter or amend a judgment pursuant to N.C.G.S. § 1A-1, Rule 59, so that her notice of appeal was timely.

2. Discovery— sanctions for delay—dismissal

The trial court did not abuse its discretion by dismissing plaintiff's complaint as a sanction for failing to make discovery in a timely fashion. A reasonable judge could conclude that the provision of discovery at a hearing, after an eight-month delay, did not suffice to preclude dismissal. The court was not required to find prejudice, and adequately considered lesser sanctions.

3. Rules of Civil Procedure— Rules 59 and 60—relief from discovery sanction

The trial court did not abuse its discretion by denying plaintiff's motion for relief from dismissal as a discovery sanction pursuant to N.C.G.S. § 1A-1, Rule 59 and 60 where the court had not abused its discretion initially by imposing the sanction.

4. Pleadings— Rule 11 sanctions—findings sufficient for appeal

The trial court's findings in imposing Rule 11 sanctions for filing motions for relief under N.C.G.S. § 1A-1, Rules 59 and 60 were sufficient for appeal.

Appeal by Plaintiff from orders entered 21 September 2007 and 11 December 2007 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 23 February 2009.

Vann Law Firm, P.A., by Christopher M. Vann, for Plaintiff.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., and Irene P. King, for Defendant.

ERVIN, Judge.

Lauren B. Batlle (Plaintiff) appeals from an order entered 21 September 2007 dismissing her amended complaint with prejudice and ordering her to pay attorneys' fees as a result of her failure to provide discovery in a timely manner. Plaintiff also appeals from an order entered 11 December 2007 denying Plaintiff's motions for relief from the 21 September 2007 order pursuant to N.C. Gen. Stat. § 1A-1, Rules 59 and 60; granting Defendant's motions to strike and for sanctions; and ordering Plaintiff to pay attorneys' fees. After consideration of Plaintiff's challenges to the validity of the 21 September 2007 and 11 December 2007 orders, we affirm the decisions of the trial court.

Plaintiff and Arturo Sabates (Defendant) were married on 7 February 1986. Plaintiff and Defendant had a son (the child), who was born on 15 June 1988. Plaintiff and Defendant separated on 5 February 1990 and subsequently entered into a Separation and Property Settlement Agreement.

According to the parties' separation agreement, Defendant was required to pay Plaintiff $2,800.00 per month in child support for twenty-four months and, thereafter, to pay Plaintiff no less than 17% of his gross monthly income for the same purpose. Defendant also agreed that his child support payments to Plaintiff would "at no time be less than Two Thousand Dollars ($2,000.00)" per month. The separation agreement also required Defendant to pay "reasonable and necessary medical, hospital, surgical, drug and dental expenses incurred for" the child "upon receipt of statements therefore."

On 4 April 2006, Plaintiff filed a complaint against Defendant. With leave of court, Plaintiff filed an amended complaint on 11 September 2006 in which she sought damages for Defendant's alleged breach of the separation agreement. On 25 September 2006, Defendant filed an answer, affirmative defenses and counterclaims in which he denied certain allegations in the amended complaint, denied liability to Plaintiff on the ground of antecedent material breach and certain other affirmative defenses (including an allegation that the child had attained the age of majority), and counterclaimed

against Plaintiff on the basis of an alleged breach of the separation agreement by Plaintiff and for overpayments allegedly made by Defendant to Plaintiff. On 19 October 2006, Plaintiff filed an amended reply in which she denied the material allegations of Defendant's counterclaims and asserted certain affirmative defenses.

On 31 October 2006, Defendant served interrogatories, a request for admissions, and a request for production of documents on Plaintiff. On 2 November 2006, Plaintiff sought and obtained an extension of time to answer Defendant's discovery requests until 2 January 2007. On 10 May 2007, counsel for Defendant communicated with counsel for Plaintiff for the purpose of noting that over four months had passed since Plaintiff's extension of time had expired, indicating that Defendant "anticipated receiving responses to all of the discovery served upon [Plaintiff] by the close of business on" 17 May 2007, and stating that, if no responses were received by that date, Defendant would "pursue the remedies available . . . for [Plaintiff's] failure to respond."

On 25 May 2007, Defendant filed a motion for sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 37 on the grounds that, "[a]s of this date, Plaintiff has filed no responses to any of Defendant's discovery requests." As a result, Defendant requested the court to "strike Plaintiff's pleadings, dismiss her suit with prejudice," "enter judgment on behalf of Defendant," and "award fees and expenses to Defendant." On 4 September 2007, the day upon which Defendant's motion for sanctions was scheduled for hearing, Plaintiff served responses to Defendant's discovery requests.

On 21 September 2007, the trial court entered an order sanctioning Plaintiff for failing to respond to Defendant's discovery requests in which the trial court found as a fact that:

9. Plaintiff failed to respond on January 2, 2007.

10. After January 2, 2007, Plaintiff failed to respond to the outstanding discovery requests and made no motion to the court for additional time to respond.

11. On May 10, 2007, Defendant's counsel sent a letter to Plaintiff through counsel reminding her that the discovery had been due for quite some time, and requested that Plaintiff serve her responses by the close of business on Thursday, May 17, 2007. The letter was served as a "good faith effort pursuant to Rule 37 of the North Carolina Rules of Civil [P]rocedure to resolve

the issue of outstanding discovery with [Plaintiff's counsel] prior to pursuing relief from the court."

12. Plaintiff ignored the deadline of May 17, 2007.

13. On [25 May 2007], Defendant filed and served on Plaintiff his motion pursuant to Rule 37 of the North Carolina Rules of Civil Procedure. On the same date, a Notice of Hearing was filed and served on counsel for Plaintiff, setting the hearing for September 4, 2007 at 10:00 a.m.

14. As of the filing of the Motion, Plaintiff had not responded in any fashion to the discovery requests served upon her in October 2006.

. . . .

17. As of the date of the hearing on September 4, 2007, Plaintiff had not served any responses to any of the discovery.

18. During Plaintiff's counsel's argument in court on September 4, he served Defendant's counsel with a written response to discovery and attached documentation. Counsel for Defendant did not have an opportunity to review the untimely written responses or documentation during the hearing and the Court makes no findings with respect to the sufficiency of the responses or documentation.

. . . .

20. Plaintiff had no legitimate excuse or justification for failing to respond to discovery Plaintiff had for ten (10) months prior to the hearing.

. . . .

22. The Court has considered lesser discovery sanctions, and dismissal of Plaintiff's lawsuit with prejudice is the only just and appropriate sanction in view of the totality of the circumstances of the case[.] . . .

23. Defendant made his motion in good faith, and after making efforts to resolve this discovery issue with Plaintiff through counsel.

Based on these findings of fact, the trial court concluded as a matter of law that:

2. The Court has considered lesser sanctions than dismissal of Plaintiff's lawsuit with prejudice. Lesser sanctions would be unjust and inappropriate in view of the totality of the circumstances of the case, which demonstrate the severity of the disobedience of Plaintiff in refusing to make discovery in a lawsuit she instituted, her unjustified noncompliance with the mandatory North Carolina Rules of Civil Procedure, and untimely response on the day of the hearing.

3. Rule 37(b)(2)(c) of the North Carolina Rules of Civil Procedure authorizes dismissal of an action with prejudice for failure to comply with responding to Defendant's discovery requests, and dismissal of Plaintiff's Amended Complaint and all claims thereto, with prejudice, is the appropriate sanction in this case.

As a result, the trial court dismissed Plaintiff's amended complaint with prejudice and awarded Defendant $4,000 in attorneys' fees and expenses.

On 5 October 2007, Plaintiff filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 to amend the judgment and a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) for relief from judgment or order. Plaintiff alleged in her motion that the order dismissing her complaint was "too severe" and unjustified "under the circumstances." Plaintiff contended that she was entitled to "relief from the judgment" due to insufficient evidence pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(7), and because the judgment was contrary to N.C. Gen. Stat. § 1A-1, Rule 59(a)(9). Plaintiff also contended that she was entitled to an amendment of the judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(e). Finally, Plaintiff alleged that "she [was] entitled to relief from judgment or [o]rder" pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b), on the grounds of "mistake, inadvertence, surprise or excusable neglect" and for "any other reason justifying relief from the operation of the judgment." Although Plaintiff admitted in her motion "that she did not produce the responses . . . in a timely fashion," she contended that "she never refused to respond to the discovery requests;" that the "fact that she prepared" draft responses was "indicative of her intent to respond;" and that the discovery requests were not "fair" and "were overly broad, called for documents and information outside the scope of the instant action," and "could only have been intended to harass the plaintiffs and delay the proceedings." As a result, Plaintiff contended that the trial court should have

considered the discovery produced at the hearing "to be in substantial compliance with the discovery requests, and allowed this case to proceed[.]"

An affidavit reiterating the contentions advanced in Plaintiff's motion and alleging that the discovery "requests were intended solely for the purpose of harassment and delay" and "included requests for information which was beyond the statutorily prescribed period of recovery" was attached to Plaintiff's motion. In this affidavit, Plaintiff also stated that she "was extremely busy at the time" that she received the discovery requests, "did not have access to [her] records because we had moved from our home," and "could not respond to the requests in a timely manner."

On 21 November 2007, Defendant filed a motion to strike Plaintiff's affidavit pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(f), because it was improperly verified; contained "incompetent conclusions not grounded in fact or truth;" attempted "to present arguments not made to the Court at the September 4, 2007 hearing;" and contained "insufficient defenses that fail to support her Rule 59/60 Motion." Defendant also claimed that he was "entitled to sanctions pursuant to Rule 11 against Plaintiff for her filing of a Motion[.]"

On 26 November 2007, the pending motions came on for hearing before the trial court. On 11 December 2007, the trial court entered an order finding that: (1) N.C. Gen. Stat. § 1A-1, Rule 59 "is inapplicable to this case"; (2) "[t]here are no grounds to grant Plaintiff relief . . . under N.C. R. Civ. P. 60(a), 60(b), or any subpart thereof"; (3) Plaintiff's motion "is not well-grounded in law or in fact"; (4) the "Affidavit of Plaintiff in Support of Motions" was not properly verified and was defective; and (5) Defendant was entitled to an award of attorneys' fees. As a result, the trial court denied Plaintiff's motions for relief under N.C. Gen. Stat. § 1A-1, Rules 59 and 60; struck Plaintiff's affidavit; and awarded attorneys' fees to Defendant.

On 16 January 2008, Plaintiff noted an appeal to this Court from: (1) the trial court's 21 September 2007 order dismissing Plaintiff's complaint with prejudice and awarding attorneys' fees and (2) the trial court's 11 December 2007 order denying Plaintiff's motions for relief under N.C. Gen. Stat. § 1A-1, Rules 59 and 60; striking Plaintiff's affidavit; and awarding attorneys' fees. On 10 December 2008, Defendant filed a motion to dismiss Plaintiff's appeal on the grounds that Plaintiff's motion pursuant to N.C. Gen. Stat. § 1A-1, Rules 59 and 60, was insufficient and did not, for that reason, suffice to toll the

thirty day period within which Plaintiff was entitled to note an appeal from the trial court's orders.

I: Timeliness of Plaintiff's Appeal

[1] A party to a civil action must file and serve a notice of appeal "within 30 days after entry of judgment[.]" N.C.R. App. P. 3(c)(1). "Failure to give timely notice of appeal . . . is jurisdictional, and an untimely attempt to appeal must be dismissed." *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983).

> [I]f a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the 30-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order[.]

N.C.R. App. P. 3(c)(3); *see also Middleton v. Middleton*, 98 N.C. App. 217, 220, 390 S.E.2d 453, 454 (1990). As a result, the timeliness of Plaintiff's appeal from the 21 September 2007 order hinges upon whether Plaintiff's 5 October 2007 motion sufficiently invoked the provisions of N.C. Gen. Stat. § 1A-1, Rules 50(b), 52(b), or 59.[1]

In analyzing the sufficiency of a motion made pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, one should keep in mind that a "failure to give the number of the rule under which a motion is made is not necessarily fatal, [if] the grounds for the motion and the relief sought [is] consistent with the Rules of Civil Procedure.' " *N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 469-70, 645 S.E.2d 105, 108 (2007), *dis. review denied*, 361 N.C. 569, 650 S.E.2d 812 (2007) (quoting *Gallbronner v. Mason*, 101 N.C. App. 362, 366, 399 S.E.2d 139, 141, *disc. review denied*, 329 N.C. 268, 407 S.E.2d 835 (1991)). As long as "the face of the motion reveal[s], and the Clerk and the parties clearly underst[and], the relief sought and the grounds asserted" and as long as an opponent is not prejudiced, a motion complies with the requirements of N.C. Gen. Stat. § 1A-1, Rule 7(b)(1). *In re Estate of English*, 83 N.C. App. 359, 363, 350 S.E.2d 379, 382 (1986). In other words, "to satisfy the requirements of Rule

1. No party to this proceeding has contended that a litigant is not entitled to seek relief from an order imposing sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 37(d), under N.C. Gen. Stat. § 1A-1, Rule 59, and we do not, for that reason, express an opinion on that issue here. However, we note in passing that the decision of this Court in *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997), *disc. review denied*, 346 N.C. 283, 487 S.E.2d 584 (1997), appears to assume that relief under N.C. Gen. Stat. § 1A-1, Rule 59, is, at least in theory, available to individuals who have been sanctioned for discovery violations.

7(b)(1)," the motion "must supply information revealing the basis of the motion." *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417. However, while a "request that the trial court reconsider its earlier decision granting the sanction" "may properly be treated as a Rule 59(e) motion," a motion made pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, "cannot be used as a means to reargue matters already argued or to put forward arguments which were not made but could have been made." *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417 (1997). Thus, in order to properly address the issues raised by Defendant's dismissal motion, we must examine the allegations in Plaintiff's motion to ascertain whether Plaintiff stated a valid basis for seeking to obtain relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 59.

In her 5 October 2007 motion, Plaintiff alleged that:

> . . . she is entitled to . . . relief from the judgment based upon the following grounds:
>
> a. [P]ursuant to Rule 59(a)(7) insufficiency of the evidence to justify the verdict or that the verdict is contrary to law and Rule 59(a)(9). . . .
>
> c. The Plaintiff . . . also contends that she is entitled to an amendment of the judgment pursuant to Rule 59(e).
>
> d. In addition, the Plaintiff . . . believes that she is entitled to relief from judgment or [o]rder pursuant to Rule 60(b)(1), mistake, inadvertence, surprise or excusable neglect[.]
>
> In support of Plaintiff's . . . contentions that she is entitled to relief from this Court's Order, she respectfully shows as follows: . . .
>
> d. The [discovery] requests were extremely demanding and unreasonable in scope[,] and Plaintiff contends the sheer breadth of the requests made collecting the documents extremely difficult and the timely production impossible.
>
> Although the Plaintiff . . . admits that she did not produce the responses to Request for Production, Interrogatories and Request for Admissions in a timely fashion, she also contends that she never refused to respond to the discovery requests and [the] fact that she prepared draft[] [responses] to the Interrogatories[] [is] indicative of her intent to respond. Plaintiff considered the requests to not be fair, that they were overly broad, called for documents and information outside of the scope of the instant

> action, and could only have been intended to harass [Plaintiff] and delay the proceedings. Further, the documents and responses were produced at the hearing on this matter and this Court should have considered said production to be in substantial compliance with the discovery requests, and allowed this case to proceed on the issue of whether . . . Defendant . . . breached his obligation for child support pursuant to the parties' Separation Agreement. The "death penalty" approach was too severe under the circumstances of this case and a lesser sanction would have been appropriate in this matter.
>
> As stated at the hearing, the Defendant . . . has known about the Separation Agreement and the Plaintiff's . . . right to pursue his failure to provide income documents for a recalculation for child support purposes since 1992, and he has not been prejudiced by the Plaintiff's . . . delay in getting the discovery responses to him.
>
> Her neglect in this matter was excusable and due to the nature of the issue in controversy, should not cause the dismissal of her case. . . .

Although Plaintiff submitted an affidavit in support of her motion, the trial court struck it on the grounds that it was "not properly verified." Plaintiff's affidavit stated, in pertinent part, that:

> [Plaintiff believed] [t]he requests were intended solely for the purpose of harassment and delay. The discovery included requests for information which was beyond the statutorily prescribed period of recovery. I was extremely busy at the time, did not have access to my records because we had moved from our home, and therefore could not respond to the requests in a timely manner. I did, however, attempt to respond to the interrogatories, however, my attorney thought them incomplete and sent them back to me for revisions. . . . Mr. Sabates has not been prejudiced by my delay. This Honorable Court's Order, however, precludes me from seeking not only child support for the eleven month period that Mr. Sabates failed to make any support payments, but also for the underpayments for the time period of 10 years prior to the filing of my suit.

After careful consideration, we conclude that Plaintiff's motion was sufficient to toll the thirty day period for noting an appeal from the trial court's 21 September 2007 order set out in N.C.R. App. P. 3(c)(1).

"Rule 59(e) governs motions to alter or amend a judgment, and such motions are limited to the grounds listed in Rule 59(a)." *Alliance for Transp. Reform*, 183 N.C. App. at 469, 645 S.E.2d at 108 (2007).[2] According to Plaintiff, her motion represented a proper effort to obtain relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(7), which provides for granting relief from a judgment based on "[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law," and N.C. Gen. Stat. § 1A-1, Rule 59(a)(9), which provides for granting relief for "[a]ny other reason heretofore recognized as grounds for [a] new trial," including whether the judgment from which the moving party seeks relief was contrary to "the greater weight of the evidence." *Seaman v. McQueen*, 51 N.C. App. 500, 505, 277 S.E.2d 118, 121 (1981). As a result, N.C. Gen. Stat. § 1A-1, Rule 59(a), provides ample basis for a party to seek relief on the basis that the trial court misapprehended the relevant facts or on the basis that the trial court misapprehended or misapplied the applicable law.

In determining whether Plaintiff adequately challenged the sufficiency of the trial court's order granting Defendant's motion for sanctions, we must start by examining N.C. Gen. Stat. § 1A-1, Rule 37(d), which states, in pertinent part, that:

> If a party . . . fails . . . to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule.

According to N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)c, one of the options available to a trial court for addressing violations of N.C. Gen. Stat. § 1A-1, Rule 37(d), is the entry of an order "dismissing the action or proceeding or any part thereof[.]" Thus, by virtue of its literal language, N.C. Gen. Stat. § 1A-1, Rule 37 "authorizes a trial judge to impose sanctions, including dismissal, upon a party for discovery violations." *Badillo v. Cunningham*, 177 N.C. App. 732, 734, 629 S.E.2d 909, 910 (2006), *aff'd*, 361 N.C. 112, 637 S.E.2d 538 (2006).

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2. In her brief, Plaintiff essentially contends that her 5 October 2007 motion should be treated as a motion to alter or amend the 21 September 2007 order pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(e). We agree with Plaintiff's characterization of her motion and will treat it as such in this opinion.

According to well-established North Carolina law, "a broad discretion must be given to the trial judge with regard to sanctions." *Rose v. Isenhour Brick and Tile Co.*, 120 N.C. App. 235, 240, 461 S.E.2d 782,786 (1995) (citations omitted) (internal quotations omitted), *aff'd*, 344 N.C. 153, 472 S.E.2d 774 (1996). A trial court does not abuse its discretion by imposing a severe sanction so long as that sanction is "among those expressly authorized by statute" and there is no "specific evidence of injustice." *Roane-Barker v. Southeastern Hospital Supply Corp.*, 99 N.C. App. 30, 37, 392 S.E.2d 663, 667 (1990), *disc. review denied*, 328 N.C. 93, 402 S.E.2d 418 (1991). However, before imposing a severe sanction such as dismissal, a trial judge must consider the appropriateness of less severe sanctions. *See Badillo*, 177 N.C. App. at 734, 629 S.E.2d at 911 (citing *Goss v. Battle*, 111 N.C. App. 173, 176-77, 432 S.E.2d 156, 158-59 (1993)).

Plaintiff's 5 October 2007 motion cited N.C. Gen. Stat. § 1A-1, Rules 59(a)(7) and (9), as a basis for affording the requested relief. *Compare Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. at 469, 645 S.E.2d at 108 (holding a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(e) to have been insufficient because it "did not make reference to any of the[] grounds of Rule 59(a);" "use any of the language from the rule which would tend to give notice of [the movant's] reliance on any of the foregoing grounds;" or "reveal[] the basis of the motion in terms of the 59(a) grounds") (quotation omitted). In her motion, Plaintiff essentially challenged the trial court's balancing of the equities, argued that Defendant was not prejudiced by her delay in providing discovery, and claimed that "a lesser sanction would have been appropriate in this matter." At an absolute minimum, this argument would, if valid, provide a recognized basis for challenging the validity of an order dismissing a complaint as a sanction for failing to provide discovery, since trial judges are required to give consideration to lesser sanctions before acting in that fashion. *Badillo*, 177 N.C. App. at 734, 629 S.E.2d at 911. Thus, even if the remainder of Plaintiff's motion constituted nothing more than a mere rearguing of information that had been previously presented to the trial court, her challenge to the sufficiency of the trial court's consideration of lesser sanctions[3] constitutes a valid basis for granting a motion to alter or amend a judgment pursuant to N.C. Gen.

3. As should be obvious, Plaintiff could not have advanced this argument prior to the entry of the 21 September 2007 order, since she had no way to know the exact language that the trial court would employ in ruling on Defendant's request for sanctions prior to that time.

Stat. § 1A-1, Rule 59(e), under N.C. Gen. Stat. § 1A-1, Rules 59(a)(7) and (9).[4]

As a result, we conclude that Plaintiff properly sought relief from the 21 September 2007 order pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(e), in her 5 October 2007 motion. For that reason, the thirty day period for noting an appeal from the 21 September 2007 order was tolled until thirty days after service upon Plaintiff of any order deciding her motion. N.C.R. App. P. 3(c)(3). Since Plaintiff filed her notice of appeal from the 21 September 2007 order within thirty days after the entry and service of the 11 December 2007 order, this Court has jurisdiction over Plaintiff's appellate challenges to both orders. Thus, Defendant's motion to dismiss Plaintiff's appeal from the 21 September 2007 order is denied.

II: Imposition of Sanctions Under Rule 37

[2] The next question we must address is whether the trial court properly dismissed Plaintiff's claims for relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 37(d). After a careful review of the record in light of the applicable law, we conclude that the trial court's order should be affirmed.

As we have already noted, a trial judge has the authority to enter an order "dismissing the action or proceeding or any part thereof, or rendering judgment by default against the disobedient party" as a sanction for failing to provide discovery. N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)c. Furthermore, as we have also noted, the imposition of particular sanctions under Rule 37(d) is subject to the sound discretion of the trial judge. *Hammer v. Allison*, 20 N.C. App. 623, 202 S.E.2d 307, *cert. denied*, 285 N.C. 233, 204 S.E.2d 23 (1974); *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995) (stating that "[s]anctions under Rule 37 are within the sound discretion of the trial court"). However, "[i]mposition of sanctions that are directed to the outcome of the case, such as dismissals, default judgments, or preclusion orders, are reviewed on appeal from final judgment, and while the standard of review is often stated to be abuse of discretion, the most drastic penalties, dismissal or default,

4. The fact that Plaintiff alleged a valid ground for relief from the 21 September 2007 order in her 5 October 2007 motion does not, of course, mean that her argument is substantively valid. At this stage, our inquiry is limited to the issue of whether Plaintiff has adequately stated a potentially valid basis for an award of relief. The extent to which Plaintiff is actually entitled to relief on the basis of this claim or is subject to sanctions for advancing it are entirely different issues that will be addressed in more detail below.

are examined in the light of the general purpose of the Rules to encourage trial on the merits." *American Imports, Inc. v. G. E. Employees Western Region Federal Credit Union*, 37 N.C. App. 121, 124, 245 S.E.2d 798, 800 (1978) (quotation omitted); *but see Fayetteville Publ. Co. v. Advanced Internet Techs., Inc.*, 192 N.C. App. 419, 424, 665 S.E.2d 518, 522 (2008) (stating that "[t]his Court reviews the trial court's action in granting sanctions pursuant to Rule 37, including dismissal of claims, for abuse of discretion) (citing *Baker v. Charlotte Motor Speedway, Inc.*, 180 N.C. App. 296, 299, 636 S.E.2d 829, 831 (2006), *disc. review denied*, 361 N.C. 425, 648 S.E.2d 204 (2007)). As a result, we review Plaintiff's challenge to the 21 September 2007 order utilizing an abuse of discretion standard while remaining sensitive to the general preference for dispositions on the merits that lies at the base of our rules of civil procedure.

According to Plaintiff, the trial court abused its discretion by dismissing her complaint with prejudice because: (1) Plaintiff did, in fact, respond to Defendant's discovery requests; (2) Defendant was not prejudiced by the late filing of Plaintiff's responses; and (3) the trial court failed to adequately consider lesser sanctions before dismissing Plaintiff's complaint. We do not, after careful review of the record, believe that any of these contentions justifies an award of appellate relief.

Plaintiff's first challenge to the 21 September 2007 order hinges on a contention that the trial court erred by failing to consider Plaintiff's "belated responses" to Defendant's discovery requests in determining the "appropriate sanction[.]" According to N.C. Gen. Stat. § 1A-1, Rules 33(a), 34, and 36, Plaintiff had 30 days plus any additional period of time allowed by the court within which to respond to Defendant's discovery requests. Plaintiff served responses to Defendant's discovery requests on 4 September 2007, approximately ten months after Defendant first submitted his discovery requests to Plaintiff and eight months after the responses were required to be served.[5] Plaintiff has cited no authority tending to establish that the trial court abused its discretion by dismissing Plaintiff's complaint after such a lengthy, eight month delay because Plaintiff ultimately served responses upon Defendant, and we are

5. The court entered an order extending the time for Plaintiff to respond to Defendant's discovery requests. Instead of requiring Plaintiff to respond to Defendant's discovery requests by 30 November 2006, which was thirty days after Defendant's requests were served, the court "allowed [Plaintiff] through the 2 day of January, 200[7], within which to file her responses."

aware of none. Furthermore, given the length of Plaintiff's delay in responding to Defendant's discovery requests, a reasonable trial judge could well have concluded that the last minute provision of discovery on 4 September 2007 did not suffice to preclude dismissal. Thus, the fact that Plaintiff provided discovery at the last minute does not establish that the trial court abused its discretion by dismissing Plaintiff's complaint.

Furthermore, contrary to Plaintiff's argument, the trial court did, in fact, consider the late filing of Plaintiff's discovery responses in deciding what sanction, if any, to impose on Plaintiff. In the 21 September 2007 order, the trial court found:

> During Plaintiff's counsel's argument in court on September 4, he served Defendant's counsel with a written response to discovery and attached documentation. Counsel for Defendant did not have an opportunity to review the untimely written responses or documentation during the hearing and the Court makes no findings with respect to the sufficiency of the responses or documentation.

The fact that the trial court did not examine the "sufficiency of the responses" is not tantamount to a failure to consider the late service of Plaintiff's responses at all; instead, taken in context, the quoted language from the 21 September 2007 order simply indicates that the trial court had not evaluated the extent to which Plaintiff's responses were complete prior to sanctioning Plaintiff. In addition, the trial court stated that it viewed "the totality of the circumstances of the case" in determining the appropriate sanction to impose upon Plaintiff and noted Plaintiff's "untimely response on the day of the hearing" in describing the reasons that a lesser sanction than dismissal would not be appropriate. Thus, we conclude that the trial court did, in fact, consider the fact that responses to Defendant's discovery requests had been submitted on 4 September 2007 in deciding that Plaintiff should be sanctioned for failing to respond to Defendant's discovery requests in a timely manner.

Secondly, Plaintiff argues that the trial court erroneously dismissed Plaintiff's complaint with prejudice because Defendant was not prejudiced by her delay in responding to Defendant's discovery requests. Contrary to Plaintiff's argument, "Rule 37 does not require the [movant] to show that it was prejudiced by the [nonmovant's] actions in order to obtain sanctions." *Cheek v. Poole*, 121 N.C. App. 370, 375, 465 S.E.2d 561, 564, *cert. denied*, 343 N.C. 305, 471 S.E.2d 68

(1996); *see also Roane-Barker*, 99 N.C. App. at 37, 392 S.E.2d at 668 (stating that Rule 37 does not require the movant to show that it was prejudiced by the nonmovant's actions in order to obtain sanctions for abuse of discovery); *Clark v. Penland*, 146 N.C. App. 288, 291, 552 S.E.2d 243, 244 (2001) (stating that "Rule 37 does not require the [movant] to show that it was prejudiced by the [nonmovant's] actions in order to obtain sanctions for abuse of discovery"). Although the trial court could have appropriately considered the issue of prejudice in making a sanctions-related decision and appears to have done so in that part of its order detailing the expense incurred by Defendant in attempting to obtain the provision of discovery, it was not required to find prejudice as a precondition for dismissing Plaintiff's complaint. " 'A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.' " *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006), *aff'd in part on other grounds*, 360 N.C. 518, 631 S.E.2d 114 (2006) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). After careful consideration of the record in light of the applicable legal standard, we cannot conclude that the trial court abused its discretion by failing to adopt Plaintiff's position on the prejudice issue.

Finally, Plaintiff argues that the trial court erred by imposing severe sanctions without adequately considering the imposition of lesser sanctions. As we noted in discussing the issue of whether Plaintiff's appeal from the 21 September 2007 order should be dismissed, a trial judge must consider the imposition of less severe sanctions prior to dismissing an action with prejudice as a sanction for failing to provide discovery in a timely manner. *See Goss*, 111 N.C. App. at 176-77, 432 S.E.2d at 158-59. However, "the trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate." *Badillo*, 177 N.C. App. at 735, 629 S.E.2d at 911.

The trial court found in the 21 September 2007 order that:

> The Court has considered lesser discovery sanctions, and dismissal of Plaintiff's lawsuit with prejudice is the only just and appropriate sanction in view of the totality of the circumstances of the case, which demonstrate the severity of Plaintiff's disobedience in failing to make discovery in a lawsuit she instituted and her unjustified noncompliance with the mandatory North Carolina Rules of Civil Procedure.

Based upon this finding, the trial court concluded in the 21 September 2007 order that:

> The Court has considered lesser sanctions than dismissal of Plaintiff's lawsuit with prejudice. Lesser sanctions would be unjust and inappropriate in view of the totality of the circumstances of the case, which demonstrate the severity of the disobedience of Plaintiff in refusing to make discovery in a lawsuit she instituted, her unjustified noncompliance with the mandatory North Carolina Rules of Civil Procedure, and untimely response on the day of the hearing.

In *In re Pedestrian Walkway Failure*, the trial court used very similar language in dismissing a complaint based on a failure to provide discovery:

> [T]he Court has carefully considered each of [plaintiff's] acts [of misconduct], as well as their cumulative effect, and has also considered the available sanctions for such misconduct. After thorough consideration, the Court has determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct[.]

In re Pedestrian Walkway Failure, 173 N.C. App. 237, 251, 618 S.E.2d 819, 828-29 (2005), *disc. review denied*, 360 N.C. 290, 628 S.E.2d 382 (2006). On appeal, we held that this language demonstrated an adequate consideration of less severe sanctions to withstand a challenge on appeal. *See also Badillo*, 177 N.C. App. at 734, 629 S.E.2d at 911. The relevant portions of the trial court's order are not materially different from the language deemed sufficient in *Pedestrian Walkway Failure* and *Cunningham*. Thus, we conclude that the trial court adequately considered the imposition of less severe sanctions prior to dismissing Plaintiff's complaint.

As a result, for all of these reasons, we conclude that the trial court did not abuse its discretion by dismissing Plaintiff's complaint as a sanction for failing to make discovery in a timely fashion. Thus, the trial court's 21 September 2007 order should be affirmed.

III: Rule 59 and Rule 60

[3] The next question we must address is whether the trial court properly denied Plaintiff's motion for relief from the 21 September 2007 order under N.C. Gen. Stat. § 1A-1, Rule 59(e) on the basis of the grounds set out in N.C. Gen. Stat. § 1A-1, Rules 59(a)(7) and (9) and

N.C. Gen. Stat. § 1A-1, Rules 60(b)(1) and (6). After a careful review of Plaintiff's challenge to the relevant portion of the 11 December 2007 order in light of the applicable law and the record, we find Plaintiff's arguments unpersuasive.

"In the absence of an abuse of discretion, a trial court's ruling on a motion for a new trial due to the insufficiency of evidence is not reversible on appeal." *Hines v. Wal-Mart Stores E., L.P.*, 191 N.C. App. 390, 393, 663 S.E.2d 337, 339 (2008), *disc. review denied*, 363 N.C. 126, 673 S.E.2d 171 (2009) (citing *In re Buck*, 350 N.C. 621, 626, 516 S.E.2d 858, 860-61 (1999) (emphasizing that requests for relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(7), are reviewed under an abuse of discretion rather than a *de novo* standard). Generally speaking, requests for relief under N.C. Gen. Stat. § 1A-1, Rule 59(a)(9) are reviewed for an abuse of discretion as well. *Worthington v. Bynum*, 305 N.C. 478, 484, 290 S.E.2d 599, 603 (1982) (stating that "it is plain that a trial judge's *discretionary* order pursuant to [N.C. Gen. Stat. §] 1A-1, Rule 59 for or against a new trial upon *any* ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown"). "However, where the [Rule 59] motion involves a question of law or legal inference, our standard of review is *de novo*." *Alliance for Transp. Reform*, 183 N.C. App. at 469, 645 S.E.2d at 107 (quoting *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000). "As with Rule 59 motions, the standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis*, 360 N.C. at 523, 631 S.E.2d at 118. Thus, the standard of review applicable to Plaintiff's challenge to the denial of her requests for relief from the 21 September 2007 order is whether the trial court's ruling constituted an abuse of discretion or involved an error of law or legal inference.

On appeal, Plaintiff contends that the trial court abused its discretion in denying her requests for relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 and Rule 60, because (1) Plaintiff did, in fact, respond to Defendant's discovery requests; (2) Defendant was not prejudiced by Plaintiff's late responses; and (3) the trial court failed to consider lesser sanctions before dismissing Plaintiff's complaint. For the reasons set forth above, however, we are unable to conclude that the trial court's refusal to provide relief constituted an abuse of discretion. As we noted in discussing similar issues in connection with Plaintiff's challenge to the 21 September 2007 order, the trial court could reasonably conclude that the fact that Plaintiff served her discovery responses on the day of the hearing on Defendant's motion for

sanctions did not suffice to preclude dismissal of Plaintiff's complaint; the trial court was not required to find prejudice to Defendant as a precondition for imposing sanctions and appears to have actually considered the prejudice issue in deciding that a less severe sanction would not suffice; and the trial court adequately considered the imposition of lesser alternatives to the dismissal of Plaintiff's complaint before imposing severe sanctions. As a result, the trial court's 11 December 2007 order denying Plaintiff's requests for relief from the 21 September 2007 order is not affected by any error of the type alleged by Plaintiff and should be affirmed.[6]

IV: Rule 11 Sanctions

[4] Finally, Plaintiff argues that the trial court erred by sanctioning her for filing motions for relief from the 21 September 2007 order pursuant to N.C. Gen. Stat. § 1A-1, Rules 59 and 60. After careful consideration, we conclude that the trial court did not err in sanctioning Plaintiff for filing this motion.

According to N.C. Gen. Stat. § 1A-1, Rule 11:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose[.] . . .

6. Plaintiff also contends that the trial court abused its discretion by striking Plaintiff's affidavit. Plaintiff's affidavit merely reiterated two of the three contentions that she brought forward on appeal, which are that (1) Plaintiff ultimately responded to Defendant's discovery requests and that (2) Defendant was not prejudiced by the delayed service of these responses. In its 11 December 2007 order, the trial court found that "[t]he 'verification' page attached to the Affidavit erroneously states that Plaintiff "has read the foregoing Complaint for Breach of Contract" and that "[t]he date the document appears to have been sworn to is October 4, 2006." Based on this factual finding, the trial court concluded that "[t]he 'Affidavit of Plaintiff in Support of Motions' submitted in connection with Plaintiff's Rule 59/60 Motion was not properly verified and is defective" and ordered that the affidavit be stricken. Assuming *arguendo* that the trial court erred by striking Plaintiff's affidavit, that error had no conceivable effect upon the outcome at trial or on appeal given our conclusion that the trial court appropriately rejected Plaintiff's challenge to the 21 September 2007 order for reasons unrelated to the presence or absence of evidentiary support in denying the motion that Plaintiff filed pursuant to N.C. Gen. Stat. § 1A-1, Rules 59 and 60.

N.C. Gen. Stat. § 1A-1, Rule 11(a). " 'There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. A violation of any one of these requirements mandates the imposition of sanctions under Rule 11.' " *Persis Nova Constr. v. Edwards*, 195 N.C. App. 55, 61, 671 S.E.2d 23, 27 (2009) (quoting *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994)).

In reviewing an order imposing sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11:

> The appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Dunn v. Canoy, 180 N.C. App. 30, 41, 636 S.E.2d 243, 250 (2006), *disc. review denied and appeal dis'd*, 361 N.C. 351, 645 S.E.2d 766 (2007) (quoting *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989)). "A court's failure to enter findings of fact and conclusions of law on this issue is error which generally requires remand in order for the trial court to resolve any disputed factual issues." *McClerin v. R-M Indus.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995). "The appropriateness of a particular sanction," however, "is reviewed for abuse of discretion." *Bledsole v. Johnson*, 357 N.C. 133, 138, 579 S.E.2d 379, 381 (2003).

In the 11 December 2007 order, the trial court found as fact that:

> 13. . . . At the hearing on November 26, 2007, Plaintiff failed to offer any evidence or present any authority warranting the Court's rehearing the arguments presented by counsel at the September 4, 2007 hearing.
>
> 14. Plaintiff failed to present any grounds pursuant to Rule 60 of the North Carolina Rules of Civil Procedure to support setting aside the Court's previous ruling, there are no such circumstances warranting such relief and justice does not demand relief from the Order.

15. The Order, filed September 21, 2007, was soundly based on the facts and law.

16. Plaintiff's Rule 59/60 Motion is not well-grounded in law or in fact.

Based on these findings of fact, the trial court concluded that "Plaintiff's Rule 59/60 Motion is not well-grounded in law or in fact" and sanctioned Plaintiff.

On appeal, Plaintiff contends that "the trial court erred by sanctioning Plaintiff for filing the motion for relief without making the factual findings required by Rule 11[.]" More particularly, Plaintiff argues that "[t]he trial court did not cite Rule 11 in its order or explain how Plaintiff's Rule 59/60 motion failed Rule 11's requirements." At bottom, despite her references to the trial court's findings of fact, Plaintiff is really challenging the adequacy of the trial court's legal conclusions. Moreover, Plaintiff has failed to identify any factual issue relevant to the sanctions issue which the trial court failed to address. In the absence of any failure on the part of the trial court to resolve such a factual controversy, we are unable to identify any inadequacy in its findings. Furthermore, the trial court specifically concluded that "Plaintiff failed to offer any evidence or present any authority warranting the Court's rehearing the arguments presented by counsel at the September 4, 2007, hearing" and "failed to present any grounds pursuant to Rule 60 of the North Carolina Rules of Civil Procedure to support setting aside the Court's previous ruling." This portion of the trial court's order is sufficient to permit us to identify the basis for the trial court's decision and to review the adequacy of its determination on appeal. Since the trial court's order is sufficient to permit appellate review and since Plaintiff has not challenged this portion of the 11 December 2007 order on any substantive ground, we are compelled to conclude that the trial court did not err by granting Defendant's motion for sanctions.[7]

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7. Our conclusion that the trial court did not err by sanctioning Plaintiff for seeking relief from the 21 September 2007 order is not in any way inconsistent with our determination that Plaintiff's 5 October 2007 motion sufficed to toll the running of the time within which Plaintiff was entitled to note an appeal from the 21 September 2007 order. In essence, the 5 October 2007 motion sufficed to toll the time for noting an appeal because it was in proper form and alleged a potentially valid basis for altering or amending the 21 September 2007 order. On the other hand, when compared with the information in the record, it is clear that these grounds were not actually valid given the language of the 21 September 2007 order. Thus, our holdings on these issues are not in any way inconsistent with each other.

V: Conclusion

For the foregoing reasons, Plaintiff's challenges to the 21 September 2007 and 11 December 2007 orders lack merit. As a result, both orders are affirmed.

AFFIRMED.

Chief Judge Martin and Judge Robert N. Hunter, Jr. concur.

STATE OF NORTH CAROLINA v. ROBERT PAUL RAINEY

No. COA08-1466

(Filed 4 August 2009)

1. Evidence— hearsay exception—party admissions—motion in limine—taped conversations while incarcerated

The trial court did not abuse its discretion in a double armed robbery and assault with a deadly weapon inflicting serious injury case by the denial of defendant's motion *in limine* to exclude taped telephone conversations made by defendant to others while he was incarcerated because: (1) the telephone conversations qualify as party admissions under N.C.G.S. § 8C-1, Rule 801(d), an exception to the hearsay rule which is applicable if the statement is offered against a party and it is his own statement; (2) defendant failed to show unfair prejudice based on the admission of this evidence; (3) the taped conversations were probative in that defendant indicated he was aware of his guilt since in each of the conversations defendant appears to be coordinating an alibi with third parties or discussing the intimidation of witnesses; and (4) defendant failed to make his Confrontation Clause argument at trial, and thus it was not properly preserved for review.

2. Identification of Defendants— photographic lineups—motion to suppress

The trial court did not err in a double robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by denying defendant's motion to suppress the pretrial photographic lineups and the identification of defendant by

two witnesses through this procedure because: (1) the victims were not informed of the identity of the photographs selected or the persons in the photographs selected; (2) while there was some significant age difference between the individuals in the photographic array, that fact was not apparent from the photographs, and there was no identifying data on the photographic array; (3) all individuals appearing in the array were the same sex and race, and had similar hair color and styles, similar complexions and similar facial hair to defendant; (4) the array was presented in a nonsuggestive fashion; and (5) the identification procedure did not result in a substantial likelihood of misidentification.

3. Discovery— alleged violations—concealed statement—notice—disclosure provided substance of testimony

The trial court did not err in a double robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by concluding there was no discovery violation under N.C.G.S. § 15A-903 even though defendant contends he was not made aware of a witness's testimony prior to trial that defendant stated during the robbery, "I hope this spic is dead" because: (1) our Supreme Court has held that delivery of a synopsis of a defendant's oral statements in response to discovery requests complies with the substance requirement of the statute; (2) nothing in the statute entitles a defendant to have the prosecutor to provide him with a description of the facts and circumstances surrounding his statements; and (3) the State provided defendant with notice that the witness claimed "they hated Mexicans," and this disclosure provided the substance of the witness's testimony and was adequate, for the purpose of the discovery statute, to prevent unfair surprise.

4. Evidence— flight—failure to appear in court—arrest

The trial court did not err in a double robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by allowing testimony concerning defendant's 2006 failure to appear in court, his arrest in Ohio, and his return to North Carolina because: (1) North Carolina has long followed the rule that an accused's flight from a crime shortly after its commission is admissible as evidence of guilt; (2) the fact that defendant left the state and failed to appear for court can be construed as evidence of flight in this case; and (3) regarding the argument that the flight was not shortly after the crime, this tem-

poral consideration goes to the weight of the evidence rather than its admissibility.

5. Evidence— prior crimes or bad acts—assault—sufficiently similar and close in time

The trial court did not abuse its discretion in a double robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by admitting N.C.G.S. § 8C-1, Rule 404(b) evidence regarding an assault incident that took place on 15 August 2003 involving defendant and three others because: (1) the prior assault demonstrated a particular fighting style, defendant fighting alongside another person or in a group against a victim, and the witness's testimony was properly admitted for the purpose of demonstrating defendant's method of operation or a common plan or scheme; (2) the witness's testimony illustrated defendant's use of witness intimidation, similar to that seen in Exhibits 55-58; (3) the evidence of the 15 August 2003 altercation was sufficiently similar to the 7 March 2004 crime; (4) the State pointed out at trial that there were ten similarities, including largely the same individuals being present at both incidents and the fact that drugs and alcohol were involved, defendant had attacked the victim at both fights with the help of others after taking the victim to an isolated location, and defendant was the oldest member in the group during both affrays and acted as a ringleader; and (5) the evidence was admitted for a proper purpose, the incident was sufficiently similar and close in time, and the testimony was not unduly prejudicial to defendant.

6. Criminal Law— instruction—flight

The trial court did not err in a double robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by submitting a flight instruction to the jury because: (1) there was evidence in the record reasonably supporting the theory of flight; and (2) defendant's failure to appear on the 6 February 2006 court date amounted to evidence that defendant took steps to avoid apprehension.

Appeal by defendant from judgment entered 14 February 2008 by Judge Christopher M. Collier in Rowan County Superior Court. Heard in the Court of Appeals 20 May 2009.

Attorney General Roy A. Cooper III, by Assistant Attorney General Kevin Anderson, for the State.

James N. Freeman, Jr. for defendant-appellant.

HUNTER, Robert C., Judge.

Robert Paul Rainey ("defendant") appeals from final judgments entered against him in Rowan County Superior Court pursuant to jury verdicts finding defendant guilty of: (1) two counts of robbery with a dangerous weapon; and (2) one count of assault with a deadly weapon inflicting serious injury. Defendant was sentenced to two consecutive terms of 146 to 185 months imprisonment. After careful review, we find no error.

I. Background

The State's evidence tended to show that on 7 March 2004, defendant, Ian Mill ("Mill"), Tony Williams ("Williams"), Bryan Merrill ("Merrill"), Oscar Mendoza ("Mendoza"), and Jamika Gadson ("Gadson") arrived at the home of Billy Roberts ("Roberts"). Before the gathering at Roberts's house, Mill had called defendant, Williams, and Merrill to inform them that Mendoza would be arriving with a large amount of money, and the three men decided to rob Mendoza. At some point during the evening, Mendoza and Mill left Roberts's home together. Mendoza testified that he and Mill planned to go to a grocery store, while Mill testified that Mendoza wanted to go purchase drugs. Mill testified that defendant had told him to drive Mendoza to meet defendant, Williams, and Merrill behind a church, the prearranged location for the robbery.

Once Mill and Mendoza arrived at the church, defendant aimed a shotgun at Mendoza, who ran, but was caught by the group. Mendoza was beaten and robbed. At trial, Mendoza testified that defendant hit him with the shotgun during the altercation and stated, " 'I hope this spic is dead.' " Mendoza also testified that four people from the party were behind the church at the time of the robbery, including defendant, Mill, Williams, and Merrill. Mill testified that defendant, Merrill, and Williams were indeed present. Mill also testified that defendant hit Mendoza with the shotgun during the robbery.

After being treated and released from the hospital, Mendoza gave a statement to Sergeant Tim Wyrick ("Sergeant Wyrick"), a police officer with the Rowan County Sheriff's Office investigating the robbery. Mendoza told Sergeant Wyrick about the robbery and later contacted

him when he recalled the names of his attackers. Sergeant Wyrick presented Mendoza with photographic line-ups, from which Mendoza identified defendant and Mill.

Jamika Gadson was also present at Roberts's residence on 7 March 2004, but did not go to the church where Mendoza was robbed. Gadson testified that when defendant, Merrill, and Williams returned, they proceeded to rob everyone in the trailer. Gadson testified that defendant hit him in the face with a shotgun. Sergeant Wyrick also investigated the assault and robbery of Gadson after his release from the hospital. Gadson was shown the same photographic line-ups, from which he identified defendant.

II. Analysis

A. Taped Telephone Conversations

[1] Defendant first argues that the trial court erred in failing to grant his motion *in limine* to exclude taped telephone conversations made by defendant to others while he was incarcerated. Defendant argues that these taped calls are inadmissible hearsay, more prejudicial than probative, and that they are barred by the Confrontation Clause.[1] Defendant's arguments are without merit.

"The trial court has wide discretion in ruling on motions *in limine* and will not be reversed absent an abuse of discretion." *State v. Maney*, 151 N.C. App. 486, 491, 565 S.E.2d 743, 746 (2002). With regard to evidence that has been admitted over a hearsay objection, this Court reviews the trial court's decision *de novo*. *State v. Miller*, 197 N.C. App. 78, 87-88, 676 S.E.2d 546, 552 (2009).

The recorded conversations at issue, presented at trial as Exhibits 55-58, were between defendant and Melissa Garrison ("Garrison"), with Ian Mill or Cami Mill ("Cami") taking part in several three-way calls. Sergeant Wyrick testified that he recognized the voices on the recordings as defendant, Garrison, Mill, and Cami. Defendant told Garrison in call number five, "You gonna have to help me get out of here. You know how stupid—you can't believe

1. Although no order appears in the record, the trial judge apparently denied this motion. At the start of trial, the attorneys made redactions to the conversations before the court. The conversations were played for the jury during trial over objection. On appeal, defendant does not argue that specific portions of the redacted calls presented to the jury constituted hearsay; rather, he argues that the conversations as a whole should not have been admitted. Defendant does not argue that the specific statements of the other parties involved in these recordings are hearsay.

how stupid that s— was, I was just showing off, you know what I'm saying?"

In other calls, defendant attempts to coordinate a cover story. Call number eleven starts with defendant telling Garrison "This is the deal—this is what I want Cami, Ian, Christy,—everybody, OK?" Defendant then outlines a version of events, saying, "[E]verybody saw that there was a fight, but there was [sic] no guns and there was no . . . motherf—— robbery." Defendant continues, "I'm going to prison, OK? I accept that, but I'm trying to minimize it. . . . I'll take the charge for kicking the Mexican's a—, but there was no robbery, all ya'll are my witnesses, all I did was kick his a—." Defendant then asks Garrison to repeat the story and they finalize the details.

The recorded conversations also depict defendant making plans to interfere with witness testimony. In call number four, defendant tells Mill, "You need to tell this motherf—— something, man, he can get some money, he can get some dope, or whatever, you know what I'm saying? . . . He don't need to pursue this, man." Also, defendant says, "[W]hile you're free . . . you need to get these motherf—— to retract that s—. . . . Look, I don't give a f—— money, dope, death threats—whatever, you know what I'm saying?" In call number five, defendant tells Mill and Garrison, "If they'll say what I g—— want 'em to say, the g—— charges will be dropped. That's what we need, cause we all [sic] in a motherf—— bind . . . ."

After reviewing the telephone conversations, we find that they qualify as party admissions, an exception to the hearsay rule, which is applicable if the statement "is offered against a party and it is [] his own statement . . . ." N.C. Gen. Stat. § 8C-1, Rule 801(d) (2007). The evidence at trial tended to show that the statements in Exhibits 55-58 were made by defendant and offered against defendant.[2]

Defendant also argues that the admission of the taped conversations offers little probative value, which is outweighed by undue prejudice. The decision of a trial judge to admit evidence in the face of a Rule 403 objection is given much deference; exclusion on 403 grounds is "left to the sound discretion of the trial judge" and will be reversed only "when the decision is arbitrary or unsupported by reason." *State v. Brockett*, 185 N.C. App. 18, 23, 647 S.E.2d 628, 633 (2007); N.C. Gen. Stat. § 8C-1, Rule 403 (2007).

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2. Again, defendant does not argue on appeal that any statements made by third parties constitute hearsay.

While all evidence offered against a party involves some prejudicial effect, the fact that evidence is prejudicial does not mean that it is necessarily unfairly prejudicial. *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994); *see also State v. Lambert*, 341 N.C. 36, 50, 460 S.E.2d 123, 131 (1995). The meaning of " 'unfair prejudice' " in the context of Rule 403 is " 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (quoting Commentary, N.C. Gen. Stat. § 8C-1, Rule 403 (1985)). Defendant has not demonstrated any such improper basis.

The evidence presented in *State v. Daniel*, 333 N.C. 756, 429 S.E.2d 724 (1993) is similar to that in the case at bar. There, the defendant claimed that evidence of a taped telephone conversation he had with a sheriff was unfairly prejudicial. *Id.* at 765, 429 S.E.2d at 730. In the conversation, the defendant admitted shooting the victims and threatened another individual with bodily harm. *Id.* at 765-66, 429 S.E.2d at 730. The judge in *Daniel* determined that the taped conversation was probative because the admissions demonstrated "defendant's mental state at the time of the shootings[,]" and was not unfairly prejudicial. *Id.* at 766, 429 S.E.2d at 730.

Similarly, the taped conversations in the present case are probative in that defendant indicates he is aware of his guilt. In each of the conversations, defendant appears to be coordinating an alibi with third parties or discussing the intimidation of witnesses, both of which provide evidence of guilt. "Generally, an attempt by a defendant to intimidate a witness to affect the witness's testimony is relevant and admissible to show the defendant's awareness of his guilt." *Brockett*, 185 N.C. App. at 26, 647 S.E.2d at 635. Here, we find that the prejudicial effect of Exhibits 55-58 did not outweigh the probative value.

Defendant further argues that the recorded conversations were barred by the Confrontation Clause. Defendant did not properly preserve this issue for review. N.C.R. App. P. 10(b)(1). In his motion *in limine*, defendant did not object on Confrontation Clause grounds. Defendant did object on constitutional and due process grounds at several points during the redaction hearing, but did not specifically object on Confrontation Clause grounds.

"In order to preserve a question for appellate review," the defendant must object "stating the *specific* grounds for the ruling the party desired the court to make if the specific grounds were not apparent

from the context." *Id.* (emphasis added). "A general objection, when overruled, is ordinarily not adequate unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence." *State v. Jones*, 342 N.C. 523, 535, 467 S.E.2d 12, 20 (1996); *see also*, *State v. Perkins*, 154 N.C. App. 148, 151-52, 571 S.E.2d 645, 647-48 (2002) (holding that two general objections were insufficient to properly preserve the issue).

Defendant did not specifically identify the Confrontation Clause as the grounds for his objection as required by Rule 10(b)(1). The general constitutional and due process objections made during trial were not sufficiently specific to preserve the issue for appellate review. N.C.R. App. P. 10(b)(1).

In sum, we find no error in the trial court's admission of Exhibits 55-58 as the statements of defendant qualify as admissions of a party opponent under Rule 801(d) and were not unduly prejudicial. We decline to address defendant's arguments based on constitutional grounds, which were not properly preserved. The trial court did not err in denying defendant's motion *in limine*.

B. Suppression of Photographic Line-up Identification

[2] The second issue on appeal concerns the denial of defendant's motion to suppress the pre-trial photographic line-ups; specifically, Mendoza's and Gadson's identification of defendant through said procedure. Defendant argues that the witnesses' identifications were based on photographic line-ups that were impermissibly suggestive and resulted in a substantial likelihood of misidentification.

When reviewing a trial court's denial of a motion to suppress, "this Court must determine whether competent evidence supports the trial court's findings of fact. Findings of fact supported by competent evidence are binding on appeal." *State v. Fisher*, 141 N.C. App. 448, 451, 539 S.E.2d 677, 680 (2000) (citation omitted). Additionally, the trial court's conclusions of law are reviewed *de novo*. *Id.* The reviewing court "must not disturb the court's conclusions if they are supported by the court's factual findings." *Id.* at 451-52, 539 S.E.2d at 680.

" '[D]ue process does not require that all participants in a lineup be identical, all that is required is that a lineup be a fair one and that the officers conducting it do nothing to induce the witness to select one participant rather than another.' " *State v. Fisher*, 321 N.C. 19, 25, 361 S.E.2d 551, 554 (1987) (quoting *State v. Grimes*, 309 N.C. 606, 610,

308 S.E.2d 293, 295 (1983)). However, " '[i]dentification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification.' " *Id.* at 23, 361 S.E.2d at 553 (quoting *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983)). This analysis is comprised of two steps:

> First, the Court must determine whether the pretrial identification procedures were *unnecessarily* suggestive. If the answer to this question is affirmative, the court then must determine whether the unnecessarily suggestive procedures were so *impermissibly* suggestive that they resulted in a substantial likelihood of irreparable misidentification. Whether a substantial likelihood exists depends on the totality of the circumstances.

Id. at 23, 361 S.E.2d at 553 (emphasis added) (citations omitted). There are several factors to be considered in this analysis, including

> "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself."

Id. (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 154 (1977)).

To determine whether a pretrial identification procedure is suggestive, the court should consider: (1) "whether the accused is somehow distinguished from others in the line-up or in a set of photographs"; and (2) "whether the witness is given some extraneous information by the police which leads her to identify the accused as the perpetrator of the offense." *State v. Wallace*, 71 N.C. App. 681, 684, 323 S.E.2d 403, 406 (1984) (Police provided photos of the individuals in the line-up with number tags, but the defendant had a police identification sign with a case number on it. While not approving of the practice, this Court held that this was not suggestive enough to make a misidentification substantially likely.).

Here, defendant contends that most of the men in the photos were not close in age to defendant and defendant was the only one wearing a red shirt. Defendant also points out that the photo line-up was shown to the witnesses together rather than separately.

Additionally, defendant argues that because both witnesses were shown the same line-up with defendant's picture in the same location within the line-up, this contributed to the impermissible suggestiveness. We find defendant's argument to be without merit.

The trial court made the following findings of fact in its order, which addressed the factors and considerations detailed in *Fisher* and *Wallace*:

> 7. The victims were not informed of the identity of the photographs selected or the persons in the photographs selected.
>
> . . . .
>
> 9. While there was some significant age difference between the individuals in the photographic array, that fact was not apparent from the photographs, and there was no identifying data on the photographic array.
>
> 10. All individuals appearing in the array were the same sex and race, and had similar hair color and styles, similar complexions and similar facial hair to the defendant.
>
> 11. The array was presented in a nonsuggestive fashion.[3]

These findings of fact are supported by the testimony given by Sergeant Wyrick, who administered the line-ups. Sergeant Wyrick testified that he deliberately selected individuals for the line-up with similar facial features. Sergeant Wyrick further claimed that he followed established police protocols when he gave Mendoza and Gadson the necessary instructions required to conduct the identification. Furthermore, there was no information listed on the photographic line-ups concerning those depicted.

From these findings, the court made the following conclusions of law:

> [T]he Court concludes as a matter of law that the pretrial identification procedure involving the defendant was reliable and was not productive of a substantial likelihood of misidentification given the totality of the circumstances surrounding the pretrial identification procedure, in that

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3. The trial judge noted that "looking at the photographs, I'm not sure I've ever seen a lineup that had more similar looking individuals, and I've looked at dozens of them."

A. The witnesses' opportunity to view the accused and observe the physical characteristics of the accused was ample and sufficient to gain a reliable impression of the accused at the time of the crime.

B. The witnesses' degree of attention was strong and focused on the accused during the time the witness viewed the accused both prior to and at the scene of the crime.

C. The witnesses' level of certainty that the accused was the same person the witness observed at the scene of the crime was firm and unequivocal.

D. The time lapse between the crime and the pretrial identification procedure was not so long as to significantly diminish the witnesses' ability to make a strong and reliable identification of the perpetrator.

E. All of the circumstances and events surrounding the crime and the pretrial identification procedure support the conclusion that the identification testimony by the witness possesses sufficient aspects of reliability.

These conclusions, based on the findings supported by the testimony at trial, directly addressed four of the five factors from *Fisher*. After considering the evidence, the trial judge held that the identification procedure did not result in "a substantial likelihood of misidentification . . . ."

Based on the trial court's findings of fact, which were supported by the evidence, and the conclusions of law, we find that the trial court did not err in denying defendant's motion to suppress the photographic line-ups.

C. Discovery Violation

[3] Mendoza testified at trial that defendant stated during the robbery, " 'I hope this spic is dead.' " Defendant argues that he was not made aware of Mendoza's testimony prior to trial and therefore, the trial court erred in overruling defendant's objection to the statement. Defendant claims that the State provided information to defendant prior to trial that Mendoza stated, " 'they' kept saying they hated Mexicans"; however, "nothing was attributed to Mr. Rainey, and certainly not the racial and ethnic slur testified to at trial." On appeal, defendant argues that this amounts to a violation of the discov-

ery requirements of N.C. Gen. Stat. § 15A-903 (2007), which requires the State to

> "[m]ake available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

N.C. Gen. Stat. § 15A-903(a)(1).

"[T]he purpose of discovery under our statutes 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, 163 (1990). " 'Determining whether the State failed to comply with discovery is a decision left to the sound discretion of the trial court.' " *State v. Workman*, 344 N.C. 482, 507, 476 S.E.2d 301, 315 (1996) (quoting *State v. Jackson*, 340 N.C. 301, 317, 457 S.E.2d 862, 872 (1995)).

"Our Supreme Court has held that delivery of a synopsis of a defendant's oral statements in response to discovery requests complies with the 'substance' requirement of [the statute]." *State v. Johnson*, 136 N.C. App. 683, 692, 525 S.E.2d 830, 836 (2000). Additionally, "[n]othing in [§ 15A-903], however, entitles a defendant to have the trial court order the prosecutor to provide him with a description of the 'facts and circumstances surrounding his statements.' " *State v. Bruce*, 315 N.C. 273, 278, 337 S.E.2d 510, 514 (1985) (quotation omitted).

Section 15A-903 has been amended several times and does not have an express substance requirement in its current form. However, case law continues to use a form of the substance requirement for determining the sufficiency of disclosures to a defendant. In *State v. Zamora-Ramos*, the defendant argued that testimony should not have been allowed because "the State did not provide the defendant with detailed written accounts of each of the statements made by [the witness] . . . ." 190 N.C. App. 420, 423, 660 S.E.2d 151, 153 (2008). The Court disagreed with the lack of sufficient detail argument because the defendant had been provided with all files, notes from meetings, and "notice of the substance of [the witness's] statements"; therefore,

the defendant was not unfairly surprised by the admission of the testimony. *Id.* at 424, 660 S.E.2d at 155.

Here, the State provided defendant with notice that Mendoza claimed "they hated Mexicans." This disclosure provided the substance of Mendoza's testimony and was adequate, for the purpose of the discovery statute, to prevent unfair surprise. Accordingly, the trial court did not err in allowing the testimony over defendant's objection.

D. Failure to Appear and Extradition

[4] Defendant claims that testimony concerning his 2006 failure to appear in court, his arrest in Ohio, and his return to North Carolina was irrelevant and more prejudicial than probative. According to defendant, this testimony is only evidence of a subsequent bad act, and since it occurred two years after the crime at issue, its probative value was outweighed by its prejudicial effect. The trial court overruled defendant's relevancy objection.

"North Carolina has long followed the rule that an accused's flight from a crime shortly after its commission is admissible as evidence of guilt." *State v. Self*, 280 N.C. 665, 672, 187 S.E.2d 93, 97 (1972). Evidence of flight does not create a presumption of guilt, but is to be considered with other factors in deciding whether the circumstances "amount to an admission of guilt or reflect a consciousness of guilt." *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 698 (1973). Where there are factors suggesting flight, "the jury must decide whether the facts and circumstances support the State's contention that the defendant fled." *State v. Norwood*, 344 N.C. 511, 535, 476 S.E.2d 349, 360 (1996). Additionally, " '[w]here the prosecution can show in a criminal case that the accused has become a fugitive from justice,' such a fact can be considered on the question of his guilt." *State v. Hairston*, 182 N.C. 911, 914, 109 S.E. 45, 47 (1921) (quoting Charles Frederic Chamberlayne, Hand Book on the Law of Evidence 424 (Arthur W. Blakemore and Dewitt C. Moore eds., Matthew Bender & Company) (1919)).

In the present case, there were indictments issued on 29 March 2004 and superceding indictments issued on 27 February 2006. Sergeant Wyrick testified that defendant failed to appear for a court date on 6 February 2006. A warrant was issued for defendant's arrest for the failure to appear. An electronic database confirmed that defendant had been arrested in Ohio, after which the district attorney's office had defendant extradited back to North Carolina.

The fact that defendant left the state and failed to appear for court can be construed as evidence of flight in this case. *See State v. Williamson*, 122 N.C. App. 229, 232, 468 S.E.2d 840, 843 (1996) (holding that a "reasonable view of this evidence is that defendant, by failing to appear for trial, attempted to avoid prosecution for the offenses charged"). As for the argument that the flight was not shortly after the crime, this temporal consideration goes to the weight of the evidence, rather than its admissibility. *See State v. Mash*, 305 N.C. 285, 288, 287 S.E.2d 824, 826 (1982).

The leaving of the state, coupled with the failure to appear in court, is evidence of flight and is thus relevant to the question of guilt. *See Hairston*, 182 N.C. at 914, 109 S.E. at 47. Thus, the trial court did not err in allowing this evidence to be submitted at trial.

E. Admissibility of 404(b) Testimony

[5] The court held a hearing to determine the admissibility of the Rule 404(b) evidence regarding an incident that took place on 15 August 2003 involving defendant, Crystal Green ("Green"), Mill, and Adam Anderson ("Anderson"). The court conducted a *voir dire* of Green, Anderson, and Mill. After hearing the testimony of each witness, the court ruled that Green's testimony was "relevant, that it is permissible and will be admitted under Rule 404(b)." The court also ruled that Green's testimony had probative value not outweighed by its prejudicial effect. However, the testimonies of Anderson and Mill were excluded as unduly prejudicial.

At trial, Green testified that on the evening of 15 August 2003, a group including herself, defendant, Mill, Anderson, and Williams went to a local club where they consumed alcohol and drugs. Green testified that there was a disagreement between defendant and Anderson. The group then left the club and went to Mill's mobile home, where a fight broke out between Williams and Anderson. Defendant joined in, both he and Williams beating Anderson until he was lying on the ground injured. Mill tried to break up the fight. Green also testified that when she spoke to defendant later about the fight, he intimidated her by angrily crushing a beer can and telling her she had "better not go to court."

On appeal, defendant argues that the trial court erred in allowing the 404(b) testimony of Green because the evidence was irrelevant, too dissimilar to be admitted under 404(b), and its prejudicial effect outweighed any probative value.

"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." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007). The statute lists several proper purposes, but this list is not exclusive; even if the evidence does not fall under a stated purpose, it may still be admissible. *State v. Blackwell*, 133 N.C. App. 31, 34, 514 S.E.2d 116, 119 (1999). Courts have described 404(b) as "a general rule of inclusion." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991).

Rule 404(b) evidence is subject to both a "similarity" and a "temporal proximity" analysis. *State v. Barnett*, 141 N.C. App. 378, 389-90, 540 S.E.2d 423, 431 (2000). The prior incidents offered as 404(b) evidence must be "sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *West*, 103 N.C. App. at 9, 404 S.E.2d at 197. The ruling of a trial court "to admit or exclude evidence" is reviewed for abuse of discretion. *State v. Smith*, 99 N.C. App. 67, 71, 392 S.E.2d 642, 645 (1990).

The trial court found that because the prior assault testified to by Green demonstrated a particular fighting style, (defendant fighting alongside another person or in a group against a victim), Green's testimony was properly admitted for the purpose of demonstrating defendant's method of operation or a common plan or scheme. Furthermore, Green's testimony illustrated the defendant's use of witness intimidation, similar to that seen in Exhibits 55-58. We agree with the trial court's reasoning.

The 404(b) evidence of the 15 August 2003 altercation was sufficiently similar to the 7 March 2004 crime. The State pointed out at trial that there were ten similarities, including largely the same individuals being present at both incidents and the fact that drugs and alcohol were involved. Another similarity is that defendant had attacked the victim at both fights with the help of others after taking the victim to an isolated location. Also, defendant was the oldest member in the group during both affrays and acted as a ringleader.

Additionally, the temporal proximity requirement is satisfied by this evidence. The prior incident occurred on 15 August 2003, while the crime in the present case occurred on 7 March 2004. These events are relatively close in time. In *State v. Carter*, 338 N.C. 569, 451 S.E.2d 157 (1994), the court was willing to admit 404(b) evidence that occurred eight years before the crime in question because " 'remote-

ness in time generally affects only the weight to be given such evidence, not its admissibility.' " *Id.* at 588-89, 451 S.E.2d at 167-68 (quoting *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 881 (1991)).

Finally, Rule 404(b) evidence is subject to the analysis of Rule 403, balancing probative value with prejudicial effect on the defendant. The determination of admissibility of evidence under Rule 403 " 'is a matter that is left in the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion.' " *State v. Moses*, 350 N.C. 741, 761, 517 S.E.2d 853, 866 (1999) (quoting *State v. Hipps*, 348 N.C. 377, 405-06, 501 S.E.2d 625, 642 (1998)). The trial court ruled that the probative value of Green's testimony was not outweighed by the prejudicial effect. We find no abuse of discretion in the trial court's determination.

Because the evidence was admitted for a proper purpose, the incident was sufficiently similar and close in time, and the testimony was not unduly prejudicial to the defendant, we find that the trial court did not err in ruling that Green's 404(b) testimony was admissible.

F. Instruction on Flight

[6] Defendant next argues that a flight instruction to the jury was not supported by the evidence.

" '[I]n order to justify an instruction on flight there must be some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged.' " *State v. Riley*, 154 N.C. App. 692, 696, 572 S.E.2d 857, 860 (2002) (quoting *State v. Fisher*, 336 N.C. 684, 706, 445 S.E.2d 866, 878 (1994)). If an appellate court finds " 'some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given.' " *State v. Ethridge*, 168 N.C. App. 359, 362-63, 607 S.E.2d 325, 328 (2005) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). To merit an instruction on flight, the defendant's leaving of the crime scene must be bolstered by " 'some evidence that defendant took steps to avoid apprehension.' " *State v. Beck* 346 N.C. 750, 758, 487 S.E.2d 751, 756-57 (1997) (quoting *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991)).

Applying the facts of the present case, at some point after the March 2004 incident, defendant fled to Ohio. This is some evidence that defendant left the area after the commission of the crime.

Defendant subsequently failed to appear in court on 6 February 2006. Missing a court date by leaving the state after the commission of a crime indicates "steps to avoid apprehension" as described in *Beck*. *Id.* Courts have also found that missing a court date can be sufficient evidence to merit an instruction on flight. *See State v. Robertson*, 57 N.C. App. 294, 297, 291 S.E.2d 302, 304 (1982).

The trial court did not err in instructing the jury on flight as there was evidence in the record reasonably supporting the theory of flight, and defendant's failure to appear on the 6 February 2006 court date amounted to evidence that defendant took steps to avoid apprehension.

Conclusion

The trial court did not err in denying defendant's motion *in limine* concerning the telephone conversations, in denying the motion to suppress the photo line-ups, in overruling the objection to Mendoza's testimony, in admitting evidence of the failure to appear and extradition from Ohio, in admitting the 404(b) testimony of Crystal Green, or in charging the jury on flight.

No error.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA v. DEMONTRISE ANTWAN DAVIS

No. COA08-1275

(Filed 4 August 2009)

1. Constitutional Law— double jeopardy—felony death by vehicle and involuntary manslaughter—different elements

Felony death by vehicle and involuntary manslaughter require proof of an unintentional killing, but do not have the same elements. Felony death by vehicle is restricted to deaths proximately caused by driving while impaired, while involuntary manslaughter is not so restricted. A 1988 Court of Appeals case to the contrary did not follow precedent, and Supreme Court cases set out different lists of elements for each offense.

2. Sentencing— involuntary manslaughter and felony death by vehicle—sentencing for both—statutory prohibition

Under N.C.G.S. § 20-141.4(c), a defendant may not be sentenced for both involuntary manslaughter and felony death by vehicle arising from the same death.

3. Sentencing— felony death by vehicle and driving while impaired—lesser included offense

The trial court erred by sentencing defendant for both felony death by vehicle and driving while impaired. Driving while impaired is a lesser included offense of felony death by vehicle.

4. Appeal and Error— preservation of issues—no objection at trial—no assignment of plain error

Defendant did not object at trial or assign plain error and did not preserve for appellate review an issue concerning a *lapsus linguae* in an instruction on the defense of accident.

5. Criminal Law— unanimous verdict—culpable negligence established by DWI—disjunctive instruction on other violations

Defendant's culpable negligence was established by the jury's unanimous verdict of guilty by DWI, and the trial court's instruction allowing the jury to consider several possible motor vehicle violations did not violate defendant's right to a unanimous verdict.

6. Homicide— second-degree murder—lesser included offense—underlying traffic violations not specified

Defendant was not denied a fair trial for second-degree murder where he contended that the second-degree murder indictment did not specify the traffic violations that might be used to prove the culpable negligence element of the lesser included offense of involuntary manslaughter.

Appeal by Defendant from judgment entered 26 February 2008 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 April 2009.

Attorney General Roy Cooper, by Special Counsel Isaac T. Avery, III, for the State.

Parish, Cooke & Condlin, by James R. Parish, for Defendant.

BEASLEY, Judge.

Defendant (Demontrise Davis) appeals from judgments entered on his convictions of driving while impaired, involuntary manslaughter, and felony death by vehicle. We find no reversible error in the individual convictions, but remand for further proceedings in light of our holdings that (1) Defendant may not be convicted of both involuntary manslaughter and felony death by vehicle arising from the same death, and; (2) Defendant may not be sentenced for both felony death by vehicle and DWI arising from the same incident.

On 8 February 2006, at approximately 3:00 a.m., the Defendant was driving west on Freedom Drive, in Charlotte, North Carolina. His car struck an eastbound vehicle operated by Kerry Moses, who died of injuries suffered in the collision. In May 2006 Defendant was indicted for second-degree murder, felony death by vehicle, and driving while impaired. He was tried before a Mecklenburg County jury in February 2008.

At the time of the collision Defendant was driving while impaired by alcohol, and Defendant violated other motor vehicle laws by driving above the legal speed limit, driving on the left of the highway's center line, and passing in a no-passing zone. Following the presentation of evidence, Defendant was convicted of felony death by vehicle, involuntary manslaughter, and driving while impaired. The trial court imposed consecutive prison sentences of 24 to 29 months for involuntary manslaughter, 19 to 23 months for felony death by vehicle and 12 months for impaired driving. From these judgments and convictions, Defendant appeals.

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[1] Defendant argues first that the trial court erred by sentencing him for both involuntary manslaughter and felony death by vehicle. Defendant asserts that this double punishment violates his right to be free of double jeopardy, and his statutory rights under N.C. Gen. Stat. § 20-141 (2007). We agree.

The Double Jeopardy Clause states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. North Carolina's " 'law of the land' clause incorporates similar protections under the North Carolina Constitution." *State v. Ballenger*, 123 N.C. App. 179, 180, 472 S.E.2d 572, 573 (1996) (citing N.C. Const. art. I, § 19). "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) (citations omitted).

Defendant first asserts that the elements of involuntary manslaughter and felony death by vehicle are "identical," making them the "same offense." Defendant misstates the law in this regard.

Involuntary manslaughter is a common law offense. "The elements of involuntary manslaughter are: (1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence." *State v. Hudson*, 345 N.C. 729, 733, 483 S.E.2d 436, 439 (1997) (citations omitted). The element of culpable negligence has been 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.' " *State v. Weston*, 273 N.C. 275, 280, 159 S.E.2d 883, 886 (1968) (quoting *State v. Cope*, 204 N.C. 28, 30, 167 S.E. 456, 458 (1933)).

" 'An intentional, wilful or wanton violation of a statute, . . . designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence.' " *State v. Jones*, 353 N.C. 159, 165, 538 S.E.2d 917, 923 (2000) (quoting *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92-93 (1985) and *Cope*, 204 N.C. at 31, 167 S.E. at 458). Further, "N.C.G.S. § 20-138.1, which prohibits drivers from operating motor vehicles while under the influence of impairing substances, is a safety statute designed for the protection of human life and limb and . . . its violation constitutes culpable negligence as a matter of law." *Jones*, 353 N.C. at 165, 538 S.E.2d at 923 (citing *McGill*, 314 N.C. at 637, 336 S.E.2d at 93).

However, in a prosecution for involuntary manslaughter the element of culpable negligence need not involve motor vehicle law or a traffic accident. *See*, *e.g.*, *State v. Powell*, 336 N.C. 762, 763, 446 S.E.2d 26, 26-27 (1994) (finding no error where "jury found defendant guilty of involuntary manslaughter based on culpable negligence by leaving dogs unattended . . . in violation of [§] 3-18 of the Winston-Salem Code"); *In re Z.A.K.*, 189 N.C. App. 354, 358, 657 S.E.2d 894, 896 (2008) (culpable negligence found in juvenile's "failure to aid [victim] after providing her with [drugs] and undertaking to provide aid").

Unlike involuntary manslaughter, the offense of felony death by vehicle is a statutory offense which was created in 1983. *See* N.C. Gen. Stat. § 20-141.4(a1) (2007). "The elements of felony death by

vehicle are: (1) defendant unintentionally causes the death of another; (2) while driving impaired as defined by N.C. Gen. Stat. §§ 20-138.1 or 20-138.2 [(2007)]; and (3) the impairment was the proximate cause of the death." *State v. Bailey*, 184 N.C. App. 746, 748, 646 S.E.2d 837, 839 (2007) (citing N.C. Gen. Stat. § 20-141.4(a1)).

Both felony death by vehicle and involuntary manslaughter require proof of an unintentional killing. Where a defendant is charged with involuntary manslaughter and it is alleged that his culpable negligence consists of driving while impaired, the same evidence might support a conviction of either felony death by vehicle or involuntary manslaughter. However, the two offenses do not have the same elements. Felony death by vehicle is restricted to deaths proximately caused by driving while impaired, but the culpable negligence element of involuntary manslaughter need not consist of driving while impaired. Nor is there a separate offense of "involuntary manslaughter by driving while impaired." The impaired driving is simply the evidence of culpable negligence. North Carolina uses a definitional test to determine whether two offenses have the same elements. *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 378 (1982), *overruled on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993) ("We do not agree . . . that the facts of a particular case should determine whether one crime is a lesser included offense of another. Rather, the definitions accorded the crimes determine whether one offense is a lesser included offense of another crime.").

We are aware that a 1988 case held that "the offense of felony death by vehicle requires the identical essential elements to those required for a conviction of involuntary manslaughter predicated on a violation of G.S. 20-138.1[.]" *State v. Williams*, 90 N.C. App. 614, 621, 369 S.E.2d 832, 837 (1988). We are also aware that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

However, "our responsibility is to follow established precedent set forth by our Supreme Court." *Brundage v. Foye*, 118 N.C. App. 138, 141, 454 S.E.2d 669, 671 (1995) (citations omitted). The opinions of the Supreme Court of North Carolina have uniformly set out a different list of elements for each offense. For example, in *Jones*, 353 N.C. at 169, 538 S.E.2d at 925-26, the Court stated that under N.C. Gen.

Stat. § 20-141.4(a1), " '[a] person commits the offense of felony death by vehicle if he unintentionally causes the death of another person while engaged in the offense of impaired driving . . . and commission of that offense is the proximate cause of death.' " (quoting N.C. Gen. Stat. § 20.141.4) In *Hudson*, the Court stated that "[t]he elements of involuntary manslaughter are: (1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence." *Hudson*, 345 N.C. at 733, 483 S.E.2d at 439 (citing *McGill*, 314 N.C. at 637, 336 S.E.2d at 92). Such cases unequivocally establish that these offenses have different elements.

Moreover, *Williams* contradicts many decades of controlling precedent, as the common-law definition of involuntary manslaughter has been essentially unchanged for at least a century. *See*, *e.g.*, *State v. Vic. Limerick*, 146 N.C. 649, 651, 61 S.E. 568, 569 (1908) ("if the prisoner was . . . guilty of culpable negligence in the way he handled and dealt with the gun, and by reason of such negligence the gun was discharged, causing the death of deceased, . . . the prisoner would be guilty of manslaughter"); *State v. Barnard*, 88 N.C. 661, 664 (1883) ("if workmen throw stones, rubbish, or other things from a house . . . by which a person underneath is killed, if they look out and give timely warning beforehand to those below, it will be accidental death; if without such caution, it will amount to manslaughter. . . . It was a lawful act, but done in an improper manner"); *State v. Leak*, 61 N.C. 450 (1868) (if the defendant "gave the [child] laudanum . . . [but] did not know the character of the laudanum as a poison, etc., it would be no more than manslaughter"). And, since the advent of the automobile, the law of involuntary manslaughter has been applied much as it is today:

> The common-law definition of involuntary manslaughter includes unintentional homicide resulting from . . . the performance of a lawful act done in a culpably negligent manner[.] . . . The definition is material in its bearing upon the criminal responsibility of a person who kills another in the breach of a statute intended and designed to prevent the infliction of personal injury[.] . . . The law of involuntary manslaughter has been applied to cases in which injury or death resulted from the collision of motor vehicles operated in violation of a statute designed to secure personal safety.

State v. Stansell, 203 N.C. 69, 71-72, 164 S.E. 580, 581 (1932) (citing *State v. Satterfield*, 198 N.C. 682, 153 S.E. 155 (1930)).

We conclude that, in its holding that felony death by vehicle and involuntary manslaughter had the same elements, the *Williams* Court failed to follow binding precedent. "[B]ecause [*Williams*] is inconsistent with prior decisions of this Court and our Supreme Court, we decline to follow it." *Cissell v. Glover Landscape Supply*, 126 N.C. App. 667, 670 fn.1, 486 S.E.2d 472, 73 fn.1 (1997), *rev'd on other grounds*, 348 N.C. 67, 497 S.E.2d 283 (1998)(this Court has responsibility to follow Supreme Court decisions "until otherwise ordered by the Supreme Court"). Accordingly, we conclude that controlling precedent establishes that felony death by vehicle and involuntary manslaughter do not have the same elements.

[2] We next determine whether Defendant may properly be sentenced for both offenses.

> For decades, the Supreme Court of the United States has applied what has been called the *Blockburger* test in analyzing multiple offenses for double jeopardy purposes. . . . "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." If what purports to be two offenses is actually one under the *Blockburger* test, double jeopardy prohibits prosecution for both.

State v. Ezell, 159 N.C. App. 103, 106-07, 582 S.E.2d 679, 682 (2003) (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 309 (1932)).

"However, as the Supreme Court made clear in *Missouri v. Hunter*, double jeopardy does not prohibit multiple punishment for two offenses—even if one is included within the other under the *Blockburger* test—if both are tried at the same time and the legislature intended for both offenses to be separately punished." *Ezell*, 159 N.C. App. at 107, 582 S.E.2d at 682 (citing *Missouri v. Hunter*, 459 U.S. 359, 368-69, 74 L. Ed. 2d 535, 544 (1983); and *Gardner*, 315 N.C. at 454-55, 340 S.E.2d at 709).

Therefore, "the intent of the legislature is determinative. The Double Jeopardy Clause plays only a limited role in deciding whether cumulative punishments may be imposed under different statutes at a single criminal proceeding—that role being only to prevent the sentencing court from prescribing greater punishments than the legisla-

ture intended." *Gardner*, 315 N.C. at 460, 340 S.E.2d at 712. "[If] a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." *Hunter*, 459 U.S. at 368-69, 74 L. Ed. 2d at 544. "Where multiple punishment is involved, the Double Jeopardy Clause acts as a restraint on the prosecutor and the courts, not the legislature." *Gardner*, 315 N.C. at 452, 340 S.E.2d at 707 (citing *Brown v. Ohio*, 432 U.S. 161, 53 L. Ed. 2d 187 (1977)). "The traditional means of determining the intent of the legislature where the concern is only one of multiple punishments for two convictions in the same trial include the examination of the subject, language, and history of the statutes." *Gardner*, 315 N.C. at 461, 340 S.E.2d at 712. In the instant case, Defendant argues that the North Carolina legislature has expressed a clear intent not to allow multiple punishments for involuntary manslaughter and felony death by vehicle arising from the same death. We agree.

In *State v. Freeman*, 31 N.C. App. 93, 228 S.E.2d 516 (1976), this Court discussed misdemeanor death by vehicle, involuntary manslaughter, and the provisions of N.C. Gen. Stat. § 20-141.4 (1973). N.C. Gen. Stat. § 20-141.4(a), since repealed, then provided in pertinent part that "[w]hoever shall unintentionally cause the death of another person while engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic shall be guilty of death by vehicle when such violation is the proximate cause of said death." N.C. Gen. Stat. § 20-141.4(b) made violation of the statute a misdemeanor.

The defendant in *Freeman* was charged with involuntary manslaughter. At trial the jury was instructed on involuntary manslaughter and misdemeanor death by vehicle. On appeal he argued that allowing the jury to consider both offenses violated N.C. Gen. Stat. § 20-141.4(c), which at that time provided that:

> (c) No person who has been placed in jeopardy upon a charge of death by vehicle shall subsequently be prosecuted for the offense of manslaughter arising out of the same death; and no person who has been placed in jeopardy upon a charge of manslaughter shall subsequently be prosecuted for death by vehicle arising out of the same death.

The defendant argued that N.C. Gen. Stat. § 20-141.4(c) prohibited misdemeanor death by vehicle from being treated as a lesser included offense of involuntary manslaughter. This Court held that "[t]he purpose of G.S. 20-141.4(c) is . . . to prevent the State from bringing a new prosecution against a defendant for death by vehicle after he has already been convicted or acquitted of manslaughter." *Freeman*, 31 N.C. App. at 96, 228 S.E.2d at 518. The Court also held that "the intention of the legislature in enacting G.S. 20-141.4 was to define a crime of lesser degree of manslaughter wherein criminal responsibility for death by vehicle is not dependent upon the presence of culpable or criminal negligence. . . . Every element of G.S. 20-141.4 is embraced in the common law definition of involuntary manslaughter." *Id.* at 97, 228 S.E.2d at 519.

In 1983, North Carolina enacted the Safe Roads Act, "Chapter 435 of the 1983 Session Laws, effective 1 October 1983[.]" *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 327, 323 S.E.2d 294, 294 (1984). As part of the Safe Roads Act, the North Carolina legislature repealed N.C. Gen. Stat. § 20-141.4(a) and enacted N.C. Gen. Stat. § 20-141.4(a1), which created the offense of felony death by vehicle and provided in part:

> (a1) A person commits the offense of felony death by vehicle if: (1) The person unintentionally causes the death of another person, (2) The person was engaged in the offense of impaired driving . . . and (3) The commission of [impaired driving] . . . is the proximate cause of the death.

The legislature also amended N.C. Gen. Stat. § 20-141.4(c) to state:

> (c) No Double Prosecutions.—No person who has been placed in jeopardy upon a charge of death by vehicle may be prosecuted for the offense of manslaughter arising out of the same death; and no person who has been placed in jeopardy upon a charge of manslaughter may be prosecuted for death by vehicle arising out of the same death.

This was the first amendment of N.C. Gen. Stat. § 20-141.4(c) after *Freeman* was decided. Significantly, the legislature added the heading "No Double Prosecutions" and deleted the word "subsequently" from the statute. It is black letter law that the

> Legislature . . . is presumed to have had the law as settled by *State v.* [*Freeman*] in mind when it passed the act of [1983], and that act will be construed according to the rule as therein stated. The

> Legislature is presumed to know the existing law and to legislate with reference to it.

State v. Southern R. Co., 145 N.C. 495, 542, 59 S.E. 570, 587 (1907).

> Thus, absent clear legislative intent to the contrary, we must presume that the General Assembly acted to abrogate the [holding of *Freeman*]. *See . . . State v. Blackstock*, 314 N.C. 232, 240, 333 S.E.2d 245, 250 (1985) (noting that in construing a statute that has been repealed or amended, it may be presumed that the legislature intended either to change the substance of the original act or to clarify the meaning of the statute).

State v. Bright, 135 N.C. App. 381, 382-83, 520 S.E.2d 138, 139 (1999). "Likewise, we note that our case law favors the imposition of a single punishment unless otherwise clearly provided by statute. 'In construing a criminal statute, the presumption is against multiple punishments in the absence of a contrary legislative intent.' " *State v. Garris*, 191 N.C. App. 276, 284, 663 S.E.2d 340, 347 (quoting *State v. Boykin*, 78 N.C. App. 572, 576-77, 337 S.E.2d 678, 681 (1985)), *disc. review denied*, 362 N.C. 684, 670 S.E.2d 907 (2008).

We conclude that under N.C. Gen. Stat. § 20-141.4(c) a defendant may not be sentenced for both involuntary manslaughter and felony death by vehicle arising out of the same death. We remand for resentencing by the trial court, with instructions to vacate Defendant's conviction of either involuntary manslaughter or felony death by vehicle.

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[3] Defendant argues next that the trial court erred by sentencing him for both felony death by vehicle and driving while impaired (DWI). We agree.

> Under N.C. Gen. Stat. § 20-141.4(a1), driving while impaired is a lesser included offense of felony death by vehicle. Upon conviction of felony death by vehicle the lesser offense merges into the greater. Thus, it is error to sentence a defendant both for felony death by vehicle and the lesser included offense of driving while impaired.

State v. Richardson, 96 N.C. App. 270, 272, 385 S.E.2d 194, 195 (1989). If the trial court vacates Defendant's conviction of involuntary manslaughter and sentences Defendant for felony death by vehicle, then the court must arrest judgment on DWI.

However, if the trial court vacates the felony death by vehicle conviction, Defendant may be sentenced for both involuntary manslaughter and DWI. *See e.g.*, *State v. Speight*, 186 N.C. App. 93, 650 S.E.2d 452 (2007).

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[4] The Defendant next argues that the trial court denied his right to a fair trial because, during the court's instruction on the defense of accident as it pertained to second-degree murder, the trial court made a "slip of the tongue." Instead of stating that, under certain circumstances, the Defendant "would not be guilty of any crime[,]" the court instead said that the Defendant "was not be my of any crime." Defendant argues that this *lapsus lingua* entitles him to a new trial. We disagree.

The Defendant did not object to this instruction at trial. N.C.R. App. P. Rule 10(c)(4) provides that:

> In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

In the instant case, the Defendant did not assign the challenged instruction as plain error and does not argue plain error on appeal. "[A] defendant must 'specifically and distinctly' assign plain error to preserve a question for appellate review that is otherwise waived pursuant to N.C. R. App. P. 10(b)(1)[.]" *State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 925 (2007) (quoting Rule 10(c)(4)). We conclude that Defendant failed to preserve this issue for appellate review. This assignment of error is overruled.

[5] Defendant next argues that the trial court erred in its instructions to the jury on the traffic violations that were pertinent to the charge of involuntary manslaughter. Defendant argues that the trial court denied his right to a unanimous verdict by instructing the jury "in the disjunctive" on the North Carolina motor vehicle violations the jury could consider in determining Defendant's guilt. We disagree.

It is long-established that "the [defendant] can be found guilty only by a unanimous verdict, beyond the reasonable doubt, of twelve [jurors]." *State v. Lilliston*, 141 N.C. 857, 868, 54 S.E. 427, 431 (1906). "The North Carolina Constitution guarantees a criminal defendant the right to a unanimous verdict. . . . To convict a defendant, the

jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged." *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982) (citing N.C. Const. art. I, § 24). "To sustain a charge of involuntary manslaughter, the State must present substantial evidence that defendant committed 'the unlawful and unintentional killing of another human being without malice' " and that the killing proximately results from the defendant's "commission of some act done in an unlawful or culpably negligent manner[.]" *State v. Fritsch*, 351 N.C. 373, 380, 526 S.E.2d 451, 456 (2000) (quoting *State v. Everhart*, 291 N.C. 700, 702, 231 S.E.2d 604, 606 (1977)). Thus, "[w]hen a safety statute is unintentionally violated, culpable negligence exists where the violation is 'accompanied by recklessness of probable consequences of a dangerous nature . . . amounting altogether to a thoughtless disregard of consequences[.]' " *Jones*, 353 N.C. at 165, 538 S.E.2d at 923 (quoting *State v. Hancock*, 248 N.C. 432, 435, 103 S.E.2d 491, 494 (1958)).

"[A]n unintentional violation of a prohibitory statute or ordinance, unaccompanied by recklessness or probable consequences of a dangerous nature . . . is not such negligence as imports criminal responsibility." *Cope*, 204 N.C. at 31, 167 S.E. at 458 (citations omitted). However, "this latter rule is inapplicable [to DWI]: one who drives under the influence cannot be said to do so inadvertently. The act (and the violation) is willful by its very nature." *McGill*, 314 N.C. at 636 n.3, 336 S.E.2d at 92 n.3.

In the instant case, the trial court instructed the jury in accordance with the law, that culpable negligence could be established by proof: (1) that Defendant drove while impaired, which is culpable negligence as a matter of law, or; (2) that Defendant drove left of center, exceeded the posted speed limit, or passed in a no passing zone, if such violation was accompanied by a reckless disregard for the probable consequences of his action, or was a willful, wanton or intentional violation of one or more of these traffic laws.

The Defendant argues on appeal that the trial court's instructions make it unclear whether the jury unanimously found Defendant's culpable negligence to be based on impaired driving or based on one or more of the other traffic violations. However, inasmuch as the jury convicted Defendant of DWI, we may conclude that the jury unanimously found that Defendant had committed this offense. The jury's unanimous finding that the Defendant committed DWI supports the culpable negligence element of involuntary manslaughter.

We next consider the trial court's instructions on Defendant's commission of one or more traffic violations. Defendant argues that his right to a unanimous jury verdict was violated, based on the fact that exceeding the posted speed limit, driving left of center, and passing in a no-passing zone are criminal offenses. In support of his position, Defendant cites *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986).

In *Diaz*, the jury was instructed that it could convict the defendant of trafficking in marijuana if defendant knowingly possessed or transported a trafficking amount of marijuana. The Supreme Court of North Carolina held that the defendant had been "deprived of his constitutional right to be convicted by a unanimous jury and [was] entitled to a new trial." *Id.* at 554, 346 S.E.2d at 494. "*Diaz* held that when the underlying acts joined by the disjunctive are separate offenses for which a defendant may be separately convicted and punished, the jury instruction is fatally ambiguous." *State v. Haddock*, 191 N.C. App. 474, 480, 664 S.E.2d 339, 344 (2008). However, if a jury is instructed that a "single wrong [may be] established by a finding of various alternative elements" the jury instruction does not deprive a defendant of the right to a unanimous verdict. *State v. Hartness*, 326 N.C. 561, 566, 391 S.E.2d 177, 180 (1990). "To decide whether the underlying acts joined by the disjunctive are separate offenses or merely alternative ways to establish a single offense, this Court considers the gravamen of the offense, determined by considering the evil the legislature intended to prevent and the applicable statutory language." *Haddock*, 191 N.C. App. at 480, 664 S.E.2d at 344.

We conclude that the evil the common law offense of involuntary manslaughter intends to prevent is the accidental death of an individual caused by a defendant's culpable negligence. A defendant's culpable negligence may arise from the intentional or reckless violation of a motor vehicle safety law. We hold that the jury was properly instructed on specific traffic offenses that, although distinct, might serve to establish a single element of involuntary manslaughter. Accordingly, Defendant's right to a unanimous verdict was not violated.

We find support for our holding in *State v. Funchess*, 141 N.C. App. 302, 540 S.E.2d 435 (2000). In *Funchess*, the defendant was charged with felonious speeding to elude arrest. The trial court charged the jury that to convict the defendant it must find two or more of the following factors: (1) that the defendant drove in excess

of fifteen miles per hour over the legal speed limit; (2) that he drove recklessly, or; (3) that he drove while his driver's license was revoked. On appeal, the defendant argued that because these three factors were also individual separate offenses, his right to a unanimous verdict had been violated. This Court held:

> Defendant further contends that the jury should have been required to agree on which of [the] . . . factors were present in his case. The State . . . argues that the statutory factors are merely alternative ways of proving the crime of felonious speeding to elude arrest. . . . Although many of the enumerated aggravating factors are in fact separate crimes under various provisions of our General Statutes, they are not separate offenses as in *Diaz*, but are merely alternate ways of enhancing the punishment for speeding to elude arrest from a misdemeanor to a Class H felony.

Id. at 307, 309, 540 S.E.2d at 438, 439. We conclude that Defendant's culpable negligence was established by the jury's unanimous verdict of guilty of DWI, and that the trial court's instruction allowing the jury to consider several possible motor vehicle violations did not violate the Defendant's right to a unanimous verdict. This assignment of error is overruled.

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[6] Finally, Defendant argues that his right to a fair trial was violated by the failure of the indictment charging him with second-degree murder to specify which traffic violations might be used to prove the culpable negligence element of involuntary manslaughter. We disagree.

Defendant was indicted for second-degree murder. Evidence produced at trial entitled Defendant to an instruction on the lesser included offense of involuntary manslaughter. Defendant cites no authority for the proposition that an indictment for an offense requires additional indictments for all lesser included offenses, and we find none. This assignment of error is overruled.

For the reasons discussed above, we find no error in any of Defendant's individual convictions, but remand for further proceedings in light of our holdings that (1) Defendant may not be convicted of both involuntary manslaughter and felony death by vehicle arising from the same death, and; (2) Defendant may not be sentenced for both felony death by vehicle and DWI arising from the same incident.

No error in part, remanded in part.

Judges McGEE and HUNTER, Robert C. concur.

STATE OF NORTH CAROLINA v. DONALD CARLTON LOWRY, DEFENDANT

No. COA08-845

(Filed 4 August 2009)

1. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence—identity as perpetrator—financial motive and opportunity

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder even though defendant contends there was insufficient evidence of defendant's identity as the perpetrator because the State presented ample evidence of both financial motive and opportunity such that a reasonable juror could have concluded that defendant was the person who killed the victim including: (1) defendant being in possession of the victim's car shortly after the probable time of her death, (2) defendant having possession of other property, jewelry and an ATM card, belonging to the victim that would have likely been taken at the time of the victim's death, (3) defendant's familiarity with the victim's house and access to the house the days before the murder, and (4) defendant's effort to eliminate evidence by wiping down the car, and his flight when confronted by police.

2. Homicide— first-degree murder—felony murder—robbery—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder under the theory of felony murder because: (1) our appellate courts have held that evidence that a victim's wallet or purse was found emptied at the crime scene is sufficient to show that a robbery occurred at the time of the murder; and (2) the State's evidence was sufficient to allow a reasonable jury to find that the victim was killed during the commission of a robbery.

Appeal by defendant from judgments entered 24 August 2007 by Judge Robert H. Hobgood in Pasquotank County Superior Court. Heard in the Court of Appeals 10 March 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Diane A. Reeves, for the State.

D. Tucker Charns for defendant-appellant.

GEER, Judge.

Defendant Donald Carlton Lowry timely appealed his convictions of first degree murder and larceny of a motor vehicle. In his brief on appeal, however, defendant argues only that the trial court erred in denying his motion to dismiss the first degree murder charge. Because, when all inferences are drawn in favor of the State, the State presented sufficient evidence from which a reasonable jury could conclude that defendant killed the victim during the course of and in furtherance of a robbery, we find no error.

Facts

On 22 August 2007, a jury convicted defendant of first degree murder, felonious larceny of a motor vehicle, and felonious possession of a stolen motor vehicle. The victim of these crimes was Carolyn Dawson, a 75-year-old retired music teacher. The Chief Medical Examiner determined that Ms. Dawson was killed on Monday, 19 September 2005.

At trial, the State's evidence tended to show the following facts. Ms. Dawson lived alone on Flora Street in Elizabeth City, North Carolina. Defendant knew Ms. Dawson and had been in her house on several occasions because he had previously done yard work for her.

On Friday, 16 September 2005, defendant brought several pieces of jewelry to sell to Milton Sawyer, who ran an antique business in Elizabeth City. Defendant told Mr. Sawyer that a friend or cousin was getting rid of some jewelry and that there was more jewelry to sell. When Mr. Sawyer asked if they could go over to the friend's or cousin's house to look at the rest of the jewelry, defendant said they could not do that. Mr. Sawyer paid defendant $90.00 to $100.00 for the jewelry, which included a star ruby ring.

On Saturday, 17 September 2005, Ms. Dawson's daughter, Renee Dawson, visited her mother at her home on Flora Street. During the visit, Ms. Dawson told Renee that she was missing her star ruby ring. At trial, Renee identified the star ruby ring sold to Mr. Sawyer by defendant as the ring belonging to her mother. On that same Saturday,

Cathy Weaver, Ms. Dawson's neighbor and friend, spoke with Ms. Dawson outside her house.

On Sunday, 18 September 2005, Diana Gallop, a friend of the family, saw Ms. Dawson at church. Emma York, Ms. Dawson's cousin, spoke to Ms. Dawson by telephone on Sunday evening. That same day, defendant asked someone for a ride to Flora Street and was seen walking down the road toward Flora Street in the early afternoon. At about 3:00 p.m. on Sunday, defendant called Mr. Sawyer and told him he had gotten some more jewelry. Mr. Sawyer picked defendant up on the side of the road, and they went to Mr. Sawyer's store. Mr. Sawyer paid defendant $50.00 or $60.00 for the second set of jewelry. Mr. Sawyer then took defendant to Bojangles and bought him a drink.

On Monday, 19 September 2005, Jennifer Peserick, who delivered the newspapers on Flora Street, put the paper in front of Ms. Dawson's door between 8:30 and 9:30 a.m., as she did every morning. Ms. Peserick noticed nothing unusual when she delivered the paper that Monday. The mailman dropped off the mail as usual on Monday morning and also noticed nothing out of the ordinary about Ms. Dawson's house.

Rebecca Neece, Ms. Dawson's sister, testified that Ms. Dawson's daily routine was to get up around 7:00 a.m. She would then fix a bowl of cereal and a banana for breakfast and read the newspaper while watching television in her pajamas until around 10:00 a.m. At that point, she would go upstairs to get dressed for the day.

On Monday morning, Ms. Weaver—Ms. Dawson's neighbor—attended a class at Elizabeth City State University and came home afterwards between 10:00 and 10:30 a.m. She was planning to take over a piece of pie and a birthday card to Ms. Dawson's house since Ms. Dawson had recently had a birthday. Ms. Dawson usually parked her silver Buick in the driveway, but since Ms. Weaver did not see the Buick, she decided to wait to go visit. Although Ms. Weaver looked for Ms. Dawson's car on and off during the day, she never saw it in the driveway.

At about 10:30 or 11:00 a.m. on Monday morning, Duggie Johnson saw defendant driving a "gray-blue" car. George Overton also saw defendant drive by in a four-door silver or gray car between 1:00 and 3:00 p.m. on that day. He testified that this was unusual because defendant usually rode a bicycle or asked others for rides. After being shown a photograph of Ms. Dawson's car, Mr. Overton said that it

looked like the car defendant was driving. Mr. Overton testified that he saw the same car parked on Martin Street early the following Wednesday morning. Jerry Lewis, the owner of a junk car business, testified that on or about that Monday, defendant offered to sell him an old car for around $500.00.

Anika Edwards, who had previously dated defendant, testified that on Tuesday, 20 September 2005, defendant came to the house on Martin Street where she lived with her mother, Vicki Edwards, at 8:05 a.m. after Anika had put her children on the school bus. He was driving a "silvery" Buick that she had never seen him drive before.

At a little before or after 10:00 a.m. on Tuesday morning, 20 September 2005, defendant came to Mr. Sawyer's store with a third collection of jewelry, for which Mr. Sawyer paid him $40.00. Renee Dawson subsequently testified that the items of jewelry sold to Mr. Sawyer by defendant were items she recognized as belonging to her mother.

Ms. Edwards testified that defendant returned to her house that morning to bring her a sandwich and stayed at her house for an hour or two. He went back a third time around 2:30 p.m., and a fourth time around 6:00 p.m. According to Ms. Edwards, when defendant came to her house the second, third, and fourth times, he was walking and she did not see a car. She also testified that she saw the silver Buick she had previously seen defendant driving parked three houses down the street from her house.

Ms. Dawson's bank records showed that on Tuesday, 20 September 2005, someone used her bank card to attempt to withdraw $100 and $40 at the Gateway Bank at 400 West Ehringhaus Street and $100 at the Gateway Bank at 1404 West Ehringhaus Street. The video surveillance matching up with the date and time of those transactions showed a man attempting to use the ATM. The man on the video was wearing the same clothes and hat that defendant was wearing that day, and he matched the physical description of defendant.

When the mailman arrived at Ms. Dawson's house on Tuesday morning at around 11:30 a.m. to deliver the mail, there was a newspaper on the porch. He had never seen one there before when delivering the mail. Additionally, when he "went to put the mail in the box, there was still mail in there from the day before and that struck [him] as unusual." The mailman did not see Ms. Dawson's car in the driveway.

Ms. Weaver was also concerned when she noticed Ms. Dawson's car was still not in the driveway on Tuesday morning. Although Ms. Dawson usually asked Ms. Weaver to pick up her mail and newspapers when she went out of town, Ms. Dawson had not indicated she would be going out of town. She was concerned because Tuesday's newspaper was still on the porch, and Monday's mail was in the mailbox. Ms. Weaver called Ms. Dawson's sister and daughter to express her concern. At their request, she went over to check on Ms. Dawson that afternoon.

When Ms. Weaver found the front door of Ms. Dawson's house locked, she went around to the side of the house and went in through the unlocked kitchen door. Ms. Weaver walked around the first floor of the house calling for Ms. Dawson. She left the house through the kitchen door and called Renee Dawson to tell her that she could not find her mother. While Ms. Weaver was on the phone with Renee Dawson, Ms. Neece arrived, went in the house, and came back out, saying she had found Ms. Dawson's dead body.

The two women went back into the house and found Ms. Dawson slumped over in the armchair in front of her television wearing her nightgown and robe. Ms. Dawson had suffered "a blow to the top of her head and her hair was matted with blood and there was maybe a little blood in the chair, but on her back and also it looked like she had been hit in the side of the face too." The two women left the house and called 911 from the yard.

Lieutenant John Etheridge arrived at Ms. Dawson's house at around 4:00 p.m. that afternoon. When more officers arrived, they cleared the house to make sure no one else was inside and then secured the scene. Between 6:45 and 7:15 p.m. that evening, Etheridge put out a call to other officers to "be on the lookout" ("BOLO") for Ms. Dawson's silver Buick.

SBI Agent Anthony Jernigan searched the crime scene. He found Ms. Dawson's body "sitting upright or partially upright with her head more in a slumped over or a bent position with the head being—leaning over toward the right shoulder." He testified that she was wearing "a floral type of robe and a white nightgown" and that there was a "considerable amount of blood that was located on her head primarily on the rear portion of her head." Near the body, Jernigan found a magazine and "various credit card and bank statements and some other bill type statements," as well as a newspaper dated Monday, 19 September 2005.

Usually, when Ms. Dawson sat in the armchair where she was found, she had her large pocketbook right next to her feet. The pocketbook had many compartments in which she carried "everything in there that was important, bills, papers, insurance things, everything like that." The purse was not found at the crime scene and was never recovered.

While observing Ms. Dawson's body, Jernigan found "two [2] indentations, indented areas, on the back of her head, one [1] more toward the top and another one [1] a little lower on the back of her head." (Bracketed material original.) There was a piece of wood lying in Ms. Dawson's lap. The agent noticed two baseball bats in the house, one near the kitchen door and one near the front door. He testified that the piece of wood that was located on Ms. Dawson's lap appeared "consistent with the bat that was located at the rear door of the residence." He testified that "[t]here was some splintered areas on this bat and upon comparing or observing the piece of wood that had been in her lap and comparing it to the bat and again it appeared to be consistent with the bat." Finally, Jernigan said that "[t]here were some hairs that were located on both bats which were collected during the crime scene search." SBI Agent Lucy Milks testified that the hair found on the bats taken from Ms. Dawson's house matched Ms. Dawson's hair. SBI Agent Jennifer Remy testified that the piece of wood found on Ms. Dawson's lap matched wood from the bats and also appeared to fit in the hole in one of the bats.

The search of the crime scene also revealed some jewelry lying in an open drawer and on top of the dresser in a downstairs bedroom. Neither door of the house showed any sign of forced entry, but a single piece of glass had been removed from the back door such that one of the officers could slide his hand through and open the door.

Deputy Jeremy Reed heard the BOLO issued for Ms. Dawson's car and later on Tuesday evening found a car matching its description parked on South Martin Street in front of the houses numbered 800 to 801. Anika and Vicki Edwards lived at 707 South Martin Street.

Officer Glenn Needham was assigned to set up surveillance on the car. At approximately 2:15 a.m. on Wednesday, 21 September 2005, he observed a black male, whom he later identified as defendant, approach the car on foot. Defendant stood in front of the car for a second and then opened the door on the driver's side. He took a rag and seemed to make a wiping motion. He leaned partially into the passenger area of the car, and "[i]t appeared as [if] he was reaching

for something on the right side of the steering wheel and collected an unknown item." He then locked the car's doors, turned his head to the right and left, and started walking quickly down the street.

Officer Needham got out of his car and started jogging at a low crouch after defendant, hiding behind parked cars as he ran. At some point, defendant looked over his shoulder and began to run. Officer Needham sprinted after defendant, identifying himself as the police and ordering defendant to stop running. Officer Needham was dressed in SWAT gear that included a vest with the words "POLICE."

Defendant ran behind the house located at 707 South Martin Street, and Officer Needham found him flat against the wall in the yard. Officer Needham pointed his gun at him and told him to show him his hands. As defendant complied, he threw a set of keys that were later determined to belong to Ms. Dawson's car. Officers also found a towel lying next to where the keys had landed. Defendant was arrested and taken into custody.

Azree Jones was the next door neighbor of Vicki and Anika Edwards. About a year after Ms. Dawson's death, Ms. Jones found a grocery bag containing credit cards with Ms. Dawson's name on them in her backyard dog pen. Ms. Jones believed that her dog had likely pulled the bag through the fence so that he could chew on the cards. Several of the cards had bite marks on them.

Defendant was charged with first degree murder, felonious larceny of a motor vehicle, and felonious possession of a stolen motor vehicle. Defendant was tried capitally in Pasquotank Superior Court. The parties stipulated that, among other things, (1) there was no blood on defendant's clothing when he was arrested; (2) there was no transfer of hair or fibers between defendant and Ms. Dawson; (3) there were no latent fingerprints on the bats or the wood fragments from the bats; and (4) there were no identifiable latent prints from Ms. Dawson's house or the car.

At trial, in addition to the above evidence, the State presented the testimony of the medical examiner, Dr. Gilliland. Dr. Gilliland testified that Ms. Dawson's head injuries were caused by a "blunt force impact" with an instrument that had a "round or rather broad surface." Ms. Dawson's injuries indicated that she had been hit from behind and that "her upper trunk and head were upright at the time." There was no evidence of any defensive injuries to the body. Dr. Gilliland also testified that Ms. Dawson's skull was not fractured by the blows to her head, meaning that "these were relatively

mild blunt force injuries of the head." Dr. Gilliland said that the injuries to Ms. Dawson "would not be expected to cause the death of a healthy individual."

It was Dr. Gilliland's opinion that "Carolyn Dawson died as the result of blunt force injuries of the head. But significant contributing factors were the hypertensive and arterial sclerotic cardiovascular disease, the heart disease caused by high blood pressure and hardening of the arteries." Dr. Gilliland concluded with reasonable medical certainty that Ms. Dawson was killed on Monday, 19 September 2005.

At the conclusion of the State's evidence, defendant moved to dismiss the murder and larceny of a motor vehicle charges. That motion was denied. Defendant did not present any evidence and renewed his motion to dismiss, which was again denied. The jury found defendant guilty of first degree murder under the theory of premeditation and deliberation and under the felony murder rule. Defendant was also convicted of felonious larceny of a motor vehicle and felonious possession of a stolen motor vehicle.

Following the sentencing hearing, the jury found the one aggravating circumstance submitted by the State: that the murder was committed for pecuniary gain. The jury then found 17 of the 18 mitigating circumstances on which it was instructed, but concluded that the mitigating circumstances were insufficient to outweigh the aggravating circumstance. The jury did not, however, unanimously find that the aggravating circumstance was sufficiently substantial to call for the death penalty, when considered with the mitigating circumstances. The jury, therefore, recommended a sentence of life imprisonment without parole.

The trial court sentenced defendant to life in prison without parole for the murder conviction, but arrested judgment on the felony possession of a stolen motor vehicle charge. The trial court also imposed a concurrent presumptive-range sentence of 14 to 17 months imprisonment for the larceny of a motor vehicle charge. Defendant gave notice of appeal in open court.

Discussion

Defendant challenges the trial court's denial of his motion to dismiss the charge of first degree murder for insufficiency of the evidence. Defendant does not contest his conviction of larceny of a motor vehicle. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d

29, 33 (2007). "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." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is that amount of evidence "sufficient to persuade a rational juror to accept a particular conclusion." *State v. Goblet*, 173 N.C. App. 112, 118, 618 S.E.2d 257, 262 (2005).

"The trial court in considering such motions is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. When the evidence is circumstantial, "[t]he trial court's function is to test whether a reasonable inference of the defendant's guilt of the crime charged may be drawn from the evidence." *Id.* (emphasis omitted). *See also State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965) ("[I]t is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty."). The Court views the evidence in the light most favorable to the State. *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823, 123 S. Ct. 916 (2003).

I

[1] Defendant's first contention on appeal is that the State failed to present sufficient evidence from which a reasonable jury could find that defendant was the person who murdered Ms. Dawson. Defendant argues this case is substantially similar to five cases in which the Supreme Court held that the State failed to sufficiently prove that the defendant was the perpetrator of the crime. *See State v. Lee*, 294 N.C. 299, 240 S.E.2d 449 (1978); *State v. White*, 293 N.C. 91, 235 S.E.2d 55 (1977); *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281, 98 S. Ct. 402 (1977); *State v. Cutler*, 271 N.C. 379, 156 S.E.2d 679 (1967); *State v. Bell*, 65 N.C. App. 234, 309 S.E.2d 464 (1983), *aff'd per curiam*, 311 N.C. 299, 316 S.E.2d 72 (1984).

In *Cutler*, 271 N.C. at 383, 156 S.E.2d at 682, however, the Supreme Court cautioned that when determining whether the evidence in a criminal case is sufficient to send the case to the jury,

> controlling principles of law are more easily stated than applied to the evidence in a particular case. Of necessity, the application must be made to the evidence introduced in each case, as a

> whole, and adjudications in prior cases are rarely controlling as the evidence differs from case to case.

In *Bell*, 65 N.C. App. at 237, 309 S.E.2d at 466, this Court also noted the difficulty in addressing the sufficiency of the evidence in murder cases such as this one, where the State has presented only circumstantial evidence.

The *Bell* Court explained:

> The real problem lies in applying the test to the individual facts of a case, particularly where the proof is circumstantial. One method courts use to assist analysis is to classify evidence of guilt into several rather broad categories. Although the language is by no means consistent, courts often speak in terms of proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular crime. In most cases these factors are not essential elements of the crime, but instead are circumstances which are relevant to identify an accused as the perpetrator of a crime.

Id. at 238, 309 S.E.2d at 467. The Court continued: "While the cases do not generally indicate what weight is to be given evidence of these various factors, a few rough rules do appear. It is clear, for instance, that evidence of *either* motive or opportunity alone is insufficient to carry a case to the jury." *Id.* at 238-39, 309 S.E.2d at 467. On the other hand, "[w]hen the question is whether evidence of *both* motive and opportunity will be sufficient to survive a motion to dismiss, the answer is much less clear. The answer appears to rest more upon the strength of the evidence of motive and opportunity, as well as other available evidence, rather than an easily quantifiable 'bright line' test." *Id.* at 239, 309 S.E.2d at 468.

All of the cases cited by defendant fall under the general rule expressed in *Bell* that a defendant's motion to dismiss should be allowed when the State presents only evidence of *either* motive *or* opportunity. In *Bell*, *White*, and *Cutler*, the State presented evidence of opportunity without presenting any evidence of the defendant's motive for the murder. *See Bell*, 65 N.C. App. at 241, 309 S.E.2d at 469 ("In sum, the evidence taken in the light most favorable to the state at the most shows only defendant had an opportunity to kill the victim. As discussed above, evidence of opportunity alone is insufficient to survive a defendant's motion to dismiss."); *White*, 293 N.C. at 96-97, 235 S.E.2d at 59 (noting that "no motive was estab-

lished for the crime[,]" "no flight was attempted by the defendant[,]" and the State only "established that the defendant had an opportunity to commit the crime charged"); *Cutler*, 271 N.C. at 384, 156 S.E.2d at 682 ("There is no evidence to show ill will between the deceased and the defendant or any other motive for the defendant to assault or kill the deceased.").

In *Furr* and *Lee*, on the other hand, the State presented evidence of motive, but not opportunity. *See Lee*, 294 N.C. at 303, 240 S.E.2d at 451 (holding that while evidence that defendant threatened to kill victim two days before her death and had previously been violent toward her was enough to establish motive, "[t]he criminal act cannot be inferred from evidence of state of mind alone" when State presented no evidence placing defendant at murder scene); *Furr*, 292 N.C. at 718-19, 235 S.E.2d at 198 ("The evidence shows that defendant wanted his wife dead; that he actively sought her death; and that he harbored great hostility toward her. This, however, without more is not enough to permit a jury to find that he killed her.").

In contrast to those cases, the State in this case presented ample evidence of *both* motive and opportunity. First, the State presented evidence that defendant had a financial motive for killing Ms. Dawson. Although defendant was not known to have a car and usually rode a bike or asked for rides, he was seen driving a car ultimately determined to be Ms. Dawson's car on the day of and the day after her murder and offered to sell a car to a junk car dealer.

In addition, Ms. Dawson's purse, which she usually kept by her side while sitting in her chair at home, was missing when her body was discovered. On the day after her murder, a man matching defendant's description was captured on surveillance video using Ms. Dawson's bank card at two ATMs attempting to withdraw $240. A bag containing Ms. Dawson's bank cards was later recovered in the yard next to the house where defendant had visited his former girlfriend several times the day after the murder and where he was arrested.

On the Friday and Sunday before the murder, defendant sold Mr. Sawyer several items of jewelry belonging to Ms. Dawson for cash, telling Mr. Sawyer there was more jewelry, but refusing to take Mr. Sawyer to go see it. On the morning after Ms. Dawson was killed, defendant sold Mr. Sawyer more jewelry belonging to Ms. Dawson.

All of this evidence, taken together, was sufficient evidence to allow the jury to conclude that defendant had a financial motive to

kill Ms. Dawson. *See State v. Ledford*, 315 N.C. 599, 614, 340 S.E.2d 309, 319 (1986) (holding State's evidence was sufficient to send issue of defendant's identity as the perpetrator of a murder to the jury when defendant displayed roll of money after defendant was seen stepping onto sidewalk in front of victim's house; defendant had a $100 bill, four $50 bills, six $20 bills, and one $1 bill in his possession when he was arrested; and victim left couple of $100 bills, several $50 bills, and several $20 bills in jar in home on Wednesday prior to assault); *State v. Barnett*, 141 N.C. App. 378, 384, 540 S.E.2d 423, 428 (2000) (holding that State's evidence that defendant had been unemployed prior to murder, had been drinking and using drugs before murder, and only had loose change in his possession on morning of murder "permitted the inference that defendant was in need of money and robbed and murdered the victim to obtain that money"), *appeal dismissed and disc. review denied*, 353 N.C. 527, 549 S.E.2d 552, *aff'd per curiam*, 354 N.C. 350, 554 S.E.2d 644 (2001).

The State also presented substantial evidence showing that defendant had the opportunity to murder Ms. Dawson. Because defendant had worked for Ms. Dawson in the past, defendant knew Ms. Dawson and had been inside her house on multiple occasions, giving him the chance to learn the layout of her house and where she kept valuable items, including her jewelry, keys, and bank cards. When Ms. Dawson's body was discovered, investigators found that a pane of glass had been removed from the back door to her house, allowing someone to enter the house easily.

Mr. Sawyer's testimony that defendant sold him jewelry belonging to Ms. Dawson in the days before her murder would allow the jury to find that defendant had been in Ms. Dawson's house on at least two occasions without her knowledge during the days immediately prior to the murder. Moreover, defendant was seen walking near Ms. Dawson's house and had asked for a ride to Flora Street on that Sunday. All of this evidence would permit a jury to conclude that defendant had been entering Ms. Dawson's house in the days before the murder. *See State v. Murphy*, 342 N.C. 813, 820, 467 S.E.2d 428, 432 (1996) (holding State's evidence sufficient to survive motion to dismiss where defendant's house was short walk from murder scene, defendant was aware that he could sneak in and out of plant where murder took place by sliding under certain spot in fence, defendant knew victim would be working alone that night and that front door would be unlocked, and defendant knew where he could find supplies to help him clean up crime scene and protect his clothes from blood).

Mr. Sawyer also testified that defendant sold him more jewelry on Tuesday morning, the day after Ms. Dawson's murder. In addition, Ms. Dawson's car was not parked in its usual spot in her driveway on Monday between 10:00 and 10:30 a.m., and shortly thereafter, defendant was seen driving a car later determined to be Ms. Dawson's car. Ultimately, defendant was found by police as he was trying to wipe down Ms. Dawson's car with a towel while it was parked near his ex-girlfriend's house. A jury could reasonably find, based on defendant's having Ms. Dawson's car Monday morning and his sale of her jewelry Tuesday morning, that defendant returned to the house on Monday morning before 10:00 a.m., the day of the murder.

These facts are very similar to the evidence held sufficient to send the identity of the perpetrator to the jury in *Powell*, 299 N.C. at 101, 261 S.E.2d at 119, in which the elderly victim was found stabbed to death in her home after neighbors became concerned that her car was not parked in its usual spot at her house. The Court concluded that the State presented sufficient evidence that the defendant was the perpetrator based on the following evidence:

> The time of death was likely in the early morning of 15 April 1978. This is consistent with the autopsy report and the fact that a coffee pot Mrs. Walker normally used only in the morning was still on. Shortly after the probable time of death, defendant was seen with Mrs. Walker's car. His fingerprints were found on the rear view mirror. The carving knife missing from the house was found in the car, and also bore defendant's fingerprints. Also, shortly after the probable time of death, defendant delivered the victim's television to his cousins, the McNeills.
>
> Victim's house was locked and windows were unbroken, giving rise to the supposition that Mrs. Walker knew her murderer and let him in. Defendant was known to Mrs. Walker's neighborhood where he had been a visitor to his father and stepmother.
>
> Moreover, when first approached by authorities on this matter, defendant fled. While flight by the defendant does not create a presumption of guilt, it is some evidence which may be considered with other facts and circumstances in determining guilt.

Id. at 100-01, 261 S.E.2d at 118.

The evidence in *Powell* parallels that presented in this case. Although the State in *Powell* also had evidence of the defendant's fingerprints on a knife belonging to the victim, there was no contention

that the knife was the murder weapon—the knife was simply a piece of property of the victim's that had been taken by the defendant. As in *Powell*, the State in this case presented evidence of (1) defendant's being in possession of the victim's car shortly after the probable time of her death, (2) defendant's also having possession of other property (jewelry and an ATM card) belonging to the victim that would have likely been taken at the time of the victim's death, (3) defendant's familiarity with the victim's house and access to the house the days before the murder, and (4) defendant's effort to eliminate evidence by wiping down the car and his flight when confronted by police. Based on this evidence, we hold that the State presented substantial evidence of defendant's identity as the perpetrator—including evidence showing both motive and opportunity—such that a reasonable juror could have concluded that defendant was the person who killed Ms. Dawson.

II

[2] Defendant also argues that the trial court erred in submitting the charge of first degree murder under the theory of felony murder to the jury because there was insufficient evidence that the murder was committed during the course of or in furtherance of a felony. "First-degree murder by reason of felony murder is committed when a victim is killed during the perpetration or attempted perpetration of certain enumerated felonies or a felony committed or attempted with the use of a deadly weapon." *State v. Gibbs*, 335 N.C. 1, 51, 436 S.E.2d 321, 350 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881, 114 S. Ct. 2767 (1994). "[T]o support convictions for a felony offense and related felony murder, all that is required is that the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction." *State v. Thomas*, 329 N.C. 423, 434-35, 407 S.E.2d 141, 149 (1991).

The State submitted robbery as the underlying felony offense. *See State v. Staten*, 172 N.C. App. 673, 687-88, 616 S.E.2d 650, 660 (explaining that because "[c]ommon law robbery is a lesser-included felony offense of armed robbery[,]" it "can properly serve as the underlying felony for defendant's first-degree felony murder conviction"), *appeal dismissed and disc. review denied*, 360 N.C. 180, 626 S.E.2d 838 (2005), *cert. denied*, 547 U.S. 1081, 164 L. Ed. 2d 537, 126 S. Ct. 1798 (2006). Defendant does not contend that the State failed to present sufficient evidence to support the elements of robbery, but rather argues that the State failed to show that the robbery occurred in the same time frame as Ms. Dawson's death.

The State presented evidence that Ms. Dawson kept her pocketbook next to her armchair when she was sitting in the chair. She usually kept her credit card bills in the pocketbook. When Ms. Dawson's body was found in the armchair, her pocketbook was missing, and her credit card bills and statements were strewn about. A person matching defendant's description was videotaped attempting to use Ms. Dawson's ATM card to withdraw money the day after her death. Investigators later recovered a bag of Ms. Dawson's credit cards in the yard next to the house defendant had visited several times the day after the murder and where he was arrested.

Our appellate courts have held that evidence that a victim's wallet or purse was found emptied at the crime scene is sufficient to show that a robbery occurred at the time of the murder. *See*, *e.g.*, *State v. Palmer*, 334 N.C. 104, 112-13, 431 S.E.2d 172, 176 (1993) (upholding denial of defendant's motion to dismiss felony murder charge where evidence showed that victim always had money with her, but when victim was found, victim's purse had been emptied and contained no money); *State v. Montgomery*, 331 N.C. 559, 566, 417 S.E.2d 742, 746 (1992) (holding there was substantial evidence to allow jury to find defendant guilty under felony murder theory where pocketbook of victim's roommate had been rifled through and money in pocketbook was missing); *State v. Quick*, 329 N.C. 1, 20, 405 S.E.2d 179, 191 (1991) (holding that State presented sufficient evidence that killing occurred during armed robbery when defendant was borrowing money from friends in days before murder, it was common knowledge that victim carried large amounts of money on his person, victim's billfold was empty when found at murder scene, and defendant was in possession of significant amount of money day after murder).

In sum, we hold that the State's evidence was sufficient to allow a reasonable jury to find that Ms. Dawson was killed during the commission of a robbery. The trial court, therefore, properly denied defendant's motion to dismiss the charge of first degree murder under the felony murder rule.

As we have upheld defendant's murder conviction on the basis of felony murder, we need not reach defendant's argument that the State did not present sufficient evidence of premeditation and deliberation. As the Supreme Court in *State v. Mitchell*, 342 N.C. 797, 813, 467 S.E.2d 416, 425 (1996), explained:

> The jury found defendant guilty on both a theory of felony murder and a theory of premeditation and deliberation. Because we

have found that there is sufficient evidence of the underlying felony to support defendant's conviction of first-degree murder under the felony murder rule, we need not discuss defendant's contention that there was insufficient evidence to convict him of first-degree murder under a theory of premeditation and deliberation. In *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 560-61 (1989), we said, "[p]remeditation and deliberation is a theory by which one may be convicted of first degree murder; felony murder is another such theory. Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes." Accordingly, we reject defendant's final argument.

We, therefore, find no error.

No error.

Judges McGEE and BEASLEY concur.

WEIN II, LLC, PLAINTIFF v. WILLIAM D. PORTER AND WIFE, MARY M. PORTER; DOUGLAS W. GOFF AND WIFE, CATHY M. GOFF; S. PAULINE HENDERSON; JOSEPH M. BELL AND WIFE, WILLDA Y. BELL; MADGE MARLER; ETHEL T. JACOBSON; TERRY L. ROGERS AND WIFE, CAROLYN E. ROGERS; WANETA M. VAN DEUREN; STEPHEN MICHAEL TENSI, JR. AND WIFE, RUTH ANN TENSI; JUSTUS DELANEY AND WIFE, CLELLA DELANEY; JERRY M. MILLICAN AND WIFE, CAROL L. MILLICAN; MORRIS MCGOUGH AND WIFE, ELIZABETH A. MCGOUGH; MARTY M. JOLLEY; MICHAEL MCGOUGH; MAUREEN WILLIAMS; BESSIE M. BARON; WATES AUSTIN COLE AND WIFE, JAN SMITH COLE; TRUSTEES OF CHRIST UNITED METHODIST CHURCH, WEAVERVILLE, NORTH CAROLINA, DEFENDANTS

No. COA08-1033

(Filed 4 August 2009)

1. Civil Procedure— summary judgment—issues of law

The trial court did not err in a restrictive covenants case by concluding that only issues of law were presented.

2. Deeds— restrictive covenants—ambiguity—vagueness

The trial court did not err by concluding that defendants were entitled to summary judgment as a matter of law and that the pertinent restrictive covenants were valid and binding on plaintiff even though plaintiff contends they are vague and ambiguous

because: (1) unless the covenants set out a specialized meaning, the language of a restrictive covenant is interpreted by using its ordinary meaning; (2) the plain language of the covenants in the instant case acknowledged that NC DOT restrictions may limit plaintiff's options for siting a driveway, expressed a desire that plaintiff's driveway be as far from the pertinent road as is permitted by NC DOT and other applicable regulations, set out a specific preferred driveway location, required good faith efforts by plaintiff to try to site the driveway at the preferred location, and provided that in no event shall the dual and separate entryways concept be changed; (3) contrary to defendants' assertions, no proof was offered that location A would ever have been permitted; and (4) the meaning of "existing" NC DOT regulations and "dual and separate entryways" is clear, neither phrase suffers from fatal ambiguity, the plain meaning of these terms is that plaintiff must follow pertinent NC DOT regulations and that the parties are restricted from sharing a common driveway, and the restrictive covenants are not void for vagueness and do not bar plaintiff from locating its driveway at location B.

3. Deeds— restrictive covenants—run with land

The trial court did not err by concluding that the pertinent restrictive covenants were valid and binding on plaintiff even though plaintiff contended the restrictive covenants did not meet the requirements for real covenants that run with the land because: (1) in the instant case the parties were either signatories to the original consent judgment or were their successors in interest, thus sufficiently establishing horizontal privity; and (2) the restrictive covenants touched and concerned the land since they address issues such as plaintiff's obligation to create a buffer between any commercial development and the defendants' neighborhood, setback requirements, etc.

4. Deeds— restrictive covenants—public policy

The trial court did not err by concluding that defendants were entitled to summary judgment as a matter of law and that the pertinent restrictive covenants were valid and binding on plaintiff even though plaintiff contended they offended public policy, violated substantive law, and are subject to avoidance for mutual mistake and impossibility of performance because: (1) plaintiffs' arguments on these issues were predicated upon the possibility that the Court of Appeals adopted defendants' interpretation of the restrictive covenants; (2) plaintiff did not argue that these

alleged problems with the restrictive covenants would still be present under its proposed interpretation of the covenants; and (3) as the Court of Appeals has rejected defendants' interpretation, these issues were not reached.

5. Deeds— restrictive covenants--requirements

Although defendants properly asserted on appeal that the restrictive covenants were valid real covenants running with the land and binding on the parties and were not void for vagueness or ambiguity, the restrictive covenants did not impose a categorical requirement that plaintiff's driveway be sited at location A and did not restrict plaintiff from locating a driveway at location B if that was the only place NC DOT will approve.

Appeal by Plaintiff from judgment entered 20 May 2008 by Judge James L. Baker in Buncombe County Superior Court. Heard in the Court of Appeals 24 February 2009.

Patla, Straus, Robinson & Moore, P.A., by Brian D. Gulden, for Plaintiff-Appellant.

Biggers & Associates, PLLC, by William T. Biggers, for Defendant-Appellees.

BEASLEY, Judge.

This appeal arises from the parties' disagreement about the application and interpretation of restrictive covenants recorded in a consent judgment. Plaintiff appeals from the trial court's entry of summary judgment in favor of Defendants. We affirm in part and reverse in part.

Plaintiff (Wein II, LLC) is a limited liability corporation doing business in Asheville, North Carolina, and is the current owner of a 4.4 acre tract (the property) located outside Asheville. The property is bounded on three sides by North Carolina limited access Highway 19-23, New Stock Road, Blueberry Hill Road, and "old 19-23" or Weaverville Road. Blueberry Hill Road connects Weaverville Road with a neighborhood of about fifteen houses, which is referred to in county land records as Section 3 Woodland Hills. Defendants are the property owners in Section 3 Woodland Hills.

Richard and Guelda Jones bought the property in 1976 and sold it to Kenneth Koehler in 1977, subject to restrictive covenants imposing general limitations on the development of the property. In 1994

Koehler filed a declaratory judgment action against property owners in Section 3 Woodland Hills, alleging that the restrictive covenants were "vague and ambiguous" and seeking a declaration that they were "void and unenforceable." In 1995 the parties negotiated an agreement and executed a consent judgment, which was signed by the trial court and filed in August 1995. The consent judgment struck the restrictive covenants, replaced them with eight new covenants, and stated that these covenants would "run with the land." The first five new covenants set out more detailed limitations on commercial development of the property, including restrictions on the number and type of permissible businesses, and required any developer to install fencing along the property line and create a buffer zone between the property and Section 3 Woodland Hills. The next three covenants are the source of the parties' disagreement. These covenants discuss the siting of the property's driveway, and express a preference that the driveway be located as shown on an attached "Exhibit A" (Location A). Location A is on Weaverville Road, about 20 yards from the intersection of Blueberry Hill Road and Weaverville Road.

The property remained undeveloped and was bought by Plaintiff in October 2002. In 2004 Plaintiff submitted a driveway permit application to the North Carolina Department of Transportation (NCDOT), requesting a permit to build a driveway at Location A. The NCDOT rejected Plaintiff's application on the basis of safety concerns about Location A. The only location that the NCDOT would approve for an entry onto the property was on Blueberry Hill Road, 125 feet from the intersection of Blueberry Hill Road and Weaverville Road, and about halfway between the houses in Section 3 Woodland Hills and Weaverville Road (hereafter Location B). In October 2006 Plaintiff obtained a driveway permit for Location B and hired a grading company to start clearing and grading the site. Defendants objected to this, on the grounds that situating the driveway at Location B violated the restrictive covenants in the 1995 consent judgment.

On 27 March 2007 Plaintiff filed a declaratory judgment action against Defendants, some of whom were also defendants in the 1995 action. Plaintiff sought a declaration that "the covenants contained in the Consent Judgment, and in specific, the limitation on placement of an entryway, are unenforceable and improper in all respects" and asserted various grounds for a declaration that the restrictive covenants were not enforceable. In its June 2007 answer, Defendants denied Plaintiff's allegations and brought a counterclaim for a decla-

ration that the restrictive covenants were valid and binding on Plaintiff, including the covenants addressing the siting of a driveway on the property. Both sides filed summary judgment motions, and on 20 May 2008 the trial court granted summary judgment for Defendants. The trial court's order ruled that the restrictive covenants were binding on Plaintiff. Plaintiff has appealed.

Standard of Review

Plaintiff appeals from entry of summary judgment. Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). The movant has the burden of "establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). The "standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

Regarding the evidence that the trial court may consider in ruling on a summary judgment motion, N.C. Gen. Stat. § 1A-1, Rule 56(e) (2007) provides in relevant part that:

> [s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . .

" 'The converse of this requirement is that affidavits or other material offered which set forth facts which would not be admissible in evidence should not be considered when passing on the motion for summary judgment.' " *Strickland v. Doe*, 156 N.C. App. 292, 295, 577 S.E.2d 124, 128 (2003) (quoting *Borden, Inc. v. Brower*, 17 N.C. App. 249, 253, 193 S.E.2d 751, 753, *rev'd on other grounds*, 284 N.C. 54, 199 S.E.2d 414 (1973)). "Hearsay matters included in affidavits should not be considered by a trial court in entertaining a party's motion for summary judgment. Similarly, a trial court may not consider that portion(s) of an affidavit which is not based on an affiant's personal knowledge." *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 776 (1998) (citing *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 52, 191 S.E.2d 683, 688-89 (1972)).

" 'Where both competent and incompetent evidence is before the trial court, we assume that the trial court, when functioning as the finder of facts, relied solely upon the competent evidence and disregarded the incompetent evidence.' When sitting without a jury, the trial court is able to eliminate incompetent testimony, and the presumption arises that it did so." *In re Foreclosure of Brown*, 156 N.C. App. 477, 487, 577 S.E.2d 398, 405 (2003) (quoting *In re Cooke*, 37 N.C. App. 575, 579, 246 S.E.2d 801, 804 (1978); and citing *Walker v. Walker*, 38 N.C. App. 226, 228, 247 S.E.2d 615, 616 (1978)). "A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) (citing Rule 56(e)).

In the instant case, the trial court determined the summary judgment motion on the basis of admissible evidence contained in the deposition of William Porter, the exhibits, and the affidavits of Glenda Weinert, Greg Benton, and William Porter.

In its summary judgment order, the trial court stated in relevant part:

> This cause was heard . . . on motions of the Plaintiff for summary judgment based upon Plaintiff's contentions that the restrictive covenants as contained in the Consent Judgment entered into in 94-CVS-3044 are void for vagueness and ambiguity in fact [and] . . . violate public policy, that the court's approval thereof in 1995 constituted an unconstitutional taking, and that mutual mistake and impossibility of performance render the covenants invalid[,] and [on] the motion of the Defendants for summary judgment contending that the Consent Judgment . . . is valid and binding on the Plaintiff and subsequent owners of the real property in question.
>
> [I]t appears to the court that there are no genuine issues as to any material facts and that the Defendants are entitled to a judgment as a matter of law.
>
> It is therefore ordered . . . that Plaintiff's motion for summary judgment is denied and that summary judgment is granted in favor of the Defendants against the Plaintiff. It is further ordered that the Consent Judgment entered into in 94-CVS-3044 is valid and binding on the Plaintiff and subsequent owners of the real

property in question, and that Plaintiff and subsequent owners are required to comply with the terms and conditions of the consent judgment.

[1] We first consider the trial court's conclusion that there were no genuine issues of material fact.

> In the instant case, each party claims entitlement to summary judgment based on its proposed interpretation of the terms of the same documents . . . . Thus[, "e]ach party based its claim upon the same sequence of events. . . . Neither party has challenged the accuracy or authenticity of the documents establishing the occurrence of these events. Although the parties disagree on the legal significance of the established facts, the facts themselves are not in dispute. Consequently, we conclude that there is no genuine issue as to any material fact surrounding the trial court's summary judgment order."

Wal-Mart Stores, Inc. v. Ingles Mkts., Inc., 158 N.C. App. 414, 416-17, 581 S.E.2d 111, 114 (2003) (quoting *Adams v. Jefferson-Pilot Life Ins. Co.*, 148 N.C. App. 356, 359, 558 S.E.2d 504, 507 (2002)). We conclude that the trial court did not err by concluding that only issues of law are presented.

We next consider the court's conclusions that Defendants were entitled to summary judgment as a matter of law and that the restrictive covenants were valid and binding on Plaintiff. The trial court's order does not state the legal basis for its ruling. However, " '[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.' " *Hill v. West*, 189 N.C. App. 189, 190, 657 S.E.2d 694, 695 (2008) (quoting *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989)).

Regarding the general rules for restrictive covenants:

> an owner of land in fee has a right to sell his land subject to any restrictions he may see fit to impose, provided that the restrictions are not contrary to public policy. . . . A restrictive covenant is a real covenant that runs with the land of the dominant and servient estates only if (1) the subject of the covenant touches and concerns the land, (2) there is privity of estate between the party enforcing the covenant and the party against whom the covenant is being enforced, and (3) the original covenanting parties intended the benefits and the burdens of the covenant to run with the land.

Runyon v. Paley, 331 N.C. 293, 299-300, 416 S.E.2d 177, 182-83 (1992) (citing *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 669, 248 S.E.2d 904, 908 (1978)) (other citations omitted). "An enforceable real covenant is made in writing, properly recorded, and not violative of public policy." *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 555, 633 S.E.2d 78, 85 (2006) (citing *J. T. Hobby & Son, Inc. v. Family Homes of Wake Cty, Inc.*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981)) (other citations omitted).

The 2002 deed to Plaintiff transfers the property subject to "[e]asements, covenants, conditions and restrictions of record[.]" Neither party disputes that the restrictive covenants in the consent judgment were in writing, were properly recorded, and are among the "covenants, conditions and restrictions of record." Plaintiff, however, raises several other challenges to the validity of the restrictive covenants.

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[2] Plaintiff first argues that the restrictive covenants at issue are void as a matter of law, on the grounds that they are vague and ambiguous. Defendants contend that the restrictive covenants are not vague, and assert that Defendants' proposed interpretation of the covenants is the only reasonable interpretation. Although we disagree with Plaintiff's contention that the restrictive covenants are vague, we agree with Plaintiff's position on the proper interpretation of the restrictive covenants.

We first review the principles that guide our analysis of restrictive covenants. "The word covenant means a binding agreement or compact benefitting both covenanting parties. . . . Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property." *Armstrong*, 360 N.C. at 554, 633 S.E.2d at 84-85 (citation omitted). "Judicial enforcement of a covenant will occur as it would in an action for enforcement of 'any other valid contractual relationship.' . . . Thus, judicial enforcement of a restrictive covenant is appropriate at the summary judgment stage unless a material issue of fact exists as to the validity of the contract, the effect of the covenant on the unimpaired enjoyment of the estate, or the existence of a provision that is contrary to the public interest." *Page v. Bald Head Ass'n*, 170 N.C. App. 151, 155, 611 S.E.2d 463, 466 (2005) (quoting *Sheets v. Dillon*, 221 N.C. 426, 431, 20 S.E.2d 344, 347 (1942)).

We also note that:

> [w]hile the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, such covenants are not favored by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land. The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent.

Hobby & Son v. Family Homes, 302 N.C. 64, 70-71, 274 S.E.2d 174, 179 (1981) (citing *Long v. Branham*, 271 N.C. 264, 156 S.E.2d 235 (1967); *Cummings v. Dosam, Inc.*, 273 N.C. 28, 159 S.E.2d 513 (1968); and *Stegall v. Housing Authority of the City of Charlotte*, 278 N.C. 95, 178 S.E.2d 824 (1971)) (other citations omitted). "The law looks with disfavor upon covenants restricting the free use of property. As a consequence, the law declares that nothing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports." *Julian v. Lawton*, 240 N.C. 436, 440, 82 S.E.2d 210, 212 (1954) (citing *Starmount Co. v. Memorial Park*, 233 N.C. 613, 65 S.E.2d 134 (1951)) (other citation omitted).

" '[C]ovenants restricting the use of property are to be strictly construed against limitation on use, and will not be enforced unless clear and unambiguous[.]' This is in accord with general principles of contract law, that the terms of a contract must be sufficiently definite that a court can enforce them." *Snug Harbor Property Owners Asso. v. Curran*, 55 N.C. App. 199, 203, 284 S.E.2d 752, 755 (1981) (quoting *Property Owner's Assoc. v. Seifart*, 48 N.C. App. 286, 269 S.E.2d 178 (1980)) (other citations omitted). Accordingly, courts will not enforce restrictive covenants that are so vague that they do not provide guidance to the court. *Id.*

However, "[t]here is little case law addressing the question of what language in a restrictive covenant is void for vagueness, and what language is not. . . . It appears that we have not dealt with this 'void for vagueness' question because our courts usually supply a definition for an undefined term in a covenant rather than void the entire covenant." *Lake Gaston Estates Prop. Owners Ass'n v. County of Warren*, 186 N.C. App. 606, 612, 652 S.E.2d 671, 675 (2007). Unless the covenants set out a specialized meaning, the language of a restrictive covenant is interpreted by using its ordinary meaning. In the instant case, the first five restrictive covenants in the consent judgment state in relevant part that "the parties have agreed as follows":

1. That the Plaintiff . . . shall have the right to use and subdivide his above described property . . . [into] not more than two (2) lots or tracts. . . .

2. That the Plaintiff . . . may place or develop no more than one (1) fast food facility . . . on [the property.] . . .

3. That the second such lot may be used as permitted by current zoning regulations, save and excepting bars, game rooms and gas service stations or an additional fast food facility[.]

4. That the Plaintiff . . . shall retain and preserve a one hundred (100) foot buffer zone, . . . adjacent to Lots 1, 2, and 3, . . . [and] shall establish an easement for the benefit of the Defendants[.] . . .

5. That upon the development [of the property] . . . an eight (8) foot fence shall be erected on the property line separating the property . . . [and] Section 3 Woodland Hills. . . . [The] fence shall be located on the Plaintiff's side of the ten (10) feet utility easement[.] . . .

(emphasis added). These covenants state specific rules and express Plaintiff's obligations in unmistakably mandatory language, as duties Plaintiff "shall" honor. The next three covenants employ a different vocabulary and tone:

6. That the parties hereto recognize and understand that there exists Controlled Access designation . . . restricting access to the property of the Plaintiff[.] . . .

7. That the Plaintiff . . . reserve[s] the right to attempt to obtain access over the Controlled Access area for . . . ingress, egress and regress to [the property];

8. That the parties hereto understand and desire that access for ingress, egress and regress . . . of the [property] . . . shall be as far away from Blueberry Hill Road, . . . as permitted by existing [NCDOT] and other applicable regulations. To this end . . . Plaintiff . . . shall use good faith efforts to structure the access as set forth in Exhibit 'A' as the said access may be approved by [governmental agencies] . . . with only such minor variations as might reasonably be required. In no event, however, shall the dual and separate entryways concept be changed. It being the intent of the parties that the parties shall

> at all times maintain the concept of separate accesses to their respective properties. . . .

(emphasis added). "Presumably the words which the parties select were deliberately chosen and are to be given their ordinary significance." *Briggs v. Mills, Inc.*, 251 N.C. 642, 644, 111 S.E.2d 841, 843 (1960) (citations omitted). In this case, the plain language of the covenants: (1) acknowledges that NCDOT restrictions that may limit Plaintiff's options for siting a driveway; (2) express a "desire" that Plaintiff's driveway be as far from the Blueberry Hill Road as is permitted by NCDOT and other "applicable regulations"; (3) set out a specific preferred driveway location; (4) require "good faith efforts" by Plaintiff to try to site the driveway at the preferred location, and; (5) provide that in no event shall the "dual and separate" entryways concept be changed.

The restrictive covenants do not however forbid Plaintiff from siting its driveway on a particular public road, such as Blueberry Hill Road. Nor do the covenants state that Plaintiff cannot build a driveway off the same road that connects Defendants' neighborhood with Weaverville Road. The covenants do not state that the only location Plaintiff may place a driveway is at Location A. We conclude that these restrictive covenants state a preference for Plaintiff's driveway to be sited at Location A, and require "good faith" efforts to achieve this goal, while recognizing that NCDOT regulations may determine the ultimate location of the driveway. We further conclude that the restrictive covenants contain no language barring Plaintiff from siting his driveway at Location B.

We have considered the parties' arguments about the meaning of the word "existing" in the restrictive covenants statement that the parties "desire that access for ingress, egress and regress [of the property] . . . shall be as far away from Blueberry Hill Road, . . . as permitted by existing [NCDOT] and other applicable regulations." We conclude that this part of the restrictive covenants is simply an acknowledgment that, notwithstanding the parties' expressed desire to site Plaintiff's driveway at Location A, Plaintiff will be required to comply with the NCDOT regulations in effect at the time he makes an application for a driveway permit.

Defendants assert that "existing" refers to the governmental regulations in effect when the parties signed the consent judgment. Defendants argue that this conclusion is required by *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 478 S.E.2d 518 (1996). We

disagree. In *Bicket*, the parties were in dispute over which country club privileges were granted by different classes of membership. In 1980 the parties executed a consent judgment providing in part that country club members would have the "use of all existing golf courses." During the following decade, the country club made various changes, including adding new golf courses, increasing fees, and creating additional classes of membership. This Court held that the promise of the "use of all existing golf courses" was limited to those golf courses that physically "existed" at the time the consent judgment was signed, and did not guarantee access to golf courses constructed years later.

The holding of *Bicket* appropriately interpreted the reference to existing golf courses, because a golf course is a tangible entity with a physical "existence." However, *Bicket* is easily distinguished from the instant case and is not controlling precedent. Laws and regulations are not physical objects, and the parties are presumed to know that statutes and regulations are subject to change. Thus, "existing" regulations are necessarily those that "exist" when an applicant seeks a driveway permit. Further, even without this phrase in the restrictive covenant, Plaintiff would be required to follow NCDOT regulations in effect when it applies for a driveway permit. Therefore, this phrase does not add additional restrictions, but merely acknowledges that NCDOT and other regulations might prohibit locating the driveway at Location A.

Defendants, however, assert that the word "existing" refers exclusively to the laws and regulations "existing" in 1995 when the consent judgment was signed. Defendants fail to explain how the covenant could possibly "run with the land" if Plaintiff's successors in interest were unable to comply with regulations in effect when they sought a driveway permit. Defendants contend that any application made under regulations not "existing" in 1995 would be "untimely." We reject Defendants' assertion for several reasons.

Firstly and most importantly, the consent judgment does not state any of the restrictions urged by Defendants. It does not state that Location A is permissible as of the time the consent judgment was executed, and does not impose a time limit on Plaintiff's application for a driveway permit. Defendants would have us interpret the restrictive covenants to include additional restrictions that are not in the actual document. We decline. "Restrictive covenants cannot be established except by a[n] instrument of record contain-

ing adequate words so unequivocally evincing the party's intention to limit the free use of the land that its ascertainment is not dependent on inference, implication or doubtful construction. . . . 'The courts are not inclined to put restrictions in deeds where the parties left them out.' " *Marrone v. Long*, 7 N.C. App. 451, 454, 173 S.E.2d 21, 23 (1970) (quoting *Hege v. Sellers*, 241 N.C. 240, 249, 84 S.E.2d 892, 899 (1954) and citing *Turner v. Glenn*, 220 N.C. 620, 18 S.E.2d 197 (1942)).

Defendants' position is predicated upon their unsupported claim that, had application been made in 1995, Location A would have been approved. Contrary to Defendants' assertions, no proof was offered that location A would ever have been permitted. In his deposition, William Porter discussed Exhibit A, depicting Location A. He admitted that he was not present when the sketch was made and did not know who had drawn it. His personal opinion regarding the likelihood that Location A might have been approved in 1995 was based solely on speculation. Defendants presented no testimony from NCDOT representatives, no certified documentary exhibits showing approval, or any other admissible evidence that this location would have been possible at any time. Nor do Defendants articulate any reasonable basis for their contention that the NCDOT would ever have approved a driveway so close to the intersection of Blueberry Hill Road and Weaverville Road.

Plaintiff argues on appeal that the term "existing" should be held to allow a driveway as permitted by regulations "existing" when it applied for a permit, as this is the less restrictive reading. We agree and conclude that "existing" NCDOT regulations are regulations in effect when application is made for a driveway permit. Furthermore, regardless of which regulations are deemed to be pertinent to the application, the restrictive covenants require only a "good faith" effort to site the driveway at A, and do not make this location mandatory. Plaintiff "contends that its driveway permit complies with the covenants" because its access is as far from Blueberry Hill Road "as permitted by NCDOT regulations that existed on the date the application was made." We express no opinion on whether Plaintiff has otherwise complied with the restrictive covenants, but agree with Plaintiff that it has adhered to this particular requirement.

The other phrase that is discussed in the parties' appellate briefs is the restrictive covenants' provision that the parties would always maintain "dual and separate" entryways into their respective properties. In his deposition, Porter testified that the restrictive covenants

stated "thou shalt not access Blueberry Hill Road for any purpose[.]" In fact, the restrictive covenants do not state this or anything similar to this. As discussed above, these three covenants appear to recognize the likelihood that the parties' preferences will be modified by applicable regulations. Porter may have been referring to the provisions regarding "dual and separate entryways." We reiterate that, unless a specialized definition is provided, the language in a contract will be " 'given effect according to the natural meaning of the words used.' " *Rosi v. McCoy*, 319 N.C. 589, 592, 356 S.E.2d 568, 570 (1987) (quoting *Callahan v. Arenson*, 239 N.C. 619, 625, 80 S.E.2d 619, 623-24 (1954)).

In the instant case, the restrictive covenants provide no specialized definition for these words. The Merriam-Webster Online Dictionary 2009[1], defines "dual" in relevant part as "consisting of two parts or elements or having two like parts"; "separate" as "not shared with another"; "entryway" as "a passage for entrance"; and "driveway" as "a private road giving access from a public way to a building on abutting grounds." An "entryway" is different from a public road, such as Weaverville Road or Blueberry Hill Rd. The covenant's reference to "dual and separate entryway" into the parties' respective properties plainly expresses a requirement that the parties' each have their own driveway, with no shared driveway. In the instant case, the parties each have a separate driveway and it is undisputed that siting Plaintiff's driveway at Location B would not trespass on any of the Defendants' properties. Therefore, applying the plain ordinary meaning of the words used, it appears that the parties have the requisite "separate accesses to their respective properties" if Plaintiff's driveway is sited at Location B.

Defendants would have us interpret this as meaning "Plaintiff's driveway shall not be located on the same public road that leads to our neighborhood." However, the parties did not draft a restrictive covenant that would forbid Plaintiff from constructing a driveway along Blueberry Hill Road. We must presume that no such limit was intended.

We conclude that the meaning of "existing [NCDOT]" regulations and "dual and separate entryways" is clear; that neither phrase suffers from fatal ambiguity; and that the plain meaning of these terms is that Plaintiff must follow pertinent NCDOT regulations and that the parties are restricted from sharing a common driveway. We conclude

1. http://www.merriam-webster.com/dictionary/

that the restrictive covenants are not void for vagueness, and do not bar Plaintiff from locating its driveway at location B.

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[3] Plaintiff also argues that the restrictive covenants do not meet the requirements for real covenants that run with the land. We disagree.

"A restrictive covenant is a real covenant that runs with the land of the dominant and servient estates only if (1) the subject of the covenant touches and concerns the land, (2) there is privity of estate between the party enforcing the covenant and the party against whom the covenant is being enforced, and (3) the original covenanting parties intended the benefits and the burdens of the covenant to run with the land." *Runyon v. Paley*, 331 N.C. at 299-300, 416 S.E.2d at 183 (citation omitted). Regarding the "touch and concern" requirement, *Runyon* stated:

> [f]or a covenant to touch and concern the land,. . . [i]t is sufficient that the covenant have some economic impact on the parties' ownership rights by, for example, enhancing the value of the dominant estate[.] . . . It is essential, however, that the covenant in some way affect the legal rights of the covenanting parties as landowners.

Id. at 300, 416 S.E.2d at 183 (citations omitted). Regarding privity, *Runyon* held that:

> most states require two types of privity: (1) privity of estate between the covenantor and covenantee at the time the covenant was created ("horizontal privity"), and (2) privity of estate between the covenanting parties and their successors in interest ("vertical privity"). . . . Vertical privity, which is ordinarily required to enforce a real covenant at law, requires a showing of succession in interest between the original covenanting parties and the current owners of the dominant and servient estates. . . . [T]o show horizontal privity, it is only necessary that a party seeking to enforce the covenant show that there was some "connection of interest" between the original covenanting parties[.]

Id. at 302-03, 416 S.E.2d at 184. In the instant case, the parties are either signatories to the original consent judgment, or are their successors in interest. We conclude that this sufficiently establishes horizontal privity. The restrictive covenants address issues such as Plaintiff's obligation to create a buffer between any commercial

development and the Defendants' neighborhood, setback requirements, etc. We easily conclude that these "touch and concern" the land. This assignment of error is overruled.

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[4] Plaintiff also argues on appeal that, if the restrictive covenants are interpreted as proposed by Defendants, they would offend public policy, violate substantive law, and be subject to avoidance for mutual mistake and impossibility of performance. In addition, Plaintiff asserts that, if it is forced to comply with Defendants' interpretation of the restrictive covenants, it then would be entitled to an easement by necessity, or financial compensation for an unconstitutional taking of property. However, Plaintiffs' arguments on these issues are predicated upon the possibility that this Court adopts Defendants' interpretation of the restrictive covenants. Plaintiff does not argue that these alleged problems with the restrictive covenants would still be present under its proposed interpretation of the covenants. As we have rejected Defendants' interpretation, we do not reach these issues.

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[5] Defendants argue on appeal that the restrictive covenants are valid real covenants running with the land and binding on the parties. They also assert that the covenants are not void for vagueness or ambiguity. We agree with these contentions. However, we conclude that the restrictive covenants do not impose a categorical requirement that Plaintiff's driveway be sited at location A, and do not restrict Plaintiff from locating a driveway on Blueberry Hill Road, if that is the only place the NCDOT will approve.

We conclude that the trial court did not err by entering an order finding the general validity and enforceability of the restrictive covenants and their applicability to the parties. We further conclude that, as a matter of law, that the Plaintiff, and subsequent owners, must comply with the terms and conditions of the consent judgment. And lastly, we conclude that the restrictive covenants do not forbid Plaintiff from constructing a driveway on Blueberry Hill.

Affirmed in part, reversed in part.

Judges McGEE and GEER concur.

STATE OF NORTH CAROLINA v. MICHAEL HARRISON HUNT, JR.

No. COA08-1377

(Filed 4 August 2009)

1. Criminal Law— instruction on felony murder—self defense not undermined

The trial court did not err by instructing the jury on felony murder where defendant argued that the instruction undermined his self-defense claim and deprived defendant of consideration of voluntary manslaughter. The instructions clearly placed the burden of proof on the State for self-defense, both as to the degree of homicide and the firing into an occupied vehicle.

2. Criminal Law— extension of session—no formal order

The trial court sufficiently complied with N.C.G.S. § 15A-1238, and the judgments against defendant were not null and void as being entered out of term, where there was no formal written order of the trial court's extension of the session from one week to the next, but the trial court repeatedly announced that it was recessing court with no objection by defendant.

3. Jury— polling—one question for two convictions—proper

The jury was properly polled where the clerk asked each juror one question about agreement with the guilty verdict for both of the offenses of which defendant was convicted, rather than asking a separate question for each offense.

4. Jury— selection—comment on gunplay in Durham

The trial court did not abuse its discretion by not striking the entire jury panel where a prospective juror commented that there was too much gunplay in Durham. Firearms were clearly going to be a part of the trial and the issue was throughly explored during *voir dire*, but defendant did not articulate why a generalized observation about gun violence by a potential juror was so damaging that a new trial was required.

5. Homicide— short-form indictment—first-degree murder—sufficiency

A short-form indictment for first-degree murder conferred jurisdiction.

Appeal by Defendant from judgment entered 20 March 2008 by Judge Howard E. Manning, Jr., in Durham County Superior Court. Heard in the Court of Appeals 22 April 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Geoffrey W. Hosford, for Defendant.

BEASLEY, Judge.

Defendant (Michael Hunt) was indicted in April 2007 for discharging a firearm into an occupied vehicle, in violation of N.C. Gen. Stat. § 34.1, and for the first-degree murder of Adam Christopher Lutz (Lutz). He was tried before a Durham County, North Carolina, jury in March 2008. Following the presentation of evidence, Defendant was found guilty of first-degree murder under the felony murder rule and of discharging a firearm into an occupied vehicle. He was sentenced to life imprisonment without parole for first-degree murder. Judgment was arrested on the conviction of discharging a firearm into an occupied vehicle. From these convictions and judgment, Defendant appeals. We find no error.

Defendant and Lutz met each other in 2001, when they attended the same Durham high school. The two were often at odds, though they had mutual friends. Between 2001 and 2006, Lutz and Defendant had several fist fights and engaged in minor altercations involving bottle-throwing, rude comments, or pushing and shoving. Lutz and Defendant were part of a group of people who often saw each other at a particular Mobil gas station in Durham, and several of the conflicts between Defendant and Lutz took place at this gas station.

On the night of 8 August 2006 Lutz drove to Nicole Smith's residence. Nicole Smith, a sixteen-year-old acquaintance of both Lutz and Defendant, lived with her grandparents at 1501 Centennial Drive. Several other young people were at the house, including Smith's brother and cousin, the cousin's girlfriend, Defendant, and Defendant's friend, Tyrone Baker. Defendant and Baker had brought semi-automatic weapons to Smith's house. Between 9:00 and 10:00 p.m., Defendant called his friend Kyle Knight who agreed to drive to Smith's and pick up Defendant and Baker. Before Knight arrived, Defendant and Baker left Smith's house and walked down Centennial Drive. After a few minutes, Lutz's truck drove past Defendant and, at about the same time, Knight sped past in his car. Defendant and Baker veered from the roadway into a steep wooded

area. From this location, Defendant fired repeated shots at Lutz's truck. A bullet struck Lutz in the back of his head and Lutz died of the resulting injuries.

This general outline of the events of 8 August 2001 is undisputed. In addition, the State presented the following evidence: Brooke Thomas testified that she was Lutz's girlfriend and was with him on 8 August 2006. During the evening, Lutz received a phone call from Smith, who asked him to come to her house. As they drove down Centennial Drive, a car sped past them. A few seconds later, Thomas heard gunshots and saw Lutz lying with his head tipped to the side, bleeding from a head wound. She tried to steer the truck, but it veered from the road and hit a tree. Thomas called the police and waited for an ambulance to arrive. On cross-examination Thomas testified that Lutz kept a gun in his car, that he was addicted to drugs, and that she had taken out a domestic violence protective order against him.

Nicole Smith testified that on 8 August 2006 she spoke with Lutz by phone about selling or giving Lutz some pills. She denied asking Defendant to bring a gun to her house or to stay there to protect the residents from vandalism. A few minutes after hearing gunshots, Smith saw Defendant running down the street carrying a "long black gun." Smith was charged with first-degree murder of Lutz, but pled guilty to conspiracy to commit armed robbery. On cross-examination, Smith admitted that she had used and sold drugs, and that she initially lied to the police about Lutz's death.

Janeen Webb, Defendant's girlfriend, testified that she and another girl were with Knight on the night of 8 August 2006, when Knight drove to Smith's house. As they drove down Centennial Drive, the Defendant and Baker approached them and got in the car. The group went to the home of another friend, Stephen Penny. At Penny's, Defendant gave Webb some clothes to wash; however, she did not wash them and later gave the clothes to law enforcement officers. Webb pled guilty to obstruction of justice.

Defendant's most important evidence was his own testimony. Defendant told the jury that he shot Lutz because he was afraid for his life and thought Lutz was about to shoot him. He testified about a number of occasions when Lutz was rude, violent, or threatening towards him. On 30 July 2006, while Lutz and Defendant were both at the local Mobil station, Lutz threatened Defendant with a gun. Later that week, Defendant was asked to stay at Smith's house to

help the residents deal with recent acts of vandalism. He and Baker went there on 7 August 2006, bringing semi-automatic weapons in order to "apprehend the people who were vandalizing" and then "hold them until the police got there." They stayed overnight and were still at Smith's the following evening, 8 August 2006. Defendant and Smith had an argument and Defendant asked Knight to come get him and Baker.

While they were waiting for Knight, Defendant and Baker started walking down Centennial Drive. When Lutz drove by in his truck, Defendant and Baker "jumped off in the woods." Lutz put his truck into reverse gear and started backing down the street towards Defendant and Baker. Defendant testified that as Lutz approached he thought he saw Lutz's passenger side window being lowered and that "the next thing [he] expected to happen was a gun to come out the window and to start shooting at [them]." Defendant began shooting at Lutz's truck and continued until he ran out of ammunition. He testified that he had not planned to ambush Lutz and that he shot Lutz only because he was afraid for his life.

[1] Other evidence will be discussed as pertinent to the issues raised on appeal. The trial evidence unequivocally established that Lutz died of a gunshot wound, and Defendant admitted at trial that he shot Lutz. Thus, the key factual issue for the jury was whether Defendant acted in self-defense. Defendant argues that the trial court erred by instructing the jury on the felony murder theory of first-degree murder, on the grounds that this instruction undermined his self-defense claim and "effectively deprived [Defendant] of jury consideration of the charge of voluntary manslaughter." We disagree.

The trial court charged the jury on conspiracy to commit first-degree murder, first-degree murder, second-degree murder, voluntary manslaughter, and firing into an occupied vehicle. We conclude that it was proper to instruct the jury on first-degree murder under the felony murder rule.

Under N.C. Gen. Stat. § 14-17 (2007), a murder "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnaping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first[-]degree[.]" The Supreme Court of North Carolina has held that:

> the purpose of the felony murder rule is to deter even accidental killings from occurring during the commission of a dangerous

> felony. To allow self-defense, perfect or imperfect, to apply to felony murder would defeat that purpose, and if a person is killed during the perpetration or attempted perpetration of a felony, then the defendant is guilty of first-degree felony murder—not second-degree murder or manslaughter.

State v. Richardson, 341 N.C. 658, 668-69, 462 S.E.2d 492, 499 (1995). The Supreme Court of North Carolina "has expressly upheld convictions for first-degree felony murder based on the underlying felony of discharging a firearm into occupied property." *State v. Wall*, 304 N.C. 609, 612, 286 S.E.2d 68, 71 (1982).

Defendant contends that because "the evidence indicated that, at most, [Defendant] acted in imperfect self[-]defense" the trial court erred by instructing the jury that it could convict Defendant of first-degree felony murder. However, Defendant conceded at trial that he shot Lutz with a semi-automatic rifle, which he fired repeatedly until he ran out of ammunition. It is undisputed that Defendant shot Lutz from a wooded area, and that during this incident Lutz did not threaten Defendant or fire a weapon. There was other evidence from which the jury might find that Defendant could not see who was in the truck and did not know if Lutz was driving or if he had a gun. Defendant made no attempt to move farther into the woods or hide from Lutz in the underbrush, and did not try to talk to the people in the truck before he began shooting. It is undisputed that when Defendant began firing repeatedly at Lutz's truck, Defendant had not been threatened by anyone in the truck and had not seen a firearm in the truck. Moreover, the jury was not required to believe Defendant's testimony that he had been afraid for his life, or that he acted in self-defense. We conclude that there was sufficient evidence to submit the offense of discharging a firearm into an occupied vehicle to the jury, and thus to submit the question of Defendant's guilt of felony murder.

We also conclude that the trial court's instructions did not deprive Defendant of the benefit of his self-defense claim. The trial court defined self-defense and the related issues of whether Defendant was the aggressor or used excessive force, and also instructed the jury that the State had the burden of proving Defendant's guilt beyond a reasonable doubt. In its charge on premeditated and deliberated first-degree murder and lesser included offenses, the trial court instructed the jury, *inter alia*, that:

> The State has the burden of proving that Defendant <u>did not</u> act in self defense.

> In deciding whether Defendant acted in self defense, the jury could consider whether Lutz was armed and whether he had a reputation for violence or danger.
>
> If the State failed to prove that Defendant either did not act in self defense or that, even if he acted in self defense, Defendant was either the aggressor or used excessive force, then Defendant would not be guilty of any homicide.
>
> If the State proved that, although Defendant acted in self defense, he either used excessive force or was the aggressor, the most he could be guilty of would be voluntary manslaughter.

The trial court repeated several times that it was the State's burden to prove that Defendant did not act in self-defense, and that Defendant would not be guilty of first-degree premeditated murder absent proof that he did not act in self-defense.

In its charge on first-degree felony murder, the trial court instructed the jury that Defendant could not be found guilty of a felony murder unless the State proved Defendant's commission of the predicate felony beyond a reasonable doubt. Regarding the predicate felony of discharging a firearm into an occupied vehicle, the jury was instructed that the State had the burden of proving that Defendant did not shoot at Lutz's truck in self-defense. This instruction was repeated both as part of the instruction on felony murder, and in the separate instruction on the offense of firing into an occupied vehicle.

In its summation instruction as to each offense, the trial court reiterated that, unless the State were able to prove beyond a reasonable doubt that Defendant did not act in self-defense, he could not be convicted of the offense. We conclude that the trial court's instructions clearly placed the burden of proof on the State with regards to self-defense, both as to the degrees of homicide and also as regards firing into an occupied vehicle. This assignment of error is overruled.

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[2] Defendant next argues that the judgments entered against him are "null and void" on the grounds that the jury's verdicts were entered "out of term." We disagree.

The trial court explained that Defendant was charged with murdering Lutz, and read the list of possible witnesses. The trial court also told the potential jurors that:

> Now, this case, as you might imagine, is not going to be something we can try in today and tomorrow, in two days. Given the number of witnesses, it more likely than not will last awhile. This case, in court parlance, will go over. And that term means that it will go into next week. . . . I anticipate that we ought to be through with this matter before the end of next week[.] . . .

The trial began on Wednesday, 12 March 2008, and at 5:50 p.m. and the trial court declared the court to be "in recess" until the following day. The trial resumed on 13 March 2008, and at 5:00 p.m. dismissed the jury and announced that "we are in recess until the morning." As the trial court had originally predicted, the trial was not over by 5:00 p.m. Friday, 14 March 2008. The court dismissed the jury, stating "[l]et the record reflect that the jurors have left, and we are in recess until 10:15 Monday morning." Defendant's trial resumed on Monday, 17 March 2008. At the completion of the trial on Thursday, 20 March 2008, the proceedings were adjourned.

Defendant did not object to any of the court's statements about the length of trial nor to the court's rulings recessing court from day to day until the trial was over. However, on appeal, he argues that, because the court did not enter a formal written order extending the term of court beyond 14 March 2008, the verdicts were entered "out of term" and that the verdicts and judgment "are null and void and should be vacated."

"Preliminarily, we note that, although the words are frequently used interchangeably, 'term' in this jurisdiction generally refers to the typical six-month assignment of superior court judges to a judicial district, while 'session' designates the typical one-week assignment to a particular location during the term." *State v. Smith*, 138 N.C. App. 605, 607-08, 532 S.E.2d 235, 237 (2000) (citation omitted). Therefore, although Defendant argues that the verdicts and judgment were entered "out of term," his contention is more properly characterized as an argument that the judgment was entered "out of session."

The trial court's extension of a session of court is governed by N.C. Gen. Stat. § 15-167 (2007), which provides in pertinent part:

> Whenever a trial for a felony is in progress on the last Friday of any session of court and it appears to the trial judge that it is unlikely that such trial can be completed before 5:00 P.M. on such Friday, the trial judge may extend the session as long as in his opinion it shall be necessary for the purposes of the case, but he

> may recess court on Friday or Saturday of such week to such time on the succeeding Sunday or Monday as, in his discretion, he deems wise. . . . Whenever a trial judge continues a session pursuant to this section, he shall cause an order to such effect to be entered in the minutes[.]

Defendant's argument is based on the absence of a formal written order memorializing the trial court's extension of the session, an issue that was addressed by this Court in *State v. Locklear*, 174 N.C. App. 547, 621 S.E.2d 254 (2005). In *Locklear*, a felony trial was not finished on Friday and the court extended the trial to the following Monday. The Defendant argued on appeal that, because the record did not contain a written order extending the session of court, the judgment entered against him was "null and void and must be vacated." This Court held:

> [t]he record does not contain a written order specifically referencing N.C. Gen. Stat. § 15-167 and stating that the session was extended thereunder. However, there are sufficient statements made by the trial court in the record to comply with N.C. Gen. Stat. § 15-167 and to effectively extend the court session. The trial court had several discussions with counsel and the jury in open court, in which the trial court clearly referenced the extension of the session. . . . While it would have been the better practice for the trial court to expressly set forth in the minutes a formal order extending the court session, we hold that the trial court, in making repeated announcements in open court without objection from defendant, satisfied N.C. Gen. Stat. § 15-167.

Id. at 550, 551, 621 S.E.2d at 256, 257.

In the present case, as in *Locklear*, the trial court repeatedly announced that it was recessing court, with no objection by Defendant. We find *Locklear* controlling on this issue and hold that the court sufficiently complied with N.C. Gen. Stat. § 15-167. This assignment of error is overruled.

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[3] Next, Defendant argues that the trial court "permitted the clerk to improperly poll the jurors" after the verdicts were returned, entitling him to a new trial. We disagree.

N.C. Gen. Stat. § 15A-1238 (2007) provides in part that:

> Upon the motion of any party made after a verdict has been returned and before the jury has dispersed, the jury must be

> polled. . . . The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict.

In the present case, the jury returned verdicts finding Defendant guilty of firing into an occupied vehicle and first-degree murder under the felony murder theory. After the verdicts were returned, the Clerk polled the jury individually, asking each one essentially the same question:

> [Juror's name], Your foreperson has returned with the following verdict, that you found Mr. Hunt not guilty of conspiracy to commit first-degree murder, guilty of discharging a firearm into an occupied and operating vehicle, and guilty of first-degree murder under the first-degree felony murder rule. Is this your verdict, and do you still assent thereto?

All twelve jurors answered in the affirmative. Defendant made no objection to this procedure, but on appeal he argues that the trial court committed reversible error by failing to require the clerk to question the jurors separately about each of the two offenses.

However, prior appellate opinions indicate that the trial court is not required to question the jurors separately as to each offense of which a defendant is convicted. For example, in *State v. Ramseur*, 338 N.C. 502, 450 S.E.2d 467 (1994), the defendant was found guilty of first-degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. As in the case at bar, the clerk polled the jurors individually, listing the offenses of which the defendant had been convicted, and asking if that was the juror's verdict and if the juror still assented thereto. The defendant made no objection to this procedure, but argued on appeal that the poll was conducted in an improper manner. The Supreme Court of North Carolina held that "each of the jurors individually was told the charges for which the jury had returned a guilty verdict and was asked whether this was their verdict and whether they still assented to the verdict. We find no error in the manner in which the jury was polled." *Id.* at 507, 450 S.E.2d at 470.

Similarly, in *State v. Sutton*, 53 N.C. App. 281, 280 S.E.2d 751 (1981), the defendant was convicted of five counts of embezzlement and argued on appeal that the jury poll should have asked the jurors about each charge separately. This Court held:

> [T]he Clerk stated separately to each juror that [the] juror had returned a verdict of guilty as to Issue No. 1, guilty as to Issue No. 2, guilty as to Issue No. 3, guilty as to Issue No. 4, and guilty as to Issue No. 5. He then asked that juror whether that was his verdict, to which the juror assented, and whether he still assented thereto, to which the juror replied in the affirmative. . . . We hold that this procedure was substantially in accord with the requirements of G.S. 15A-1238 and note in passing that defendant made no request at trial that the Clerk be instructed to be more specific in the questions propounded to the jurors.

Id. at 289-90, 280 S.E.2d at 756. Defendant has not cited any cases requiring that jurors be polled separately as to each offense, and we find none. On the basis of *Ramseur*, *Sutton*, and similar cases, we hold that the jury was properly polled. This assignment of error is overruled.

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[4] During jury *voir dire*, a prospective juror commented that there was too much "gunplay" in Durham. Defendant asserts that the trial court's failure to strike the entire jury pool in response to this remark constitutes reversible error. We disagree.

Firearms clearly were a part of this trial. Defendant shot Lutz with a semi-automatic rifle; Lutz had a smaller gun in his possession at the time. Witnesses also owned or used firearms. Accordingly, the subject of firearms generally, gun ownership, and gun violence was thoroughly explored during *voir dire*, both by the prosecutor and defense counsel. The trial court asked generally if any of the jurors had personal experiences that might make it difficult for them to serve on the jury; the prosecutor asked if any jurors had known someone charged with murder or serious assault; defense counsel sought the jurors' views on gun ownership. The resulting colloquies included juror disclosures about their previous experiences involving firearms or homicide. One juror was excused after informing the court that he "had a son killed last year and I don't think I can listen to all this." Another "knew a guy who killed somebody" and also had an uncle who had been charged with a violent crime. Two jurors had family members who had been convicted of murders committed with a firearm. A Durham business had been robbed, and its owner thought guns were involved. Another juror was excused after disclosing that her uncle was murdered in Durham the year before, and that the case was still pending. We also note that defense counsel told the jurors at the outset that Defendant had shot and killed the victim and that the issue would be whether he had acted in self-defense.

It is apparent that jury *voir dire* included a significant focus on the jurors' personal histories and opinions regarding firearms and gun violence. The challenged dialog occurred in this context and consisted of the following:

> THE COURT: . . . Mr. Moore.
>
> JUROR: Yes, sir. My little cousin was injured in a drive-by shooting on Cornwallis when he was five years old. He's now unable to use his legs.
>
> THE COURT: Do you think, given what you've heard about this case, that you would not be able to be fair and impartial in a matter involving a shooting?
>
> JUROR: Yes, sir. Because I think the gun play in Durham is just too much right now.
>
> THE COURT: Thank you Mr. Moore. . . .

Mr. Moore was excused for cause and defense counsel later put on the record that he had asked the trial court to strike the jury panel and that the motion was denied. Defendant argues that the trial court's refusal to strike the entire jury panel "deprived [him] of a fair and impartial jury to consider his fate."

In support of this position, Defendant cites *State v. Gregory*, 342 N.C. 580, 467 S.E.2d 28 (1996). In *Gregory*, a prospective juror stated during *voir dire* that she had worked for the defendant's former attorney and had therefore learned confidential information that was favorable to the State. The juror was excused for cause and the remaining jurors were instructed to disregard her remarks. However, on appeal, the Court found plain error.

> [E]ight of the jurors who determined defendant's guilt and ultimately recommended the death sentence heard [the juror] say, "I helped prepare the defense for [Defendant]; answer "Yes" when the court asked if she had learned confidential information which would be favorable to the State if learned by the State; and say about that confidential information, "I feel it may influence my decision." . . . [T]his information left the eight jurors who heard the conversation free to speculate about the nature of the damning information that defendant and his attorneys were presumably hiding from their view. If the jury saw any gaps in the evidence, the colloquy with [the juror] invited them to fill in the gaps

on the assumption that the missing information was favorable to the State.

Id. at 587, 467 S.E.2d at 33.

Defendant argues that the present case is similar to *Gregory*. We disagree. The prospective juror in *Gregory* announced in front of other jurors that she knew about confidential evidence against the defendant that would not be shared with the other jurors. Her statements pertained to the defendant then on trial, and suggested the existence of undisclosed evidence that was so significant that the juror could not disregard it. The resultant prejudice to the defendant is clear. Moreover, the implication that the jury would not be privy to important evidence invoked the specter of justice thwarted by "technicalities." In contrast, Mr. Moore gave no indication that he had information about Defendant, the witnesses, or the facts of this case. Defendant argues that he is entitled to a new trial on the basis of Mr. Moore's unremarkable comment expressing dismay at the amount of "gun play" in Durham. Defendant fails to articulate why such a generalized observation about gun violence was so damaging that a new trial is required.

The trial court "has broad discretion 'to see that a competent, fair and impartial jury is impaneled and rulings in this regard will not be reversed absent a showing of abuse of discretion.' " *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991) (quoting *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979)). We conclude that the trial court did not abuse its discretion by failing to strike the jury panel following Mr. Moore's comment. This assignment of error is overruled.

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[5] Defendant's final argument is that the "short form indictment" used to charge him with first-degree murder was "fatally defective" and did not confer jurisdiction on the trial court. Defendant's argument has been rejected by the Supreme Court of North Carolina. *See State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000) ("this Court has consistently held that indictments for murder based on the short-form indictment statute are in compliance with both the North Carolina and United States Constitutions."). "This Court is bound by precedent of the North Carolina Supreme Court." *State v. Gillis*, 158 N.C. App. 48, 53, 580 S.E.2d 32, 36 (2003) (citation omitted). This assignment of error is overruled.

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

No error.

Judges McGEE and HUNTER, Robert C. concur.

STATE OF NORTH CAROLINA v. BRIAN KEITH WATTERSON, DEFENDANT

No. COA08-1110

(Filed 4 August 2009)

Firearms and Other Weapons— possession of weapon of mass death and destruction—instruction—mens rea

The trial court did not err in a double possession of a weapon of mass death and destruction case by failing to instruct the jury that it was required to determine whether defendant knew that his two shotguns had barrels less than 18 inches long because: (1) the General Assembly intended that possession of the weapon alone would constitute a violation of N.C.G.S. § 14-288.8; (2) nothing in the language of the statute specifically requires, as an element of the crime, knowledge of the precise physical characteristics of the shotgun; and (3) even applying the factors in *Staples*, 511 U.S. 600 (1994), as a method of determining legislative intent, they support the conclusion that the General Assembly did not intend for the State to prove that a defendant knew of the physical characteristics of the weapon that made it unlawful under N.C.G.S. § 14-288.8.

Appeal by defendant from judgments entered 12 February 2008 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 24 March 2009.

Attorney General Roy Cooper, by Assistant Attorney General Richard H. Bradford, for the State.

Eric A. Bach for defendant-appellant.

GEER, Judge.

Defendant Brian Keith Watterson appeals his convictions for two counts of possession of a weapon of mass death and destruction in

violation of N.C. Gen. Stat. § 14-288.8 (2007) based on his possession of two sawed-off shotguns that had barrel lengths of less than 18 inches. Defendant argues on appeal that the trial court erred in failing to instruct the jury on an essential element of the offense: that he knew the physical characteristics of the shotguns that made them unlawful. We conclude, however, that the General Assembly intended that possession of the weapon alone—as defined by present law regarding "possession"—would constitute a violation of N.C. Gen. Stat. § 14-288.8. The trial court, therefore, properly refused to instruct the jury that it was required to find that defendant knew that the barrels of the two shotguns in his possession were less than 18 inches.

Facts

The State's evidence at trial tended to show that on the evening of 16 August 2007, defendant called the Guilford County Sheriff's Department, reporting a possible break-in at his house. Deputy Vincent L. Gaddy and another deputy were dispatched to defendant's residence to investigate. When they arrived, the two deputies performed a security sweep of the interior of the house. While doing so, they noticed two shotguns in defendant's bedroom.

After finishing their sweep, the deputies asked defendant about the shotguns and inspected them. Defendant acknowledged that the guns belonged to him and explained that he had "cut the barrels off" because he believed he was being stalked, and he needed to be able to move around more easily in his home while holding the guns. Defendant also told the deputies that he did not know the length of the barrels of the two guns.

Deputy Gaddy looked up the legal limitations for the length of a shotgun's barrel, but was unable to visually determine whether the guns' barrels were too short. After getting a tape measure from a third deputy, the two deputies measured the length of the barrels of defendant's guns: one measured 13 9/16 inches long, while the second measured 14 3/4 inches long. Based on the length of the barrels, the deputies arrested defendant and charged him with two counts of possession of a weapon of mass death and destruction.

At trial, defendant moved to dismiss the charges at the close of the State's evidence, contending that the State had failed to "prove that [defendant] actually knew that the length of the shotguns was less than eighteen inches." After the trial court denied the motion to dismiss, defendant testified that he is a former service member of the

United States Navy, where he was given security training, including SWAT-team-style training. Defendant explained that he believed he was being stalked as a result of a lawsuit he had filed. He had sawed off the barrels of both guns to make it easier to maneuver around in the house while carrying either of the guns. Defendant stated that the barrel of one of the shotguns had previously been bent, so he decided to cut it off at the bend to make the gun safer. He sawed off the other shotgun by "eyeball[ing] what [he] thought would be a safe measurement for safe use of the weapon." Defendant further testified that he did not measure the barrels of either gun before or after cutting them down and that he never knew what the actual lengths of the barrels were. Defendant renewed his motion to dismiss at the close of his evidence, and the trial court again denied the motion.

During the charge conference, defendant requested that the trial court instruct the jury that as an essential element of the crime, the jury must find that defendant knew that the barrels of the shotguns were less than 18 inches long. Defendant submitted to the court a proposed written instruction that would have required the jury to find not only that defendant possessed a shotgun that had a barrel less than 18 inches long, but also that "the defendant knew that the shotgun had a barrel with a length less than eighteen (18) inches." When the trial court refused to give the proposed instruction, defense counsel objected that the jury was not being required to make any finding of criminal intent, knowledge, or willfulness.

Ultimately, the trial court instructed the jury that the State was required to prove only "[t]hat the defendant possessed a weapon of mass death and destruction." The court then explained that "[p]ossession of an article may be either actual or constructive," but that either form of possession requires that the person be "aware of [the article's] presence and [have] both the power and intent to control its disposition or use." The court then instructed the jury that "[a] weapon of mass death and destruction is any shotgun with a barrel of less than eighteen inches in length."

The jury found defendant guilty of both counts. The trial court sentenced defendant to a presumptive-range term of 15 to 18 months imprisonment for one count. With respect to the second count, the court imposed a presumptive-range term of 19 to 23 months, but suspended the sentence and placed defendant on supervised probation for 60 months beginning upon his release from incarceration on the first count. Defendant timely appealed to this Court.

Discussion

The sole issue before this Court is whether the trial court erred in not instructing the jury that it was required to determine whether defendant knew that his shotguns had barrels less than 18 inches long. "A trial judge is required by N.C.G.S. § 15A-1231 and N.C.G.S. § 15A-1232 to instruct the jury on the law arising on the evidence. This includes instruction on the elements of the crime." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). This Court, therefore, reviews de novo the trial court's jury instructions regarding the elements of the offense at issue. *State v. Ramos*, 193 N.C. App. 629, 635, 668 S.E.2d 357, 362 (2008), *aff'd on other grounds*, 363 N.C. 352, 678 S.E.2d 224 (2009).

N.C. Gen. Stat. § 14-288.8(a) makes it "unlawful for any person to manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any weapon of mass death and destruction." The statute defines the term "weapon of mass death and destruction" to include:

(1) Any explosive or incendiary:

a. Bomb; or

b. Grenade; or

c. Rocket having a propellant charge of more than four ounces; or

d. Missile having an explosive or incendiary charge of more than one-quarter ounce; or

e. Mine; or

f. Device similar to any of the devices described above; or

(2) Any type of weapon (other than a shotgun or a shotgun shell of a type particularly suitable for sporting purposes) which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; or

(3) Any firearm capable of fully automatic fire, any shotgun with a barrel or barrels of less than 18 inches in length or an overall length of less than 26 inches, any rifle with a barrel or barrels of less than 16 inches in length or an overall length of

less than 26 inches, any muffler or silencer for any firearm, whether or not such firearm is included within this definition. For the purposes of this section, rifle is defined as a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder; or

(4) Any combination of parts either designed or intended for use in converting any device into any weapon described above and from which a weapon of mass death and destruction may readily be assembled.

The term "weapon of mass death and destruction" does not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of Title 10 of the United States Code; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting purposes, in accordance with Chapter 44 of Title 18 of the United States Code.

N.C. Gen. Stat. § 14-288.8(c).

Although defendant contends that a failure to require the State to prove that a defendant knew the length of the shotgun barrel would render N.C. Gen. Stat. § 14-288.8 a strict liability crime without any requirement of *mens rea*, that articulation of the issue is not precisely correct. Analogous to the controlled substances statutes, *see* N.C. Gen. Stat. § 90-95 (2007) (providing that it is unlawful for any person to manufacture; sell or deliver; possess with intent to manufacture, sell, or deliver; or possess a controlled substance), the General Assembly has prohibited a person from "manufactur[ing], assembl[ing], possess[ing], stor[ing], transport[ing], sell[ing], offer[ing] to sell, purchas[ing], offer[ing] to purchase, deliver[ing] or giv[ing] to another, or acquir[ing] any weapon of mass death and destruction." N.C. Gen. Stat. § 14-288.8(a). There is a degree of knowledge or intent implicit in these acts—our courts have fleshed out the law governing these acts in other contexts prohibiting the same acts with respect to other contraband. *See Black v. Littlejohn*, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985) ("An additional principle of statutory construction recognizes that when a term has long-standing legal significance, it is presumed that legislators intended the same significance

to attach by use of that term, absent indications to the contrary . . . ." (internal quotation marks omitted)); *Williams v. Alexander County Bd. of Educ.*, 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998) ("In ascertaining the intent of the legislature, the presumption is that it acted with full knowledge of prior and existing laws.").

Indeed, in this case, the trial court specifically required the jury to find that defendant was "*aware* of [the sawed-off shotgun's] presence and [had] both the power and *intent* to control its disposition or use." (Emphasis added.) Thus, the more precise issue before this Court, given the facts of this case, is whether the statute requires a different level of knowledge or *mens rea* than that required by the law of possession.

"Whether a criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design." *State v. Hales*, 256 N.C. 27, 30, 122 S.E.2d 768, 771 (1961). As a cardinal principle of statutory interpretation, "[i]f the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993). Thus, in effectuating legislative intent, it is the duty of the courts to give effect to the words actually used in a statute and not to delete words used or to insert words not used. *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009).

We first note that nothing in the language of the statute specifically requires, as an element of the crime, knowledge of the precise physical characteristics of the shotgun. N.C. Gen. Stat. § 14-288.8(c)(4), however, includes within the definition of a weapon of mass death and destruction "[a]ny combination of parts either *designed* or *intended* for use in converting any device into any weapon described above and from which a weapon of mass death and destruction may readily be assembled." (Emphasis added.) Similarly, the final paragraph in N.C. Gen. Stat. § 14-288.8(c) provides that "[t]he term 'weapon of mass death and destruction' *does not include* any device which is neither *designed* nor *redesigned* for use as a weapon[.]" (Emphasis added.) These two sentences thus include a *mens rea* component that is not included within the other, prior descriptions of weapons defined as weapons of mass death and destruction. Because the General Assembly specifically included additional intent provisions in these subsections of the statute, we

can presume that it did not intend for courts to impose additional intent requirements in the other subsections. *See N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) ("When a legislative body 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion.' " (quoting *Rodriguez v. United States*, 480 U.S. 522, 525, 94 L. Ed. 2d 533, 537, 107 S. Ct. 1391, 1393 (1987))).

Moreover, in 2001, the General Assembly enacted N.C. Gen. Stat. § 14-288.21 (2007), which relates to nuclear, biological, or chemical weapons of mass destruction. In this legislation, the General Assembly (1) amended N.C. Gen. Stat. § 14-288.8(c) to repeal that portion of the statute that had previously identified nuclear material as a weapon of mass death and destruction and (2) created the new statute to separately govern nuclear, biological, and chemical weapons. *See* Act of Nov. 28, 2001, 2001 N.C. Sess. Laws 470, secs. 1, 3. This new statute parallels N.C. Gen. Stat. § 14-288.8 with a significant exception: the new statute contains an additional knowledge requirement. N.C. Gen. Stat. § 14-288.21 makes it "unlawful for any person to *knowingly* manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire a nuclear, biological, or chemical weapon of mass destruction." (Emphasis added.) Significantly, the General Assembly did not amend N.C. Gen. Stat. § 14-288.8 to add a similar requirement that the acts be undertaken "knowingly."

This legislative history, together with the differences in the otherwise identically worded statutes, strongly suggest that the General Assembly did not intend to require the State to prove that a defendant knowingly possessed a shotgun with a barrel of less than 18 inches. *See Carolinas-Virginias Ass'n of Bldg. Owners & Managers v. Ingram*, 39 N.C. App. 688, 699, 251 S.E.2d 910, 917 ("[Legislative] intent is to be found in the wording of the statute itself, viewed against the background of its history and with due regard given for the reason for its enactment and its relationship and interplay with other statutes."), *disc. review denied*, 297 N.C. 299, 254 S.E.2d 925 (1979).

In addition, this interpretation of N.C. Gen. Stat. § 14-288.8 is consistent with the design and purpose of the statute. *See State v. Fennell*, 95 N.C. App. 140, 143-44, 382 S.E.2d 231, 233 (1989) (holding § 14-288.8 is designed to "permit[] possession of shotguns, with the

exception of those which have been tampered with so as to shorten the barrel," and purpose of statute is "preservation of the public peace and safety"). The listed weapons of mass death and destruction are weapons that are deemed by the General Assembly to have no innocent purpose, and thus it is logical that § 14-288.8 contains no knowledge requirement. *See Staples v. United States*, 511 U.S. 600, 626, 128 L. Ed. 2d 608, 629, 114 S. Ct. 1793, 1808 (1994) (Stevens, J., dissenting) ("In 1934, when Congress originally enacted [the National Firearm Act], it limited the coverage of the 1934 Act to a relatively narrow category of weapons such as submachineguns and sawed-off shotguns—weapons characteristically used only by professional gangsters like Al Capone, Pretty Boy Floyd, and their henchmen. At the time, the Act would have had little application to guns used by hunters or guns kept at home as protection against unwelcome intruders.").

In arguing that N.C. Gen. Stat. § 14-288.8 requires the State to prove that he knew of the characteristics of the shotguns in his possession that made them unlawful, defendant relies heavily on the multi-factor test set out by the United States Supreme Court in *Staples* for evaluating whether a statute creates a strict liability offense. In concluding that the government was required to prove that the defendant knew that the weapon he possessed had the physical characteristics that brought it within the scope of the National Firearms Act, the *Staples* Court considered the following factors: (1) the background rules of the common law and its conventional *mens rea* requirement; (2) whether the crime can be characterized as a public welfare offense; (3) the extent to which a strict-liability reading of the statute would encompass innocent conduct; (4) the harshness of the penalty; (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of time-consuming and difficult proof of fault; and (8) the number of prosecutions expected. *Staples*, 511 U.S. at 604-19, 128 L. Ed. 2d at 615-25, 114 S. Ct. at 1796-1804.

Defendant also relies upon *State v. Williams*, 158 Wash. 2d 904, 913-16, 148 P.3d 993, 998-99 (2006), in which the Supreme Court of Washington applied the *Staples* factors to a Washington statute similar to N.C. Gen. Stat. § 14-288.8, in that it prohibited the possession of shotguns with barrel lengths less than 18 inches. The *Williams* Court ultimately concluded, based on its application of the *Staples* factors, that "the legislature intended that the State prove that a person knew, or should have known, the characteristics that make a firearm illegal

to be convicted under" the Washington statute. 158 Wash. 2d at 915-16, 148 P.3d at 999.

Critically, in contrast to this case, in neither *Staples* nor *Williams* were the courts confronted with any indication from other legislation or legislative history of the legislature's intent. *See State v. Jordan*, 89 Ohio St. 3d 488, 491, 733 N.E.2d 601, 605 (2000) (in concluding that State was not required to prove defendant knew that barrel of shotgun was less than 18 inches long, declining to follow *Staples* because it "is a case involving federal statutory interpretation" and court was "interpreting a state statute"). In any event, our application of the *Staples* factors further supports our conclusion that the State was not required to prove beyond a reasonable doubt that defendant knew that the shotguns in his possession had barrel lengths less than 18 inches.

As to the first factor—the background rules of the common law and its typical *mens rea* requirement—our General Assembly has specifically stated that the Article containing § 14-288.8 is intended to "supersede and extend the coverage" of the common law. N.C. Gen. Stat. § 14-288.3 (2007). It is, therefore, unreasonable to limit N.C. Gen. Stat. § 14-288.8, a wholly statutorily-created offense, to common law principles. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) ("The legislative branch of government is without question 'the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter.' " (quoting *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956))). *See also Morissette v. United States*, 342 U.S. 246, 262, 96 L. Ed. 288, 299, 72 S. Ct. 240, 249 (1952) ("Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act.").

The second factor addresses whether the offense can be characterized as a public welfare offense. " 'The legislature may deem certain acts, although not ordinarily criminal in themselves, harmful to public safety, health, morals and the general welfare, and by virtue of its police power may absolutely prohibit them, either expressly or impliedly by omitting all references to such terms as "knowingly", "wilfully", "intentionally" and the like.' " *State v. Hill*, 31 N.C. App.

733, 735, 230 S.E.2d 579, 580 (1976) (quoting 1 Burdick, *Law of Crime* § 129j (1946)), *disc. review denied*, 292 N.C. 267, 233 S.E.2d 394 (1977). *Accord State v. Haskins*, 160 N.C. App. 349, 352-53, 585 S.E.2d 766, 768-69 (recognizing legislature may regulate conduct under State's police power to promote public welfare without requiring *mens rea* element in criminal statute), *appeal dismissed and disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003).

This Court has extended the concept of strict liability offenses beyond public welfare to public safety. In *Hill*, this Court held that N.C. Gen. Stat. § 20-138 (repealed 1983), which prohibited driving or operating a vehicle while "under the influence of intoxicating liquor," created a strict liability offense because the statute "sp[oke] absolutely" in that it contained no *mens rea* requirement and because it was included "in the same category as our speed limit statutes." 31 N.C. App. at 736, 230 S.E.2d at 580. Similarly, in *Haskins*, this Court concluded that N.C. Gen. Stat. § 14-269.2, which prohibits possession of guns on school campuses without specifying any culpable mental state, created a strict liability offense given that the offense was statutorily created, without a corresponding common law predecessor, and was enacted due to the " 'the increased necessity for safety in our schools.' " 160 N.C. App. at 352, 585 S.E.2d at 769 (quoting *In re Cowley*, 120 N.C. App. 274, 276, 461 S.E.2d 804, 806 (1995)). Here, N.C. Gen. Stat. § 14-288.8 appears in Subchapter X of Chapter 14, which includes "Offenses Against the Public Safety," and thus comes within the rationale of both *Hill* and *Haskins*.

As for the third factor—the risk of convicting people engaging in innocent behavior—the United States Supreme Court in *Staples* observed:

> *Of course, we might surely classify certain categories of guns—no doubt including the machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation—as items the ownership of which would have the same quasi-suspect character we attributed to owning hand grenades* in [*United States v. Freed*, 401 U.S. 601, 28 L. Ed. 2d 356, 91 S. Ct. 1112 (1971)]. But precisely because guns falling outside those categories traditionally have been widely accepted as lawful possessions, their destructive potential, while perhaps even greater than that of some items we would classify along with narcotics and hand grenades, cannot be said to put gun owners sufficiently on notice of the likelihood of regulation to justify interpreting [the

> National Firearms Act] as not requiring proof of knowledge of a weapon's characteristics.

511 U.S. at 611-12, 128 L. Ed. 2d at 620, 114 S. Ct. at 1800 (emphasis added). Sawed-off shotguns and the other types of weapons identified in N.C. Gen. Stat. § 14-288.8(c) are not ones that people typically innocently possess. *See Staples*, 511 U.S. at 626-27, 128 L. Ed. 2d at 629-30, 114 S. Ct. at 1808 (Steven, J., dissenting) (noting that weapons such as machine guns and sawed-off shotguns were predominately used in crime, rather than for traditional gun uses, like hunting and home protection, and thus "the likelihood of innocent possession of such an unregistered weapon was remote").

The fourth factor requires consideration of the severity of the penalty imposed. N.C. Gen. Stat. § 14-288.8(d) provides that "[a]ny person who violates any provision of this section is guilty of a Class F felony." N.C. Gen. Stat. § 15A-1340.17(d) (2007), in turn, provides that the maximum possible sentence of a Class F felony is 59 months imprisonment. Although a nearly five-year sentence may be a fairly harsh punishment, the General Assembly has imposed comparable penalties for the commission of other truly strict liability offenses. *See State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (observing that "[t]he crime of failing to notify the appropriate sheriff of a sex offender's change of address under N.C.G.S. § 14-208.11(a) is a strict liability offense" categorized as a Class F felony); *State v. Bryant*, 359 N.C. 554, 562-63, 614 S.E.2d 479, 484-85 (2005) (concluding failure to register as sex offender under N.C. Gen. Stat. § 14-208.11 is strict liability offense punishable as Class F felony). Given the other indications of legislative intent, the severity of the penalty is an issue for the General Assembly.

The fifth *Staples* factor requires consideration of the seriousness of the potential harm to the public. N.C. Gen. Stat. § 14-288.8 prohibits certain acts involving a "*weapon of mass death and destruction*." N.C. Gen. Stat. § 14-288.8(a). As the phrase connotes, one purpose of the statute is to prevent mass death or destruction through the use of certain weapons designed to inflict such damage. In addition to prevention, the statute's prohibition on more activities than mere possession—manufacturing, assembling, storing, transporting, selling, offering to sell, purchasing, offering to purchase, delivering, giving, and acquiring—evidences the General Assembly's aim to exclude completely the existence of weapons of mass death and destruction from the public sphere.

In short, the statute keeps weapons of mass death and destruction off of the streets and out of the hands of those people that might use them. *See Staples*, 511 U.S. at 627, 128 L. Ed. 2d at 630, 114 S. Ct. at 1808 (Stevens, J., dissenting) (stating that strict-liability reading of federal statute "reflected a legislative judgment that the likelihood of innocent possession of [unregistered machine guns and sawed-off shoguns] was remote, and far less significant than the interest in depriving gangsters of their use"); *State v. Kerner*, 181 N.C. 574, 578, 107 S.E. 222, 225 (1921) (holding General Assembly has authority under police power to prohibit pistols under a certain size to "prevent the use of pistols of small size, which are not borne as arms, but which are easily and ordinarily carried concealed"). *See also* Carl W. Thurman, III, *State v. Fennell: The North Carolina Tradition of Reasonable Regulation of the Right to Bear Arms*, 68 N.C. L. Rev. 1078, 1085 (1990) (discussing *Fennell's* holding that N.C. Gen. Stat. § 14-288.8 was a reasonable restriction on the state constitutional right to bear arms because "the prohibition on short-barrelled shotguns" was reasonably related to interest in preserving public peace and safety).

As for the sixth factor, addressing the difficulty involved in ascertaining the true facts about the weapon, defendant here could have avoided prosecution by performing the hardly onerous task of measuring the length of the barrels of the two shotguns to ensure that they were over 18 inches long. With respect to the shotgun with the bent barrel, defendant could have lawfully disposed of the firearm upon finding that he could not modify the barrel to make it "safe[r]" without also making it illegal.

While both *Staples*, 511 U.S. at 615-16, 128 L. Ed. 2d at 622-23, 114 S. Ct. at 1802, and *Williams*, 158 Wash. 2d at 915, 148 P.3d at 999, discuss the possibility that a semi-automatic firearm—which is not a prohibited weapon—might be imperceptibly altered or might wear down with time into a prohibited automatic weapon, that is not the fact situation presented by this record. Nor do we express any opinion as to whether such a weapon would be encompassed within N.C. Gen. Stat. § 14-288.8.

The seventh factor requires consideration of the burden imposed on the prosecution to prove culpable knowledge on the part of the defendant. The Supreme Court in *Staples*, 511 U.S. at 615-16 n.11, 128 L. Ed. 2d at 622-23 n.11, 114 S. Ct. at 1802 n.11, noted that "knowledge can be inferred from circumstantial evidence, including any external indications signaling the nature of the weapon." Based on this lan-

guage, the *Williams* Court held that requiring the State to prove that the defendant had knowledge of the fact that the shotgun's barrel was less than 18 inches would not be an excessive burden on the government. 158 Wash. 2d at 915, 148 P.3d at 999.

Neither Court explained how, exactly, the government should proceed to prove that a defendant knew that the barrel of the gun in his or her possession was, for example, 17.5 inches long rather than 18. Reading a knowledge requirement into N.C. Gen. Stat. § 14-288.8 of the type sought by defendant in this case would necessitate the "bizarre" assumption that the General Assembly "intended the owner of a sawed-off shotgun to be criminally liable if he knew its barrel was 17.5 inches long but not if he mistakenly believed the same gun had an 18-inch barrel." *Staples*, 511 U.S. at 634, 128 L. Ed. 2d at 634, 114 S. Ct. at 1812 (Stevens, J., dissenting). We do not believe that the Legislature intended to place such a substantial burden on the prosecution.

The final *Staples* factor is the number of prosecutions to be expected. Generally, the fewer expected prosecutions, the more likely intent is not required. *See Watson Seafood & Poultry Co. v. George W. Thomas, Inc.*, 289 N.C. 7, 14, 220 S.E.2d 536, 542 (1975) (refusing to construe motor vehicle statute as creating strict liability because "the requirement of proving intent or guilty knowledge would make it impossible to enforce such laws in view of the tremendous number of petty offenses"). The record on appeal is silent as to the number of prosecutions for alleged violations of N.C. Gen. Stat. § 14-288.8. Nevertheless, our search of appellate decisions has identified only 11 appellate opinions arising out of prosecutions for violation of N.C. Gen. Stat. § 14-288.8, even though the statute has been in existence since 1969.

In sum, even if we apply the *Staples* factors as a method of determining legislative intent, they support the conclusion that the General Assembly did not intend for the State to prove that a defendant knew of the physical characteristics of the weapon that made it unlawful under N.C. Gen. Stat. § 14-288.8. The trial court in this case, therefore, did not err in refusing to instruct the jury that it was required to find that defendant knew that the barrels of the shotguns in his possession were less than 18 inches long.

No Error.

Judges McGEE and BEASLEY concur.

WORTHY v. IVY CMTY. CTR., INC.

[198 N.C. App. 513 (2009)]

ANGELA WORTHY, INDIVIDUALLY, AND SHANALDA MCLEAN, A MINOR CHILD, BY AND THROUGH HER GUARDIAN AD LITEM, ANGELA WORTHY, PLAINTIFFS V. THE IVY COMMUNITY CENTER, INC; CECILIA WATSON BLACKWELL, EXECUTRIX OF THE ESTATE OF GORDON L. BLACKWELL, DECEASED; TRANSOM DEVELOPMENT, INC., F/K/A REGENCY DEVELOPMENT ASSOCIATES, INC., THE IVY COMMONS LIMITED PARTNERSHIP, D/B/A IVY COMMONS APARTMENTS; THE CITY OF DURHAM; JACKIE MARROW; AND INTERSTATE MANAGEMENT CONSULTANTS, INC., DEFENDANTS

No. COA08-458

(Filed 4 August 2009)

1. Premises Liability— injury in apartment fire—whether plaintiffs were trespassers—issue of fact

The evidence was sufficient to raise an issue of fact regarding whether plaintiffs were trespassers in an apartment in which they suffered burns, or whether they were on the premises with the consent of management.

2. Negligence— apartment fire—causation—expert testimony not needed

The cause of a fire did not need to be established by expert testimony where there was eyewitness testimony. Whether the testimony was credible was for the jury and whether expert testimony might be necessary in a case relying only upon circumstantial evidence was not addressed here.

3. Negligence— apartment fire—wiring in stove hood—summary judgment

Plaintiff's evidence in a negligence case that wiring in a stove hood sparked an apartment fire was sufficient to survive summary judgment, despite defendants' photographic evidence and expert testimony to the contrary.

4. Negligence— apartment fire—faulty wiring—negligent inspection by city

A claim for negligent inspection does not constitute a nonjusticiable political question.

5. Negligence— apartment fire—wiring in stove hood—negligent inspection by city—public duty doctrine

The public duty doctrine does not preclude a claim against a city for negligent inspection of a building.

Appeal by plaintiffs from order entered 12 September 2007 by Judge J.B. Allen, Jr. in Durham County Superior Court. Heard in the Court of Appeals 19 November 2008.

Perry, Perry & Perry, P.A., by Robert T. Perry, for plaintiffs-appellants.

Hoof & Hughes, PLLC, by J. Bruce Hoof, for defendants-appellees.

GEER, Judge.

Plaintiffs Shanalda McLean and her legal guardian and guardian ad litem Angela Worthy appeal from the trial court's order granting summary judgment to defendants on plaintiffs' negligence claim.[1] We agree with plaintiffs' contention that summary judgment was improper as plaintiffs' forecast of evidence raised triable issues of fact regarding Shanalda's legal status on the property and as to the cause of the fire resulting in her burns. Accordingly, we reverse.

Facts

Delwyn Powell entered into a lease to rent apartment B-6 in the Ivy Commons Apartment complex in Durham, North Carolina. He lived there with Sharon McLean and her children until he moved out in July 2004. Although Ms. McLean's sister Angela Worthy is the guardian of Ms. McLean's daughter Shanalda McLean, Shanalda regularly stayed at the apartment with her mother and her siblings.

After moving into the apartment, Ms. McLean made several complaints to Ivy Commons' manager, Jackie Marrow, about exposed wires over the stove, "naked wires" hanging from the air conditioning unit, and a faulty electrical socket in the children's room. Although Ms. Marrow said that someone would take care of the problems, they were never fixed. Concerned about the wires dangling over the stove, Ms. McLean called the fire department and the operator told her to turn off all the power in the apartment and then to push the wires back up into the hood of the stove. She did this regularly because the wires would often fall down when the hood was being wiped down or when the light or fan on the hood was turned on.

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1. Collectively, defendants are The Ivy Community Center, Inc.; Transom Development, Inc., f/k/a Regency Development Associates, Inc.; The Ivy Commons Limited Partnership, d/b/a Ivy Commons Apartments; the City of Durham; Jackie Marrow; Interstate Management Consultants, Inc.; and Gordon L. Blackwell. Mr. Blackwell died during the proceedings and the executrix of his estate, Cecilia Watson Blackwell, was substituted in his place.

On the night of 5 September 2004, two of Ms. McLean's children, Shanalda and David Barnhill, were asleep on the living room floor after a birthday party. David got up around 2:30 a.m. and wanted to make french fries. His mother helped him put some oil in a pot and turned on the burner for him. When the oil got hot, David put some french fries in the pot. According to David, "a couple of seconds later," he looked up and saw "some sparks coming from the little hood part" over the stove. The sparks were coming from wires "looping down" from the hood. The oil in the pot ignited from the sparks, and "flames started coming out." David jumped back and yelled "[f]ire," and Ms. McLean rushed into the kitchen. She saw flames coming up from the pot and wires hanging from the hood of the stove, which she had not seen previously when she was helping David make the fries.

Ms. McLean shouted for everyone to "[g]o outside" while she tried to put out the fire. She grabbed the pot and began to take it outside, but when she got to the door, she ran into Shanalda, who was coming back into the apartment to make sure that all of the children had gotten out and spilled the hot oil on both of them. They were taken to UNC Hospital and kept overnight to treat their burns. Shanalda suffered severe burns on her face, neck, back, hand, and legs.

On 10 October 2005, plaintiffs filed a complaint against The Ivy Commons Limited Partnership and the partnership's general partners—The Ivy Community Center, Inc., Transom Development, Inc., and Gordon L. Blackwell—alleging negligence in maintaining the premises. The complaint also asserted a claim against the City of Durham for negligent inspection. Plaintiffs amended the complaint on 4 December 2006 to add a claim against Interstate Management Consultants, Inc. and its employee, Jackie Marrow, who managed Ivy Commons Apartments, alleging that they were negligent in leasing an apartment that they knew or should have known was in an unfit or uninhabitable condition.

All defendants moved for summary judgment on 31 August 2007, and, in an order entered on 12 September 2007, the trial court entered summary judgment in favor of defendants. Plaintiffs timely appealed to this Court.

Discussion

The standard of review for an order granting summary judgment requires a determination whether (1) the pleadings, depositions,

answers to interrogatories, and admissions on file, together with any affidavits, 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), *aff'd per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001); N.C.R. Civ. P. 56(c). The trial court may not resolve issues of fact and necessarily must deny the motion if there is a genuine issue as to any material fact. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Further, the evidence is viewed in the light most favorable to the nonmoving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

I

[1] Plaintiffs and defendants vigorously dispute Ms. McLean's and Shanalda's legal status on the Ivy Commons property. Defendants contend that the mother and daughter were not legally residing in the apartment, and, therefore, they were trespassers. "[A] trespasser is one who enters another's premises without permission or other right." *Nelson v. Freeland*, 349 N.C. 615, 617, 507 S.E.2d 882, 884 (1998). If the mother and daughter were trespassers, then they would have "no basis for claiming protection [from the landowner] beyond refraining from willful injury." *Id.* at 632, 507 S.E.2d at 892. Consequently, a landowner is not liable to a trespasser for mere negligence. *Holcomb v. Colonial Assocs., L.L.C.*, 358 N.C. 501, 510, 597 S.E.2d 710, 716 (2004). In contrast, "[a] lawful visitor is one who is on the premises with the landowner's permission or by legal right." *Id.* The permission granted by a landowner may be express or implied from the circumstances. *Id.*

Defendants maintain that "[t]he material facts to McLean's, and consequently to Shanalda's, legal status in the subject Ivy Commons apartment at the time of the fire, are established by the terms of the lease." The lease agreement produced by defendants was signed only by Mr. Powell, listed Mr. Powell as the only tenant in apartment B-6, expressly prohibited any other persons from residing in the apartment without being listed, and prohibited subleasing or assignment of the lease. Based on the terms of this lease, defendants contend "neither McLean nor Shanalda were lawful residents in the subject apartment."

Plaintiffs counter that their evidence shows that Ivy Commons' management knew that Ms. McLean was living in apartment B-6, that it knew she was responsible for paying the rent, and that management

took no action to evict her, thus indicating that the management impliedly permitted her and Shanalda to reside in the apartment. In addition, in his deposition, Mr. Powell testified that he remembered signing a lease that listed Ms. McLean and Shanalda as tenants, that Ms. McLean was present when this lease was signed, and that they discussed with Ivy Commons' management the fact that Ms. McLean and her children would be living in the apartment.

Defendants contend that Mr. Powell's testimony is insufficient to survive summary judgment because plaintiffs failed to produce a copy of the " 'phantom' lease" that listed Ms. McLean and the children as tenants. We need not decide, however, whether Mr. Powell's testimony regarding the lease would be sufficient by itself to defeat summary judgment because plaintiffs submitted additional evidence of Ms. McLean's and Shanalda's lawful presence on the premises.

Samantha Lincoln, a maintenance worker at Ivy Commons, stated in an affidavit that Ivy Commons' management, including Ms. Marrow, "knew Sharon McLean and her children, including Shanalda McLean[,] were tenants at apartment B-6 of Ivy Commons Apartments[.]" Ms. Lincoln further stated that "[a]fter the fire of September 4, 2004 [sic], with knowledge of management, Sharon McLean and her children continued to live in the said unit." In addition, Manuel Rodriguez, another maintenance worker at Ivy Commons, testified in his deposition that he knew that Ms. McLean and Shanalda were living in apartment B-6 prior to the fire as he would see them when he went into the apartment to perform his maintenance duties. Further, Mr. Powell reported in his deposition that Ms. McLean delivered all the rent payments to the Ivy Commons office while he was living there.

Ms. McLean testified in her deposition about making complaints about the apartment to Ms. Marrow. In addition, after Mr. Powell moved out, she asked Ms. Marrow what she needed to do to continue living in the apartment. Ms. Marrow told her "don't worry about that" and said that Ms. McLean could stay in the apartment as long as she paid her bills. Finally, plaintiffs presented evidence from various other witnesses indicating that Ivy Commons' management knew that Ms. McLean continued to live in the apartment after the fire occurred even though Mr. Powell was no longer residing there.

This evidence is sufficient to raise an issue of fact regarding whether Ms. McLean and Shanalda were trespassers or whether they were on the premises with the consent of Ivy Commons' manage-

ment. *See McIntosh v. Carefree Carolina Communities, Inc.*, 328 N.C. 87, 399 S.E.2d 114 (1991), *rev'g per curiam for reasons stated in the dissent*, 98 N.C. App. 653, 656, 391 S.E.2d 851, 853 (1990) (reversing entry of summary judgment when even though defendant's evidence indicated that plaintiff arrived on property as licensee, plaintiff's forecast of evidence regarding defendant's conduct after his arrival gave rise to issue of fact as to whether plaintiff's status had changed to invitee). *See generally* 62 Am. Jur. 2d *Premises Liability* § 121 (2009) ("Where a plaintiff who is alleged to have been a trespasser presents evidence that would, if believed, support a finding that he or she was an implied invitee or licensee at the time he or she was injured, the plaintiff's status is a question for the jury.").

II

[2] In arguing that summary judgment was proper even if defendants owed a duty to plaintiffs, defendants do not challenge plaintiffs' showing of negligence, but contend instead that the undisputed competent evidence establishes that Shanalda's injury was not caused by any negligence. According to defendants, the fire could not have resulted from any wires in the hood of the stove.

In his deposition, David described how the fire started in the kitchen on 5 September 2004. He testified that around 2:30 in the morning, he began to cook some french fries with the help of his mother. She put some oil in a pot, turned on the burner, and told David to put some french fries in the oil once it got hot. Immediately after he put some french fries in the heated oil, he looked up and saw "some sparks coming from the little hood part" over the stove. He testified that the sparks were coming from wires "looping down" from the hood. According to David, the oil in the pot ignited and "flames started coming out."

Ms. McLean corroborated this testimony in her deposition. She testified that when she started helping David make the fries, she did not see any wires hanging down. She later heard "popping" sounds, and when she went into the kitchen she saw the wires hanging down from the hood and the fire in the pot.

Defendants maintain that David's testimony is not competent evidence because he is not an expert, and causation of a fire must be established by expert testimony. Defendants cite *State v. Blakeney*, 352 N.C. 287, 531 S.E.2d 799 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780, 121 S. Ct. 868 (2001), *State v. Hales*, 344 N.C. 419, 474 S.E.2d 328 (1996), and *State v. Sexton*, 153 N.C. App. 641, 571 S.E.2d

41 (2002), *aff'd in part and disc. review improvidently allowed in part*, 357 N.C. 235, 581 S.E.2d 57 (2003), for the proposition that "determination of the cause of a fire is not within the knowledge of the average person and, thus, the opinion of a lay witness on such an issue cannot be helpful to the jury."

None of these cases, however, stand for the proposition asserted by defendants. In each case, the Court held that an expert was, in fact, qualified to give an expert opinion as to whether a fire was intentionally started—they do not hold that expert testimony as to the cause of the fire was required, especially when, as here, the testifying witness was an eye witness to the fire. *See Blakeney*, 352 N.C. at 311-12, 531 S.E.2d at 817 (holding that SBI agent was qualified to give expert testimony regarding "the cause or origin determination of fires"); *Hales*, 344 N.C. at 424-25, 474 S.E.2d at 331 (concluding fire marshal was qualified to give expert testimony about whether fire was started accidentally or intentionally); *Sexton*, 153 N.C. App. at 651, 571 S.E.2d at 48 (holding that expert was qualified under N.C.R. Evid. 702 to testify regarding cause of fire in arson case).

These cases do not preclude David's testimony, who was testifying as an eye witness who asserts that he actually saw what occurred. As this Court pointed out in *Kilgo v. Wal-Mart Stores, Inc.*, 138 N.C. App. 644, 651 n.9, 531 S.E.2d 883, 889 n.9, *disc. review denied*, 353 N.C. 266, 546 S.E.2d 104 (2000), lay witnesses' opinions regarding the cause of an injury are admissible when based on the witnesses' "perceptions . . . obtained from observing the accident scene."

We have found no case in North Carolina holding that an eye witness' testimony regarding the cause of a fire is insufficient as a matter of law. Instead, traditionally, plaintiffs have confronted the argument that their claims for injuries resulting from a fire were barred by the lack of direct or eye witness testimony. A century ago, our Supreme Court rejected this contention: "The cause of the fire is not required to be shown by direct and positive proof, or by the testimony of an eye-witness. It may, as we have seen, be inferred from circumstances, and there are many facts like this one, which cannot be established in any other way." *Simmons v. John L. Roper Lumber Co.*, 174 N.C. 221, 225, 93 S.E. 736, 738 (1917). Thus, while "[t]here can be no liability [for a fire] without satisfactory proof," such proof may be "direct or circumstantial evidence, not only of the burning of the property in question but that it was the proximate result of negligence and did not result from natural or accidental causes." *Phelps v. City of Winston-Salem*, 272 N.C. 24, 31, 157 S.E.2d 719, 724 (1967).

Necessarily, direct evidence—as with an eye witness— can be sufficient proof.

Our Supreme Court observed in *Phelps*, 272 N.C. at 28, 157 S.E.2d at 722, that "[p]roof of the origin of fires usually presents a difficult, if not impossible, problem. It is extremely rare that direct evidence is available; consequently, as in this case, circumstantial evidence is the only available method in a large majority of actions, either civil or criminal." *See also Fowler-Barham Ford, Inc. v. Indiana Lumbermens Mut. Ins. Co.*, 45 N.C. App. 625, 628, 263 S.E.2d 825, 827, *disc. review denied*, 300 N.C. 372, 267 S.E.2d 675 (1980) ("Ordinarily, there is no direct evidence of the cause of a fire, and therefore, causation must be established by circumstantial evidence."). We need not address whether expert testimony might be necessary in a case relying only upon circumstantial evidence because this case presents the "extremely rare" and out-of-the-ordinary case in which there was an eye witness. Whether this direct evidence is credible is a question for the jury.

[3] Defendants next argue that David's testimony cannot be sufficient because (1) it is contrary to the physical evidence, and (2) the testimony from defendants' expert witnesses establishes that the fire could not have started in the way David testified it occurred. " 'As a general rule, evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature is not sufficient to take the case to the jury, and in case of such inherently impossible evidence, the trial court has the duty of taking the case from the jury.' " *Jones v. Schaffer*, 252 N.C. 368, 378, 114 S.E.2d 105, 112 (1960) (quoting 88 C.J.S. *Trial* § 208(b)(5)); *accord McFetters v. McFetters*, 98 N.C. App. 187, 192, 390 S.E.2d 348, 351 ("When the physical laws of nature refute testimony as inherently impossible, no issue of fact exists, and the judge has the duty to take the case from the jury."), *disc. review denied*, 327 N.C. 140, 394 S.E.2d 177 (1990).

Defendants' argument primarily hinges on their claim that the photographs of the stove and witness testimony incontrovertibly establish that the wires in the stove's hood were not exposed, but rather were behind a sheet-metal cover. As a result, defendants assert, even if the wires did spark, the sparks would have been contained behind the cover. In making this argument, defendants rely extensively on Ms. McLean's brief testimony that two photographs of the hood, exhibits 19 and 20, accurately show the appearance of the hood immediately after the fire. Defendants then note that these photographs do not show any wires hanging down from the hood.

Notwithstanding her testimony that the exhibits accurately portrayed the hood immediately after the fire, Ms. McLean also repeatedly stated that when she entered the kitchen and saw the fire, she also saw wires hanging down from the hood emitting blue sparks. We cannot infer from her limited testimony identifying the two exhibits that she intended to indicate—contrary to her other testimony—that no hanging wires existed. It is well established that, in connection with a motion for summary judgment, all evidence must be viewed in the light most favorable to the non-moving party—plaintiffs, in this case. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) ("The movant's papers are carefully scrutinized; those of the adverse party are indulgently regarded. All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party." (internal citations omitted)). We also note that Ms. McLean testified that on other occasions, she tucked the wires back up into the hood after calling the fire department, suggesting that the wires could be prevented from hanging down. We cannot hold, in light of Ms. McLean's other testimony, that the photographs and the testimony relied upon by defendants incontrovertibly establish that wires were not hanging down from the hood of the stove at the time the fire started.

Defendants next argue that two close-up photographs of the inside of the hood with a portion removed, exhibits 3 and 12,[2] show that the wires were not damaged. Defendants assert that their expert Michael Sutton gave his opinion that sparking could have occurred only if the wires "arced," and, in that event, the insulation on the wires would have been melted. That is not, however, what Mr. Sutton states in his affidavit. He neither states that any possible sparks must have resulted from arcing nor does he state that arcing would have melted the insulation. He merely states that based on his assessment of the photographs of the wires, "[t]here was no evidence of any electrical faults or damaged insulation." In any event, Mr. Sutton never examined the actual hood, fan, or wires, but rather relied only upon his viewing of the photographs. These two photographs are not sufficiently clear to require entry of summary judgment.

Finally, defendants argue that their experts establish that it is "highly improbable" that the wires emitted sparks and that it is "highly unlikely" that the sparks could have ignited the oil. Although defendants maintain that the physical evidence demonstrates that

2. These photographs were taken after the hood was removed from the stove and taken out of the apartment.

David's explanation of how the fire started is *improbable*, defendants do not assert that it is *impossible*. In his affidavit, moreover, Mr. Sutton states only that, "in general," sparks are an insufficient ignition source for cooking oil.

In *Carter v. Colonial Life & Accident Ins. Co.*, 52 N.C. App. 520, 278 S.E.2d 893, *disc. review denied*, 304 N.C. 193, 285 S.E.2d 96 (1981), the defendant similarly argued that its expert witnesses required entry of summary judgment when plaintiff countered the expert testimony regarding causation with only his lay affidavit about what happened. The insured, in that case, fell off of a ladder, sustaining an injury to his hip that required hip replacement surgery. *Id.* at 521, 278 S.E.2d at 893. In moving for summary judgment, the insurer submitted the depositions of two doctors stating that the cause of the insured's injury was a pre-existing condition from an old sports injury. *Id.* at 522, 278 S.E.2d at 894. In opposition to the insurer's motion, the insured submitted his own affidavit describing the fall and explaining why he believed his hip injury was due to the fall. *Id.* at 525-26, 278 S.E.2d at 895-96.

On appeal from the grant of summary judgment, the insurer maintained that summary judgment was proper, "contend[ing] that the depositions of [the two doctors] are conclusive evidence as to the non-exclusivity of [the insured]'s injury. [The insurer] argue[d] that [the insured]'s affidavit is insufficient, as a matter of law, to refute the opinion of [its] doctors." *Id.* at 526, 278 S.E.2d at 896. This Court held that the insured's affidavit was admissible to prove causation, thus raising an issue of fact precluding summary judgment. *Id.* at 527, 278 S.E.2d at 897.

Similarly here, in opposition to defendants' expert evidence, plaintiffs produced David's deposition testimony in which he stated that he saw sparks from dangling wires ignite the hot oil. Consistent with *Carter*, plaintiffs have submitted sufficient evidence of defendants' negligence to defeat the motion for summary judgment.

III

[4] The City of Durham makes two arguments separate and distinct from those made by the other defendants. Rather than disputing the sufficiency of plaintiffs' evidence regarding whether the City was negligent in its inspections, the City contends that (1) the issue is a non-justiciable controversy, and (2) the public duty doctrine precludes liability in this case.

The City first argues that the decision whether to perform inspections is committed to the absolute discretion of the City's housing authority, and thus the refusal to inspect or enforce building codes under N.C. Gen. Stat. § 160A-412 (2007) is a non-justiciable political question. The City, however, cites no cases that support its position that conduct of the City's housing agency represents a non-justiciable political question.[3] Nor have we found any.

To the contrary, our courts regularly adjudicate disputes regarding a governmental entity's duty to inspect. *See Thompson v. Waters*, 351 N.C. 462, 463-65, 526 S.E.2d 650, 651-52 (2000) (adjudicating claim for negligent inspection); *Laurel Valley Watch, Inc. v. Mountain Enters. of Wolf Ridge, LLC*, 192 N.C. App. 391, 399, 665 S.E.2d 561, 567 (2008) ("In the event that a county official refuses to investigate or enforce a county's ordinance, an action will lie in mandamus to compel the official to investigate and enforce the ordinance."); *McCoy v. Coker*, 174 N.C. App. 311, 317-18, 620 S.E.2d 691, 696 (2005) (determining whether plaintiff sufficiently pled claim for relief by alleging negligent inspection by county inspector). Indeed, this Court has specifically held that a municipality may be compelled through a writ of mandamus to comply with N.C. Gen. Stat. § 160A-412, the statute at issue here. *See Midgette v. Pate*, 94 N.C. App. 498, 504, 380 S.E.2d 572, 576 (1989) (" 'Where a duty to make a decision is imposed upon a body or officer, even though discretion is involved in the determination, mandamus will lie to compel the body or officer to make the decision, since there is no discretion involved in whether action is to be taken.' " (quoting A. Rathkopf, 3 *The Law of Zoning and Planning* § 44.03[2])).

In short, our courts have never concluded that a claim for negligent inspection constitutes a non-justiciable political question. Since the City has cited no authority that specifically supports its position, we decline to do so in this case.

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3. In support of its contention, the City cites mainly to *Heckler v. Chaney*, 470 U.S. 821, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985), and *Bacon v. Lee*, 353 N.C. 696, 549 S.E.2d 840, *cert. denied*, 533 U.S. 975, 150 L. Ed. 2d 804, 122 S. Ct. 22 (2001). These cases are inapposite as neither applies the political question doctrine to disputes regarding a municipality's negligent inspection. *See Heckler*, 470 U.S. at 838, 84 L. Ed. 2d at 728, 105 S. Ct. at 1659 (holding FDA's decision not to pursue enforcement actions requested by respondents was not subject to review under APA); *Bacon*, 353 N.C. at 716-17, 549 S.E.2d at 854 (applying political question doctrine to clemency proceedings). We cannot see in what way either *Heckler* or *Bacon*, arising out of separation of powers concerns, is relevant to this action.

[5] The City also argues that "the public duty doctrine entitles the City to judgment as a matter of law." The public duty doctrine "provides that governmental entities, when exercising their statutory powers, act for the benefit of the general public and therefore have no duty to protect specific individuals." *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 482, 495 S.E.2d 711, 716, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449, 119 S. Ct. 540 (1998). In *Thompson*, 351 N.C. at 465, 526 S.E.2d at 652, however, the Supreme Court expressly refused to apply the public duty doctrine to bar claims relating to building inspections performed by municipalities, stating: "After careful review of appellate decisions on the public duty doctrine in this state and other jurisdictions, we conclude that the public duty doctrine does not bar this claim against Lee County for negligent inspection of plaintiffs' private residence."

Defendants contend that *Thompson's* holding is the result of "unfortunate phraseology." The Court's holding, however, is unambiguous: "We are now asked to extend the public duty doctrine . . . in this case against a county for the alleged negligence of its building inspector. We *decline* to do so." *Id.* at 464, 526 S.E.2d at 651 (emphasis added). Decisions of this Court confirm that the public duty doctrine does not preclude a claim against the City for negligent inspection of a building. *See Eason v. Union County*, 160 N.C. App. 388, 392, 585 S.E.2d 452, 455 (2003) ("Defendant's motion for summary judgment asserted that the public duty doctrine barred plaintiff's claim. We reiterate our Supreme Court's decision in *Thompson v. Waters* that the public duty doctrine does not bar a claim against the county for negligent inspection of a private residence."); *Kennedy v. Haywood County*, 158 N.C. App. 526, 529, 581 S.E.2d 119, 121 (2003) ("In *Thompson*, the Court held that (1) the public duty doctrine was applicable only to law enforcement officers, and (2) that it was *not* applicable to county building inspectors.").

The City nonetheless asserts that "[w]hat Justice Frye meant to say was that, because the facts of the case fit precisely into the special duty exception to the public duty doctrine, the doctrine did not apply in the *Thompson* case." This Court does not presume to tell the Supreme Court what it "meant to say," as opposed to adhering to what *Thompson* actually held. We, therefore, reverse the trial court's order entering judgment in favor of defendants.

Reversed.

Judges McGEE and BRYANT concur.

IN RE S.C.R.

[198 N.C. App. 525 (2009)]

IN THE MATTER OF: S.C.R., A MINOR CHILD

No. COA09-368

(Filed 4 August 2009)

1. Appeal and Error— preservation of issues—failure to object—failure to raise constitutional issue at trial

Although respondent father contends the trial court violated his right to due process in a termination of parental rights case by conducting the termination hearing less than nine months after petitioner took custody of the minor child, the Court of Appeals declined to address this issue because: (1) the record failed to show that respondent moved to continue the hearing or otherwise voiced an objection to the timing of the hearing; and (2) it is well settled that a constitutional issue not raised in the lower court will not be considered for the first time on appeal.

2. Appeal and Error— preservation of issues—failure to give notice within ten days

Although respondent father contends the trial court erred in a termination of parental rights case by failing to make findings of fact as required by N.C.G.S. § 7B-907(b) when it changed the permanent plan for the minor child to adoption, this assignment of error was overruled because respondent father failed to give notice within ten days of the hearing to preserve his right to appeal the trial court's findings and order which changed the permanent plan for the minor child to adoption.

3. Constitutional Law— effective assistance of counsel—failure to show prejudice

Respondent father did not receive ineffective assistance of counsel in a termination of parental rights case because a parent must establish he suffered prejudice in order to show that he was denied a fair hearing, and respondent did not make this showing.

4. Termination of Parental Rights— failure to file a responsive pleading—failure to take necessary steps to establish paternity

The trial court did not err by terminating respondent father's parental rights to the minor child because: (1) although both respondents contended the trial court erred in finding that neither party filed a responsive pleading to the motion to terminate parental rights, respondent father conceded in his brief that the

error in this finding of fact had no bearing upon the court's determination of the grounds upon which it terminated their parental rights; (2) although a father may have acted consistently with acknowledging his paternity, strict compliance with the four requirements under N.C.G.S. § 7B-1111(a)(5) was required in order for a father to prevent termination of his parental rights; (3) the trial court made findings as to the minor child's birth out-of-wedlock and respondent father's failure to take any of the four actions required by the statute in a timely fashion; and (4) in light of the Court of Appeals holding with respect to this ground of termination, respondent father's arguments regarding the remaining grounds for termination found by the trial court need not be addressed.

5. Termination of Parental Rights— neglect—sufficiency of findings

The trial court did not err by terminating respondent mother's parental rights on the basis of neglect because: (1) respondent did not complete participation in the drug treatment program, continually missed classes, failed to comply with attendance requirements, was terminated twice from the drug treatment program, and received positive drug screenings on multiple occasions; (2) the testimony of the supervisor of DSS's foster care unit indicated respondent failed to visit the minor child on a consistent basis; (3) the trial court found that the minor child was removed from respondent's care due to respondent's substance abuse, lack of employment, and failure to obtain stable housing, and these findings reflect consideration of evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect, and support a conclusion that the minor child was neglected at the time of the termination hearing; and (4) respondent's contentions that other grounds were unsupported by the findings of fact need not be addressed since grounds existed to terminate respondent's parental rights on the basis of neglect.

6. Termination of Parental Rights— best interest of child—consideration of statutory factors

The trial court did not err or abuse its discretion by finding that it was in the best interest of the minor child to terminate respondent mother's parental rights because: (1) the trial court's findings indicated it considered the age of the minor child, the desire of the foster parents to adopt the minor child, the nurtur-

ing and affectionate relationship between the minor child and the foster parents, the strong bond between the minor child and her foster parents as compared to the lack of a bond between the minor child and respondents, the likelihood of adoption, and the consistency of adoption with the permanent plan; and (2) the trial court's findings reflected a reasoned decision based upon the statutory factors listed in N.C.G.S. § 7B-1110(a).

Judge WYNN concurring.

Appeal by respondents from order entered 17 December 2008 by Judge Spencer G. Key, Jr. in Stokes County District Court. Heard in the Court of Appeals 13 July 2009.

J. Tyrone Browder for Stokes County Department of Social Services.

Pamela Newell Williams for Guardian ad Litem.

Charlotte Gail Blake for respondent-mother appellant.

Richard E. Jester for respondent-father appellant.

BRYANT, Judge.

I.M.R.[1] (respondent-mother) and C.B.R. (respondent-father) appeal from an order entered 17 December 2008 terminating their parental rights to S.C.R. We affirm.

Facts

S.C.R. has continuously been in the custody of the Stokes County Department of Social Services (DSS) since 9 April 2008. Between the dates of 12 November 2007 and 18 January 2008, DSS received five separate protective services reports alleging that respondent-mother was using crack cocaine, marijuana, prescription medicine, and alcohol while acting as S.C.R.'s sole caregiver. One report also alleged that respondent-mother and her boyfriend, who is not S.C.R.'s father, were involved in a domestic violence incident in S.C.R.'s presence. Respondent-mother entered into safety plans in which she agreed to arrange for someone other than her boyfriend to be a safe and sober caretaker for S.C.R. before respondent-mother consumed drugs or alcohol.

1. Initials have been used throughout the opinion to protect the identity of the minor child.

On 5 February 2008, DSS found S.C.R. to be at risk due to respondent-mother's substance abuse and domestic violence between respondent-mother and her boyfriend. On 9 April 2008, DSS received another child protective services report alleging law enforcement officers had found respondent-mother "passed out drunk." S.C.R. was in the sole care of respondent-mother's boyfriend at the time of the incident. Respondent-mother had been evicted from her residence and was temporarily residing with her grandmother. Respondent-father was incarcerated at the time of the incident.

On 14 May 2008, respondent-mother and respondent-father entered into a case plan with DSS. Respondent-mother agreed to obtain a psychological and parenting assessment and follow all recommendations; submit to random drug screens; attend and complete parenting classes; obtain and maintain employment for a minimum of six months; obtain and maintain suitable and safe housing; obtain a substance abuse assessment and follow all recommendations; obtain assessments for anger management and domestic violence and follow all recommendations; and pay child support. Respondent-father was incarcerated and scheduled to be released 1 July 2009. He agreed to continue AA and NA meetings while incarcerated and after his release, attend Father Accountability classes, and cooperate with child support enforcement to establish child support payments.

On 22 May 2008, the trial court adjudicated S.C.R. as neglected. The trial court ordered respondent-mother to obtain substance abuse treatment, obtain a psychological/parenting assessment and psychiatric evaluation, and submit to random drug screenings. Respondent-mother failed to complete any of the requirements of her case plan or the court's order with the exception of submitting to random drug screens. Respondent-mother enrolled in an outpatient substance abuse program on 17 April 2008. However, respondent-mother sporadically attended the daily sessions, resulting in her termination from the program in June 2008. Respondent-mother obtained readmission to the program on 10 July 2008 but was terminated again from the program on 27 October 2008. Respondent-mother tested positive for marijuana eight times during the months of July and August 2008. She tested positive for marijuana, "benzos," and cocaine on 22 October 2008 at her final drug screening prior to the termination of parental rights hearing.

Weekly visitations with S.C.R. were made available to respondent-mother from 15 April 2008 through 5 November 2008. Respondent-mother failed to attend eighteen out of twenty-nine

scheduled visits. Respondent-mother failed to establish a permanent residence, and has lived with various friends and relatives in nine different locations since April 2008. Respondent-mother neither established employment nor paid any money to support S.C.R.

From 14 February 2007 through the date of the termination hearing, respondent-father was incarcerated on a cocaine trafficking conviction. Respondent-father's scheduled release date was 3 July 2009. While incarcerated, respondent-father worked for the Department of Transportation, earning seventy cents per day. He also worked in a canteen earning one dollar per day. Respondent-father did not pay any child support or purchase anything for S.C.R. Respondent-father wrote letters to S.C.R. and has approximately thirty photos of S.C.R. Prior to DSS taking custody of S.C.R., respondent-father's parents brought S.C.R. to visit him while he was incarcerated. After custody of S.C.R. was awarded to DSS, respondent-father was only able to visit S.C.R. during court hearings.

Prior to DSS's filing of the motion to terminate parental rights on 19 August 2009, respondent-father had taken no action to (1) establish paternity judicially or by affidavit filed in a central registry maintained by the Department of Health and Human Services (DHHS), (2) legitimate S.C.R. pursuant to N.C. Gen. Stat. § 49-10 or to file a petition for this specific purpose, (3) legitimate S.C.R. by marriage to S.C.R.'s mother, or (4) provide substantial financial support or consistent care of S.C.R. and her mother. After DSS filed the petition to terminate parental rights, respondent-father filed an affidavit of parentage signed by respondent-father and respondent-mother respectively.

On 25 June 2008, the trial court ceased reunification efforts with respondent-mother and respondent-father, and on 24 July 2008, changed the permanent plan for S.C.R. to adoption with a concurrent plan of reunification.

Based upon its findings of fact, the trial court concluded that respondent-mother's parental rights may be terminated on the grounds that S.C.R. is neglected and dependent. The trial court concluded that respondent-father's parental rights may be terminated on the grounds that S.C.R. is neglected, and respondent-father had not taken any of the permissible actions to establish paternity or otherwise legitimate S.C.R. prior to the filing of the motion to terminate parental rights on 19 August 2008. By a separate disposition order, the court concluded that it is in the best interest of S.C.R. that respond-

ent-mother's and respondent-father's parental rights be terminated. Respondent-mother and respondent-father appeal.

On appeal respondent-father argues: (I) the trial court's proceeding to termination of his parental rights violated his due process rights because the time period between DSS taking custody of S.C.R. and termination of his rights was less than nine months; (II) he received ineffective assistance of counsel; (III) the trial court erred by failing to make required findings when changing the permanent plan to adoption; and (IV) the trial court erred in terminating his parental rights.

Respondent-mother argues the trial court erred by: (I) finding grounds existed to terminate her parental rights based upon a finding of neglect; (II) by finding and concluding that grounds existed to terminate her parental rights on the basis of dependency because the trial court failed to make adequate findings of fact; and (III) by finding it was in S.C.R.'s best interest to terminate respondent-mother's parental rights.

Respondent-Father's Appeal

I

[1] Respondent-father argues that the trial court's conducting the termination hearing less than nine months after petitioner took custody of S.C.R. violated his right to due process. We note that the record fails to show that respondent-father moved to continue the hearing or otherwise voiced an objection to the timing of the hearing. "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) (2007). Moreover, it is well settled that a constitutional issue not raised in the lower court will not be considered for the first time on appeal. *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988). We therefore decline to address this issue.

II & III

[2] Respondent-father next contends the trial court erred by failing to make findings of fact as required by N.C. Gen. Stat. § 7B-907(b) when it changed the permanent plan for S.C.R. to adoption. Respondent-father also contends he was denied effective assistance of counsel because of his counsel's failure to raise the issue during the termination proceedings. We disagree.

Pursuant to N.C. Gen. Stat. § 7B-507(c), "any hearing at which the court finds and orders that reasonable efforts to reunify a family shall cease, the affected parent . . . may give notice to preserve the parent['s] right to appeal the finding and order in accordance with G.S. 7B-1001(a)(5)." N.C. Gen. Stat. § 7B-507(c) (2007). "Notice may be given in open court or in writing within 10 days of the hearing at which the court orders the efforts to reunify the family to cease." *Id.* In the present case, respondent-father failed to give notice within ten days of the hearing to preserve his right to appeal the trial court's findings and order which changed the permanent plan for S.C.R. to adoption. Therefore, this assignment of error is overruled.

[3] Respondent-father claims he received ineffective assistance of counsel. A parent in a termination of parental rights proceedings has the right to counsel. N.C. Gen. Stat. § 7B-1101.1(a) (2007). This right to counsel also includes the right to effective assistance of counsel. *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996). To successfully establish that counsel's assistance was ineffective, a parent must show: (1) [his] counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) [his] attorney's performance was so deficient [he] was denied a fair hearing. *Id.* A parent must also establish he suffered prejudice in order to show that he was denied a fair hearing. *In re L.C.*, 181 N.C. App. 278, 283, 638 S.E.2d 638, 641, *disc. review denied*, 361 N.C. 354, 646 S.E.2d 114 (2007). Respondent-father has not made this showing. Therefore, this contention is overruled.

IV

[4] Respondent-father contends the trial court erred by terminating his parental rights to S.C.R. We disagree.

" '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 (quoting *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984)), *disc. review denied*, *In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004). If the trial court's findings of fact "are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). "[I]t is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testi-

mony." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). Additionally, the trial court's findings of fact to which an appellant does not assign error are conclusive on appeal and binding on this Court. *In re J.D.S.*, 170 N.C. App. 244, 250-51, 612 S.E.2d 350, 354-55, *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005).

Termination of parental rights is a two-step process involving an adjudicatory stage and a dispositional stage. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). At the adjudicatory stage, the petitioner must show by clear, cogent and convincing evidence that a statutory ground to terminate exists. *Id.* If the trial court determines that grounds for termination exist, the trial court must proceed to the dispositional stage where it determines whether terminating parental rights is in the best interest of the juvenile. *Id.*; *see also* N.C. Gen. Stat. § 7B-1110(a) (2007).

We first note both respondent-father and respondent-mother contend the trial court erred in finding that neither party filed a responsive pleading to the motion to terminate parental rights. The parties' contentions are not without merit because the record shows that both respondent-mother and respondent-father did in fact file responses to the motion. However, as respondent-father concedes in his brief, the error in this finding of fact has no bearing upon the court's determination of the grounds upon which it terminated respondent-mother or respondent-father's parental rights. The error, therefore, is harmless.

Respondent-father contends the trial court erred by terminating his parental rights on the basis that he failed to legitimate S.C.R. prior to the filing of the motion to terminate his parental rights.

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(5), the trial court may terminate a father's parental rights if it finds:

> The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights:
>
> > a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; provided, the court shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or

b. Legitimated the juvenile pursuant to provisions of G.S. 49-10 or filed a petition for this specific purpose; or

c. Legitimated the juvenile by marriage to the mother of the juvenile; or

d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

N.C. Gen. Stat. § 7B-1111(a)(5) (2007). Although a father may have "acted consistently with acknowledging his paternity," strict compliance with the foregoing four requirements is required in order for a father to prevent termination of his parental rights. *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96, 105, 630 S.E.2d 673, 678 (2006). Here, the trial court made findings as to S.C.R.'s birth out-of-wedlock and respondent-father's failure to take any of the four actions required by the statute in a timely fashion. We hold these findings support the trial court's conclusion.

In light of our holding with respect to this ground of termination, we need not address respondent-father's arguments regarding the remaining grounds for termination found by the trial court. N.C. Gen. Stat. § 7B-1111(a) (2007) ("The court may terminate the parental rights upon a finding of one or more of the following [grounds.]"). *See also In re D.B.*, 186 N.C. App. 556, 561, 652 S.E.2d 56, 60 (2007) ("Where a trial court concludes that parental rights should be terminated pursuant to several of the statutory grounds, the order of termination will be affirmed if the court's conclusion with respect to any one of the statutory grounds is supported by valid findings of fact."), *aff'd per curiam*, 362 N.C. 345, 661 S.E.2d 734 (2008).

Respondent-Mother's Appeal

I

[5] Respondent-mother contends the trial court erred by terminating her parental rights on the basis of neglect because the findings of fact regarding her involvement with the outpatient drug treatment program, her drug screens, and visits with S.C.R. are inadequate and are not supported by clear, cogent, and convincing evidence. We disagree.

A proceeding to terminate parental rights consists of an adjudication stage and a disposition stage. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). During the adjudication phase, the petitioner must show by clear, cogent, and convincing evidence the existence of a statutory ground authorizing the termination of

parental rights. *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). "Upon determining that one or more of the grounds for terminating parental rights exist, the court moves to the disposition stage to determine whether it is in the best interests of the child to terminate the parental rights." *Id.* at 247, 485 S.E.2d at 615. "A finding of any one of the enumerated grounds for termination of parental rights under N.C.G.S. 7B-1111 is sufficient to support a termination." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003). The appellate court reviews the order to determine whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusion of law. *In re Shepard*, 162 N.C. App. at 221, 591 S.E.2d at 6.

After careful review of the record, we hold the trial court's findings were supported by clear, cogent, and convincing evidence. The finding regarding respondent-mother's incomplete participation in the drug treatment program is supported by a report which showed respondent-mother continually missed classes and failed to comply with attendance requirements. The evidence shows that respondent-mother was terminated twice from the drug treatment program and she received positive drug screenings on multiple occasions. Additionally, the testimony of Marsha Marshall, supervisor of DSS's foster care unit, indicated respondent-mother failed to visit S.C.R. on a consistent basis. Ms. Marshall testified that of the twenty-nine visitations scheduled between 15 April 2008 and 5 November 2008, respondent-mother attended only ten. The trial court's findings were supported by clear, cogent, and convincing evidence. Therefore, this assignment of error is overruled.

Respondent-mother also contends the trial court's order terminating her parental rights on the basis of neglect is deficient because the trial court failed to find or to conclude that there was a reasonable probability that neglect was likely to recur. We disagree.

> 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). "A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect

at the time of the termination proceeding." *In re Young*, 346 N.C. at 248, 485 S.E.2d at 615 (1997). "[A] prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984). If the child is removed from the parent before the termination hearing, then "the trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232.

S.C.R. was removed from respondent-mother's care because of respondent-mother's substance abuse, lack of employment, and failure to obtain stable housing. The evidence and the trial court's findings show that respondent-mother continued to engage in substance abuse, having repeatedly and continuously tested positive for illegal substances while S.C.R. was no longer in her care, and did so as recently as 22 October 2008, less than one month prior to the termination hearing. Respondent-mother also failed to complete a substance abuse treatment program. Respondent-mother has still failed to obtain employment or find stable housing. The trial court's findings reflect consideration of "evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect" and support a conclusion that S.C.R. was neglected at the time of the termination hearing. Therefore, this assignment of error is overruled.

II

Because we have found that grounds existed to terminate respondent-mother's parental rights on the basis of neglect, we need not address respondent-mother's contentions that other grounds were unsupported by the findings of fact. *See In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) (quoting *In re Clark*, 159 N.C. App. 75, 78 n3, 582 S.E.2d 657, 659 n3 (2003)), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006) ("[W]here the trial court finds multiple grounds on which to base a termination of parental rights, and 'an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds.' ").

III

[6] Lastly, respondent-mother contends the trial court erred and abused its discretion by finding it in the best interest of S.C.R. to terminate respondent-mother's parental rights. We disagree.

Upon finding the existence of a ground to terminate one's parental rights, a court must then decide whether termination of parental rights is in the best interest of the child. N.C. Gen. Stat. § 7B-1110(a) (2007); *In re Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. The decision is within the discretion of the trial court and may be reviewed only for an abuse of discretion. *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406-07 (2003). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so *arbitrary* that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Factors the trial court considers in determining whether terminating parental rights would be in the child's best interest include:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2007).

In the present case, the trial court's findings indicate it considered the age of S.C.R., the desire of the foster parents to adopt S.C.R., the nurturing and affectionate relationship between S.C.R. and the foster parents, the strong bond between S.C.R. and her foster parents as compared to the lack of a bond between S.C.R. and respondent-mother and respondent-father, the likelihood of adoption, and the consistency of adoption with the permanent plan. The trial court's findings thus reflect a reasoned decision based upon the statutory factors listed in N.C.G.S. § 7B-1110(a). The trial court did not abuse its discretion in determining it would be in the best interest of S.C.R. to terminate respondent-mother's parental rights. Therefore, this assignment of error is overruled.

For the foregoing reasons, the adjudication and disposition orders are affirmed.

Affirmed.

Judge STEELMAN concurs.

Judge WYNN concurs in a separate opinion.

WYNN, Judge, concurring.

I am compelled to join in affirming the termination of the Father's parental rights on the grounds that he had failed to legitimate the child in any of the ways required under N.C. Gen. Stat. § 7B-1111(a)(5). *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96, 105-06, 630 S.E.2d 673, 678 (2006). In *Child's Hope, LLC*, however, Judge Jackson wrote a poignant dissent opining that DSS had failed to prove by clear and convincing evidence that the father had not provided "consistent care with respect to the juvenile and mother," *see* N.C. Gen. Stat. § 7B-1111(a)(5)(d), because the evidence showed that he had been misled about the pregnancy and undertaken substantial efforts to provide care upon learning about the child and his paternity. *See Doe*, 178 N.C. App. at 108-09, 630 S.E.2d at 680. Though that dissent offered an appeal as a matter of right to our Supreme Court, the matter was not appealed.

Nonetheless, the trial court's findings of fact were sufficient to support termination of the father's parental rights based on a finding of neglect. The findings that the father paid no child support although he earned a meager sum, was incarcerated twice for drug convictions, and ceased attending parenting classes while incarcerated as required by his case plan, support the conclusion that he did not, and would not in the future, provide the necessary care and supervision to the child. Thus, rather than rely upon the ground that the father did not legitimate the child, I would instead uphold termination of his parental rights on the ground that he neglected the child.

PLUMMER v. PLUMMER

[198 N.C. App. 538 (2009)]

JAMES L. PLUMMER, SR., PLAINTIFF v. JOYCE ANN PLUMMER, DEFENDANT

No. COA08-1158

(Filed 4 August 2009)

1. Divorce— equitable distribution—real property—valuation

The trial court did not err in an equitable distribution action in its valuation of real property where the court had to value the property nine years after the date of separation and no professional appraisals were presented, but the parties presented tax values, outstanding tax bills, and outstanding mortgages. There was competent evidence to support the valuation.

2. Divorce— equitable distribution—real estate debt—distribution

The distribution of debt securing real estate in an equitable distribution proceeding was remanded where it was not clear from the trial court's order whether the debt was to be distributed along with the property or separate from it. There was no abuse of discretion in the valuation of the property.

3. Divorce— equitable distribution—unequal distribution—findings—not sufficient

The trial court's findings supporting an unequal distribution in an equitable distribution action were not sufficient to allow appellate review and were remanded.

4. Divorce— equitable distribution—use of assets

The trial court did not err in an equitable distribution action by considering plaintiff's use of his retirement funds, his maintenance of property, and his retention of the benefits of the property. Acts that waste, neglect, devalue, or convert marital or divisible property are statutory distributional factors.

5. Divorce— equitable distribution—unequal distribution—speculative tax consequences

An unequal distribution of property in an equitable distribution action was remanded because the court considered speculative tax consequences where no evidence of tax consequences was presented.

6. Divorce— equitable distribution—distribution of property—party's opinion

The trial court did not err in an equitable distribution proceeding by considering a party's opinion regarding the distribution of property under the catch-all provision of the statute.

7. Divorce— equitable distribution—findings—ability to pay—no evidence on tax consequences

Although plaintiff argued in an equitable distribution action that the trial court erred by ordering him to pay a distributional award without considering tax consequences or his ability to pay, the court found that plaintiff had the ability to pay the award and plaintiff did not present evidence about any alleged tax consequences.

Appeal by plaintiff from judgment entered 6 March 2008 by Judge Thomas G. Taylor in Gaston County District Court. Heard in the Court of Appeals 26 February 2009.

Wake Family Law Group, Sokol McLamb Schilawski Oliver Ladd & Grace, PLLC by Suzanne R. Ladd, for plaintiff-appellant.

Terry Albright Kenny, P.C. by Terry Albright Kenny, for defendant-appellee.

JACKSON, Judge.

James L. Plummer, Sr. ("plaintiff") appeals the 6 March 2008 equitable distribution judgment ordering an unequal division of property in favor of Joyce Ann Plummer ("defendant"). For the reasons stated below, we remand.

Plaintiff and defendant were married to each other on 25 November 1961 and separated on 25 May 1999. Plaintiff filed an action for absolute divorce on 31 May 2000. On 23 June 2000, defendant filed an answer and counterclaim, admitting the allegations in plaintiff's complaint and seeking an equitable distribution of property. The parties' divorce was granted on 21 July 2000, with equitable distribution left open to be determined at a later date.

Plaintiff has asbestosis and a brain injury. Defendant had heart transplant surgery in 2002. Defendant filed a motion for an interim allocation of one-half of a portion of the property being held by plain-

tiff, including retirement and pension accounts. The motion was heard on 17 April 2007 and the trial court distributed a portion of the marital property pursuant to an order filed 12 September 2007.

The equitable distribution hearing ultimately was held on 18 February 2008, nearly nine years after the parties separated. The trial court, *inter alia*, awarded the home at 419 Kirby Drive in which defendant had been living to defendant, and the home at 123 Riverside Drive in which plaintiff had been living to plaintiff. The trial court also ordered plaintiff to pay to defendant a distributive award of $90,000.00. Plaintiff appeals.

The proper standard of review of equitable distribution awards was expressed in *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985).

> Historically our trial courts have been granted wide discretionary powers concerning domestic law cases. The legislature also clearly intended to vest trial courts with discretion in distributing marital property under N.C.G.S. 50-20 . . . .
>
> It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

Id. at 777, 324 S.E.2d at 833 (internal citations omitted). "In conformity with the standard of review, this Court will not 'second-guess values of marital . . . property where there is evidence to support the trial court's figures.' " *Pellom v. Pellom*, 194 N.C. App. 57, 62, 669 S.E.2d 323, 325 (2008) (alteration in original) (quoting *Mishler v. Mishler*, 90 N.C. App. 72, 74, 367 S.E.2d 385, 386, *disc. rev. denied*, 323 N.C. 174, 373 S.E.2d 111 (1988)), *disc. rev. denied*, 363 N.C. 375, —— S.E.2d —— (2009).

[1] Plaintiff first argues that the trial court erred in valuing the real properties located at 419 Kirby Drive and at 123 Riverside Drive. Based upon the standard of review, we disagree. However, we note that our review would be easier had the trial court been more precise in its statement of property values.

Here, the trial court was in the unenviable position of attempting to value real property approximately nine years after the date of separation. Accordingly, there were significant differences between the date of separation values of the properties and the date of distribution values. No professional appraisals were presented to the trial court as evidence of the properties' values at either time. However, the parties presented tax values, outstanding tax bills, and evidence of outstanding mortgages with respect to the various properties.

As to the residence at 419 Kirby Drive, 1999 tax records reflect a tax value of $35,550.00 on the date of separation. It was not encumbered by a mortgage, but it did have outstanding tax liens of $1,804.00. Accordingly, there was competent evidence from which the trial court could conclude that its net value as of the date of separation was $35,550.00 less $1,804.00, or $33,746.00. By 2007, the tax value of the property was $42,600.00, an increase of $7,050.00. At that time, there was no mortgage debt, but the outstanding taxes due on the property totaled $4,621.00, an increase of $2,817.00. Therefore, there was competent evidence from which the trial court could conclude that the net increase in value of the property was $7,050.00 less $2,817.00, or $4,233.00. The trial court valued the property at $37,979.00.

Pursuant to statute, passive appreciation in the value of marital property between the date of separation and the date of distribution is subject to equitable distribution as divisible property. N.C. Gen. Stat. § 50-20(b)(4)a. (2007). Although plaintiff presented evidence that he had made improvements to 419 Kirby Drive, the trial court discredited this evidence as not sufficiently credible or detailed. Therefore, any appreciation in the value of the property between 1999 and 2008 was passive and subject to equitable distribution as divisible property. Although the trial court did not separately label the net value as of the date of separation ($33,746.00) and the net value of the divisible passive appreciation ($4,233.00), we cannot discern an abuse of the trial court's discretion in reaching the overall value of $37,979.00 ($33,746.00 plus $4,233.00) for 419 Kirby Drive. Because there is evidence to support the trial court's valuation, we affirm its conclusion.

As to the residence at 123 Riverside Drive, the 1999 tax value was $61,200.00. As of the date of separation, there was an outstanding mortgage balance of $76,864.44. Accordingly, there was competent evidence from which the trial court could conclude that its net value as of the date of separation was $61,200.00 less the outstanding mort-

gage balance of $76,864.44, yielding negative equity of $15,664.44. By 2007, the tax value of the home was $101,430.00, an increase of $40,230.00. The mortgage balance at that time had been reduced by $29,275.44 to $47,589.00. Plaintiff had made the mortgage payments between the date of separation and the date of distribution. Pursuant to statute, "decreases in marital debt" are divisible property, subject to equitable distribution. N.C. Gen. Stat. § 50-20(b)(4)d. (2007). Therefore, there was competent evidence from which the trial court could conclude that the net value of the divisible property was $40,230.00 plus $29,275.44, or $69,505.44. The trial court valued 123 Riverside Drive at $53,841.00.

When the date of separation negative equity of $15,664.44 is subtracted from the net value of the divisible property of $69,505.44, the result is $53,841.00—the value assigned by the trial court. Therefore, we can discern no abuse of discretion in the trial court's valuation of 123 Riverside Drive.

[2] Plaintiff next argues that the trial court erred in not specifically distributing the debt secured by another of the parties' real estate holdings. We agree.

In its order, the trial court distributed real property located at 508 Glasgow Road to defendant. As with the real property located at 123 Riverside Drive, on the date of separation, the encumbrances on this property exceeded the value of equity. The property had appreciated passively, and plaintiff had made payments on the associated marital debt. The trial court valued 508 Glasgow at $19,091.00 without detailing how it calculated that figure. The trial court did not specifically distribute the remaining $25,109.00 balance of the marital debt on the property.[1]

In addition to raising valuation arguments similar to those raised on the above properties, plaintiff contends that the trial court intended to distribute the debt to defendant along with the real property. Because the mortgage is held in his name, he remains responsible for the debt. He contends that the matter should be remanded so that the trial court can clarify its intentions. Defendant contends that it was proper for the trial court to distribute the property to her but the outstanding debt to plaintiff. Because it is not clear from the trial

1. The trial court did not specifically distribute the remaining $47,589.00 balance of the marital debt on the property located at 123 Riverside Drive either. However, plaintiff has not challenged that fact. Ultimately the Riverside Drive property was distributed to him.

court's order whether the outstanding debt secured by the property located at 508 Glasgow Road is to be distributed to defendant along with the property, or to plaintiff separate from the property, we remand this matter to the trial court for clarification.

As to the property's value, the 1999 tax value was $34,890.00. As of the date of separation, there was an outstanding mortgage balance of $43,360.73. The 2006 tax value was $44,200. By the date of distribution, the mortgage balance had been reduced to $25,108.37 due to plaintiff's payments. The trial court valued 508 Glasgow Road at $19,091.00.

Similar to the property located at 123 Riverside Drive, between the date of separation and the date of distribution, the tax value of 508 Glasgow Road passively increased by $9,310.00 from $34,890.00 to $44,200.00. The $43,360.73 marital debt was reduced by $18,252.36 due to plaintiff's payments. We can discern no abuse of discretion in the trial court's valuation of 508 Glasgow Road at $19,091.00, when the net value at the date of separation (-$8,470.73) is combined with the net value of the divisible property ($27,562.36).

[3] Plaintiff next argues that the trial court did not make sufficient findings of fact and conclusions of law to support its determination that an unequal distribution in defendant's favor was equitable. We agree.

Pursuant to North Carolina General Statutes, section 50-20(j), in any equitable distribution order, "the court shall make written findings of fact that support the determination that the marital property and divisible property has been equitably divided." N.C. Gen. Stat. § 50-20(j) (2007). "If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably[,]" considering fourteen enumerated factors. N.C. Gen. Stat. § 50-20(c) (2007). "[I]f evidence is presented as to several statutory factors, the trial court *must* make findings as to each factor for which evidence was presented." *Rosario v. Rosario*, 139 N.C. App. 258, 261, 533 S.E.2d 274, 276 (2000) (emphasis added) (citations omitted). "[T]he degree of specificity required in a court order pertaining to equitable distribution cannot be established with scientific precision." *Id.* at 267, 533 S.E.2d at 279. However, the court's findings of fact must be "sufficiently specific to allow appellate review." *Id.* (citing *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986)).

The factors to be considered in determining that an unequal distribution is equitable are:

(1) The income, property, and liabilities of each party at the time the division of property is to become effective.

(2) Any obligation for support arising out of a prior marriage.

(3) The duration of the marriage and the age and physical and mental health of both parties.

(4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects.

(5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.

(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.

(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.

(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.

(9) The liquid or nonliquid character of all marital property and divisible property.

(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.

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

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital prop-

erty or divisible property, or both, during the period after separation of the parties and before the time of distribution.

(11b) In the event of the death of either party prior to the entry of any order for the distribution of property made pursuant to this subsection:

a. Property passing to the surviving spouse by will or through intestacy due to the death of a spouse.

b. Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to the surviving spouse due to the death of a spouse.

c. Property passing to the surviving spouse from life insurance, individual retirement accounts, pension or profit-sharing plans, any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary (excluding any benefits under the federal social security system), or any other retirement accounts or contracts, due to the death of a spouse.

d. The surviving spouse's right to claim an "elective share" pursuant to G.S. 30-3.1 through G.S. 30-33, unless otherwise waived.

(12) Any other factor which the court finds to be just and proper.

N.C. Gen. Stat. § 50-20(c) (2007). The trial court is required to make findings of fact as to each factor upon which evidence is presented. *Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 600 (1988).

Here, the trial court made the following finding of fact with respect to the factors enumerated in subsection (c):

50. In considering whether an equal distribution would be equitable, the Court has considered all the evidence relating to the statutory factors set out in North Carolina General Statute 50-2[0](c) specifically including the following:

A. The income and earning abilities of the parties;

B. The length of the marriage;

C. The Plaintiff husband's interest in his 401K account and his separate use of the funds prior to the date of distribution;

D. The homemaker contributions of the Defendant wife;

E. The tax consequences to the Defendant wife, and the marital estate, of this distribution which will not qualify as a tax-exempt exchange due to the length of time since the parties' separation and divorce;

F. The Plaintiff husband's maintenance of property since the time of separation and his receipt of all the benefits from the property; and

G. The Plaintiff husband's assertion under oath of his belief that the Defendant's possession of the Kirby Street property while the Plaintiff retained possession of the remaining parcels of real property and all of the funds in the retirement account was an equitable and fair division of the marital property.

In addition to this finding of ultimate fact, the trial court made numerous additional findings of fact.

As to the first enumerated factor, the trial court found as fact that it considered the income and earning abilities of the parties; however, it failed to find as fact what the parties' incomes or earning abilities were. Although the interim distribution order stated the parties' respective incomes, the trial court neither incorporated those earlier findings of fact into its order nor found as fact that those prior findings still were accurate. Further, although there are extensive findings of fact as to the properties involved, there is no finding of fact that the trial court considered the nature of those properties in the decision to distribute the marital estate unequally. There also is no finding of fact that the trial court considered the nearly $73,000.00 in outstanding loan balances owed by plaintiff on various items of real property.

The trial court found that the parties were both in poor health. However, it failed to find that it considered the parties' physical and mental health as an unequal distributional factor, pursuant to subsection (c)(3).

There is evidence in the record that plaintiff attended two years of ministerial school during the marriage. There is no indication in the trial court's order that it considered defendant's contributions to the marriage during that time in determining that an unequal distribution of marital assets was equitable, pursuant to subsection (c)(7).

Although finding of fact number 53 refers to the non-liquidity of the marital assets, this finding of fact pertains to whether an in-kind distribution is equitable. There is no finding of fact pursuant to subsection (c)(9) that this non-liquidity was considered in determining that an unequal distribution would be appropriate.

There was evidence in the record that unbeknownst to plaintiff, defendant signed plaintiff's name to stock dividend checks for six or seven years, keeping the funds for her own use. Although the trial court found as fact that plaintiff retained exclusive use of his retirement funds, there is no similar finding of fact with respect to defendant's conversion of marital property, pursuant to subsection (c)(11a).

The trial court's findings of fact are insufficient to allow for adequate appellate review. Therefore, we remand with instructions to make more specific findings of fact with respect to the distributional factors considered and the underlying evidence supporting those distributional factors.

[4] Plaintiff next argues that the trial court erred in considering inappropriate factors in determining the unequal distribution of marital assets. We disagree, in part, but agree as to the tax consequences.

Plaintiff first contends that plaintiff's interest in and use of his retirement funds was not an appropriate factor to be considered by the trial court. Pursuant to section 50-20(c), "[a]cts of either party to . . . waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution" is one of the distributional factors enumerated by statute. N.C. Gen. Stat. § 50-20(c)(11a) (2007). This factor also permits the trial court to consider plaintiff's maintenance of the property and retention of the benefits of the property, which plaintiff also contends was improperly considered.

[5] Plaintiff next contends that the trial court's consideration of speculative tax consequences was inappropriate. Section 50-20(c)(11) requires the trial court "to consider tax consequences that will result from the distribution of property that the court actually orders." *Weaver v. Weaver*, 72 N.C. App. 409, 416, 324 S.E.2d 915, 920 (1985), *disapproved of on other grounds*, *Armstrong*, 322 N.C. at 403, 368 S.E.2d at 599. Here, neither party presented evidence of the potential for, or extent of, any potential tax consequences that would result from the distribution of the marital estate. However, both attorneys discussed possible tax consequences with the court in their final

arguments. Defendant's attorney argued that because the distribution was more than six years after the divorce was granted, defendant had lost the presumption of a non-taxable exchange between spouses. Plaintiff's attorney agreed that "there could be some real serious tax problems based on the exchange and the fact that it was delayed[,]" but argued that the delay should be charged against defendant and not plaintiff. However, "it 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) (citations omitted).

Here, the trial court found as fact that it considered "[t]he tax consequences to the Defendant wife, and the marital estate, of this distribution which will not qualify as a tax-exempt exchange due to the length of time since the parties' separation and divorce[.]" Although the trial court was authorized by statute to consider the tax consequences of the distribution, there was no *evidence* presented that the distribution would not qualify as a tax-exempt exchange between former spouses. "It is error for a trial court to consider 'hypothetical tax consequences as a distributive factor.' " *Dolan v. Dolan*, 148 N.C. App. 256, 258, 558 S.E.2d 218, 220 (quoting *Wilkins v. Wilkins*, 111 N.C. App. 541, 553, 432 S.E.2d 891, 897 (1993)), *aff'd*, 355 N.C. 484, 562 S.E.2d 422 (2002) (per curiam). Therefore, we must remand to the trial court for reconsideration in light of its finding as to this portion of the award as well.

[6] Plaintiff's final contention of this argument is that it was improper for the trial court to consider plaintiff's opinion regarding the equitable distribution of the parties' property. Pursuant to the "catch-all provision" of subsection (c)(12), the trial court can consider "[a]ny other factor which the court finds to be just and proper." N.C. Gen. Stat. § 50-20(c)(12) (2007). This factor is limited to those things " 'which are relevant to the marital economy[,]' " that is, relating to " 'the source, availability and use by the wife and husband of economic resources during the course of the marriage.' " *Johnson v. Johnson*, 78 N.C. App. 787, 789-90, 338 S.E.2d 567, 569 (1986) (quoting *Smith v. Smith*, 314 N.C. 80, 86, 331 S.E.2d 682, 686 (1985)). Here, plaintiff agreed that he thought that it was fair that he "would get all the retirement and all the other property and [defendant] would get Kirby Street, which was half hers anyway." This goes directly to the availability of economic resources.

There is a statutory basis for the trial court to have considered plaintiff's use of his retirement funds and his opinion regarding what was equitable. Therefore, the trial court did not err in considering

those factors. Although there also is a statutory basis for the trial court to consider tax consequences, because no evidence of tax consequences was presented, the trial court should not have considered that distributional factor.

[7] Finally, plaintiff argues that the trial court erred in ordering him to pay to defendant a $90,000.00 distributive award without considering his ability to pay, or any actual tax consequences or other costs associated with the award and adjusting the award accordingly. We disagree.

The trial court found as fact that plaintiff has the ability to pay the distributive award, noting that the value of previously received retirement funds was more than the distributive award. Plaintiff contends that there is no evidence that those funds still existed at the time of the award. We note that in addition to the nearly $99,000.00 previously withdrawn from plaintiff's retirement account, on 29 September 2007, less than five months prior to the hearing, the remaining retirement funds were equally divided between the parties pursuant to the interim equitable distribution order. At that time there were sufficient funds remaining in plaintiff's retirement account—approximately $120,000.00—to satisfy the distributive award. Plaintiff did not present evidence regarding any alleged tax consequences or other costs associated with the award; therefore, the trial court was correct in not considering the actual tax consequences to plaintiff. Therefore, this argument is without merit.

In sum, we affirm the trial court's valuation of the real property located at 419 Kirby Drive and 123 Riverside Drive. We hold that the trial court properly considered plaintiff's ability to pay a distributive award of $90,000.00 to defendant. However, we remand with instructions to the trial court to clarify to whom the debt associated with the real property located at 508 Glasgow Road is distributed. Further, we remand with instructions to the trial court to make additional findings of fact to support its conclusion that an unequal distribution would be equitable, specifying the distributional factors considered and the underlying evidence supporting those distributional factors. The trial court specifically is authorized to conduct further evidentiary hearings as it deems necessary to comply with this opinion.

Remanded.

Judges STEPHENS and STROUD concur.

ANN MARIE CALABRIA, PLAINTIFF v. NORTH CAROLINA STATE BOARD OF ELECTIONS, LARRY LEAKE, GENEVIEVE SIMS, LORRAINE SHINN, CHARLES WINFREE, AND ROBERT CORDLE, DEFENDANTS

No. COA08-1269

(Filed 4 August 2009)

Elections— rescue funds—changes in statutes—mootness

The trial court correctly dismissed a case in which plaintiff conceded an election, did not dispute that she is no longer entitled to receive rescue funds from the State Board, did not dispute that her claim was subject to the mootness doctrine, and none of the exceptions to that doctrine applied. Amendments to statutes have addressed the issues raised in plaintiff's complaint, so that the exceptions for repetition and public interest did not apply, and the adverse collateral consequences exception did not apply because the unresolved allegations of misconduct relied upon by plaintiff involved entities that were not parties to the action.

Appeal by plaintiff from order entered 21 May 2008 by Judge James C. Spencer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 4 May 2009.

Shanahan Law Group, PLLC, by Kieran J. Shanahan and John E. Branch, III, for plaintiff-appellant.

Roy Cooper, Attorney General, by Susan K. Nichols, Special Deputy Attorney General, and Mark A. Davis, Special Deputy Attorney General, for defendants-appellees.

MARTIN, Chief Judge.

In North Carolina's 2006 General Election, two judges of this Court—Robin Hudson ("Hudson") and Ann Marie Calabria ("plaintiff")—were candidates for Associate Justice (the "Wainwright" seat) of the North Carolina Supreme Court. After reviewing their respective applications to become certified as North Carolina Judicial Public Financing candidates, the State Board of Elections ("State Board") so certified both candidates and disbursed $211,050.00 from the North Carolina Public Campaign Fund to both Hudson and plaintiff. Seven days before the election, FairJudges.Net, a North Carolina non-profit corporation, reported to the State Board that it had disbursed $204,225.00 to run a television advertisement in markets across the State, including Raleigh-Durham, Greensboro,

Charlotte, High Point, and Winston-Salem. The advertisement's audio track stated:

> Fairness. It's the most important quality a judge can have. Sarah Parker, Mark Martin, Patricia Timmons-Goodson, and Robin Hudson. Fair, unbiased judges. That's what we need in our North Carolina courts. Sarah Parker, Mark Martin, Patricia Timmons-Goodson, and Robin Hudson. Judges who will treat all people fairly.

This advertisement was re-broadcast numerous times in selected markets throughout the State between 31 October 2006 and 7 November 2006.

On 31 October 2006, plaintiff sent a letter to Gary Bartlett, executive director of the State Board, seeking "rescue funds"[1] in "an amount equal to the reported excess" "funneled" to Hudson's campaign by FairJudges.Net. Plaintiff asserted that FairJudges.Net was a "partisan group of Democratic [political action committees], candidates, unions, trial lawyers and wealthy Democratic Party activists [that] has inserted itself and huge amounts of cash into this campaign in an effort to defeat [plaintiff] and to elect [Hudson] to the North Carolina Supreme Court" in contravention of "what had been a nonpartisan, publicly financed election organized under a new statute the legislature intended to eliminate partisan politics and private interest money from the process of electing judges." On 1 November 2006, Executive Director Bartlett denied plaintiff's request for rescue funds for two stated reasons: (1) FairJudges.Net's communications were not "independent expenditures," but rather "electioneering communications," which "would not count toward [plaintiff's] trigger for rescue funds" under N.C.G.S. §§ 163-278.66 and 163-278.67 as written in 2006; and (2) "[e]ven if the funds spent for the advertisement by FairJudges.net did count toward [plaintiff's] trigger for rescue funds, only the amount of $51,056.25 would be counted because it would be divided among the four candidates named in the advertisement," and this amount "combined with the independent expenditures totaling $23,759.00 [attributed to Hudson's campaign to date] would only total $74,815.25, not enough to exceed the trigger for rescue funds." Executive Director Bartlett further informed plaintiff that she was

1. The term "rescue funds" is used throughout this opinion, since the term appeared in the text of the statutes at issue at the time this action began. However, the General Assembly has since amended Chapter 163 "by deleting the term 'rescue' wherever it appears and substituting the term 'matching.' " *See* 2007 N.C. Sess. Laws 1622, ch. 510, § 1(c).

entitled to appeal his decision to the State Board within three business days pursuant to N.C.G.S. § 163-278.68(c).

On 3 November 2006, plaintiff's counsel sent a letter to Executive Director Bartlett appealing to the State Board from his decision "denying [plaintiff's] request for [rescue] funds and the reasons in support of that denial." After considering the matter on that same day, the State Board, by an evenly-divided vote, denied plaintiff's request to overturn Executive Director Bartlett's decision in an order entered on 20 November 2006. The State Board also ordered that "[t]he staff shall make appropriate inquiries into the allegations of coordinated activities by FairJudges.Net and the North Carolina Democratic Party, including their officers, agents, and employees, and report the results of their investigation to the State Board as expeditiously as possible." On 7 November 2006, Hudson defeated plaintiff in the election by 20,551 votes out of 1,593,171 votes cast.

On 20 November 2006, plaintiff filed an election protest with the State Board alleging that the State Board's "failure" to "release rescue funds coupled with the coordinated expenditures of a State political party in amounts of funds which are nearly equal to the total amount of funds received by [plaintiff] from the Public Campaign Finance Fund" are "irregularities and improprieties which occurred in this election to such an extent that they taint the results of the entire election and cast doubt on its fairness." Plaintiff requested that the State Board "withhold certification of this election until it completes its administrative investigation of this matter and the impact of any such findings on this election contest" and, in the alternative, requested that the State Board conduct a hearing on this matter at which plaintiff could "examine witnesses to determine the extent to which the election communications were []coordinated between fairjudges.net and the N.C. Democratic party." After hearing the matter on 28 November 2006, the State Board dismissed plaintiff's election protest, determining "there is not probable cause to believe that a violation of election law or irregularity or misconduct has occurred in the conduct of this election." The State Board also determined that the dismissal of plaintiff's election protest "in no way alters the order entered on November 20, 2006, directing the staff to make 'appropriate inquiries into the allegations of coordinated activities by FairJudges.net and the North Carolina Democratic Party.' "

Plaintiff filed a Verified Complaint for Declaratory Judgment; Petition for Judicial Review of an Agency Decision and Appeal from Decision of the North Carolina State Board of Elections and Request

for Injunctive Relief ("Complaint") against defendants—the State Board; Larry Leake, in his official capacity as Chairman of the State Board; and Genevieve Sims, Lorraine Shinn, Charles Winfree, and Robert Cordle, each in his or her official capacity as members of the State Board—in which she sought: (I) an appeal from the State Board's decision to deny her "rescue funds"; (II) a declaratory judgment; (III) an appeal from the State Board's decision to deny her election protest; and (IV) an injunctive remedy due to an alleged violation of her civil rights. After the State Board issued the certificate of election to Hudson, who took office on 4 January 2007, plaintiff "acknowledge[d] that Counts I, III, and IV of her Complaint ha[d] been fully adjudicated or [we]re moot and that therefore only Count II for a Declaratory Judgment" of her Complaint remained before the trial court. Additionally, although plaintiff sought a declaratory judgment as to several issues in her Complaint, according to plaintiff's brief before this Court, "[t]he parties later agreed that the Legislature amended the Campaign Finance Act, which resolved future application of the statute as to" all but the following issue: "[W]ere the expenditures by 'Fairjudges.net' campaign contributions in excess of the limits allowed or in violation of the Campaign Finance Act?"

On 26 January 2007, defendants moved to dismiss the action for lack of subject matter jurisdiction, and failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. Defendants subsequently filed an Amended Motion to Dismiss, moving to dismiss plaintiff's claims on the additional grounds that the North Carolina General Assembly's enactment of Session Law 2007-510 rewrote N.C.G.S. §§ 163-278.66 and 163-278.67, "further render[ed] the claims asserted by [plaintiff] in this action subject to dismissal based on the doctrine of mootness since [plaintiff's] claims were filed prior to the enactment of S.L. 2007-510 and were, therefore, based entirely on the prior wording of those statutes." On 21 May 2008, the superior court granted defendants' motion and dismissed plaintiff's Complaint with prejudice after concluding that "Count II of Plaintiff's Complaint is moot and should be dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted." Plaintiff appealed to this Court from the trial court's 21 May 2008 Order.

"The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice." *Lide v. Mears*, 231

N.C. 111, 117, 56 S.E.2d 404, 409 (1949). "[I]t does not undertake to convert judicial tribunals into counsellors [sic] and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs." *Id.* Instead, "[t]he Act recognizes the need of society for officially stabilizing legal relations by adjudicating disputes before they have ripened into violence and destruction of the *status quo*." *Id.* at 117-18, 56 S.E.2d at 409 (internal quotation marks omitted).

> [The Declaratory Judgment Act] satisfies this social want by conferring on courts of record authority to enter judgments declaring and establishing the respective rights and obligations of adversary parties in cases of actual controversies without either of the litigants being first compelled to assume the hazard of acting upon his own view of the matter by violating what may afterwards be held to be the other party's rights or by repudiating what may be subsequently adjudged to be his own obligations.

Id. at 118, 56 S.E.2d at 409. "This being so, an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute." *Id.* Thus, "a declaratory judgment should issue (1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002) (alteration in original) (internal quotation marks omitted). "When these criteria are not met, no declaratory judgment should issue." *Id.*

Moreover, when, 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.' " *Pearson v. Martin*, 319 N.C. 449, 451, 355 S.E.2d 496, 497 (quoting *In re Peoples*, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979)), *reh'g denied*, 319 N.C. 678, 356 S.E.2d 789 (1987). "That [an] action was brought as a declaratory judgment action does not alter this result. Under the Declaratory Judgment Act, jurisdiction does not extend to questions that are altogether moot." *Id.* at 451, 355 S.E.2d at 498. " 'The statute does not require the

court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise.' " *Id.* at 451-52, 355 S.E.2d at 498 (quoting *Tryon v. Duke Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942)). Thus, "[i]f the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action," *In re Peoples*, 296 N.C. at 148, 250 S.E.2d at 912, because "a moot question is not within the scope of our Declaratory Judgment Act." *Morris v. Morris*, 245 N.C. 30, 36, 95 S.E.2d 110, 114 (1956).

In the present case, plaintiff asked the trial court to declare, with respect to "*her* rights, status, and other legal relations" only, whether the expenditures by FairJudges.Net were contributions "in violation of the Campaign Finance Act" which "ultimately should have resulted in the [State Board's] grant of rescue funds to [plaintiff]." However, plaintiff has since "conceded the election of [Hudson]," as "the election has already occurred and the winner has been certified," and does not dispute that she is no longer entitled to receive the rescue funds she was seeking from the State Board. *See* N.C. Gen. Stat. § 163-278.64(d)(7) (2007) ("A candidate shall return to the [Public Campaign] Fund any amount distributed for an election that is unspent and uncommitted at the date of the election, or at the time the individual ceases to be a certified candidate, whichever occurs first."); N.C. Gen. Stat. § 163-278.66(b) (2007) ("A certified candidate who ceases to be certified or ceases to be a candidate or who loses an election shall . . . return any unspent revenues received from the Fund."). In fact, plaintiff does not dispute that her claim is subject to the mootness doctrine, but contends her claim was properly before the trial court because it meets the following three exceptions to the mootness doctrine: (A) the "capable of repetition, yet evading review" exception; (B) the "collateral legal consequences of an adverse nature" exception; and (C) the "public interest" exception.

A.

Plaintiff first contends the remaining issue in Count II of her Complaint is excepted from the mootness doctrine because it is "capable of repetition yet evad[ed] review." Assuming, without deciding, that plaintiff's Complaint alleged a proper claim, we disagree that it is excepted from the mootness doctrine under this exception.

Two elements are required for the "capable of repetition, yet evading review" exception to the mootness doctrine to apply: "(1) the challenged action [is] in its duration too short to be fully litigated

prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (alterations in original) (internal quotation marks omitted), *disc. review denied*, 324 N.C. 543, 380 S.E.2d 770 (1989). Since the parties do not dispute that plaintiff's claim satisfied the first element of this exception, we address only the second element.

At the time of the November 2006 General Election, N.C.G.S. § 163-278.67(a) provided that, when "funds in opposition to a certified candidate or in support of an opponent to that candidate" are reported to "exceed the trigger for rescue funds[,] . . . the Board shall issue immediately to that certified candidate an additional amount equal to the reported excess within the limits set forth in this section." N.C. Gen. Stat. § 163-278.67(a) (2005). In 2006, "funds in opposition to a certified candidate or in support of an opponent to that candidate" were based upon a calculation which included "[t]he sum of all expenditures reported . . . of *entities making independent expenditures* in opposition to the certified candidate or in support of any opponent of that certified candidate." N.C. Gen. Stat. § 163-278.67(a)(2) (2005) (emphasis added). However, since the 2007 amendments to N.C.G.S. § 163-278.67(a), *see* 2007 N.C. Sess. Laws 1621-22, ch. 510, § 1(b), "funds in opposition to a certified candidate or in support of an opponent to that candidate" are now based upon a calculation which includes "[t]he aggregate total of all expenditures and payments reported . . . of *entities making independent expenditures or electioneering communications* in opposition to the certified candidate or in support of any opponent of that certified candidate." N.C. Gen. Stat. § 163-278.67(a)(2) (2007) (emphasis added).

As discussed above, the State Board's decision to deny plaintiff rescue funds was based upon a determination that (1) FairJudges.Net's communications were "electioneering communications," which did not count toward the trigger for rescue funds under the 2006 version of N.C.G.S. §§ 163-278.66 and 163-278.67; and (2) even if the funds spent for the advertisements by FairJudges.Net *did* count toward plaintiff's trigger for rescue funds, only a portion of those funds would be counted, and that amount, when combined with the independent expenditures made in support of Hudson as of the date of plaintiff's request for rescue funds, would not have been enough to exceed the trigger for rescue funds as determined by statute. Plaintiff does not dispute that the 2007 amendments to

N.C.G.S. §§ 163-278.66 and 163-278.67 directly address these issues. *See* 2007 N.C. Sess. Laws 1620-22, ch. 510, § 1(a)-(b).

However, plaintiff asserts that the amendments to N.C.G.S. § 163-278.67 do not render her claim moot because "the issue of coordination of spending to influence elections, regardless of the expenditures' legal status as an 'electioneering communication' or an 'independent expenditure[,'] was not resolved by [the amendments]." Accordingly, plaintiff "contends that Fairjudges.net's expenditures were coordinated with the Democratic Party, thereby rendering them contributions to [plaintiff's] opponent's campaign which ultimately should have resulted in the [State Board's] grant of rescue funds to [plaintiff]." Consequently, plaintiff states that her Complaint "asks the Court to declare whether the expenditures by Fairjudges.net were either contributions in excess of the limits allowed by the Campaign Finance Act or contributions otherwise in violation of the Campaign Finance Act, which implicates the 'coordination' issue; if so[, plaintiff] should have been entitled to rescue funds." In other words, although it may be true that "[t]he issue of what constitutes a 'coordinated' campaign will assuredly arise again in North Carolina elections," plaintiff's argument before this Court is that FairJudges.Net's alleged "coordination" with the North Carolina Democratic Party frustrated her efforts to obtain rescue funds from the Public Campaign Fund. However, because the State Board is now statutorily *required*, as a result of the 2007 amendments to N.C.G.S. §§ 163-278.66 and 163-278.67, to consider disbursements for "electioneering communications," in addition to "independent expenditures," when determining whether to issue rescue funds to a certified candidate—without any exception for disbursements that are "coordinated" with a political party—we conclude that there is no "reasonable expectation that [plaintiff] would be subjected to the same action again." *See Crumpler*, 92 N.C. App. at 723, 375 S.E.2d at 711 (internal quotation marks omitted). Therefore, we hold that this issue does not fall within the "capable of repetition, yet evading review" exception to the mootness doctrine.

B.

Plaintiff next contends the remaining issue in Count II of her Complaint is excepted from the mootness doctrine because it would result in collateral legal consequences of an adverse nature. Again, we disagree.

As discussed above, "[g]enerally, an appeal should be dismissed as moot '[w]hen events occur during the pendency of [the] appeal

which cause the underlying controversy to cease to exist.' " *Smith ex rel. Smith v. Smith*, 145 N.C. App. 434, 436, 549 S.E.2d 912, 914 (2001) (second and third alterations in original) (quoting *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977)). "Nevertheless, 'even when the terms of the judgment below have been fully carried out, 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.' " *Id.* (quoting *In re Hatley*, 291 N.C. at 694, 231 S.E.2d at 634). Moreover, "[t]he continued justiciability of appeals involving collateral legal consequences is not limited to criminal cases. A civil appeal is not moot when the challenged judgment may cause collateral legal consequences for the appellant." *In re A.K.*, 360 N.C. 449, 453, 628 S.E.2d 753, 756 (2006).

In the present case, plaintiff argues: "Here, *the conduct of the parties* has not been ruled on at all. If the conduct is illegal, the litigants and the public are entitled to a final ruling, and *the adverse legal consequence is to leave allegations of misconduct unresolved*." (Emphasis added.) She continues: "This clarification is necessary and needed because the [State Board] has regretfully failed to follow the evidence it unearthed and has failed to make a determination as to the 'coordinated contribution' issue presented in this matter." However, plaintiff also asserts that she does not want this Court to "make a ruling that Fairjudges.net and the North Carolina Democratic Party did something wrong so that they can be punished, but rather, is seeking a declaration to whether the coordination between the two entities constituted contributions to the Hudson campaign *triggering [plaintiff's] right to rescue funds*." (Emphasis added.) In other words, in support of plaintiff's contention that the issue before this Court is subject to the "collateral legal consequences of an adverse nature" exception, plaintiff asserts that she is seeking a declaratory judgment regarding "unresolved" "allegations of misconduct" "of the parties," but alleges "misconduct" and "illegal[ity]" only on the part of FairJudges.Net and the North Carolina Democratic Party—neither of whom are parties to this action. Therefore, we are not persuaded by plaintiff's assertion that "leav[ing] allegations of misconduct" or alleged "illegal[ity]" of non-parties "unresolved" requires a determination by this Court that the trial court's dismissal of plaintiff's remaining claim "can reasonably be expected to result" in collateral legal consequences of an adverse nature in this matter. *See Smith ex rel. Smith*, 145 N.C. App. at 436, 549 S.E.2d at 914 (internal quotation marks omitted).

C.

Finally, plaintiff contends the remaining issue in Count II of her Complaint is excepted from the mootness doctrine because it falls within the "public interest" exception. Again, we disagree.

"Even if moot, . . . this Court may, if it chooses, consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (per curiam). However, as discussed above, the relief plaintiff seeks in this case is an answer to the question of whether FairJudges.Net's alleged "coordination" with the North Carolina Democratic Party frustrated her efforts to obtain rescue funds from the Public Campaign Fund in the 2006 General Election. Since N.C.G.S. §§ 163-278.66 and 163-278.67 have since been amended and now require the State Board to consider disbursements for the type of communications which gave rise to the underlying action—making no exception from the issuance of rescue funds for those disbursements that are "coordinated" with a political party—we conclude that the question presented by plaintiff to this Court is not of such public interest as to except this matter from the mootness doctrine. Therefore, we hold that the trial court did not err when it determined that the remaining issue in plaintiff's Complaint is moot, and further hold that the matter does not fall within any of the three exceptions to the mootness doctrine as asserted by plaintiff. Accordingly, the trial court's order is affirmed. Our disposition of this appeal renders it unnecessary to address plaintiff's remaining assignments of error.

Affirmed.

Judges LEWIS and WALKER concur.

MILTON K. FUSSELL AND TERESA FUSSELL, PLAINTIFFS v. NORTH CAROLINA FARM BUREAU, MUTUAL INSURANCE COMPANY, INC., PACESETTERS REALTY, INC. OF WAKE COUNTY, THE TOWN OF APEX, AND THOMAS COOPER, DEFENDANTS

No. COA08-597

(Filed 4 August 2009)

Negligence— breach of duty—town employee turned on water at unoccupied house

The trial court erred by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claim for negligence against defendant town based on the allegation that a town employee turned on the water at plaintiffs' house and left the water turned on when the employee saw that the meter was running and thus should have known that water was running somewhere in the apparently unoccupied house, and the case is remanded for further proceedings because: (1) it was reasonably foreseeable that leaving the water running in an unoccupied house could result in property damage; and (2) although the Town contends that it did not agree to inspect the house for proper plumbing or to make sure the water was running properly, the duty alleged is not the duty to inspect the house's plumbing, but rather to use ordinary care in turning the water service back on. However, in the absence of any allegations by plaintiffs that a special relationship existed between the Town and plaintiffs, the Town had no duty to protect plaintiffs from any harmful conduct by the real estate agent that requested the water services.

Judge BRYANT dissenting.

Appeal by plaintiffs from order entered 6 December 2006 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 3 December 2008.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for plaintiffs-appellants.

Little & Little, PLLC, by Cathryn M. Little, for defendant-appellee the Town of Apex.

GEER, Judge.

Plaintiffs Milton K. and Teresa Fussell appeal from the trial court's order dismissing their claim for negligence against defendant

the Town of Apex pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs' complaint, when viewed in the light most favorable to plaintiffs, alleges that the Town's employee turned on the water at plaintiffs' house and left the water turned on when the employee could see that water was running somewhere in the apparently unoccupied house. We hold that these allegations sufficiently state a negligence claim because it was reasonably foreseeable that leaving the water running in an unoccupied house could result in property damage. We, therefore, reverse the order dismissing plaintiffs' complaint.

Facts

Plaintiffs' complaint alleged the following facts. Plaintiffs entered into a contract to purchase a house and adjacent vacant lot in Apex, North Carolina. At that time, the sellers of the property were renting the house to Mary Lois Woodson. Woodson would not vacate the property, and at least once, plaintiffs refused to go forward with the closing of the sale because Woodson had not yet moved out. In order to induce plaintiffs to close, defendant Thomas Cooper, the property's listing agent, provided plaintiffs with a written statement that Woodson would vacate the property by midnight on 23 June 2004. Plaintiffs closed on the property on 24 June 2004.

Woodson, however, remained in the house without plaintiffs' knowledge or consent. Cooper knew she was still living there, and upon Woodson's request, Cooper called the Town on 25 June 2004 and asked that it restore water service to the property, explaining that the tenant needed to get ready for a wedding. The Town sent one of its employees to the home to restore the water service.

When the employee arrived at the house, he knocked on all the doors to the home, but received no answer. The employee nonetheless restored the water service. He saw that the meter was running, but left the property without confirming that anyone was home. In fact, no one was present on the property. A faucet in the upstairs bathtub had, however, been left on and water began flowing through it once the Town's employee restored water service. Since the bathtub drain was plugged, the tub overflowed and water ran through the home for several days before being discovered, causing substantial damage to the property.

On 22 August 2006, plaintiffs filed suit against the Town, North Carolina Farm Bureau Mutual Insurance Company, Inc., Cooper, and

his realty company, Pacesetters Realty, Inc. of North Carolina. All defendants filed Rule 12(b)(6) motions to dismiss the complaint. The trial court granted the motions to dismiss of the Town and Farm Bureau, but denied the motions to dismiss of Pacesetters and Cooper. Although the trial court denied plaintiffs' motion to certify the orders for immediate appeal under Rule 54(b) of the Rules of Civil Procedure, plaintiffs voluntarily dismissed their claims against Cooper and Pacesetters on 22 February 2008. Plaintiffs then timely appealed the dismissal of their claim against the Town.

Discussion

This Court reviews a trial court's ruling on a motion to dismiss de novo. *Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 415 (2003). We must determine " 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.' " *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (quoting *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001)), *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

"In order to avoid dismissal under Rule 12(b)(6), a party must state enough to satisfy the substantive elements of at least some legally recognized claim." *Winters v. Lee*, 115 N.C. App. 692, 694, 446 S.E.2d 123, 124 (internal quotation marks omitted), *disc. review denied*, 338 N.C. 671, 453 S.E.2d 186 (1994). "To withstand a motion to dismiss, plaintiff's negligence complaint must allege the existence of a legal duty or standard of care owed to the plaintiff by the defendant, breach of that duty, and a causal relationship between the breach of duty and certain actual injury or loss sustained by the plaintiff." *Sterner v. Penn*, 159 N.C. App. 626, 629, 583 S.E.2d 670, 673 (2003) (internal quotation marks omitted).

Plaintiffs alleged that the Town was negligent in the following respects:

> 36. Defendant Apex's agents, servants, or employees were negligent in that the agents, servants or employees:
>
> a. Failed to determine whether defendant Cooper had authority to direct that the water be turned on at the Property;
>
> b. Failed to determine the status or condition of the faucets and other plumbing before turning the water on;

c. Failed to determine whether anyone was present in the house before turning the water on; and

d. Failed to take precautions to ensure that no problems would arise when the water was turned on.

37. The negligent acts and omissions described herein were committed by servants, agents or employees of defendant Apex working in the course and scope of their employment or agency; therefore, those negligent acts and omissions are imputed to defendant Apex.

On appeal, the parties dispute whether these factual allegations were sufficient to allege that the Town breached any duty of reasonable care owed plaintiffs.

In *Mosseller v. City of Asheville*, 267 N.C. 104, 106, 147 S.E.2d 558, 560 (1966), the plaintiff slipped on ice that formed when water leaked from the City's water line into the streets and froze. Our Supreme Court first held that a municipal corporation that sells water for private consumption is acting in a proprietary capacity and can be held liable to the same extent as a privately owned water company. *Id.* at 107, 147 S.E.2d at 561. Nevertheless, the Court concluded that the trial court had properly dismissed the action because the plaintiff had not shown that her injury was reasonably foreseeable to the City. *Id.* at 110, 147 S.E.2d at 563.

The Court explained that a municipal corporation

> is not an insurer against injury or damage by water leaking from such system. It is liable only if the escape of the water was due to its negligence either as to the initial break in the water line or in its failure to repair or cut off the line so as to stop the flow. The reasonable care which is required of the city when engaged in such operation, like that required of a privately owned water company, includes the exercise of ordinary diligence to discover breaks in its lines and to correct such defects of which it has notice, or which it could have discovered by the exercise of reasonable inspection.

Id. at 107, 147 S.E.2d at 561 (internal citation omitted). The Court noted that because no evidence explained how the leak occurred, the plaintiff could recover only by showing that the City "was negligent in its failure to take steps to stop the flow of water after it had actual or constructive notice of the leak." *Id.*

The record indicated that the City had actual notice of a small leak that was causing a small amount of water to flow in the gutter. *Id.* The City did not send anyone to repair the leak until after the plaintiff had fallen. *Id.* at 110, 147 S.E.2d at 563. Nevertheless, the Supreme Court concluded that the possibility that a large volume of water would freeze on the streets and be covered with light snow such that the unsuspecting plaintiff might slip and fall was unforeseeable. Consequently, the Court affirmed the entry of judgment in favor of the City.

In *Graham v. N.C. Butane Gas Co.*, 231 N.C. 680, 685, 58 S.E.2d 757, 761 (1950), our Supreme Court explained that a gas company must "use reasonable care to prevent the escape of gas" in its customers' buildings. *Id.* The Court acknowledged that when the gas company does not own and did not install the gas fixtures in a customer's building, the gas company "is in no way responsible for their condition or for their maintenance," and thus can act on the assumption "in the absence of notice to the contrary[,] that such fixtures are sufficiently secure to permit gas to be introduced into the building with safety." *Id.*

If, however, the gas company "becomes aware that such gas is escaping from the gas fixtures on the premises into the building, it becomes the duty of the gas company to shut off the gas supply until the further escape of gas from the fixtures can be prevented, even though the fixtures do not belong to the company and are not in its charge or custody." *Id.*, 58 S.E.2d at 762. Therefore, "[i]f the gas company continues to transfer gas to the fixtures on the premises after it learns that the gas is escaping therefrom, it does so at its own risk, and becomes liable for any injury proximately resulting from its act in so doing." *Id.*

In applying these principles, the Court noted that the plaintiffs had presented evidence that the defendant was delivering 50 gallons of gas to the plaintiffs' storage tank. *Id.* at 686, 58 S.E.2d at 762. While the defendant's agent was transferring the gas from his tank truck to the storage tank, the agent realized that the gas was escaping through the plaintiffs' gas range into the plaintiffs' kitchen. Rather than shutting off the gas "until the further escape of the gas from the gas range could be prevented, [he] continued to introduce the gas into the house of the plaintiffs until the last of the 50 gallons had been transferred from the tank truck to the storage tank." *Id.* When he entered the kitchen to light the pilot light and prevent further escape of gas, an explosion and fire occurred resulting in the destruction of

the plaintiffs' property. *Id.* The Court concluded that this evidence was sufficient to support a claim of negligence against the gas company. *Id.*

We believe that this case more closely resembles *Graham* than *Mosseller*. In their complaint, plaintiffs alleged that the Town's employee knocked on the doors of the house and did not receive any answer, suggesting that no one was home. The employee nonetheless reconnected the water service to the house. The complaint alleges that the employee saw that the water meter was running, which—viewing the allegations in the light most favorable to plaintiffs—indicated that water was flowing in the house even though no one was present. Despite the potential for water running in the house with no one present, the Town's employee left without disconnecting the water. We cannot hold, at the motion to dismiss stage, that it would be unforeseeable to the Town employee that leaving water flowing in an unoccupied house could cause property damage. Consequently, plaintiffs' allegations were sufficient to allege a duty on the part of the Town to turn the water back off to avoid water damage in the house.

The Texas Court of Civil Appeals reached an identical conclusion in *City of Denton v. Gray*, 501 S.W.2d 151 (Tex. Ct. Civ. App. 1973). In *Gray*, the City received a request to turn the water on at a rental house and sent an employee out to the premises. When he arrived, the house was locked and no one was home, but the employee still turned the water on. Subsequently, he noticed that the water meter was running, indicating that water was running somewhere inside the house. He did not, however, disconnect the water service, but rather simply left. The house subsequently flooded because of an open faucet, and the plaintiffs brought suit against the City for negligence. *Id.* at 155.

As in this State, a City in Texas "that owns and operates a waterworks system for profit is required by law to exercise ordinary care in the operation of its system." *Id.* at 153. This duty includes the duty of the City to a homeowner "to exercise ordinary care in . . . the act of turning the water on and off." *Id.* at 154. The court concluded that the evidence presented by the plaintiffs was sufficient "to support the court's conclusion that the City's employees were negligent in turning the water on and in leaving it on upon the occasion in question under the circumstances that prevailed at the time." *Id.* at 155.

Defendants, however, rely on *Lambeth v. Media Gen., Inc.*, 167 N.C. App. 350, 351, 605 S.E.2d 165, 166-67 (2004), in arguing that the

City had no duty to make sure the plumbing of plaintiffs' house was working properly before turning on the water. In *Lambeth*, the plaintiffs contacted their newspaper delivery service and requested that their home delivery be stopped while they were out of town to "reduce the appearance that their home was vacant." *Id.*, 605 S.E.2d at 167. A newspaper employee left the request at the newspaper carrier's drop off location in a manner that allowed someone passing by to read it and learn that the plaintiffs had requested that delivery be stopped. As a result, the plaintiffs' house was targeted for a robbery while they were out of town. *Id.* The plaintiffs sued the newspaper for negligence, alleging that the newspaper should have ensured that the stop-delivery notice was kept confidential. *Id.* at 351-52, 605 S.E.2d at 167.

On appeal of the dismissal of their claims, this Court affirmed, holding that the plaintiffs had not sufficiently alleged that the newspaper had a duty of reasonable care to keep secret the information about their absence from their home. *Id.* at 353, 605 S.E.2d at 168. The Court explained that although the newspaper did have a duty to use ordinary care in delivering the newspapers and in stopping that delivery upon request, that duty was not breached. *Id.* The plaintiffs were alleging instead that the newspaper had a separate duty to keep secret their request to stop delivery. The Court explained that "[p]laintiffs cite no authority for the proposition that Media General owed a further legal duty to plaintiffs to treat the 'stop delivery' request in confidence, and we decline to invent one." *Id.*

Here, the Town contends that it did not agree to inspect the house for proper plumbing or to make sure the water was running properly. This argument, however, misstates the duty alleged by plaintiffs. The duty alleged is not the duty to inspect the house's plumbing, but rather to use ordinary care in turning the water service back on. Because the complaint alleges the meter was running, indicating water was flowing in the house when no one was present, the complaint adequately alleges a breach of the duty to use ordinary care in turning on the water.

Plaintiffs also argue that the Town was negligent in failing to ensure that Cooper had authority to request that water services be provided to plaintiffs' home. The complaint alleges that Cooper was a real estate agent licensed in North Carolina and that he told the Town that a tenant on the property needed water services. Plaintiffs, however, cite no authority suggesting that there is a duty to investigate the authority of someone requesting municipal services.

Moreover, plaintiffs' complaint contains no allegation that the Town knew or should have known that Cooper, who told the Town he was the property's listing agent, lacked such authority.

"In general, there is no duty to prevent harm to another by the conduct of a third person." *Hedrick v. Rains*, 121 N.C. App. 466, 469, 466 S.E.2d 281, 283, *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996). There is, however, an exception to the general rule "where there is a special relationship between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct, or a special relationship between the defendant and the injured party which gives the injured party a right to protection." *Id.* at 469, 466 S.E.2d at 283-84 (internal citations omitted). In the absence of any allegations by plaintiffs that such a special relationship existed between the Town and plaintiffs, the Town had no duty to protect them from any harmful conduct by Cooper.

In sum, because plaintiffs' complaint contains sufficient allegations that the Town owed plaintiffs a duty to use ordinary care in restoring water service to their property, we reverse the trial court's order dismissing their claim and remand for further proceedings. We find plaintiffs' remaining arguments, however, unpersuasive.

Reversed.

Judge McGEE concurs.

Judge BRYANT dissents in a separate opinion.

BRYANT, Judge dissenting.

The majority reverses the trial court's judgment dismissing plaintiff's negligence claim against the Town of Apex, holding that plaintiff's allegations are sufficient to state a claim of negligence. Because I am unable to find any North Carolina case law that would expand a water company's duty of reasonable care to require that it shut off the water supply to a building if, after turning the water supply on, an employee notices that the meter is running, I respectfully dissent.

As stated by the majority, plaintiff's negligence complaint must allege, among other things, the existence of a legal duty or standard of care owed to the plaintiff by the defendant in order to withstand a motion to dismiss. *Sterner v. Penn*, 159 N.C. App. 626, 629, 583 S.E.2d 670, 673 (2003). However, the majority's reliance upon *City of Denton*

v. Gray, 501 S.W.2d 151 (Tex. Civ. App. 1973) to establish the existence of defendant's legal duty to shut off the water supply to plaintiff's home is misplaced. Although *Denton* does involve facts substantially similar to the present case (the water company was owned and operated by the city; the city was asked to turn the water to plaintiff's house on; when the city employee turned the water on, he noticed the water meter was running, indicating water was running in the home; the employee did not turn the water off, but left the water running; the home was subsequently flooded), the Texas Court's holding was based primarily on substantial evidence that the City had established "a custom or practice in connection with turning on water service to residences" that

> (a) someone must be at the residence, or, (b) the house must be unlocked so a City employee can enter and see if there are open faucets or other water leaks, or (c) in the absence of both of the above, the City employee who is connecting the service is to watch the water gauge to see if it stops registering water flowing through the meter after enough water has flowed through the meter to fill the bathroom commodes. If it does not stop registering within such time, then he is to disconnect the water service.

Id. at 152. This custom or practice was evidence of a standard of care, and the facts show that the City had not complied with the standard of care when turning the water on to the plaintiff's house. The Texas Court affirmed the judgment against the City and concluded that the evidence of the City's custom "was admissible" and "proof of conformance with the custom is some proof of due care and proof of nonconformance with it is proof of negligence." *Id.* at 154.

In the present case, there is no evidence that the Town of Apex has established a custom that requires someone to be home, or an employee to check the home to ensure that no spigots were left running, or to turn off the water if the water meter is running when the water supply is being turned on. In the absence of evidence of such custom and in the absence of a legal duty to shut off the water, plaintiff's claim must fail.

The majority also cites to *Graham v. N.C. Gas Co.*, 231 N.C. 680, 685, 58 S.E.2d 757, 761 (1950), in support of its holding that plaintiff's complaint stated a sufficient claim for negligence. However, *Graham* is distinguishable from the present case. In *Graham*, a gas company was held to have breached its duty of care when an employee failed to shut off the gas supply to a house after he realized the meter was

running and gas was being released into the home. Our Supreme Court noted that North Carolina law recognizes that gas is a very dangerous substance and due to its nature, a gas company's duty of reasonable care requires that if an employee

> becomes aware that such gas is escaping from the gas fixtures on the premises into the building, it becomes the duty of the gas company to shut off the gas supply until the further escape of gas from the fixtures can be prevented, even though the fixtures do not belong to the company and are not in its charge or custody. If the gas company continues to transfer gas to the fixtures on the premises after it learns that the gas is escaping therefrom, it does so at its own risk, and becomes liable for any injury proximately resulting from its act in so doing.

Id. at 685, 58 S.E.2d at 762 (1950).

Because no North Carolina case law expands a water company's duty of care to require the water company to ensure that after the water supply to a building has been turned on, the water is not running in the building or, if the water is running, someone is present in the building, plaintiff has not alleged the existence of trial court should be affirmed.

JAY EDUARD KRUEGER, PETITIONER v. NORTH CAROLINA CRIMINAL JUSTICE EDUCATION & TRAINING STANDARDS COMMISSION, RESPONDENT

No. COA08-679

(Filed 4 August 2009)

1. Administrative Law— judicial review of final agency decision—improper standard of review did not require remand

Although the trial court erred by reviewing a final agency decision under the standard set out in N.C.G.S. § 150B-51(b) instead of N.C.G.S. § 150B-51(d) and applying the standard established by N.C.G.S. § 1A-1, Rule 56, this error does not require a remand to the trial court for application of the proper standard of review because the Court of Appeals can review the final agency decision under the correct Rule 56 standard since the decision at issue is a summary judgment decision and an appellate court reviews a grant of summary judgment *de novo*.

2. Police Officers— suspension of law enforcement certification—submission of falsified or inaccurate radar training records

The trial court erred by granting summary judgment in favor of respondent NC Criminal Justice Education and Training Standards Commission on its decision to suspend petitioner's law enforcement certification for five years based on his submission of falsified or inaccurate radar training records, and the case is remanded to the superior court for further remand for an evidentiary hearing before an administrative law judge (ALJ) of the Office of Administrative Hearings because: (1) the two disputed claims in the case went completely unaddressed by the ALJ, and the Commission expressly declined to address petitioner's constitutional claim; (2) the ALJ's and the Commission's findings of fact suggest that neither one considered the evidence submitted in support of petitioner's motion for summary judgment; and (3) the case cannot be resolved on summary judgment given the evidence set forth in the record as the parties' briefs demonstrated that resolution of petitioner's claims that respondent acted arbitrarily and capriciously and violated his constitutional rights are dependent on a determination of the facts relating to petitioner's suspension and the facts relating to the other officers who received lesser punishments.

Appeal by petitioner from order entered 26 February 2008 by Judge A. Leon Stanback, Jr. in Wake County Superior Court. Heard in the Court of Appeals 3 December 2008.

Edelstein & Payne, by M. Travis Payne, for petitioner-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Mark A. Davis and Assistant Attorney General Jane Ammons Gilchrist, for respondent-appellee.

GEER, Judge.

Petitioner Jay Eduard Krueger appeals from the trial court's order upholding the decision of respondent, the North Carolina Criminal Justice Education and Training Standards Commission ("the Commission"), to suspend his law enforcement certification for five years. The trial court, in reviewing the Commission's decision, failed to make the necessary determination under N.C. Gen. Stat.

§ 150B-51(d) (2007) as to whether petitioner's evidence gave rise to a genuine issue of material fact on his claims that the Commission's decision was unconstitutional and/or arbitrary and capricious. Because the parties' arguments on appeal demonstrate that genuine issues of material fact exist, we reverse the trial court's order granting summary judgment to respondent and remand to the superior court for remand for an evidentiary hearing before an administrative law judge of the Office of Administrative Hearings.

Facts

In May 2005, petitioner, a certified law enforcement officer employed since 2000 by the Raleigh Police Department ("the Department"), was interviewed by the Department after allegations surfaced that he had submitted falsified or inaccurate radar training records. Petitioner admitted that he had signed forms for two other law enforcement officers showing that those officers had completed radar training with petitioner when they had not in fact done so.

As a result, petitioner was suspended without pay for 20 days and barred from applying for special assignments or promotions within the Department. The Commission then initiated action to revoke petitioner's law enforcement certification. 12 N.C. Admin. Code 09A.0204(b)(8) (2008) provides that the Commission may suspend, revoke, or deny an officer's or applicant's certification if the Commission finds that the officer or applicant "knowingly and willfully, by any means of false pretense, deception, defraudation, misrepresentation or cheating whatsoever, aided another person in obtaining or attempting to obtain credit, training or certification from the Commission[.]"

When the suspension is for such a reason, "the period of sanction shall be not less than five years; however, the Commission may either reduce or suspend the period of sanction . . . or substitute a period of probation in lieu of suspension of certification following an administrative hearing . . . ." 12 N.C. Admin. Code 09A.0205(b)(5) (2008). To that end, the Commission has adopted a policy authorizing its Probable Cause Committee, "[i]n those cases that it deems to be appropriate," to enter into a consent agreement with an officer to reduce the sanction imposed before a Final Agency Decision is reached.

Petitioner submitted evidence to the administrative law judge ("ALJ") of five officers who were allowed to enter into consent agreements reducing their punishments under this policy. Petitioner was

not, however, given an opportunity to reduce his punishment, but rather, on 16 February 2006, the Probable Cause Committee voted to suspend petitioner's certification for five years. Petitioner gave notice of appeal from this decision to the superior court, but the Commission requested that the matter be heard first before an ALJ.

In petitioner's pre-hearing statement before the ALJ, petitioner asserted that the imposition of a five-year suspension of his certification "would constitute a violation of his constitutional rights, including but not limited to his rights to substantive due process and equal protection." He asked that the Commission "either suspend any sanction that has been issued, or, at most, subject Petitioner to a probationary period." Petitioner argued that a lesser sanction was warranted "based on his history, his performance as a law enforcement officer, and his overall good character." He also contended that he had "suffered very substantial sanctions imposed on him by the Raleigh Police Department, and that those sanctions are more than sufficient and appropriate to assure that there will be no reoccurrence of such lapses on his part."

On 7 December 2006, petitioner filed a motion for summary judgment attaching his own affidavit; exhibits relating to petitioner's disciplinary action and suspension of his law enforcement certification; exhibits relating to the suspension of the certification of other officers and consent agreements for lesser sanctions entered into between the Probable Cause Committee and the other officers; and exhibits relating to respondent's policy and procedure regarding consent agreements. Petitioner also attached respondent's verified response to a motion to compel stating that it had no information concerning the criteria and standards used to decide whether to issue a sanction of less than a suspension of an officer's certification.

In his motion, petitioner argued that his exhibits "show[ed] that while Petitioner engaged in some inappropriate actions for which he has received substantial discipline from his employer, his actions were comparable to, or less serious than actions in which other law enforcement officers engaged who received a sanction from Respondent less than a suspension of their law enforcement certification." Petitioner further asserted that he has "never been offered the opportunity by Respondent to enter into a consent agreement for a lesser sanction, and that Respondent [did] not apply uniform criteria and standards in deciding when to offer a law enforcement officer a sanction less than suspension of their certification." In conclusion, petitioner contended that "[t]he exhibits accompanying this Motion

show that there is no genuine issue as to any material fact, and that Respondent has acted in an arbitrary fashion in exercising its discretion, violating Petitioner's rights to due process and equal protection guaranteed by the North Carolina Constitution and the Constitution of the United States."

On 14 December 2006, respondent filed an unverified response to petitioner's motion for summary judgment. In that response, respondent stated that in the cases of officers who received consent agreements, "the law enforcement officers fully admitted culpability and wrongdoing." Respondent further asserted that the Probable Cause Committee had treated petitioner and other officers employed by the Department that had been accused of the same violation "identically." The record on appeal indicates that respondent relied on the 16 February 2006 Probable Cause Committee minutes as its sole exhibit. Respondent contended that petitioner's motion should be denied, but did not formally seek summary judgment on its own behalf.

On 22 March 2007, the ALJ issued a proposed decision recommending that summary judgment be granted to respondent and that petitioner's certification be suspended for 240 days. In that proposed decision, the ALJ included findings of fact that petitioner admitted he knowingly and willfully signed false forms in order to aid other officers in obtaining radar certification, that petitioner admitted he did not respond to calls, that he was suspended from the Department for 20 days without pay, that he was ineligible to apply for promotions or specialized positions for two years, and that he also received reduced merit raises. The ALJ then stated: "No findings are made as to the constitutional issues raised by Petitioner." The final finding of fact stated: "Based upon the admissions of Petitioner, there are no genuine issues of material fact as to whether Petitioner knowingly and willfully, by any means of false pretense, deception, defraudation, misrepresentation or cheating whatsoever, aided another person in obtaining or attempting to obtain credit, training or certification from the Commission."

The ALJ's conclusions of law noted first that the parties were properly before the Office of Administrative Hearings and recited the terms of the governing provisions of the Administrative Code. The ALJ then concluded:

> That based upon Petitioner's admission that he knowingly and willfully signed a falsified Form SMI 15 for C.B. Mingia in order to aid C.B. Mingia in obtaining radar certification from the

> Commission; and based upon Petitioner's admission that he knowingly and willfully signed two falsified Form SMI 15s for K.A. O'Neal in order to aid K.A. O'Neal in obtaining radar certification from the Commission; and based upon the fact that Officer K.A. O'Neal received radar certification from the Commission based upon his submission of the Form SMI 15s to the Commission, there are no litigable issues for the Administrative Law Judge to decide on whether Respondent properly found probable cause to suspend Petitioner's law enforcement officer certification.

The ALJ then proposed—even though respondent had not, according to the record on appeal, moved for summary judgment—"that Respondent's Motion for Summary Judgment be granted on grounds that there are no litigable issues for the administrative law judge to decide . . . ." The ALJ further recommended that petitioner's certification be suspended for a period of 240 days. The ALJ ended his proposed decision by stressing again that "[t]he undersigned does not address constitutional issues raised by Petitioner." The ALJ's recommended decision did not specifically mention petitioner's claim that the Commission's refusal to lessen the sanction was arbitrary and capricious.

On 8 June 2007, the Commission issued a Final Agency Decision adopting essentially verbatim the ALJ's findings of fact and conclusions of law. The Commission neither modified nor added any findings of fact. The Commission, however, did add one conclusion of law, stating only: "That the Respondent's actions and decisions are not arbitrary and capricious." The Commission then ordered petitioner's certification suspended for a period of not less than five years from the date that the order became final, although it further provided that the suspension would be active for only 180 days with the remainder suspended on condition that petitioner violate no law or any administrative code provision of the State of North Carolina.

On 13 July 2007, petitioner filed a petition for judicial review in Wake County Superior Court, and on 26 February 2008, the superior court entered an order affirming the Final Agency Decision. In that order, the superior court noted: "Petitioner did not dispute that he violated Commission Rule 12 NCAC 09A.0204(b)(8) in that he knowingly and willingly, by any means of false pretense, deception, defraudation, misrepresentation or cheating whatsoever, aided another person in obtaining or attempting to obtain credit, training or certification from the Commission." The superior court also noted

that petitioner "did not dispute that the Commission had the authority to suspend his certification for a violation of this rule."

The superior court then found that "[t]he sanction imposed by [the Commission] was within the limits permitted by 12 NCAC 9A.0205(b)(5)." The court concluded, based on its findings of fact, that respondent's findings and conclusions were "made pursuant to lawful procedure and [we]re not affected by error of law" and that they "are supported by substantial admissible evidence in view of the whole record as submitted, and such Findings and Conclusions are not arbitrary or capricious." Finally, the trial court concluded that respondent's Final Agency Decision and the sanction imposed were "within the discretion given to the Respondent" and "the exercise of this discretion did not violate the due process or equal protection rights of Petitioner." Petitioner timely appealed to this Court.

Discussion

[1] "Where there is an appeal to this Court from a trial court's order affirming an agency's final decision, we must '(1) determine the appropriate standard of review and, when applicable, (2) determine whether the trial court properly applied this standard.' " *Blalock v. N.C. Dep't of Health & Human Servs.*, 143 N.C. App. 470, 473, 546 S.E.2d 177, 180 (2001) (quoting *In re Appeal by McCrary*, 112 N.C. App. 161, 166, 435 S.E.2d 359, 363 (1993)). In determining the appropriate standard of review in this case, we first observe that the Final Agency Decision granted summary judgment to respondent on the ground that there were "no genuine issues of material fact" to be resolved.

The trial court, in reviewing that decision, applied the standard of review set out in N.C. Gen. Stat. § 150B-51(b):

> Except as provided in subsection (c) of this section, in reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

Both parties presume this is the correct standard of review and have argued that standard on appeal.

Our legislature, however, specifically addressed review of a final agency decision granting summary judgment in N.C. Gen. Stat. § 150B-51(d):

> In reviewing a final agency decision allowing judgment on the pleadings or summary judgment, or in reviewing an agency decision that does not adopt an administrative law judge's decision allowing judgment on the pleadings or summary judgment pursuant to G.S. 150B-36(d), the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56. If the order of the court does not fully adjudicate the case, the court shall remand the case to the administrative law judge for such further proceedings as are just.

In *York Oil Co. v. N.C. Dep't of Env't Health & Natural Res.*, 164 N.C. App. 550, 553, 596 S.E.2d 270, 272 (2004), as in this case, the final agency decision adopted the ALJ's recommended decision granting summary judgment to the agency. On review in the superior court, the court affirmed the Final Agency Decision, applying the whole record test and holding that there was sufficient evidence to support the final agency decision. *Id.* This Court, however, concluded that the trial court had applied the wrong standard of review, explaining that " '[i]n reviewing a final agency decision allowing . . . summary judgment . . ., the [trial] court may enter any order allowed by . . . Rule 56.' " *Id.* at 554, 596 S.E.2d at 723 (quoting N.C. Gen. Stat. § 150B-51(d)). Instead of applying the whole record test, the trial court should have determined "whether there were any genuine issues of material fact and whether any party was entitled to judgment as a matter of law." *Id.* at 555, 596 S.E.2d at 273-74.

Thus, as an initial matter, we hold that the trial court, in this case, erred in reviewing the Final Agency Decision under the standard set out in § 150B-51(b) as opposed to following § 150B-51(d) and apply-

ing the standard established by Rule 56 of the Rules of Civil Procedure: whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). Even though the trial court acted under a misapprehension of the law, this error does not require remand to the trial court for application of the proper standard of review.

In *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 664, 599 S.E.2d 888, 897 (2004), our Supreme Court explained that generally, when an appellate court determines that a trial court entered an order " 'under a misapprehension of the applicable law,' " the appellate court should "remand for application of the correct legal standards." (Quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004).) On the other hand, "in cases appealed from administrative tribunals, the trial court's erroneous application of the appropriate standard of review does not automatically necessitate remand." *Id.* The Court held that in administrative cases, an appellate court's "obligation to review for errors of law" can be fulfilled " 'by addressing the dispositive issue(s) before the agency and the superior court' and determining how the trial court *should have* decided the case upon application of the appropriate standards of review." *Id.* at 664-65, 599 S.E.2d at 898 (quoting *Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment*, 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J., dissenting), *rev'd per curiam for reasons stated in the dissent*, 355 N.C. 269, 559 S.E.2d 547 (2002)).

Since the decision at issue is a summary judgment decision and an appellate court reviews a grant of summary judgment de novo, this Court can—and, according to *Carroll*, should—go ahead and review the final agency decision under the correct Rule 56 standard. Thus, in *York*, 164 N.C. App. at 555-56, 596 S.E.2d at 274-75, this Court proceeded to review the final agency decision under Rule 56, determined that issues of fact existed, and reversed and remanded the order affirming the final agency decision.

[2] We, therefore, turn to the question whether the Final Agency Decision in this case properly determined that the record contained no genuine issues of material fact and that respondent was entitled to judgment as a matter of law. We note first that petitioner has never disputed that he violated the Commission's regulations or that the

suspension of his certification for five years was a sanction expressly authorized by the regulations. Instead, petitioner argued in his motion for summary judgment filed with the ALJ that the Commission's failure to exercise its discretion to reduce the sanction was, in light of actions taken as to other law enforcement officers, arbitrary and capricious and violated his constitutional rights to due process and equal protection.

In the ALJ's proposed decision, however, the findings of fact and conclusions of law addressed only the points that petitioner conceded: that he violated the regulations and was sanctioned in accordance with those regulations. The ALJ failed to address either of the two issues actually raised by petitioner. The ALJ expressly stated that it was making no findings of fact on the constitutional issues and did not mention at all petitioner's claim that the failure to impose a lesser sanction was arbitrary and capricious in light of sanctions imposed by respondent on other officers. In short, the two disputed claims in the case went completely unaddressed by the ALJ.

The Commission also expressly declined to address petitioner's constitutional claim. It did, however, add a conclusion of law, without any explanation of the basis for the conclusion, that its decision to suspend petitioner's license was not arbitrary and capricious.

Although, generally, findings of fact are not appropriate at the summary judgment stage because issues of fact may not be resolved, they may be used to set out the undisputed facts. *See In re Estate of Pope*, 192 N.C. App. 321, 329, 666 S.E.2d 140, 147 (2008) ("While it is true that a trial court may not, on summary judgment, make findings of fact resolving disputed issues of fact, when—as here—the material facts are undisputed, an order may include a recitation of those undisputed facts."), *disc. review denied*, 363 N.C. 126, 673 S.E.2d 129 (2009). In this case, the ALJ's and the Commission's findings of fact suggest that neither one considered the evidence submitted in support of petitioner's motion for summary judgment. Neither the ALJ nor the Commission mentioned that evidence or provided any explanation as to why the evidence was not addressed.

Respondent, in seeking to have the grant of summary judgment affirmed, does not make any argument that it is entitled to judgment as a matter of law based on petitioner's evidence, but instead points to evidence countering the evidence presented by petitioner in support of his motion. Although respondent also makes some assertions in its brief regarding "facts" that it identifies as undisputed, we can-

not find any support in the record on appeal for those facts. On the other hand, petitioner does not argue that the facts are undisputed, but rather urges this Court, contrary to Rule 56, to make its own findings of fact.

This case cannot be resolved on summary judgment given the evidence set forth in the record. As the parties' briefs demonstrate, resolution of petitioner's claims that respondent acted arbitrarily and capriciously and violated his constitutional rights are dependent on a determination of the facts relating to petitioner's suspension and the facts relating to the other officers who received lesser punishments. While petitioner argues that he was given a harsher punishment than other officers who were accused of actions comparable to or less serious than his violations, respondent counters that petitioner was "treated identically" to other officers accused of the exact same violation and that the officers referenced by petitioner were less culpable. Our review of the record indicates that genuine issues of material fact exist. We must, therefore, reverse the trial court's entry of summary judgment and remand for an evidentiary hearing before an ALJ of the Office of Administrative Hearings. Because of our resolution of this appeal, we need not reach petitioner's remaining contentions.

Reversed and remanded.

Judges McGEE and BRYANT concur.

STATE OF NORTH CAROLINA v. KEVIN MAURICE HARGRAVE

No. COA09-85

(Filed 4 August 2009)

1. Evidence— lay opinion—law enforcement officers—drugs and money indicative of sales

The trial court did not err in a prosecution arising from a cocaine sale by admitting lay opinion testimony from officers that the cocaine was packaged as if for sale and that the money found was indicative of drug sales. Defendant did not object at trial on the grounds that the officers were not qualified as experts and waived his right to appeal; however, if the issue had been pre-

served, there would have been no error because the testimony of the officers was based on personal experience and was helpful to the jury.

2. Witnesses— SBI lab technician—no advanced degree—testimony admissible

The trial court did not abuse its discretion in a cocaine prosecution by admitting testimony from the State's lab technician even though she did not have an advanced degree. The witness was better qualified than the jury to form an opinion on the particular subject and the trial court did not abuse its discretion in allowing the witness to testify.

3. Evidence— prior offense—incident indicative of knowledge

The trial court did not abuse its discretion by admitting evidence that defendant had been driving with a revoked license two months after the incident leading to his arrest. The evidence was admitted to show defendant's knowledge rather than his character, and was not more prejudicial than probative.

4. Evidence— past misconduct—sufficiently similar—not too remote

The trial court did not abuse its discretion by allowing a witness to testify to prior drug transactions with defendant where the past instances were sufficiently similar and not too remote in time, and the court gave an instruction limiting the evidence to common plan and preparation.

5. Drugs— constructive possession of drugs—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss drug charges, based on constructive possession, where defendant was not in exclusive control of the premises but substantial evidence existed to show incriminating circumstances.

6. Sentencing— habitual felon status—presumptive range—not excessive

A sentence within the presumptive range was not excessive and in violation of the Eighth Amendment for a defendant who had attained habitual felon status.

Appeal by defendant from judgment entered 1 May 2008 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 10 June 2009.

Attorney General Roy Cooper, by Assistant Attorney General Sueanna P. Sumpter, for the State.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for defendant-appellant.

HUNTER, Robert C., Judge.

Kevin Maurice Hargrave ("defendant") appeals from judgment entered in accordance with jury verdicts finding him guilty of: (1) "giving a false name to a law enforcement officer"; (2) "selling cocaine"; (3) "driving a motor vehicle on a public highway while license has been suspended or revoked"; (4) "delivering cocaine"; (5) "possession of cocaine with the intent to sell or deliver"; and (6) having attained habitual felon status. With regards to his prior record level, defendant stipulated that he was "a level four for felony sentencing" and "a level three for misdemeanor sentencing[.]" The trial court arrested judgment on the conviction of delivering cocaine, consolidated all of the remaining convictions into one Class C felony for sentencing purposes, and sentenced defendant to an active term of 120 to 153 months imprisonment, which was in the presumptive range for a defendant with a prior record level of IV. N.C. Gen. Stat. § 15A-1340.17(c) (2007). After careful review, we find no error.

I. Background

The State's evidence tended to show that either shortly before midnight on 30 November 2007 or shortly after midnight on 1 December 2007, Peter Paul Bruno ("Mr. Bruno") contacted defendant to buy cocaine. The two men met at approximately 12:50 a.m. in the parking lot of Bethpage Grocery, which was closed. Defendant's and Mr. Bruno's cars were the only vehicles in the lot, and the two men sat and talked prior to completing their transaction. Mr. Bruno gave defendant fifty dollars in exchange for at least two crack rocks. Deputy D.L. Logan ("Deputy Logan") spotted the two cars parked side by side and became suspicious when he saw Mr. Bruno either exit from or lean into the passenger's side of defendant's car. Upon further investigation, Deputy Logan spotted cocaine in Mr. Bruno's car. At this point, Deputy Logan called for back up, which arrived shortly thereafter and included Sergeant M.T. Grier ("Sergeant Grier") and Officer Brent Rowland ("Officer Rowland"). Mr. Bruno admitted to Deputy Logan that he was there to buy cocaine from defendant and that he had paid defendant with two twenty-dollar bills and two five-dollar bills in exchange for the cocaine.

Deputy Logan's attention then turned to defendant, who appeared nervous and whose "hands [were] shaking." Defendant then lied to Deputy Logan about his name because his license was revoked. Deputy Logan found $551 on defendant, which was all neatly bundled except for two twenty-dollar bills and two five-dollar bills. This corroborated Mr. Bruno's statement that he had just completed a drug sale with defendant. Shortly thereafter, Officer Rowland spotted a baggie containing smaller baggies of cocaine on the ground outside the front driver's side door of defendant's car. Defendant was then arrested. A subsequent chemical analysis performed by Misty Icard ("Ms. Icard") of the SBI determined that the substances found near defendant's car and those found in Mr. Bruno's car were cocaine base.

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

II. Analysis

A. Opinion Testimony

Officer Witnesses

[1] First, defendant alleges that the trial court erred by allowing officers Logan, Grier, and Rowland to give lay opinion testimony that the cocaine was packaged as if for sale and that the total amount of money and the number of twenty-dollar bills found on defendant were indicative of drug sales. Specifically, defendant contends that before the officers could give this opinion testimony, they needed to be presented and qualified as experts. We disagree.

As an initial matter, we note that defendant technically waived his right to appeal this issue because he failed to object to the testimony of Sergeant Grier and Officer Rowland on this ground. "Where evidence is admitted over objection, and the same evidence . . . is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984); *see also State v. Jolly*, 332 N.C. 351, 361-62, 420 S.E.2d 661, 667-68 (1992); *State v. Oxendine*, 224 N.C. 825, 828, 32 S.E.2d 648, 649 (1944). Here, all three officers testified that the cocaine was packaged as if for sale, the total amount of cash on defendant, and the number of twenty-dollar bills on defendant were all indicative of drug sales. While defendant objected to Deputy Logan's testimony because he was not an expert, he did not object to Officer Rowland's testimony and only objected to Sergeant Grier's testimony on the ground of relevance. Therefore, technically, this issue is not properly before us.

Nevertheless, even if we assume, *arguendo*, that defendant preserved this issue for our review, as discussed *infra*, we find that the trial court did not err in admitting this testimony.

Defendant cites *State v. Fletcher* and *State v. Chisholm* in support of his contention that in order for an officer to provide opinion testimony of the type in question, he or she must first be formally qualified as an expert. *State v. Fletcher*, 92 N.C. App. 50, 56-57, 373 S.E.2d 681, 685-86 (1988); *State v. Chisholm*, 90 N.C. App. 526, 528-29, 369 S.E.2d 375, 377 (1988). While these cases provide that an officer can give expert opinion testimony as to whether a substance was marijuana and whether marijuana was packaged for private use, they do not hold that it is always necessary for officers to be formally qualified as experts in order for such testimony to be admissible.

Furthermore, in *State v. Bunch*, 104 N.C. App. 106, 408 S.E.2d 191 (1991), this Court held that lay witnesses can present opinion testimony if said testimony is relevant and based on personal knowledge:

> Under N.C. Gen. Stat. § 8C-1 Rule 701 (1988), opinion testimony from a lay witness is permitted when it is "rationally based on the perception of the witness" and is helpful to the jury. As long as the lay witness has a basis of personal knowledge for his opinion, the evidence is admissible.

Id. at 110, 408 S.E.2d at 194 (quoting N.C. Gen. Stat. § 8C-1 Rule 701 (1988)). This Court applied this principle to the law enforcement testimony regarding drug transactions in *Bunch* and in *State v. Hart*, 66 N.C. App. 702, 311 S.E.2d 630 (1984). *See Bunch*, 104 N.C. App. at 110, 408 S.E.2d at 194 (holding that an officer can give opinion testimony as a lay witness as to the common practice in drug sales of having one person hold the money and another hold the drugs); *Hart*, 66 N.C. App. at 703, 311 S.E.2d at 631 (holding that an officer can give opinion testimony as a lay witness that chemicals found in the defendant's home were often used in the heroin trade).

Here, the testimony of each of the officers in the instant case was based on personal experience and was helpful to the jury in deciding whether the cocaine was for sale. At the time of trial, Deputy Logan had been employed for nearly four years with the sheriff's office, had completed courses in drug investigation, had passed basic law enforcement training, and had worked with the narcotics team. Sergeant Grier had nearly twenty-one years of law enforcement experience, had supervised the patrol division for the previous six years,

had worked as a vice narcotics officer for nine years, and had participated in undercover narcotics operations. Officer Rowland had six-and-a-half years of training as an officer, had completed basic law enforcement training, had completed approximately 1500 hours of in-service training, and had previously worked with vice narcotics on cases. As in *Hart* and *Bunch*, the officers' respective testimony was based on personal knowledge of drug practices. The testimony was also relevant because the fact that defendant had cocaine packaged for sale increases the likelihood that he was selling cocaine. Accordingly, we hold that the trial court did not err in admitting this testimony.

Lab Technician's Expert Testimony

[2] Next, defendant asserts that the trial court erred by admitting testimony from the State's lab technician, Ms. Icard, who testified that the substances found by law enforcement contained cocaine. Specifically, defendant appears to contend that Ms. Icard was unqualified to provide expert testimony as to the chemical analysis because she does not have an advanced degree. We disagree.

When an expert witness is proffered, the trial court must conduct a three-step inquiry: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations omitted). Here, defendant only questions whether Ms. Icard was qualified to be an expert and appears to assert that she was not because she did not possess an advanced degree. Notably, defendant does not cite a single case to support his argument that an advanced degree is necessary to provide this type of expert testimony.

In holding that the trial court did not abuse its discretion in admitting testimony from an SBI agent, this Court declared in *Jenkins*:

> [T]he general rule is that the determination of whether a witness qualifies as an expert is a factual one which is ordinarily within the exclusive province of the trial judge whose finding will not be disturbed unless there is no competent evidence to support it or an abuse of discretion. One is qualified as an expert if, through study or experience, he is better qualified than the jury to form an opinion on the particular subject.

State v. Jenkins, 74 N.C. App. 295, 299, 328 S.E.2d 460, 463 (1985) (citations omitted).

At the time of trial, Ms. Icard had earned a Bachelor's degree in chemistry, had completed basic law enforcement training, had completed in-house training to be a forensic drug chemist, and had testified as an expert in that field on approximately forty previous occasions. Additionally, admission of testimony as to this type of chemical analysis is routine, and this technique is well established. Because of Ms. Icard's study and training in this area, she is better qualified than the jury to form an opinion on the particular subject. Therefore, we hold that the trial court did not abuse its discretion by allowing her to testify as an expert regarding the chemical analysis she performed.

B. Character Testimony

Next, defendant alleges the trial court erred in admitting evidence regarding his subsequent driving with a revoked license and regarding his prior drug transactions with Mr. Bruno. He asserts that this evidence did not demonstrate knowledge, common plan or intent, and was more prejudicial than probative. We disagree.

Rule 404(b) of the North Carolina Rules of Evidence provides, in relevant part:

> 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 . . . .

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007). Rule 404(b) is a general rule of inclusion and only excludes evidence admitted for the sole purpose of showing that the defendant has the tendency to commit similar offenses to the one charged. *State v. Mack*, 188 N.C. App. 365, 376, 656 S.E.2d 1, 10 (2008). Additionally, Rule 404(b) allows admission of evidence of both subsequent and prior acts of defendant. *Id.* at 377, 656 S.E.2d at 10-11. As noted in *State v. Stevenson*, 169 N.C. App. 797, 611 S.E.2d 206 (2005), evidence admitted under Rule 404(b) is still subject to the balancing test of Rule 403:

> Where evidence of prior conduct is relevant to an issue other than the defendant's propensity to commit the charged offense, "the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and

> not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403."

Id. at 800, 611 S.E.2d at 209 (quoting *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988)).

Furthermore, the trial court can "guard[] against the possibility of prejudice by instructing the jury to consider [the witness's] testimony only for the limited [permissible] purposes . . . ." *Id.* at 802, 611 S.E.2d at 210. The trial court's decision that evidence is admissible under Rule 404(b) will only be reversed if "it could not have resulted from a reasoned decision." *State v. Bidgood*, 144 N.C. App. 267, 272, 550 S.E.2d 198, 202, *cert. denied*, 354 N.C. 222, 554 S.E.2d 647-48 (2001).

Subsequent Driving With a Revoked License

[3] To sustain the charge of driving with a revoked license, the State must prove that: "(1) [defendant] operated a motor vehicle, (2) on a public highway, (3) while his operator's license was suspended or revoked, and (4) had knowledge of the suspension or revocation." *State v. Woody*, 102 N.C. App. 576, 578, 402 S.E.2d 848, 850 (1991).

Here, Deputy Logan testified over objection that two months after the incident leading to defendant's arrest, he saw defendant again operating a motor vehicle on a public highway. This evidence was not admitted to show defendant's character and conformity therewith, but rather its probative value relates to the issue of knowledge, specifically that defendant knowingly drove with a revoked license.

Additionally, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. The admission of this evidence was minimally prejudicial given that other evidence showed that defendant knowingly drove with a revoked license, including Deputy Logan's testimony that when he initially confronted defendant, defendant gave him a false name because he knew that his license was revoked. Furthermore, like in Stevenson, Deputy Logan's testimony regarding the subsequent act was accompanied by a clear limiting instruction. While defendant contends that the limiting instruction was confusing because the trial court initially directed the jury to consider this evidence on the issue of intent and later changed the relevant issue to knowledge, we do not believe that a reasonable jury would have been confused by this instruction, especially when the trial court clearly rearticulated this instruction during its charge to the jury.

In sum, because the testimony pertaining to defendant's subsequent driving with a revoked license was admitted to show defendant's knowledge and was not more prejudicial than probative, we conclude that the trial court did not abuse its discretion by admitting this evidence.

Prior Drug Transactions

[4] Next, defendant alleges that the trial court erred by allowing Mr. Bruno to testify regarding his prior drug transactions with him. Defendant contends that this evidence did not demonstrate a common plan or scheme and was more prejudicial than probative. We disagree.

The testimony of the prior transactions is admissible because it establishes a common plan or scheme. Evidence of prior crimes cannot be admitted solely because they are " 'similar' " and " 'within a time not too far removed from the crime with which the defendant [is] charged.' " *State v. Byrd*, 309 N.C. 132, 141, 305 S.E.2d 724, 731 (1983) (alteration in original), *overruled on other grounds by State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). However, if the incidents are " 'sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403,' " the evidence is admissible under Rule 404(b). *Stevenson*, 169 N.C. App. at 800, 611 S.E.2d at 209 (holding that prior acts were sufficiently similar when the incidents occurred at the same place, involved the same type of drug, and the defendant fled when approached by the police in all incidents) (quoting *Boyd*, 321 N.C. at 577, 364 S.E.2d at 119).

In the instant case, the past incidents of drug sales between defendant and Mr. Bruno were sufficiently similar to the present crime. In all occurrences, Mr. Bruno called defendant prior to the sale, the parties met at an agreed upon place, defendant and Mr. Bruno sat in one of their cars and talked before concluding the sale, and defendant sold a similar amount of cocaine at a similar price. The prior incidents are not too remote in time because they all occurred within two years. Additionally, the court guarded against unfair prejudice by issuing a limiting instruction to the jury that it should consider the evidence only for the purposes of "motive, identity, a common plan or scheme, and preparation for the alleged crimes . . . ."

In sum, because the past and present incidents are sufficiently similar and not too remote in time and the trial court issued a limit-

ing instruction to guard against unfair prejudice, we conclude that the trial court did not abuse its discretion in admitting Mr. Bruno's testimony as to his prior drug transactions with defendant.

C. Motion to Dismiss

[5] Defendant next alleges that the trial court erred by denying his motion to dismiss the drug-related charges because there was insufficient evidence to show defendant possessed narcotics. We disagree.

A motion to dismiss for insufficient evidence should be denied if there is substantial evidence of each essential element of the crime. *State v. Duncan*, 136 N.C. App. 515, 518, 524 S.E.2d 808, 810 (2000). Substantial evidence is evidence that a reasonable mind might find adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The court must consider the evidence in the light most favorable to the State, the State should receive the benefit of every reasonable inference that can be drawn from the evidence, and all inconsistencies should be resolved in the State's favor. *State v. Hinson*, 85 N.C. App. 558, 564, 355 S.E.2d 232, 236, *appeal dismissed and disc. review denied*, 320 N.C. 635, 360 S.E.2d 98 (1987).

The evidence here is sufficient to support constructive possession. Constructive possession exists when the defendant, although not in actual possession of the contraband, has the intent and capability to exercise control over it. *State v. Spencer*, 281 N.C. 121, 129, 187 S.E.2d 779, 784 (1972). When the defendant is not in exclusive control of the premises where the drugs are found, the State must prove other incriminating circumstances to get the benefit of an inference of constructive possession. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). Some examples of incriminating circumstances are: being in close proximity to the contraband in question, *State v. Miller*, 363 N.C. 96, 99-100, ––– S.E.2d –––, ––– (2009); owning other items of property found near the contraband, *State v. Autry*, 101 N.C. App. 245, 252, 399 S.E.2d 357, 362 (1991); acting nervous in the presence of law enforcement, *State v. Butler*, 356 N.C. 141, 147-48, 567 S.E.2d 137, 141 (2002); and possessing a large amount of cash, *State v. Neal*, 109 N.C. App. 684, 687, 428 S.E.2d 287, 290 (1993).

Here, defendant was not in exclusive control of the premises, but substantial evidence existed to show incriminating circumstances. Like in *Miller* and *Autry*, defendant and his property (his car) were in

close proximity to the drugs. Furthermore, like in *Butler*, defendant acted nervous in the presence of law enforcement. Also, as in *Neal*, defendant possessed a large amount of cash. Additionally, the drugs were of the same type that defendant allegedly sold to Mr. Bruno and were found immediately outside the front driver's side door of defendant's car, and the sale of cocaine was corroborated by Mr. Bruno's statement that he paid for the drugs with bills in the exact denominations that were found loose in defendant's pocket. Finally, both Mr. Bruno and defendant initially attempted to leave the scene when Deputy Logan arrived, but they both stopped when ordered to do so.

In sum, we conclude that substantial evidence existed to support defendant's constructive possession of the cocaine, and the trial court did not err in denying defendant's motion to dismiss the drug-related charges.

D. Eighth Amendment

[6] Finally, defendant argues that his sentence was excessive, and therefore in violation of the Eighth Amendment. We disagree.

Defendant does not cite a single North Carolina case holding that a sentence imposed under our habitual felon statute was excessive. In fact, "[t]his Court and the North Carolina Supreme Court have consistently rejected Eighth Amendment challenges to habitual felon sentences." *State v. Cummings*, 174 N.C. App. 772, 776, 622 S.E.2d 183, 185-86 (2005), *disc. review denied*, 361 N.C. 172, 641 S.E.2d 306 (2006), *cert. denied*, 550 U.S. 963, 167 L. Ed. 2d 1140 (2007); *see also State v. Clifton*, 158 N.C. App. 88, 91, 95 580 S.E.2d 40, 42, 45 (upholding a sentence of two consecutive terms of 168 to 211 months active imprisonment under the habitual felon statute where the defendant committed two counts of a non-violent Class H felony), *cert. denied*, 357 N.C. 463, 586 S.E.2d 266 (2003); *State v. Hensley*, 156 N.C. App. 634, 639, 577 S.E.2d 417, 421 (upholding a sentence of 90 to 117 months active imprisonment where the defendant had attained habitual felon status and committed a non-violent Class H felony), *disc. review denied*, 357 N.C. 167, 581 S.E.2d 64 (2003).

Here, defendant's most serious underlying conviction is a Class G felony, and he was sentenced to an active term of 120-153 months imprisonment, which was within the presumptive range. Because this Court upheld the sentence in *Clifton*, where the defendant received a longer active term for a less severe underlying felony, we conclude

that the sentence in the instant case did not violate the Eighth Amendment. Therefore, we overrule this assignment of error.

No error.

Judges STEELMAN and GEER concur.

TRANSPORTATION SERVICES OF NORTH CAROLINA, INC. D/B/A CRYSTAL TRANSPORTATION, PLAINTIFF v. WAKE COUNTY BOARD OF EDUCATION, KATHRYN WATSON QUIGG, AND WILLIAM R. MCNEAL, DEFENDANTS

No. COA08-664

(Filed 4 August 2009)

1. Schools and Education— breach of contract—lack of preaudit certificate

The trial court erred by denying defendant Board of Education's motion to dismiss an action for breach of a contract to provide transportation for special needs students based on the lack of a preaudit certificate required by N.C.G.S. § 115C-441(a) because: (1) the lack of a preaudit certificate renders a contract invalid and unenforceable under N.C.G.S. § 159-28(a) (2007), a statute essentially identical to N.C.G.S. § 115C-441(a), but applicable to local governments rather than school boards; (2) the 2002 contract, attached to the complaint, was an obligation evidenced by a contract requiring the payment of money and therefore fell within the scope of the plain language of N.C.G.S. § 115C-441(a); (3) there was nothing in the statute excluding contracts for school transportation from its reach; (4) to the extent that plaintiff questioned the practicability of the preaudit certificate requirement, those concerns are more properly addressed by the legislature; and (5) in the absence of an allegation as to the existence of a certificate attached to the contract, the contract is, necessarily, void.

2. Schools and Education; Estoppel— breach of contract—notice of limitations upon authority

Defendant Board of Education was not estopped in a breach of contract action from asserting the contract's invalidity based on the requirements of N.C.G.S. § 115C-441(a) even though plain-

tiff contends the Board previously treated the contract as valid and accepted the benefits flowing from that contract because: (1) a county is not subject to an estoppel to the same extent as an individual or a private corporation, although an estoppel may arise against a county out of a transaction in which it acted in a governmental capacity if an estoppel is necessary to prevent loss to another, and if such an estoppel will not impair the exercise of the governmental powers of the county; (2) parties dealing with governmental organizations are charged with notice of all limitations upon the organizations' authority, as the scope of such authority is a matter of public record; and (3) to permit a party to use estoppel to render a county contractually bound despite the absence of the preaudit certificate would effectively negate N.C.G.S. § 159-28(a), and the Court of Appeals is not free to allow a party to obtain a result indirectly that the General Assembly has expressly forbidden, including avoiding the requirements of N.C.G.S. § 115C-441(a).

Appeal by defendant Wake County Board of Education from order entered 13 March 2008 by Judge A. Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 29 January 2009.

Anderson Jones, PLLC, by Matthew Duncan and Todd Jones, for plaintiff-appellee.

Tharrington Smith, L.L.P., by Rod Malone and Neal A. Ramee, for defendant-appellant Wake County Board of Education.

GEER, Judge.

Defendant Wake County Board of Education ("the Board") appeals from the trial court's denial of its motion to dismiss the breach of contract action brought by plaintiff Transportation Services of North Carolina, Inc., doing business as Crystal Transportation ("Crystal"). The Board contends the contract it entered into with Crystal is invalid and unenforceable because it lacked the preaudit certificate required by N.C. Gen. Stat. § 115C-441(a) (2007). This Court held in *Data Gen. Corp. v. County of Durham*, 143 N.C. App. 97, 103, 545 S.E.2d 243, 247-48 (2001), that the lack of a preaudit certificate renders a contract invalid and unenforceable under N.C. Gen. Stat. § 159-28(a) (2007), a statute essentially identical to N.C. Gen. Stat. § 115C-441(a), but applicable to local governments rather than school boards. We hold that *Data General* is dispositive in this case

and, therefore, conclude that the trial court erred in denying the Board's motion to dismiss.

Facts

This appeal arises out of a contract dispute between Crystal and the Board. Crystal has provided transportation for special needs students in the Wake County public school system for over 10 years. For the 1996-1997 school year, the Board orally agreed to compensate Crystal for its services on a per-mile-traveled basis. For the 1997-1998 school year, the Board orally agreed to compensate Crystal for its services on a per-student-assigned basis rather than on a per-mile-traveled basis. Under the terms of that agreement, the Board compensated Crystal for each student it was assigned to transport, regardless whether the student was actually transported that day. Thus, Crystal was entitled to compensation for the following students it did not actually transport: (1) those students who attended year-round schools, but were "tracked out"; and (2) pre-Kindergarten students who did not attend school on Fridays.

At the end of the 1997-1998 school year, the parties entered into a written multi-year contract terminating in 2003 under which the same compensation scheme was adopted. The Board paid Crystal under this contract through the 2001-2002 school year. In 2002, the parties entered into a new contract that contained the same terms and was to extend until 2008. The Board subsequently refused to pay Crystal for the students that were not actually transported because their year-round schools were not in session or because they did not attend school on Fridays.

On 19 September 2007, Crystal brought suit against the Board in Wake County Superior Court for breach of contract. Attached to the complaint was a copy of the 2002 contract. The Board filed a motion to dismiss on 27 November 2007 and an amended motion to dismiss on 13 December 2007. In the amended motion to dismiss, the Board contended that the 2002 contract was "void, invalid, and unenforceable on its face pursuant to N.C. Gen. Stat. § 115C-441(a)."

On 31 December 2007, Crystal filed an amended complaint in which it carried over its breach of contract claims and added three new claims. First, Crystal contended the Board was estopped from arguing that the 2002 contract was invalid because it had accepted benefits from that contract for six years. Crystal also asserted a claim for negligent misrepresentation against the Board, and a claim for negligence against defendant Kathryn Watson Quigg, the former chair

of the Board and defendant William R. McNeal, the former secretary of the Board. Crystal also alleged that "a pre-audit was in fact performed," but did not allege that a preaudit certificate existed or was affixed to the 2002 contract.

On 24 January 2008, the Board filed a motion to dismiss Crystal's amended complaint for failure to state a claim under Rule 12(b)(6) and for lack of personal jurisdiction under Rule 12(b)(2) of the Rules of Civil Procedure, arguing that the 2002 contract was invalid and unenforceable under N.C. Gen. Stat. § 115C-441(a) and that all defendants were protected from suit by the doctrine of governmental immunity. On 13 March 2008, the trial court entered an order granting in part and denying in part the Board's motion.

The trial court granted the Board's motion to dismiss Crystal's claims for negligent misrepresentation and negligence against the Board, Quigg, and McNeal for failure to state a claim for relief and for lack of personal jurisdiction on the basis of governmental and public official immunity. The trial court denied the Board's motion to dismiss Crystal's breach of contract and estoppel claims. The Board timely appealed to this Court.

I

[1] This Court reviews de novo a trial court's ruling on a motion to dismiss.[1] " '[T]he 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.' " *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (quoting *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001)), *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

N.C. Gen. Stat. § 115C-441(a) provides, in part, that

> no obligation may be incurred by a local school administrative unit unless the budget resolution includes an appropriation authorizing the obligation and an unencumbered balance remains in the appropriation sufficient to pay in the current fiscal year the sums obligated by the transaction for the current fiscal year. *If an*

1. We note that the trial court's order denying the Board's motion to dismiss is an interlocutory order. Although interlocutory orders are not ordinarily immediately appealable, because the Board's motion to dismiss was based on the ground of governmental immunity, the trial court's denial of that motion affects a substantial right and can be immediately appealed. *See Data Gen.*, 143 N.C. App. at 100, 545 S.E.2d at 245-46.

> *obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this section.*

(Emphasis added.) It further provides that "[a]n obligation incurred in violation of this section is invalid and may not be enforced." *Id.*

The North Carolina appellate courts have not previously considered the effect of the omission of a preaudit certificate from a contract with a school board in violation of N.C. Gen. Stat. § 115C-441(a). This Court has held, however, that a contract with a local government that has no preaudit certificate is invalid under N.C. Gen. Stat. § 159-28(a), an almost identical statute that applies to local governments. The text of N.C. Gen. Stat. § 159-28(a) closely parallels that of N.C. Gen. Stat. § 115C-441(a), providing that "[i]f an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection."

In *Data General*, 143 N.C. App. at 99, 545 S.E.2d at 245, the County of Durham entered into a lease with Data General for computer hardware and software. Data General filed suit for breach of contract, *quantum meruit*, estoppel, and negligent misrepresentation, contending that the County kept and used the equipment for almost two years without making payments to Data General. *Id.* The trial court denied the County's motion to dismiss. *Id.* On appeal, this Court held that the contract was unenforceable under N.C. Gen. Stat. § 159-28(a) because the contract was missing its preaudit certificate. 143 N.C. App. at 103, 545 S.E.2d at 248. The Court explained:

> In the instant case, Data General has failed to make a showing that the required preaudit certificate exists, and none is evidenced in the record. Furthermore, Durham County has argued that no such certificate exists. As there is insufficient evidence in the record that the requirements of N.C. Gen. Stat. § 159-28(a) have been met, we conclude that no valid contract was formed between Data General and Durham County, and Durham County therefore has not waived its sovereign immunity to be sued (and Data General may not maintain a suit) for contract damages.

Id., 545 S.E.2d at 247-48.

This Court has applied this same principle in several other cases. *See Finger v. Gaston County*, 178 N.C. App. 367, 370, 631 S.E.2d 171, 173 (2006) (upholding trial court's grant of summary judgment where plaintiff's agreement with county did not have preaudit certificate); *L&S Leasing, Inc. v. City of Winston-Salem*, 122 N.C. App. 619, 623, 471 S.E.2d 118, 121 (1996) (upholding trial court's grant of summary judgment to city on plaintiff's breach of contract claim because contract lacked preaudit certificate); *Cincinnati Thermal Spray, Inc. v. Pender County*, 101 N.C. App. 405, 408, 399 S.E.2d 758, 759 (1991) (affirming Rule 12(b)(6) dismissal of plaintiff's breach of contract claim where contract between parties did not have preaudit certificate); *see also Cabarrus County v. Systel Bus. Equip. Co.*, 171 N.C. App. 423, 426, 614 S.E.2d 596, 598 (reversing trial court's order enforcing settlement agreement where preaudit certificate was not signed by finance officer), *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177 (2005).

A court "must be guided by the 'fundamental rule of statutory construction that statutes in pari materia, and all parts thereof, should be construed together and compared with each other.' " *Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (quoting *Redevelopment Comm'n v. Sec. Nat'l Bank*, 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960)). Thus, "courts must harmonize such statutes, if possible, and give effect to each, that is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious body of legislation, if possible." *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 371, 90 S.E.2d 898, 904 (1956).

N.C. Gen. Stat. § 159-28(a) is part of the Local Government Budget and Fiscal Control Act, while N.C. Gen. Stat. § 115C-441(a) is part of the School Budget and Fiscal Control Act. Although each statute applies to a different type of governmental entity, both statutes deal with the same subject matter: contracts with a unit of government that require the payment of money. To that end, N.C. Gen. Stat. § 159-7(d) (2007), part of the Local Government Budget and Fiscal Control Act, provides:

> Except as expressly provided herein, this Article does not apply to school administrative units. The adoption and administration of budgets for the public school system and the management of the fiscal affairs of school administrative units are governed by the School Budget and Fiscal Control Act, Chapter 115, Article 9.

> *However, this Article and the School Budget and Fiscal Control Act shall be construed together to the end that the administration of the fiscal affairs of counties and school administrative units may be most effectively and efficiently administered.*

(Emphasis added.)

Thus, this Court is directed by both long-standing principles of statutory construction and the legislature to construe N.C. Gen. Stat. § 115C-441(a) in the same manner as N.C. Gen. Stat. § 159-28(a). As a result, this Court's holding in *Data General* and other decisions construing N.C. Gen. Stat. § 159-28(a) are controlling. We, therefore, hold that a preaudit certificate is required for a contract to be valid and enforceable under N.C. Gen. Stat. § 115C-441(a). *See also Nash-Rocky Mount Bd. of Educ. v. Rocky Mount Bd. of Adjustment*, 169 N.C. App. 587, 590-91, 610 S.E.2d 255, 258-59 (2005) (reasoning that in construing definition of word "building" in statute applying to cities, court should look to its previous decision construing same term in identical statute applying to counties).

Crystal argues that despite the substantial similarity between N.C. Gen. Stat. § 115C-441(a) and N.C. Gen. Stat. § 159-28(a), the holding in *Data General* does not apply to its 2002 contract because local school boards are unique governmental entities and are subject to statutes not applicable to other governmental units. Crystal points to the fact that *Data General* involved a contract with a fixed price and a set appropriation. In contrast, Crystal argues, here, the Board is authorized to add additional appropriations for further transportation needs that may arise after the budget has already been set. According to Crystal, the uncertainty about the total cost for the school system's transportation needs and the statutory authorization for future allocation of funds if they are needed makes it impossible to preaudit the school system's transportation costs. Crystal contends that, consequently, transportation contracts such as the 2002 contract should not be treated as an obligation incurred by the school system to another party, but rather as a direct operational expense of the system.

Our Supreme Court has emphasized that " '[w]hen language used in the statute is clear and unambiguous, this Court must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning.' " *Sara Lee Corp. v. Carter*, 351 N.C. 27, 35, 519 S.E.2d 308, 313 (1999) (quoting *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996)). N.C. Gen. Stat. § 115C-441(a) pro-

vides that all "obligations" that are "evidenced by a contract or agreement requiring the payment of money" must be accompanied by a preaudit certificate. It is undisputed that the 2002 contract, attached to the complaint, is an obligation evidenced by a contract requiring the payment of money. It, therefore, falls within the scope of the plain language of N.C. Gen. Stat. § 115C-441(a).

Moreover, this Court's holding in *Watauga County Bd. of Educ. v. Town of Boone*, 106 N.C. App. 270, 276, 416 S.E.2d 411, 415 (1992), demonstrates that the preaudit certificate requirement is not limited to fixed price contracts. In *Watauga*, the Town of Boone passed a resolution requiring 18% of the profits of the Town's Alcohol Beverage Control ("ABC") store be given to the school system. *Id.* at 271-72, 416 S.E.2d at 412. The profits that would go to the school system each year were not fixed—the amount could and did vary from year to year. *Id.* at 272, 416 S.E.2d at 412. One year, the school system received $33,000.00, while it received $27,000.00 and $38,000.00, respectively, over the next two years. *Id.* The Court nonetheless declared the resolution invalid under N.C. Gen. Stat. § 159-28(a) because it lacked a preaudit certificate. 106 N.C. App. at 276, 416 S.E.2d at 415.

Additionally, we note that there is nothing in the statute excluding contracts for school transportation from its reach. The plain language of N.C. Gen. Stat. § 115C-441(a) states—without any identified exceptions—that any "obligation" incurred by a local school administrative unit that involves the payment of money or a purchase order *must* be accompanied by a preaudit certificate attached to the face of the contract.

In *Sara Lee*, 351 N.C. at 36, 519 S.E.2d at 313 (quoting *Upchurch v. Hudson Funeral Home, Inc.*, 263 N.C. 560, 565, 140 S.E.2d 17, 21 (1965)), our Supreme Court stressed that " '[w]here the legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is a general rule of construction that the courts have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself.' " *See also In re Advance Am.*, 189 N.C. App. 115, 120, 657 S.E.2d 405, 409 (2008) (explaining that when the plain language of the statute is unambiguous, " 'the Court is without power to interpolate or superimpose conditions and limitations which the statutory exception does not of itself contain' " (quoting *State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670-71 (1969))). We are, therefore, bound by the plain lan-

guage of the statute and cannot recognize any exceptions not already set forth in the statute.

To the extent that Crystal questions the practicability of the preaudit certificate requirement, those concerns are more properly addressed by the legislature. As our Supreme Court stressed in *Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950):

> We have no power to add to or subtract from the language of the statute. The province of the Court is to interpret statutes conformable to the language in which they are expressed, and to declare the law in accord with the will of the law-making power, when exercised within constitutional limits. The question of the wisdom or propriety of statutory provisions is not a matter for the courts, but solely for the legislative branch of the state government.

See also Maready v. City of Winston-Salem, 342 N.C. 708, 714, 467 S.E.2d 615, 619 (1996) (explaining that "so long as an act is not forbidden, its wisdom and expediency are for legislative, not judicial, decision"); *Reed v. State Highway & Pub. Works Comm'n*, 209 N.C. 648, 655, 184 S.E. 513, 517 (1936) ("Wisdom or impolicy of legislation is not [a] judicial question. Policy of legislation is for the people, not courts. Courts do not say what law ought to be, but only declare what it is." (internal citations omitted)).

Finally, Crystal argues that because its complaint alleged that all of the statutory requirements—with the exception of the affixing of the signed preaudit certificate to the contract—were met, the trial court properly declined to dismiss Crystal's complaint. N.C. Gen. Stat. § 115C-441(a), however, specifically requires that the signed preaudit certificate be attached to the contract, stating that "the contract, agreement, or purchase order *shall* include on its face a certificate stating that the instrument has been preaudited to assure compliance with this section." (Emphasis added.) *See also Cincinnati Thermal Spray*, 101 N.C. App. at 408, 399 S.E.2d at 759 (holding contract invalid because plaintiff made no showing that preaudit certificate existed and therefore was "unable to show that N.C. Gen. Stat. § 159-28(a) [was] followed"); *L&S Leasing*, 122 N.C. App. at 623, 471 S.E.2d at 121 (holding contract invalid and unenforceable because "[p]laintiff has failed to show that such a certificate of compliance authorizing the alleged contract with L&S Leasing exists and none is evidenced in the record"). Thus, in the absence of an allegation as to the existence of a certificate attached to the contract, the contract is,

necessarily, void. The trial court, therefore, erred in not dismissing Crystal's complaint.

II

[2] Crystal also contends that even if the 2002 contract is subject to the requirements of N.C. Gen. Stat. § 115C-441(a) and was required to have a preaudit certificate, the Board should be estopped from asserting the contract's invalidity because the Board previously treated the contract as valid and accepted benefits flowing from that contract. "A county is not subject to an estoppel to the same extent as an individual or a private corporation." *Washington v. McLawhorn*, 237 N.C. 449, 454, 75 S.E.2d 402, 405-06 (1953). Nevertheless, "an estoppel may arise against a county out of a transaction in which it acted in a governmental capacity, if an estoppel is necessary to prevent loss to another, and if such an estoppel will not impair the exercise of the governmental powers of the county." *Id.* at 454, 75 S.E.2d at 406.

In *Data General*, 143 N.C. App. at 104, 545 S.E.2d at 248, however, this Court rejected Data General's argument that the County was estopped from asserting the defense of sovereign immunity. The Court held that "Data General may not recover under an equitable theory such as estoppel for breach of contract where Durham County has not expressly entered a valid contract." *Id.* Moreover, the Court explained, "parties dealing with governmental organizations are charged with notice of all limitations upon the organizations' authority, as the scope of such authority is a matter of public record." *Id.* Therefore, "parties contracting with a county within this state are presumed to be aware of, and may not rely upon estoppel to circumvent, such requirements." *Id.*

In *Finger*, 178 N.C. App. at 371, 631 S.E.2d at 174, the Court reasoned that "[t]o permit a party to use estoppel to render a county contractually bound despite the absence of the [preaudit] certificate would effectively negate N.C. Gen. Stat. § 159-28(a). We are not free to allow a party to obtain a result indirectly that the General Assembly has expressly forbidden." Such is the case here—applying estoppel to hold the Board liable would allow Crystal to escape the purpose of the legislature in enacting N.C. Gen. Stat. § 115C-441(a). *See also Wood v. N.C. State Univ.*, 147 N.C. App. 336, 347, 556 S.E.2d 38, 45 (2001) (stating that "the law is clear that any waiver of the State's sovereign immunity must be by action of the General Assembly" and holding that "[i]f a court could estop NCSU from asserting its otherwise valid sovereign immunity defense, then, effec-

tively, that court, rather than the General Assembly, would be waiving the State's sovereign immunity"), *appeal dismissed and disc. review denied*, 355 N.C. 292, 561 S.E.2d 887 (2002).

Therefore, because the 2002 contract's lack of a preaudit certificate renders it invalid and unenforceable, and because Crystal cannot rely upon estoppel to avoid this requirement, we hold that the trial court erred in denying the Board's motion to dismiss. We, therefore, reverse.

Reversed.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA v. CHARLIE VANCE RAWLINSON

No. COA08-585

(Filed 4 August 2009)

1. Larceny— misdemeanor larceny—joinder—subject matter jurisdiction—motion to dismiss—sufficiency of evidence

The superior court did not lack jurisdiction to render judgment on the charge of misdemeanor larceny of a license plate, or in the alternative, by refusing to dismiss the larceny charge at the close of the State's evidence, because: (1) under N.C.G.S. § 15A-926(a), the superior court may join a misdemeanor to another charge over which the superior court has jurisdiction if the charges are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan; (2) a joinder motion need not be written if made at a hearing, and, in the judge's discretion, the motion may be made orally even at the beginning of trial; (3) in the instant case, the State made an oral motion to join the misdemeanor larceny charge with the felony charges in proceedings held 2 October 2007; (4) the projected evidence presented by the State was sufficient to show defendant's acts in a video store and the taking of the license plate were based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan; and (5) the State presented sufficient evidence including evidence tend-

ing to show that a license plate was stolen from a vehicle on 5 February 2005, the same day the incidents occurred at the video store leading to defendant's other charges; the vehicle was parked next to the video store; and defendant was arrested the following day in possession of a different vehicle, but with the stolen license plate attached.

2. Burglary and Unlawful Breaking or Entering— felonious breaking or entering—motion to dismiss—sufficiency of evidence—implied consent—video store office

The trial court did not err by refusing to dismiss the charge of felonious breaking or entering because: (1) the office in a video store was not open to the public and defendant did not have implied consent to enter the office; and (2) even if defendant had implied consent to enter the office of the video store, defendant's act of stealing the cash and checks inside the deposit bag rendered that implied consent void *ab initio*.

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

Although defendant contends that the trial court's order was defective based on the trial court's failure to make specific findings of fact or conclusions of law, this argument is not properly before the Court of Appeals because failure to assign error to the findings of fact precludes appellate review. N.C. R. App. P. 10(c).

Appeal by Defendant from judgments entered 4 October 2007 by Judge Carl R. Fox in Superior Court, Iredell County. Heard in the Court of Appeals 10 December 2008. An opinion was filed in this matter on 19 May 2009 and withdrawn by this Court on 5 June 2009. This opinion supercedes and replaces in full the opinion filed by this Court on 19 May 2009.

Attorney General Roy Cooper, by Special Counsel Jay J. Chaudhuri and Assistant Special Counsel Lindsey L. Deere, for the State.

Irving Joyner for Defendant.

McGEE, Judge.

Charlie Vance Rawlinson (Defendant) was indicted by the grand jury in Iredell County on 22 January 2007 on the charges of felony larceny, attaining habitual felon status, larceny chose in action, felony

breaking or entering, preparation to commit burglary or other housebreakings, safecracking, and misdemeanor larceny. The record now shows that the trial court granted the State's motion for joinder pursuant to N.C. Gen. Stat. § 15A-926 (2008), on the grounds that the offenses were "based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." Defendant agreed that the offenses were "all connected in time" and did not object to the joinder of the offenses. A jury found Defendant guilty of felony breaking or entering and misdemeanor larceny on 4 October 2007. Defendant admitted his status as an habitual felon. The trial court sentenced Defendant to a term of 80 months to 105 months in prison. The State's evidence at trial tended to show the following.

Cheryl White (White) was working as manager of Queen City Audio, Video and Appliance (the video store) in Mooresville, North Carolina, on 5 February 2005. The video store was located in a former drugstore building and was divided into two areas: the retail area and the manager's office (the office). The retail area was the largest area, and it was located on ground level. The office was located on the left side of the retail area, two or three steps above the retail area. The office had a two-way mirror across the exterior of the office that faced the retail area. The entire retail area could be seen from inside the office, but customers in the retail area could not see inside the office. The office was not open to the public and during normal business hours, the door to the office remained closed, but unlocked. White testified that the video store's safe was located in the office, and that there was a bank deposit bag containing cash and checks stored inside the safe.

White was assisting a customer when she noticed a man, later identified as Defendant, standing alone at the front of the video store. When White's customer decided to make a purchase, White escorted the customer up to the office to obtain rebate information related to the customer's purchase. As White and the customer approached the office, White saw the office door open. White saw Defendant inside the office, standing over White's desk and holding White's purse. White asked Defendant what he was doing in the office, and Defendant replied, "I'm looking for a bathroom." White told Defendant he would not find a bathroom in the office. White testified that she did not take her eyes off Defendant. She said that her close proximity to Defendant and the bright lighting in the video store gave her a good view of Defendant. Defendant then dropped White's purse, walked

out of the office, and left the video store. White locked the office and immediately followed Defendant. White and the customer ran out of the video store but were unable to see Defendant. They did see a black sports utility vehicle speeding out of the parking lot.

White returned to the office and discovered that the safe was pulled loose from the bolts in the desk, was moved forward, and its door was open. White testified the contents of the safe, which included the bank deposit bag and a one-hundred dollar bill, were missing. The bank deposit bag contained checks totaling $7,242.19. Police were called and responded within five minutes. Lieutenant John Brammer (Lt. Brammer) of the Mooresville Police Department investigated the incident.

Jennifer Ibinson (Ibinson) testified that she was an employee at the Cool Cuts Hair Salon, located in the same shopping center as the video store, and was within walking distance of the video store. Ibinson testified that her North Carolina license tag, PWE 4149, was attached to her vehicle on the morning of 5 February 2005. However, when she returned home from work that afternoon, Ibinson noticed her license plate was missing.

Gertrude Knox (Knox) testified that she was employed at the Dollar General store in Kings Mountain, North Carolina in February 2005. The Dollar General contained an office that was not open to the public and that was accessible only through a walkway through the stockroom. A safe containing money was located inside the office. The walls of the office did not reach the ceiling, which made it possible to gain entry by climbing up and over the office walls.

Knox testified that when she entered the Dollar General office on 6 February 2005, she was holding a one-hundred dollar bill, which she placed in her pocket. She used a key to enter the locked office and discovered Defendant standing in front of the safe. Defendant told Knox that he was "[l]ooking for the bathroom" and Knox responded to Defendant that "he wasn't supposed to be back there without permission." Defendant turned to leave the office, but he stopped and attempted to get the one-hundred dollar bill out of Knox's pocket. Defendant tore a piece of the one-hundred dollar bill that was in Knox's pocket. Knox then screamed for help.

Jennifer Tate (Tate), assistant manager at Dollar General, responded to Knox's cry for help. Tate recognized Defendant as a customer from earlier in the day. Tate called 911 and Defendant fled the Dollar General, driving away in a vehicle. The Dollar General was

well lit, and neither Knox nor Tate had any difficulty seeing Defendant while he was in the Dollar General.

Corporal Mark Butler (Cpl. Butler) of the Kings Mountain Police Department received Tate's 911 call and responded. Cpl. Butler had received a description of the suspect's vehicle through the 911 dispatch. The vehicle was described as a red Plymouth with North Carolina license tag PWE 4149. Cpl. Butler saw a vehicle matching the description and attempted to stop it. The vehicle initially stopped, but as Cpl. Butler started to exit his vehicle, the suspect drove away. Cpl. Butler continued pursuit in his vehicle until the suspect stopped, exited his vehicle, and ran away on foot. Cpl. Butler chased the suspect on foot, and apprehended him in the back of a Food Lion store. The suspect was later identified as Defendant.

Lt. Brammer learned on 11 February 2005 that the missing license plate stolen from Ibinson's vehicle on 5 February 2005 was recovered by Cpl. Butler as a result of the car chase from the Dollar General on 6 February 2005. Lt. Brammer returned to the video store approximately two weeks after the incident and asked White if she could identify the person who stole funds from the video store safe on 5 February 2005. Lt. Brammer presented White with a six-picture photographic line-up that included Defendant's photograph. When White was shown the photographic line-up, she immediately identified Defendant as the man she had seen in the office of the video store on 5 February 2005.

At the close of the State's evidence, Defendant moved to dismiss the larceny charge. Defendant's motion was denied. Defendant did not present any evidence at trial. A jury found Defendant guilty of felony breaking or entering and misdemeanor larceny. Defendant appeals.

I.

[1] In Defendant's first argument, he contends that the superior court lacked subject matter jurisdiction to render judgment on the charge of misdemeanor larceny, and, in the alternative, that the trial court erred in refusing to dismiss the larceny charge at the close of the State's evidence. We disagree.

Defendant argues that because the district court has "exclusive, original jurisdiction for the trial of criminal actions . . . below the grade of felony, and the same are hereby declared to be petty misde-

meanors[,]" N.C. Gen. Stat. § 7A-272 (2007), the superior court lacked subject matter jurisdiction over the misdemeanor charge because it was not first tried in district court. The superior court may obtain jurisdiction over a misdemeanor charge by direct appeal to the superior court from a conviction in district court. *State v. Martin*, 97 N.C. App. 19, 22-23, 387 S.E.2d 211, 213 (1990). Additionally: "The superior court has jurisdiction to try a misdemeanor charge: . . . (3) [w]hich may be properly consolidated for trial with a felony under G.S. 15A-926[.]" *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 835-36 (1993) (quoting N.C. Gen. Stat. § 7A-271(a)). Pursuant to N.C. Gen. Stat. § 15A-926(a), the superior court may join a misdemeanor to another charge over which the superior court has jurisdiction if the charges are "based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2007). "[A] joinder motion 'need not be *written* if made at a hearing, and, in the judge's discretion, the motion may be made orally even at the beginning of trial.' " *In re R.D.L.*, 191 N.C. App. 526, 534, 664 S.E.2d 71, 76 (2008) (citations omitted).

In the case before us, the State made an oral motion to join the misdemeanor larceny charge with the felony charges in proceedings held 2 October 2007. Defendant stated to the trial court that he had no objection to this joinder. The State then presented its theory of the case to the trial court, which included projected evidence that on 5 February 2005 Defendant entered the video store, pried open a safe, and then fled the store. On that same day, a license plate was stolen from a vehicle parked in a lot near the video store. The following day, Defendant was seen near a safe in a Dollar General store, and fled when confronted. He sprayed pepper spray into the face of an elderly lady who was following him and threw her to the ground. Other witnesses saw him run, get into a vehicle, and drive away. One witness memorized the license plate number on the vehicle, and police stopped the vehicle later that day, apprehending Defendant after a foot chase. The license plate recovered from the vehicle in which Defendant fled was the same as the one stolen from the parking lot outside the video store the day before. At the close of the hearing on the motion for joinder, the trial court again asked: "So these offenses are all joined without objection; is that correct?" Defendant responded: "Yes, sir."

We hold that the projected evidence presented by the State was sufficient to show Defendant's acts in the video store and the taking

of the license plate were "based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a). The trial court did not abuse its discretion in allowing the State's oral motion for joinder.

Defendant next argues that the State's evidence in support of the larceny charge was insufficient to allow the issue to go to the jury. We first note that Defendant included no citation in his brief to any authority in support of this argument. This is in violation of Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, and subjects this argument to dismissal. N.C.R. App. P. 28(b)(6); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008). Furthermore, we hold the State presented sufficient evidence to survive Defendant's motion to dismiss the larceny charge.

> "In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged." "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." In ruling on a defendant's motion to dismiss, the evidence is viewed in the light most favorable to the State and the State is allowed every reasonable inference.

State v. Friend, 164 N.C. App. 430, 438, 596 S.E.2d 275, 281 (2004) (internal citations omitted). "To convict a defendant of larceny, it must be shown that [the defendant] (1) took the property of another; (2) carried it away; (3) without the owner's consent, and (4) with the intent to deprive the owner of the property permanently." *State v. Reeves*, 62 N.C. App. 219, 223, 302 S.E.2d 658, 660 (1983) (citations omitted).

> The doctrine of recent possession " 'allows the jury to infer that the possessor of certain stolen property is guilty of larceny.' " This Court has also explained that under the doctrine of recent possession, the State must show three things: "(1) that the property was stolen; (2) that defendant had possession of this same property; and (3) that defendant had possession of this property so soon after it was stolen and under such circumstances as to make it unlikely that he obtained possession honestly."

Friend, 164 N.C. App. at 438-39, 596 S.E.2d at 282 (internal citations omitted).

The State's evidence tends to show that Ibinson's license plate was stolen from her vehicle on 5 February 2005, the same day the incidents occurred at the video store leading to Defendant's other charges. Ibinson's vehicle was parked next to the video store. Defendant was arrested the following day in possession of a vehicle, not Ibinson's, but with Ibinson's license plate attached. We hold this evidence, when viewed in the light most favorable to the State, was sufficient for the charge of larceny to go to the jury. This argument is without merit.

II.

[2] In Defendant's second argument, he contends the trial court erred in refusing to dismiss the charge of felonious breaking or entering based on insufficiency of the evidence. We disagree.

"Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." N.C. Gen. Stat. § 14-54(a) (2007). "Thus, '[t]he essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein.' " *State v. Brooks*, 178 N.C. App. 211, 214, 631 S.E.2d 54, 57 (2006) (quoting *State v. White*, 84 N.C. App. 299, 301, 352 S.E.2d 261, 262, *cert. denied*, 321 N.C. 123, 361 S.E.2d 603 (1987)). In order for an entry to be unlawful under N.C. Gen. Stat. § 14-54(a), the entry must be without the owner's consent. *See State v. Boone*, 297 N.C. 652, 655, 256 S.E.2d 683, 685 (1979). "[A]n entry with consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis of a conviction for felonious entry under [N.C. Gen. Stat. §] 14-54(a)." *Id.* at 658, 256 S.E.2d at 687. "However, the subsequent conduct of the entrant may render the consent to enter void *ab initio*." *Brooks*, 178 N.C. App. at 214, 631 S.E.2d at 57; *see State v. Speller*, 44 N.C. App. 59, 60, 259 S.E.2d 784, 785 (1979) (holding that the defendant's actions where he went "into an area not open to the public and remain[ed] hidden there past closing hours made the entry through the front door open for business unlawful.").

Defendant cites *Boone*, *Brooks*, and *State v. Winston*, 45 N.C. App. 99, 262 S.E.2d 331 (1980) in support of his argument that he had implied consent to enter the video store. In *Boone*, the defendant entered a store that was open to the public during business hours. *Boone*, 297 N.C. at 653, 256 S.E.2d at 684. The defendant briefly left the store and then returned with three other people. *Id.* The defendant remained outside while the other three went inside for three to

five minutes, and then the defendant and the others left. *Id.* In *Boone*, our Supreme Court held that because the defendant entered the store at a time when it was open to the public, his entry was with the consent of the owner and could not serve as the basis for a conviction for felonious entry. *Id.* at 659, 256 S.E.2d at 687. In *Brooks*, the defendant and a co-participant entered a law office, a business open to the public, but went into an area of the law office they knew was not open to the public after the co-participant had been told not to return to the premises. *Brooks*, 178 N.C. App. at 212-13, 631 S.E.2d at 56. Our Court held that

> [w]hen [the] defendant entered the reception area of the firm, he did so with implied consent from the firm. However, [the] defendant took action which rendered this consent void *ab initio* when he went into areas of the firm that were not open to the public so that he could commit a theft[.]

Id. at 215, 631 S.E.2d at 57. Unlike in *Brooks*, Defendant argues that in the present case, the State failed to produce required evidence that Defendant was aware of the limits of the implied consent or was informed of an express withdrawal of consent to enter the video store office.

In *Winston*, the defendant entered an office of the Clerk of Superior Court of Cumberland County in the Cumberland County Courthouse in Fayetteville, North Carolina during regular working hours. *Winston*, 45 N.C. App. at 100, 262 S.E.2d at 332. The office was connected by a corridor to a large hallway, and was located on the first floor of the courthouse. *Id.* There were no signs indicating that either the corridor or the office were private and not open to the public, while other areas of the courthouse did have such signs informing the public of the private nature of those areas. *Id.* The office was used to handle adoptions, foreclosures, and other business of the clerk of court which necessarily required the use of the office by members of the general public. *Id.* at 101, 262 S.E.2d at 333. Our Court held that because the office was open for business to the public when the defendant entered, "[t]he general public, including the defendant, had implied consent and invitation to enter the office at that time." *Id.*

In the present case, as in *Boone*, the video store was open to the public, and thus Defendant had implied consent to enter the video store. *See Boone*, 297 N.C. 652, 256 S.E.2d 683. At issue, however, is whether the video store's office, where the safe was located, was also

open to the public so as to extend that implied consent for entry to the office. Our Court considered this issue in its recent opinion *In re S.D.R.*, 191 N.C. App. 552, 664 S.E.2d 414 (2008).

In *In re S.D.R.*, the defendant was brought to the Anson Cooperative Extension Service (the Extension) in Wadesboro, North Carolina as part of a community service and restitution after-school program. *Id.* at 554, 664 S.E.2d at 417. The defendant was instructed to sit in the Extension's library, which was located directly across from the office of the Extension's director. *Id.* The director testified that she had seen the defendant sitting in the library, and that when she returned from a brief trip to the restroom, the defendant was standing in the doorway of her office. *Id.* The director later discovered that cash that had been in her purse was missing. *Id.*

On appeal, our Court distinguished *In re S.D.R.* from the facts in *Winston*. We held that the director's office in *In re S.D.R.* was not held out to the public in the same way that the clerk's office was in *Winston*. *Id.* at 557, 664 S.E.2d at 419.

> Although the Extension is a public building that houses a public agency, just as the Cumberland County Courthouse [in *State v. Winston*] is a public building that houses public agencies, the evidence does not show that [the director's] job functions necessarily require the general public to have access to [the director's] office or that members of the general public use [the director's] office.

Id. The director's office at the Extension was not open to regular foot traffic, and although members of the public occasionally did come into the office, they had to either have an appointment or be specifically invited to enter. *Id.* at 558, 664 S.E.2d at 419-20. Furthermore, we held that even if the defendant in *In re S.D.R.*, had implied consent to enter the director's office because it was necessary for the general public to have access to that office, the act of stealing cash from the director's purse was sufficient to render that implied consent void *ab initio* as contemplated by *Winston* and *Boone*. *Id.* at 557, 664 S.E.2d at 420.

In the case before us, we hold that the office in the video store was similar to the director's office in *In re S.D.R. See id.* In the present case, the office was attached to the retail area of the video store, which was open to the public during regular business hours, and when Defendant entered the video store. Also, members of the

general public did sometimes need to enter the office for business purposes. However, like the director's office in *In re S.D.R.*, members of the general public were only permitted entrance into the office when invited and accompanied by an employee of the video store. We hold that the office in the video store was not open to the public and that Defendant did not have implied consent to enter the office. Moreover, even if Defendant had implied consent to enter the office of the video store, Defendant's act of stealing the cash and checks inside the deposit bag rendered that implied consent void *ab initio*. *See id.* This argument is without merit.

III.

[3] In Defendant's fourth assignment of error, he contends the trial court committed reversible error in preparing a defective order in denying Defendant's request to suppress the identification of Defendant by White. However, Defendant's argument on appeal is actually that the trial court's order was defective because the trial court failed to make specific findings of fact or conclusions of law pursuant to N.C. Gen. Stat. § 15A-977(f). As Defendant has not assigned error to the trial court's failure to make specific findings of fact and conclusions of law, Defendant's argument is not properly before our Court.

Although findings of fact may be challenged for the first time on appeal, their sufficiency must be properly raised for appellate review. N.C.R. App. P. 10. Failure to assign error to the findings of fact precludes appellate review. N.C.R. App. P. 10(c); *see State v. Tadeja*, 191 N.C. App. 439, 444, 664 S.E.2d 402, 407 (2008) (holding where "[the] defendant failed to assign error to any of the trial court's findings of fact or conclusions of law these contentions [were] not reviewable."). Defendant's third argument is dismissed.

Defendant's remaining assignment of error was not set out in Defendant's brief and is deemed abandoned. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. Rule 28(b)(6).

No error.

Judges BRYANT and GEER concur.

IN RE: S.F.

No. COA09-426

(Filed 4 August 2009)

1. Appeal and Error— termination of parental rights—notice of appeal—timeliness

A termination of parental rights appeal was timely where the notice of appeal was given within thirty days of judgment in open court, but before entry of judgment.

2. Appeal and Error— termination of parental rights—certificate of service not included—jurisdiction—certiorari

Certiorari was allowed in a termination of parental rights proceeding where the guardian *ad litem* and DSS contended that the Court of Appeals lacked jurisdiction because the notice of appeal did not include a certificate of service. Failure to show proof of service affects personal jurisdiction but does not deprive the Court of Appeals of subject matter jurisdiction, and the guardian *ad litem* and DSS had actual notice.

3. Termination of Parental Rights— findings—sufficiency

Unchallenged findings supported the trial court's conclusion that sufficient grounds existed to terminate respondent's parental rights. Other assignments of error to other findings were not considered because a finding of one statutory ground is sufficient.

4. Termination of Parental Rights— termination in best interest of child—unchallenged findings—sufficiency

The trial court did not abuse its discretion by concluding that termination of parental rights was in the child's best interests where respondent did not challenge the supporting findings as unsupported by the evidence.

Appeal by Respondent-Father from order entered 4 February 2009 by Judge David K. Fox in District Court, Polk County. Heard in the Court of Appeals 13 July 2009.

Feagan Law Firm, PLLC, by Phillip R. Feagan, for petitioner-appellee, Polk County Department of Social Services.

Pamela Newell Williams, for the Guardian ad Litem. Peter Wood, for respondent-appellant.

WYNN, Judge.

In this appeal, Respondent-Father argues the trial court erred by terminating his parental rights to minor child S.F. Because clear and convincing evidence supports the trial court's findings of fact, which in turn support grounds to terminate Respondent-Father's parental rights, we affirm.

On 20 August 2003, the Polk County Department of Social Services (DSS) filed a juvenile petition alleging that S.F. had severe bruising all over her body, and that S.F. told hospital personnel that her mother's boyfriend caused the bruising. DSS took nonsecure custody of S.F. and custody was continued until the adjudication hearing pursuant to the consent of S.F.'s mother. In October 2003, the trial court adjudicated S.F. an abused, neglected, and dependent juvenile based upon her being physically abused by her mother's boyfriend while in her mother's home.

S.F. was initially placed in a foster home, but after Respondent-Father made substantial gains toward reunification, the trial court placed S.F. with Respondent-Father in April 2004. However, following a permanency planning hearing in October 2004, the trial court removed S.F. from Respondent-Father's home based upon his positive tests for illegal drugs, and having been charged with drug and weapon offenses. The trial court placed S.F. with her paternal grandparents and allowed visitation.

In April 2005, the trial court awarded guardianship of S.F. to the paternal grandparents and ceased reunification efforts with Respondent-Father and S.F.'s mother. Upon learning that the paternal grandmother had allowed S.F. to spend the night at Respondent-Father's home where he and his girlfriend abused drugs, DSS filed a motion for review. In September 2005, the trial court terminated the paternal grandparents' guardianship of S.F. and returned custody of S.F. to DSS.

The paternal grandparents appealed the termination of their guardianship, and Respondent-Father appealed the cessation of reunification efforts by DSS. Meanwhile, S.F.'s mother relinquished her parental rights to S.F., who was placed with a family that adopted S.F.'s half-sister. After holding a permanency planning hearing on 24 October 2006, the trial court concluded that DSS should pursue termination of Respondent-Father's parental rights pending the outcome of the appeal by Respondent-Father and S.F.'s paternal grand-

parents. By an unpublished opinion filed 2 January 2007, this Court affirmed the trial court's order terminating guardianship and ceasing reunification efforts. *In re S.F.*, 181 N.C. App. 149, 639 S.E.2d 454 (2007) (unpublished).

On 23 May 2007, DSS filed a petition to terminate Respondent-Father's parental rights and, on 21 November 2007, the trial court terminated Respondent-Father's parental rights. Respondent-Father appealed to this Court. By opinion filed 3 June 2008, this Court vacated the trial court's order for lack of subject matter jurisdiction. *In re S.F.*, 190 N.C. App. 779, 660 S.E.2d 924 (2008).

On 14 August 2008, DSS filed a motion to terminate Respondent-Father's parental rights. The trial court conducted a hearing on the motion on 22 December 2008. Following the hearing, the trial court orally announced the termination of Respondent-Father's parental rights in open court. Respondent-Father filed notice of appeal from that order on 31 December 2008. However, the trial court's written order was not filed until 4 February 2009.[1] In its order, the trial court terminated Respondent-Father's parental rights based upon neglect (N.C. Gen. Stat. § 7B-1111(a)(1)) and willfully leaving the child in foster care without making reasonable progress under the circumstances (N.C. Gen. Stat. § 7B-1111(a)(2)). The trial court also concluded that it was in the best interest of the child to terminate Respondent-Father's parental rights.

All parties to this appeal filed briefs in this Court. Respondent-Father filed a brief on 16 April 2009, the Guardian *ad Litem* for S.F. filed a brief on 5 May 2009, and DSS filed a brief on 18 May 2009. Respondent-Father also filed a petition for writ of certiorari on 13 May 2009. However, the Guardian *ad Litem* and DSS filed a joint motion to dismiss this appeal on 28 May 2009, alleging that this Court lacks jurisdiction because Respondent-Father's Notice of Appeal was untimely and included no certificate of service.

[1] Thus, we first consider our jurisdiction to hear this appeal. Regarding the timeliness of Respondent-Father's notice of appeal, this Court has squarely held that notice of appeal given within thirty days after rendering of judgment in open court, but before entry of judgment, is timely. *Darcy v. Osborne*, 101 N.C. App. 546, 548, 400

1. The Clerk of Polk County Superior Court entered an order on 13 February 2009 stating that counsel for Respondent-Father could refile the Notice of Appeal filed prior to the entry of the termination order. However, nothing in the record indicates that the notice of appeal was actually refiled.

S.E.2d 95, 96 (1991). Therefore, Respondent-Father's notice of appeal in this case was timely.

[2] The Guardian *ad Litem* and DSS also contend that this Court lacks jurisdiction because the notice of appeal did not include a certificate of service. However, our case law establishes that the failure to show proof of service affects personal jurisdiction and does not deprive this Court of subject-matter jurisdiction. *Blevins v. Town of West Jefferson*, 182 N.C. App. 675, 682-83, 643 S.E.2d 465, 469-70 (Geer, J., dissenting), *adopted per curiam*, 361 N.C. 578, 653 S.E.2d 392 (2007); *Hale v. Afro-American Arts Int'l*, 110 N.C. App. 621, 625, 430 S.E.2d 457, 459-60 (Wynn, J., dissenting), *adopted per curiam*, 335 N.C. 231, 436 S.E.2d 588 (1993). *But cf. In re C.T. & B.T.*, 182 N.C. App. 166, 641 S.E.2d 414, *aff'd per curiam*, 361 N.C. 581, 650 S.E.2d 593 (2007) (dismissing appeal where the appellant failed to attach certificate of service to notice of appeal in record on appeal). Because this Court has subject-matter jurisdiction over this appeal, and the record shows that the Guardian *ad Litem* and DSS had actual notice of this appeal, we exercise our discretion and allow Respondent-Father's petition for writ of certiorari to address the merits of his contentions. *See* N.C.R. App. 21.

On the merits of his appeal, Respondent-Father contends the trial court: (I) erred by concluding that grounds existed to terminate his parental rights; and (II) abused its discretion by concluding that terminating his parental rights was in S.F.'s best interests. We disagree with Respondent-Father's contentions.

I.

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

Parental rights may be terminated when "[t]he parent has willfully left the juvenile in foster care or placement outside the home for

more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2) (2007). Willfulness does not imply fault on the part of the parent, but may be established " 'when the respondent had the ability to show reasonable progress, but was unwilling to make the effort.' " *In re O.C. & O.B.*, 171 N.C. App. 457, 465, 615 S.E.2d 391, 396 (quoting *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001)), *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). Even if a parent has made some efforts to regain custody, a trial court may still find that he or she willfully left the child in foster care under section 7B-1111(a)(2). *See id.*

Supporting its conclusion that Respondent-Father willfully left S.F. in foster care or placement outside the home for more than 12 months without showing reasonable progress to the satisfaction of the court, the trial court found in pertinent part:

> 14. The child was first placed in the custody of Polk County DSS on August 20, 2003, when a Non-Secure Custody Order was entered and continued until October 21, 2003, when an Adjudication Order of Abuse and Neglect was entered. The child remained in foster care until a trial placement began with the Respondent Father . . . by Order entered April 13, 2004. The child remained in the home of the Respondent Father until October 2004, when she was moved into the home of her paternal grandparents . . . after Polk County DSS learned that the Respondent Father was charged with drug and weapon offenses and tested positive for controlled substances.
>
> 15. Guardianship of the child was given to the paternal grandparents by Order entered April 12, 2005. Said guardianship in the paternal grandparents was terminated by Order entered September 13, 2005, after said guardians allowed the child to be unsupervised in the presence of persons using illegally controlled substances, thereby neglecting their duties as guardian of the person of the juvenile. On December 21, 2005, the child was placed in her current foster care placement where she continues to reside.
>
> . . .
>
> 19. On December 21, 2005, the child was placed in her current foster care placement which is where she continues to reside.

The juvenile has remained in that foster care placement since said date, which placement has provided a safe and secure environment for the child and she is very bonded with her foster parents.

20. The Respondent Father has been a party to this proceeding since prior to the Adjudication in October 2003.

21. The Respondent Father has not visited, nor requested visits with[] his minor child since she re-entered foster care. He has not written or called to inquire about the child's status. In December 2005, Christmas presents, provided by the Respondent Father's mother, were delivered by the Respondent Father for the child to the DSS office; however, he did not inquire about the child.

22. Respondent Father has been convicted of various criminal offenses and was incarcerated in the North Carolina Department of Corrections until November 2008.

23. Respondent Father was convicted of felony possessions of Schedule II Methamphetamine on April 25, 2007, along with failure to appear upon the felony charges. The offense date of the possession charge was August 26, 2005.

24. Respondent Father was convicted of carrying a concealed weapon and several failures to appear on misdemeanor charges on January 24, 2007. The offense date of March 11, 2006.

25. From March 7, 2005 until July 11, 2005, during which time efforts were being made for reunification of the Respondent Father with his minor child, the Respondent Father had eleven (11) positive drug screens for methamphetamine and marijuana.

26. Polk County DSS had no contact with the Respondent Father during his incarceration from April 23, 2007 to November 3, 2008. Further, the Respondent Father has made no contact with Polk County DSS since his release November 3, 2008.

27. Respondent Father was initially ordered to pay child support on or about October 24, 2003, in the amount of $56.00 per month pursuant to a Voluntary Support Agreement he entered into with the Polk County IV-D Child Support Agency. His payments thereto were at [] best sporadic, having been summoned back to court several times for non-payment. Since the child reentered foster care on September 13, 2005, the Respondent Father has

made only one (1) payment in the amount of $100.00, on or about March 16, 2007, but was incarcerated prior to making any payment on the lump sum. Since his release from prison, the Respondent Father has not made any arrangements to support his child. His arrearage is $1,021.61, and he has neglected his child by not paying said child support obligation.

28. The cost of foster care for the child has been no less than $16,114.00. The Respondent Father failed or refused to pay a reasonable portion thereof although he had been gainfully employed, prior to his incarceration, and he had the ability to pay at least a portion of the same. Since Respondent Father's release from incarceration on November 5, 2008, he has been employed as a laborer with Russell's Guttering of Greenville, South Carolina, earning reportedly cash compensation of $1,000.00 or more and has still made no child support payments.

. . .

32. The minor child was moved from her foster home placement in April 2004 and placed in the home of the Respondent Father. The "Consent Order Upon Six Month and Permanency Planning Review" entered in this matter on April 13, 2004, now almost five years ago, gave the Respondent Father definable goals; he had the child in placement with him. He had made substantial gains toward reunification and had worked actively on his case plan. The plan was to make this reunification permanent, to get DSS out of the care picture completely. The father was fully in charge of his daughter then as the child was under his roof. He knew all this time that he had drug weaknesses and this was his chance to prove himself and continue to demonstrate an ability to parent his child. Yet, he relapsed and lost the child. If he had only done right then, we wouldn't be here now.

33. The minor child continued in placement with the father until October 2004 when he was charged with carrying a concealed weapon, felony drug charges, and tested positive for several controlled substances. Four years ago he was asked to aggressively address and comply with the correction of these issues. The child was placed in his custody, but because of his weaknesses, he willfully placed the child out of his home. By and large this could be said to be the end of this procedure. Both he and the mother slipped off the radar.

34. Reunification efforts were ceased and termination of parental rights proceedings began. The father and grandmother filed an appeal to the September 2005 Court Order terminating guardianship in November 2005. Their appeal was denied but the judgment was not filed in the Clerk's office until February 6, 2007, and the petition could not be heard until the appeal was final. This bought the father an additional 16 months of this child's life to demonstrate in the face of earlier orders to cease reunification [and] that he could be a nurturing parent. At this point we are trying to make a silk purse out to several things but he placed himself out of the run[ning] during the additional 16 months given him to show his ability to nurture the child.

35. Respondent Father has made one child support payment of $100.00. He has paid only 1/10th in child support what he has paid for traffic violations in order to get his license back, which he lost for various willful offenses. Respondent Father testified could not pay on his child support obligation after his release from custody in November 2008 because he had to pay fines and costs to pursue the return of his drivers license and insurance upon his vehicle.

36. The Respondent Father was ordered to attend drug treatment in 2005 and did not participate [in] or complete that treatment.

37. During the time the Respondent Father was on probation during March and April 2007, despite attending some drug treatment during that time, he tested positive for Schedule VI-marijuana on four (4) drug screens and Respondent Father admitted his use to said controlled substance.

38. Since April 2007, and while the Respondent Father was incarcerated in the North Carolina Department of Corrections, he participated in NA & AA. He attended a couple of meetings then. By January 2008, the father's efforts ceased on NA/AA treatment. In the last eleven months there has been no addressing of his substantial substance abuse problems. These issues are ongoing, have existed for years and Respondent Father continues to not address his drug problems, except for the few minutes of his time spent at NA/AA, while he was in the Department of Corrections.

Although Respondent-Father assigns error to finding of fact thirty-eight, he did not specifically argue in his brief that this finding is unsupported by the evidence. Consequently, the court's findings of fact, including finding of fact thirty-eight, are presumed to be correct

and supported by competent evidence. *See In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404-05 (2005) (concluding respondent had abandoned factual assignments of error when she "failed to specifically argue in her brief that they were unsupported by evidence"). We hold the above referenced unchallenged findings of fact support the trial court's conclusion that sufficient grounds exist to terminate Respondent-Father's parental rights to S.F. pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

We note that the trial court concluded that grounds existed pursuant to sections 7B-1111(a)(1) and (2) of the North Carolina General Statutes to terminate Respondent-Father's parental rights. Although Respondent-Father argues that the other ground under subsection (a)(1) is also not supported by the evidence, we need not address his argument. *See In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984) (a finding of one statutory ground is sufficient to support the termination of parental rights). To the extent that Respondent-Father assigned error to additional findings of fact made by the trial court, we need not address those assignments of error because we have concluded that the unchallenged findings support the conclusion that Respondent-Father willfully left S.F. in foster care for twelve months without making reasonable progress.

II.

[4] Next, Respondent-Father contends the trial court abused its discretion in concluding that the termination of his parental rights was in S.F.'s best interests.

In determining whether terminating the parent's rights is in the juvenile's best interest, the court shall consider the following:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

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

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

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

(6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110 (2007).

Here, the trial court made the following findings to support the court's determination that it was in the bests interests of the child to terminate Respondent-Father's parental rights:

> 45. The child has been successful in adjusting to life in foster care and has established a very loving and secure relationship with her foster parents, having been in that placement since December 21, 2005. She is also in placement with her half-sister who is twelve (12) years of age. The child is a good candidate for adoption by the foster parents.
>
> 46. The paternal grandmother, Barbara Bradley, whose guardianship of the minor child was terminated by the Court on September 13, 2005, last saw her minor grandchild in October 2005. There are no suitable relatives to provide care for this child at present.
>
> 47. The minor child was approximately 3 years old when she came into the custody of Polk County Department of Social Services. She is now 8 1/2 years old.
>
> 48. The minor child has remained in the same foster care home in South Carolina since her placement in September 2005. The foster care home is providing a safe and appropriate placement for the minor child and the foster parents wish to adopt the minor child. The foster care family previously adopted the half sister of this minor child.
>
> 49. The Court received testimony from the Foster Father Randy Grice which demonstrated that the minor child is doing well in her current foster care placement. She desires to be adopted by her foster care family and wishes to change her last name.
>
> 50. The Respondent Father has another child or children with their birth mothers located in Kentucky or Tennessee and with whom he has no contact or is otherwise not involved in those children's lives.
>
> 51. The best interests of the minor child require an Order of Termination of Parental Rights be entered as to the Respondent Father [] so that said child may be placed for adoption.

Again, Respondent-Father does not argue that these findings of fact are unsupported by the evidence. Based upon the trial court's unchallenged findings, we conclude that the trial court did not abuse its discretion by concluding that terminating Respondent-Father's

parental rights was in the best interests of the child. Accordingly, this argument is without merit.

Affirmed.

Judges BRYANT and STEELMAN concur.

JAMIE MOORE, EMPLOYEE, PLAINTIFF v. SULLBARK BUILDERS, INC., EMPLOYER; BUILDERS MUTUAL INSURANCE CO., CARRIER DEFENDANT

No. COA08-1348

(Filed 4 August 2009)

1. Workers' Compensation— affirmative defense—intoxication—test results did not indicate level—marijuana metabolites

The Industrial Commission did not err in a workers' compensation case by concluding plaintiff's injuries were compensable and that N.C.G.S. § 97-12 did not bar plaintiff's claim even though the evidence showed defendant tested positive on the date of the injury for cannabinoids, a metabolite of marijuana, because: (1) the competent evidence before the Commission supported its conclusion that plaintiff's injury was not a result of intoxication by marijuana; (2) the Commission is the sole judge of the weight and credibility of conflicting evidence, and it was within the Commission's discretion to determine that a doctor's opinion that plaintiff's toxicology results obtained during testing at the hospital were insufficient to establish plaintiff was under the influence of marijuana was more credible than another doctor's conflicting opinion; (3) although a rebuttable presumption of intoxication may be established as a result of a positive medical test pursuant to N.C.G.S. § 97-12, such tests must "be in a manner generally acceptable to the scientific community and consistent with applicable State and federal law, and both doctors testified that the test performed by the hospital was not completed for forensic purposes and should only be used for medical purposes; (4) a doctor testified that the test results did not indicate the level of marijuana metabolites, thus only allowing the conclusion that marijuana was in plaintiff's system at the time of the injury; and (5) defendant's argument that the award of compensation to a

plaintiff injured while under the influence of a controlled substance is against public policy need not be addressed based on competent evidence that defendant was not intoxicated at the time of his injury.

2. Workers' Compensation— disability—incapable of work or earning same wages

The Industrial Commission did not err in a workers' compensation case by determining that plaintiff was entitled to temporary total disability benefits because: (1) the medical evidence shows that plaintiff was physically incapable of work in any employment after his injury; (2) there was competent evidence to show that plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment; (3) plaintiff's attempt to return to work with defendant and his unsuccessful attempt to work with his former employer show that he made a reasonable effort to obtain employment but was incapable of earning the same wages in any other employment; and (4) plaintiff's limited education, his past work in carpentry and construction, and his physical condition which caused him continuing pain and restricted his motion, his doctor's restrictions of no lifting over forty pounds and no repetitive bending made it futile for him to seek other employment.

Appeal by defendant from Opinion and Award entered 14 July 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 March 2009.

Law Offices of Brian Peterson, by Brian Peterson, for plaintiff-appellee.

Lewis & Roberts, PLLC, by Jeffrey A. Misenheimer, for defendant-appellants.

BRYANT, Judge.

Sullbark Builders, Inc. (defendant) appeals from an Opinion and Award determining that defendant failed to meet its burden of proof to successfully assert an affirmative defense pursuant to N.C. Gen. Stat. § 97-12. We affirm.

Facts

Jamie Moore (plaintiff) began working for defendant in September of 2005 as a trim carpenter. Plaintiff's primary duties included

installing interior trim, installing crown and window molding, installing hardwood floors, and preparing stair railings. To perform his duties, plaintiff had to transport job-related materials around the building site. On 7 December 2005, plaintiff was assisting another employee when plaintiff fell approximately 12 feet to the bottom of a retaining wall. Plaintiff lost his balance when his ankle twisted while carrying two-by-twelve boards on his shoulders.

After his fall, plaintiff was transported to Mission Hospitals where he was diagnosed with a thoracic spine fracture, pulmonary contusion, and dehydration. Plaintiff was admitted to the hospital and submitted to a urine toxicology screening and other tests. The urine screening, testing for Ethanol and six drugs, indicated Plaintiff's urine contained cannabinoids and opiates. The toxicology report did not indicate the levels or concentrations of the detected substances.

On 14 December 2005, defendant filed a Form 61 Denial of Workers' Compensation Claim on the basis that plaintiff's claim was barred by N.C. Gen. Stat. § 97-12 because plaintiff was intoxicated at the time of the accident. Plaintiff filed a request for hearing and the matter was heard on 9 October 2006.

At the hearing, the deposition testimony of Drs. Shayne Cox Gad (Dr. Gad) and Andrew Mason (Dr. Mason) were presented. An Opinion and Award was filed 18 December 2007 concluding that defendant failed to meet its burden of proof to assert the defense of intoxication. Defendant appealed to the Full Commission (the Commission). On 14 July 2008, the Commission filed an Opinion and Award adopting the Deputy Commissioner's Award with modifications. Defendant appeals.

On appeal, defendant argues: (I) the Full Commission committed reversible error by finding and concluding plaintiff's claim for compensation was not barred by N.C. Gen. Stat. § 97-12; (II) it is against public policy to award compensation to plaintiff who was injured at work while intoxicated; and (III) the Full Commission erred by finding and concluding plaintiff was entitled to benefits under the Workers' Compensation Act.

Standard of Review

"Our review of the Commission's opinion and award is limited to determining whether competent evidence of record supports the find-

ings of fact and whether the findings of fact, in turn, support the conclusions of law." *Rose v. City of Rocky Mount*, 180 N.C. App. 392, 395, 637 S.E.2d 251, 254 (2006), *review denied*, 361 N.C. 356, 644 S.E.2d 232 (2007). "Under our Workers' Compensation Act, the Commission is the fact finding body. The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citations and quotations omitted). The Commission's findings "are conclusive on appeal when supported by competent evidence, even though there is evidence that would have supported findings to the contrary." *Hollman v. City of Raleigh*, 273 N.C. 240, 245, 159 S.E.2d 874, 877 (1968).

I

[1] Defendant argues the Commission erred by concluding plaintiff's injuries were compensable and that N.C. Gen. Stat. § 97-12 did not bar plaintiff's claim. We disagree.

> Under N.C.G.S. § 97-12,
>
> [n]o compensation shall be payable [to an employee] if the injury or death to the employee was proximately caused by:
>
> . . .
>
> (2) His being under the influence of any controlled substance listed in the North Carolina Controlled Substances Act, G.S. 90-86, et seq., where such controlled substance was not by prescription by a practitioner[.]

N.C.G.S. § 97-12(2) (2007).

> The statute further provides:
>
> "Intoxication" and "under the influence" shall mean that the employee shall have consumed a sufficient quantity of intoxicating beverage or controlled substance to cause the employee to lose the normal control of his or her bodily or mental faculties, or both, to such an extent that there was an appreciable impairment of either or both of these faculties at the time of the injury.
>
> A result consistent with "intoxication" or being "under the influence" from a blood or other medical test conducted in a manner generally acceptable to the scientific community and consistent with applicable State and federal law, if any, shall create a rebuttable presumption of impairment from the use of alcohol or a controlled substance.

Id. "[B]eing under the influence of a controlled substance [is an] affirmative defense which place[s] the burden of proof on the employer in a claim for Workers' Compensation. [This defense] will be a proximate cause of the employee's death or injury if it is a cause in fact." *Harvey v. Raleigh Police Dep't.*, 85 N.C. App. 540, 545, 355 S.E.2d 147, 151 (1987).

The evidence presented in this case showed defendant tested positive on the date of the injury for cannabinoids, a metabolite of marijuana. The Commission made the following findings regarding plaintiff's positive test results:

> 13. Plaintiff had a urine toxicology screen a few hours after arriving at Mission Hospitals. The urine toxicology screen results indicated a positive result for cannabinoids and opiates. The results did not provide any numeric levels of concentrations. No confirmatory tests were performed.
>
> . . .
>
> 17. Dr. Mason testified, "it's well recognized in the scientific community, urine tests cannot be used to establish impairment." Dr. Mason provided a list of ten quotes taken from scientific articles of forensic toxicology that support his statement that "even competently performed forensic urine tests, by themselves, do not establish impairment."
>
> 18. Dr. Gad testified that to determine impairment, the drug test had to provide the levels of concentrations in order to be able to give an opinion about impairment. Dr. Gad stated: "If the substance is metabolite for cocaine or marijuana, if you—those metabolites have minimal or very limited activity. And if you just know that you have some of it in the urine, you can't—you can't speak to impairment." Dr. Gad's testimony shows that the test results in this case, because it only reported a positive result for marijuana, merely showed that "at some point, he used marijuana."
>
> 19. Following the urine toxicology results, the medical record in question states "positive results have not been verified by a second confirmatory procedure. Unconfirmed results should not be used for nonmedical purposes." Both toxicologists agree that the urine toxicology test in question was a test completed for medical purposes only, not valid for forensic purposes. Both toxicologists agree that a urine toxicology test that does not provide an actual

level for cannabinoid concentration does not address impairment and therefore cannot be used to show impairment.

20. Both Dr. Mason and Dr. Gad testified that the psychoactive effects of marijuana remain active for a limited period of time. Dr. Mason testified that it was usually up to four hours, while Dr. Gad testified that it was between four and six hours, depending on the dose. Even if the Plaintiff had smoked marijuana just before going to work, any psychoactive effects would have faded before the work accident.

23. The testimony of those who were with the Plaintiff on the day of the accident confirm that he did not consume marijuana at any time during the work period on the day he was injured. There is no credible evidence that on the day of plaintiff's work injury, Plaintiff was under the influence of marijuana or other controlled substances. This conclusion is consistent with the medical records. The greater weight of the evidence shows no indication that Plaintiff was impaired or intoxicated at the time of his work related accident.

24. Plaintiff's fall at work was caused by an accidental misstep of the Plaintiff and the circumstances of the work environment, where the railing he attempted to use to steady himself gave way. The greater weight of the credible and competent evidence fails to establish that the accident which caused plaintiff's injuries was proximately caused by plaintiff being under the influence of any controlled substance.

. . .

28. Based on Plaintiff's work experience and vocational and educational limitations, it would have been futile for Plaintiff to seek to obtain physically suitable employment during the time that he was under restrictions of part-time work with no lifting over twenty-five pounds.

29. Defendant did not terminate the Plaintiff as an employee. In May 2006, the owners of Defendant discussed with the Plaintiff the possibility of his returning to limited part-time work activities with Defendant. Defendant would not make accommodations for the Plaintiff to return to work with them once the Plaintiff was released to limited part-time work. Plaintiff has not performed any work for Defendant since the date of his injury, December 7, 2005.

The Commission then concluded:

> 2. The positive toxicology result from Mission Hospitals is not a result that would establish intoxication or being under the influence, such as to create a presumption of impairment. However, even if such a presumption of impairment were created, Plaintiff has presented sufficient competent testimony through toxicologist, Dr. Andrew P. Mason, which rebuts any such presumption. Defendants' assertion of such defenses are therefore rejected. N.C. Gen. Stat. § 97-12.

In the present case, the competent evidence before the Commission supported its conclusion that plaintiff's injury was not a result of intoxication by marijuana. As the Commission is the sole judge of the weight and credibility of conflicting evidence, it was within the Commission's discretion to determine that Dr. Mason's opinion that plaintiff's toxicology results obtained during testing at the hospital were insufficient to establish plaintiff was under the influence of marijuana was more credible than Dr. Gad's conflicting opinion. Although a rebuttable presumption of intoxication may be established as a result of a positive medical test pursuant to N.C.G.S. § 97-12, such tests must "be in a manner generally acceptable to the scientific community and consistent with applicable State and federal law." *Id.* Both Dr. Mason and Dr. Gad testified that the test performed by the hospital was not completed for forensic purposes, and should only be used for medical purposes. Also, Dr. Gad testified that the test results did not indicate the level of marijuana metabolites, only allowing the conclusion that marijuana was in plaintiff's system at the time of the injury. The test results were insufficient to establish that plaintiff was "impaired" and did not have "the normal control of his or her bodily or mental faculties, or both, to such an extent that there was an appreciable impairment of either or both of these faculties at the time of the injury." *Id.*

The Commission's conclusion that defendant failed to meet its burden of proof that plaintiff was under the influence of a controlled substance at the time of his injury was supported by competent evidence in the record. Therefore, this assignment of error is overruled.

II

Defendant argues that awarding compensation to a plaintiff injured while under the influence of a controlled substance is against the public policy of the State, however, we decline to address this

argument because we have determined the Commission's conclusion that plaintiff was not intoxicated at the time of his injury was supported by competent evidence in the record. Therefore, this assignment of error is overruled.

III

[2] Defendant argues the Commission erred by finding and concluding plaintiff was entitled to benefits under the Worker's Compensation Act because plaintiff did not produce any competent evidence to establish the existence of his disability. We disagree.

In order to support a conclusion of disability, the Commission must find:

> 1. that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment,
>
> 2. that plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment,
>
> 3. that this individual's capacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). The burden is on the plaintiff to prove both the existence of his disability and its degree. *Id.*

The Full Commission's Conclusion of Law number 6 states:

> As a consequence of his injuries sustained in the accident of December 7, 2005, Plaintiff was unable to earn wages in the same or any other employment and was totally disabled beginning December 7, 2005 and continuing at least through the hearing date of October 9, 2006. Plaintiff is entitled to have Defendants pay him temporary total disability compensation at the rate of $357.98 per week during this period. N.C. Gen. Stat. § 97-29.

Plaintiff did not work from the date of his injury on 7 December 2005 through the date of the Full Commission hearing on 9 October 2006 with the exception of two days he unsuccessfully tried to work painting. Plaintiff has also shown that he is entitled to temporary total disability compensation during this time by satisfying the test for disability set out in *Hilliard*.

First, the burden is on the employee to show that he is unable to earn the same wages he had earned before the injury in the same

employment. *Hilliard* at 595, 290 S.E.2d at 683. The 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 v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

The medical evidence shows that plaintiff was physically incapable of work in any employment after his injury. When plaintiff was released from the hospital on 16 December 2005, the Discharge Instructions regarding "Returning to Work/School/Day Care" stated "when your doctor says it is okay," and plaintiff was discharged to home rest with only light activity until follow-up. Over the next several months, plaintiff continued visiting his treating physician, Dr. Lytle, and on 17 March 2006, Dr. Lytle wrote that plaintiff was "written out of work until next appointment on 5/16/06." Although Dr. Lytle noted on 22 May 2006 that plaintiff could resume work on a limited basis up to four hours per day with no lifting greater than forty pounds and no repetitive bending, on 18 July 2006, Dr. Lytle wrote that plaintiff "has been unable to return to his work, as they do not have anything for him to do on a short-term basis and also feel like he's too high risk to continue to work." Because plaintiff was not able to afford a follow-up visit, the appointment on 18 July 2006 was the last time he was treated by Dr. Lytle. At that time, Dr. Lytle's medical record established that plaintiff was incapable of work "at the current time" and that he would write plaintiff a work release to return to work "depending on how he improves." Thus, there is competent evidence to support the Full Commission's conclusion that plaintiff was physically incapable of work in any employment.

There is also competent evidence to show that plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment. Plaintiff attempted to return to work with defendant, but because he refused to sign a release form stating that he would not file any legal action against defendant if he was injured again on the job, he did not accept the part-time position

offered. He also attempted to obtain employment with a former employer who made special accomodations for him. After working only two days, plaintiff's former employer released plaintiff because he was physically unable to do the work. Plaintiff's attempt to return to work with defendant and his unsuccessful attempt to work with his former employer show that he made a reasonable effort to obtain employment but was incapable of earning the same wages in any other employment.

Additionally, plaintiff was limited to lifting no more than forty pounds and no repetitive bending because of his injury. These restrictions hindered him from any work in carpentry, construction, or painting. This is supported by the evidence that neither defendant nor plaintiff's former employer had work to accommodate plaintiff's restrictions. Thus, plaintiff's incapacity to earn the same wages was caused by his work injury.

Plaintiff has met his burden of proving his disability because he satisfies each prong of the test for disability set out in *Hilliard*. Therefore, this conclusion of law is supported by competent evidence.

The Full Commission's conclusion of law number 7 states:

> Plaintiff is entitled to have Defendants pay him temporary total disability compensation or temporary partial disability compensation until such time as Plaintiff is able to return to work at the same or greater wages than his weekly compensation rate. Therefore, unless the parties reach a private resolution of this matter, and until further agreement of the parties or order of the Commission, Defendants shall continue to pay Plaintiff total disability compensation. N.C. Gen. Stat. 97-29.

To earn his pre-injury earnings, plaintiff needed to find employment that paid him at or near $26.80 per hour and allowed him to work only four hours per day—the amount of time to which he was restricted by his doctor. Because of plaintiff's limited education, his past work in carpentry and construction, and his physical condition which caused him continuing pain and restricted his motion, his doctor's restrictions of no lifting over forty pounds and no repetitive bending made it futile for him to seek other employment. This determination of futility takes into account plaintiff's work experience, educational and vocational limitations, and his average weekly wage to conclude that plaintiff could not obtain suitable employment dur-

ing the time he was under his doctor's restrictions. Therefore, this conclusion of law is supported by competent evidence.

Because there is substantial and competent evidence to support the Full Commission's findings of fact and conclusions of law that plaintiff was entitled to benefits under the Worker's Compensation Act, this assignment of error is overruled. For the foregoing reasons, the Order and Award of the Full Commission is affirmed.

Affirmed.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY BOHLER

No. COA08-1515

(Filed 4 August 2009)

Sentencing— prior record level—out-of-state convictions—statutory default rules

There was no prejudicial error in a resentencing proceeding where the trial court should have simply accepted the default rules set out in N.C.G.S. § 15A-1340.14(e) in evaluating out-of-state convictions, but the error did not adversely effect the prior record level determination.

Appeal by defendant from judgment entered 17 July 2008 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 20 May 2009.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

Leslie C. Rawls, for defendant.

ERVIN, Judge.

On 11 April 2007, Defendant Michael Anthony Bohler (Defendant) was convicted of one count of felonious breaking and entering, three counts of misdemeanor breaking or entering, one count of felonious larceny, three counts of misdemeanor larceny, and four counts of

felonious possession of stolen goods. On the same date, Defendant admitted to having attained the status of an habitual felon. On 11 April 2007, Judge V. Bradford Long imposed a judgment upon Defendant in which he consolidated all of Defendant's convictions for judgment, determined that Defendant had 12 prior record points and should be assigned a prior record level of IV, and sentenced Defendant to a minimum of 120 months and a maximum of 153 months imprisonment in the custody of the North Carolina Department of Correction. Defendant noted an appeal from this judgment.

On 3 June 2008, this Court filed an unpublished opinion holding that Defendant had been erroneously convicted and sentenced for both larceny and possession of the same property and that this error was not rendered harmless by the fact that all of Defendant's convictions were consolidated for judgment. *State v. Bohler*, 190 N.C. 822, 662 S.E.2d 37 (2008). As a result, we vacated Defendant's convictions for possession of stolen property and remanded this case to the Superior Court of Moore County for resentencing.

On 17 July 2008, the trial court conducted a resentencing hearing. At the conclusion of the resentencing hearing, the trial court entered judgment against Defendant based on his convictions for felonious breaking or entering, three counts of misdemeanor breaking or entering, felonious larceny, and three counts of misdemeanor larceny. At that time, the trial court consolidated the offenses for which Defendant had been convicted for judgment, determined that Defendant had 12 prior record level points and a prior record level of IV, and sentenced Defendant to a minimum term of 120 months imprisonment and a maximum of 153 months imprisonment in the custody of the North Carolina Department of Correction.[1] In determining that Defendant had accumulated 12 prior record points, the trial court assigned Defendant four points based on a single prior conviction for a Class G felony (a conviction for the sale and delivery of cocaine in Moore County File No. 00 CrS 4686); four points based on two prior convictions for Class H felonies (a South Carolina housebreaking and larceny conviction in Greenwood County File No. B122976 and a

1. The Prior Record Level Worksheet from the 2008 resentencing is not contained in the Record on Appeal. As a result, the analysis set forth in this opinion is based on the worksheet presented at the original 11 April 2007 sentencing proceeding in light of the affirmative representation of Defendant's trial counsel that the 19 July 2008 document was "essentially the exact same worksheet as on the last judgment," the absence of any representation to the contrary from the State at the resentencing hearing, and the consistency between the information shown on that worksheet and the findings set out in the trial court's judgment.

South Carolina larceny conviction in Greenwood County File No. B563847), and four points based on four prior convictions for misdemeanor offenses (a South Carolina conviction for petit larceny in Greenwood County File No. D1199196, a South Carolina conviction for criminal domestic violence in Greenwood County File No. D915091, a conviction for misdemeanor larceny in Moore County File No. 99 Cr 395, and a conviction for misdemeanor possession of stolen goods in Moore County File No. 95 Cr 6044). Following the imposition of judgment, Defendant noted an appeal to this Court.

Discussion

Defendant contends that the trial court erred by calculating his prior record level using out-of-state convictions that had not been properly shown to be "substantially similar" to various North Carolina offenses. More specifically, Defendant argues that the trial court inappropriately treated his two South Carolina convictions for housebreaking and larceny and for larceny as Class H felonies and inappropriately treated his two South Carolina convictions for petit larceny and criminal domestic violence as Class A1 or Class 1 misdemeanors in determining his prior record level. As a result, Defendant argues he should have been sentenced as a level III rather than a level IV offender and that this case should be remanded to the trial court for resentencing. After careful consideration of Defendant's arguments on appeal, we find no prejudicial error in the determination of the sentence imposed upon Defendant.

The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal. *State v. Fraley*, 182 N.C. App. 683, 691,643 S.E.2d 39, 44 (2007). It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review. *State v. Morgan*, 164 N.C. App. 298, 304, 595 S.E.2d 804, 809 (2004); *see* N.C. Gen. Stat. §§ 15A-1446(d)(5), (d)(18). As a result, the issue before the Court is simply whether the competent evidence in the record adequately supports the trial court's decision that Defendant had accumulated twelve prior record points and should be sentenced as a prior record level IV offender.

According to N.C. Gen. Stat. § 15A-1340.14(a), "[t]he prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section."

The number of prior record points for each class of felony and misdemeanor offense is specified in N.C. Gen. Stat. § 15A-1340.14(b). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f). A prior conviction may be proved by "stipulation of the parties;" "[a]n original or copy of the court record of the prior conviction;" "[a] copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts;" or "[a]ny other method found by the court to be reliable." N.C. Gen. Stat. § 15A-1340.14(f). However, "a worksheet prepared and submitted by the State, purporting to list a defendant's prior convictions is, without more, insufficient to satisfy the State's burden in establishing proof of prior convictions." *Morgan*, 164 N.C. App. 298, 304, 595 S.E.2d 804, 809 (2004) (quoting *State v. Eubanks*, 151 N.C. App. 455, 505, 565 S.E.2d 738, 742 (2002)).

The proper manner in which to consider out-of-state convictions in calculating a defendant's prior record level is specified in N.C. Gen. Stat. § 15A-1340.14(e), which provides, in pertinent part, that:

> a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. . . . . If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record points.

The rules for proving the proper number of prior record level points that should be assigned to specific out-of-state convictions differ from those applicable to in-state convictions in one important respect.

> However, our Court recently held in *State v. Hanton*, 175 N.C. App. 250, 623 S.E.2d 600 (2006), that "the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court." *Id.* at 255, 623 S.E.2d at 604. Our Court further stated that "[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *Id.* at 253, 623 S.E.2d at 603 (quoting *State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (1979). Although this Court did not explicitly state that a defendant could not stipulate to the substantial similarity of out-of-state convictions, the Court did conclude that this Court's prior statement in *State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000), that a defendant might stipulate to this question, was "non-binding dicta." *Hanton*, [175] N.C. App. at [254], 623 S.E.2d at 603. We are bound by prior decisions of a panel of this Court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Thus, we conclude that the stipulation in the worksheet regarding Defendant's out-of-state convictions was ineffective. *See Hanton*, [175] N.C. App. at [253-255], 623 S.E.2d at 603-04.

State v. Palmateer, 179 N.C. App. 579, 581-82, 634 S.E.2d 592, 593-94 (2006); *see also State v. Lee*, 194 N.C. App. 748, 749-50, 668 S.E.2d 393, 394-95 (2008).

At the time of resentencing, Defendant stipulated to the prior record worksheet. In addition, the record reflects that the colloquy occurred between the trial court and Defendant's trial counsel at the resentencing hearing:

> THE COURT: Judge Long could have given him a minimum of 133 months and a maximum of 169 months. Correct?
>
> MR. MORRIS: Correct.
>
> THE COURT: How old is your client?
>
> MR. MORRIS: Forty-two.
>
> THE COURT: Does he stipulate that his prior record points are 12 and his prior record level is IV pursuant to habitual felon Prior Record Level Worksheet?

MR. MORRIS: Yes, Your Honor. We've previously stipulated to those.

As a result, the record establishes that Defendant stipulated to both the fact of the South Carolina convictions and their substantial similarity to offenses bearing specific North Carolina classifications at the resentencing hearing.

In challenging the trial court's decision to classify him as a level IV offender, Defendant argues that, "[b]ecause the State offered no evidence to show that the South Carolina convictions were misdemeanors or felonies, or that they were substantially similar to North Carolina offenses of either type, the South Carolina offenses should have been disregarded in calculating [Defendant's] prior record level." Had the trial court "[d]isregard[ed] the South Carolina convictions," Defendant contends that he "would have received four points for the Class G convictions" and "three points for the North Carolina misdemeanors[2]," resulting in a prior record level of III. Given that set of circumstances, Defendant contends that he should have been "exposed to a minimum guideline range of 93-116 months" instead of the 120 month minimum sentence that was actually imposed upon him. After careful consideration of Defendant's arguments, we conclude that the trial court did not commit prejudicial error in concluding that he should be sentenced as a level IV offender.

The fundamental flaw in Defendant's argument is his assumption that stipulations between the State and a criminal defendant as to the fact of an out-of-state conviction for either a felony or a misdemeanor and stipulations as to the "substantial similarity" between an out-of-state offense and a North Carolina crime are equally ineffective. Such an argument, however, lacks support in our sentencing jurisprudence. In each of the decisions upon which Defendant relies, the trial judge assigned additional points over and above the default values for out-of-state convictions based on stipulations that those out-of-state convictions were "substantially similar" to various North Carolina offenses. *Lee*, 194 N.C. App. at 350, 668 S.E.2d at 395 (holding that the trial court erroneously assigned points to an out-of-state misdemeanor in calculating the defendant's prior record level despite the State's failure to prove that this offense was "substantially similar" to a Class A1 or Class 1 North Carolina misdemeanor); *Palmateer*, 179 N.C. App. at 581-82, 634 S.E.2d at 593-94 (holding that the trial court

2. Our review of the sentencing worksheet suggests that Defendant received points for two North Carolina misdemeanor convictions rather than three.

erroneously treated certain out-of-state convictions as "substantially similar" to various North Carolina offenses for purposes of calculating the defendant's prior record level in the absence of sufficient proof); *Hanton*, 175 N.C. App. at 259-60, 623 S.E.2d at 607 (holding that the trial court erred by treating certain out-of-state convictions as a Class A1 misdemeanor for the purpose of calculating the defendant's prior record level despite the absence of sufficient proof that this offense was "substantially similar" to a North Carolina Class A1 misdemeanor). Thus, although the decisions upon which Defendant relies clearly establish that the trial court erred by treating Defendant's South Carolina convictions for housebreaking and for larceny as "substantially similar" to North Carolina Class H felonies and by treating Defendant's South Carolina convictions for petit larceny and criminal domestic violence as "substantially similar" to North Carolina Class A1 or Class 1 misdemeanors, that conclusion does not mean that the trial court lacked the authority to consider these convictions for purposes of sentencing at all.

In *State v. Hinton*, 196 N.C. App. 750, 675 S.E.2d 672, 675 (2009), this Court expressly differentiated between the validity of a stipulation "to the existence of any of the convictions listed on the prior record level worksheet" and "the assignment of points to his prior convictions in New York." In light of this conclusion, we specifically stated that:

> According to the statute, the default classification for out-of-state felony convictions is "Class I." Where the State seeks to assign an out-of-state conviction a *more serious* classification than the default Class I status, it is required to prove "by the preponderance of the evidence" that the conviction at issue is "substantially similar" to a corresponding North Carolina felony. [N.C. Gen. Stat. § 15A-1340.14(e).] However, where the State classifies an out-of-state conviction as a Class I felony, no such demonstration is required. "Unless the State proves by a preponderance of the evidence that the out-of-state felony convictions are substantially similar to North Carolina offenses that are classified as Class I felonies or higher, the trial court must classify the out-of-state convictions as *Class I felonies* for sentencing purposes. *Hanton*, 140 N.C. App. at 690-91, 540 S.E.2d at 383 (emphasis added).

Hinton, 196 N.C. App. at 755, 675 S.E.2d at 675. Thus, while the trial court may not accept a stipulation to the effect that a particular out-of-state conviction is "substantially similar" to a particular North

Carolina felony or misdemeanor, it may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction. As a result, instead of accepting the parties' stipulation as to the number of points to be assigned to Defendant's South Carolina convictions, the trial court should have simply applied the default rules set out in N.C. Gen. Stat. § 15A-1340.14(e) in determining Defendant's prior record level to the Defendant's record as stipulated to by the parties. In undertaking that analysis, the trial court should have treated Defendant's South Carolina felonious housebreaking and felonious larceny convictions as Class I rather than Class H offenses and should have assigned no points to Defendant's South Carolina petit larceny and criminal domestic violence convictions. N.C. Gen. Stat. § 15A-1340.14(e). However, since both Class H and Class I felonies are assigned two prior record points each by N.C. Gen. Stat. § 15A-1340.14(b)(4), a correct application of the rules set out in N.C. Gen. Stat. § 15A-1340.14 establishes that, had the correct analysis been undertaken, the trial court should have determined that Defendant had ten prior record points rather than twelve (four points for the Moore County possession of cocaine with the intent to sell and deliver conviction, two points each for the South Carolina felonious housebreaking and felonious larceny convictions, and two points for the Moore County misdemeanor larceny and misdemeanor possession of stolen property). Since a Defendant with ten prior record level points is still a level IV offender, it is clear that the trial court's error did not adversely affect the sentencing process. Thus, while the trial court did err by classifying Defendant's South Carolina felonious housebreaking and felonious larceny convictions as Class H rather than Class I felonies and by including Defendant's South Carolina convictions for petit larceny and criminal domestic violence in calculating Defendant's prior record level, that error did not adversely affect the prior record level determination, rendering it harmless and precluding the Court from granting Defendant any relief on appeal.[3]

AFFIRMED.

Judges McGEE and JACKSON concur.

3. In light of our determination that the trial court's error in calculating Defendant's prior record level was harmless, we need not undertake an independent analysis of whether the South Carolina offenses for which Defendant was convicted were, in fact, "substantially similar" to North Carolina Class H felonies or Class A1 or Class 1 misdemeanors.

STATE OF NORTH CAROLINA v. KIRK JAMES KELLER, DEFENDANT

No. COA08-967

(Filed 4 August 2009)

1. Appeal and Error— appealability—guilty plea—writ of certiorari

Based on the fundamental nature of the errors asserted by defendant, the Court of Appeals granted *certiorari* to review defendant's arguments regarding the factual basis for his guilty pleas to the charges of second-degree murder, first-degree kidnapping, and accessory after the fact to first-degree murder.

2. Criminal Law— guilty plea—sufficiency of evidence—mutually exclusive offenses—kidnapping requires live victim

The trial court erred by accepting defendant's guilty plea in the absence of an adequate factual basis supporting the plea as to the charges of second-degree murder, first-degree kidnapping, and accessory after the fact to first-degree murder, and the case is remanded to the trial court for such further proceedings as the State may elect to pursue because: (1) defendant could not be convicted of both second-degree murder of the victim as a principal and accessory after the fact to first-degree murder of the victim since the offenses are mutually exclusive; and (2) with respect to the kidnapping charge, the proffered factual basis for the plea indicated only that defendant transported the victim's already deceased body, and N.C.G.S. § 14-39 requires that the victim of the crime be alive.

Appeal by defendant from judgments entered 25 January 2007 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 29 January 2009.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

GEER, Judge.

Defendant Kirk James Keller appeals from judgments entered on his guilty plea to second degree murder, first degree kidnapping,

accessory after the fact to first degree murder, and robbery with a dangerous weapon. The victim of all four crimes was Kenneth Mac Richardson. We agree with defendant's contention that the trial court erred in accepting his plea in the absence of an adequate factual basis supporting the plea as to the charges of second degree murder, first degree kidnapping, and accessory after the fact to first degree murder. Because the offenses are mutually exclusive, defendant could not be convicted of both second degree murder of Mr. Richardson, as a principal, and accessory after the fact to first degree murder of Mr. Richardson. With respect to the kidnapping charge, the proffered factual basis for the plea indicated only that defendant transported Mr. Richardson's already deceased body. Kidnapping, however, requires that the victim of the crime be alive. We, therefore, vacate defendant's guilty plea as to the above charges and the resulting judgments and remand this matter to the trial court.

Facts

On 15 November 2004, defendant was indicted for first degree murder of Mr. Richardson, first degree kidnapping of Mr. Richardson, and conspiracy to commit robbery of Mr. Richardson with a dangerous weapon. A plea hearing was held on 16 November 2006, where, prior to defendant's entering his plea, a bill of information was filed, also charging him with accessory after the fact to first degree murder.

At the hearing, the prosecutor summarized the factual basis for defendant's pleas:

> [Prosecutor]: Your Honor, on October 21st of 2004, I know the Court heard the facts in this case and during this time numerous times. The family has been here. On that date the father, brother, mother-in-law was murdered. The wife, codefendant of this defendant, Jessica Keller, the facts are clear that she stabbed and killed him—this defendant looked on, it's our position, and it has been our position that he was an aid and abetted [sic]. Sit by, ready, willing, and able to render assistance and did in fact lean [sic] assistance in helping afterwards to drive the body to South Carolina, stealing the car, kidnapping him, and disposing of the body, in fact, the evidence would have shown that he had mental state and was involved in this killing from the beginning as an aid and abetted [sic], guilty also by the felony murder rule. All the family members are going to want to speak at the time we pray judgment, Your Honor.
>
> THE COURT: Certainly.

[Prosecutor]: That's a summary of the facts for the Court at this time.

Based on this summary, the trial court accepted defendant's guilty plea to second degree murder, first degree kidnapping, conspiracy to commit robbery with a dangerous weapon, and accessory after the fact to first degree murder.

The trial court continued judgment until 25 January 2007, when it sentenced defendant to four consecutive presumptive-range terms of 189 to 236 months for second degree murder; 100 to 129 months for first degree kidnapping; 29 to 44 months for conspiracy to commit robbery with a dangerous weapon; and 100 to 126 months for accessory after the fact. Defendant filed both a notice of appeal and a petition for writ of certiorari, seeking review of his guilty plea.

I

[1] In his petition for writ of certiorari, defendant challenges the factual basis for his guilty plea to second degree murder, first degree kidnapping, and accessory after the fact to first degree murder.[1] Although defendant is not entitled to appeal from his guilty plea as a matter of right, his arguments are reviewable pursuant to a petition for writ of certiorari. *See State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987) (electing to grant certiorari to review defendant's "contention that the trial court improperly accepted his guilty plea" where defendant was not entitled to appeal as matter of right); *State v. Rhodes*, 163 N.C. App. 191, 193, 592 S.E.2d 731, 732 (2004) ("Under *Bolinger*, defendant in this case is not entitled to appeal from his guilty plea as a matter of right, but his arguments may be reviewed pursuant to a petition for writ of certiorari.").

The State argues that *Bolinger* does not control because it does not address whether a defendant may petition for writ of certiorari on the issue of whether a trial court improperly accepted a guilty plea. To the contrary, the *Bolinger* Court specifically pointed out that defendant was not entitled to an appeal, but nonetheless determined that review was still available based on a petition for writ of certiorari:

> [A]ccording to N.C.G.S. § 15A-1444 defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea. Defendant may obtain

1. Defendant does not seek review of his guilty plea to conspiracy to commit robbery with a dangerous weapon.

> appellate review of this issue only upon grant of a writ of certiorari. Because defendant in the instant case failed to petition this Court for a writ of certiorari, he is therefore not entitled to review of the issue.
>
> Neither party to this appeal appears to have recognized the limited bases for appellate review of judgments entered upon pleas of guilty. For this reason we nevertheless choose to review the merits of defendant's contention.

Bolinger, 320 N.C. at 601-02, 359 S.E.2d at 462.

The State also opposes defendant's petition for writ of certiorari on the ground that this Court lacks the authority to grant certiorari under Rule 21 of the Rules of Appellate Procedure. The Supreme Court's holding in *Bolinger* and this Court's decision in *Rhodes* applying *Bolinger* foreclose this argument. *See also State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006) (holding challenge to procedures in accepting guilty plea reviewable by certiorari); *State v. Carter*, 167 N.C. App. 582, 585, 605 S.E.2d 676, 678 (2004) (following *Bolinger* and *Rhodes*).[2] Due to the fundamental nature of the errors asserted by defendant, we grant certiorari to review defendant's arguments regarding the factual basis for his pleas. *See State v. Poore*, 172 N.C. App. 839, 841, 616 S.E.2d 639, 640 (2005) (granting certiorari to review sufficiency of factual basis supporting defendant's guilty plea).

II

[2] N.C. Gen. Stat. § 15A-1022(c) (2007) provides that the trial "judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea." *See also State v. Weathers*, 339 N.C. 441, 453, 451 S.E.2d 266, 272 (1994) ("A judge may not accept a defendant's guilty plea without first determining that there is a factual basis for the plea."). The trial court may consider any properly presented information, with the "trial record . . . reflect[ing] the information and evidence relied upon in reaching the decision that an adequate factual basis does exist." *State v. Atkins*, 349 N.C. 62, 96, 505 S.E.2d 97, 118 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036, 119 S. Ct. 2025 (1999). Here, as permitted by N.C.

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2. In any event, our Supreme Court has also "recognize[d] . . . discretionary avenues of appellate jurisdiction . . . in addition to those routes of mandatory review conferred by statute. *See* N.C. Const. art. IV, § 12, cl. 1; *In re Brownlee*, 301 N.C. 532, 547-48, 272 S.E.2d 861, 870 (1981)[.]" *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197 n.3, 657 S.E.2d 361, 365 n.3 (2008).

Gen. Stat. § 15A-1022(c)(1), the trial court based its determination on "[a] statement of the facts by the prosecutor."

Defendant first argues that the offenses of second degree murder and accessory after the fact to first degree murder of the same victim are mutually exclusive offenses, and, consequently, he could not be sentenced for both. The elements of second degree murder are: "(a) an unlawful killing; (b) of a human being; (c) with malice, but without premeditation and deliberation." *State v. McDonald*, 151 N.C. App. 236, 243, 565 S.E.2d 273, 277, *appeal dismissed and disc. review denied*, 356 N.C. 310, 570 S.E.2d 892 (2002). In turn, "[a]n accessory after the fact is one who, knowing that a felony has been committed by another, receives, relieves, comforts or assists such felon, or who in any manner aids him to escape arrest or punishment." *State v. Oliver*, 302 N.C. 28, 55, 274 S.E.2d 183, 200 (1981).

The State concedes that "[t]he law on this point is unambiguous[,]" and that the Supreme Court's holding in *State v. McIntosh*, 260 N.C. 749, 133 S.E.2d 652 (1963), *cert. denied*, 377 U.S. 939, 12 L. Ed. 2d 302, 84 S. Ct. 1345 (1964), is controlling. The *McIntosh* Court explained:

> A participant in a felony may no more be an accessory after the fact than one who commits larceny may be guilty of receiving the goods which he himself had stolen. The crime of accessory after the fact has its beginning after the principal offense has been committed. How may an accessory after the fact render assistance to the principal felon if he himself is the principal felon?

Id. at 753, 133 S.E.2d at 655. *See also State v. Johnson*, 136 N.C. App. 683, 695, 525 S.E.2d 830, 837 (2000) ("A defendant charged and tried as a principal may not be convicted of the crime of accessory after the fact."); *State v. Jewell*, 104 N.C. App. 350, 353, 409 S.E.2d 757, 759 (1991) (holding that being the principal to a crime and being an accessory after the fact to that crime are mutually exclusive offenses), *aff'd per curiam*, 331 N.C. 379, 416 S.E.2d 3 (1992).

In short, as *McIntosh* dictates, and the State acknowledges, defendant could not be sentenced based on the mutually exclusive offenses of second degree murder and accessory after the fact to first degree murder. The trial court, therefore, erred in accepting defendant's guilty plea to both second degree murder and accessory after the fact to first degree murder.

Defendant argues that there is also an insufficient factual basis to support his guilty plea to first degree kidnapping. Defendant maintains that the prosecutor's summary is insufficient to support his kidnapping plea because "[k]idnapping as defined in §14-39 clearly requires that a live person be confined, restrained, or removed, since a corpse could not grant or withhold consent or be confined, restrained, or removed for the stated purposes." The State does not address this argument in its brief.

N.C. Gen. Stat. § 14-39 (2007), North Carolina's kidnapping statute, states in relevant part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other *person* 16 years of age or over *without the consent* of such *person*, or any other *person* under the age of 16 years without the consent of a parent or legal custodian of such *person*, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other *person* for a ransom or as a hostage or using such other *person* as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the *person* so confined, restrained or removed or any other person; or
>
> (4) Holding such other *person* in involuntary servitude in violation of G.S. 14-43.12.
>
> (5) Trafficking another *person* with the intent that the other *person* be held in involuntary servitude or sexual servitude in violation of G.S. 14-43.11.
>
> (6) Subjecting or maintaining such other *person* for sexual servitude in violation of G.S. 14-43.13.
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the *person* kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the *person* kidnapped was released in a safe place by the defendant and had not been

seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39(a)-(b) (emphasis added).

We read N.C. Gen. Stat. § 14-39 as inherently requiring a live victim. The statute repeatedly refers to the subject or victim of the kidnapping as a "person." The statute makes confinement, restraint, or removal unlawful without consent, something that necessarily must be given by a living person.

The statute, moreover, prohibits holding a person as a "hostage," "terrorizing" a person, or subjecting a person to "involuntary servitude" or "sexual servitude." N.C. Gen. Stat. § 14-39(a)(1), (3)-(5). All of these acts necessitate a live victim. *See People v. Hillhouse*, 27 Cal. 4th 469, 498, 40 P.3d 754, 773, 117 Cal. Rptr. 2d 45, 67 (2002) ("There can be no doubt that, like rape, kidnapping in general, and kidnapping for robbery in particular, requires a live victim. . . . If one kills, then moves the body, the crimes committed do not include kidnapping. The statutory references to a 'person' or an 'individual' as the kidnapping victim, clearly contemplate someone alive." (internal citations omitted)), *cert. denied*, 537 U.S. 1114, 154 L. Ed. 2d 789, 123 S. Ct. 869 (2003); *Ducksworth v. State*, 113 Nev. 780, 793, 942 P.2d 157, 166 (1997) ("Kidnapping requires the willful seizing, confining, or carrying away of a live person.").

In addition, N.C. Gen. Stat. § 14-39(b) differentiates between first degree and second degree kidnapping based primarily on whether the "person kidnapped" was released by the defendant in a safe place. This distinction further supports the conclusion that the statute contemplates a live victim as "no further harm can befall someone already dead; asportation of a corpse cannot increase the risk of harm." *Hillhouse*, 27 Cal. 4th at 498, 40 P.3d at 773, 117 Cal. Rptr. 2d at 67.

In this case, the prosecutor's statements at the plea hearing do not provide a sufficient factual basis to support defendant's first degree kidnapping charge. Based on the prosecutor's description of the events that resulted in the charge, defendant did not engage in any conduct that could constitute kidnapping until after his wife had "stabbed and killed" the victim. According to the prosecutor, it was not until "*afterwards*" that defendant helped steal the victim's car and "drive the *body* to South Carolina" and "dispos[e] of the *body*[.]"

There was no description of any restraint, confinement, or removal of the victim by defendant prior to the victim's death. *Compare Ducksworth*, 113 Nev. at 793, 942 P.2d at 166 ("Because all of the testimony indicated that [the victim] was dead before he was moved, we conclude that no rational trier of fact could have found the essential elements of the kidnapping charge beyond a reasonable doubt."), *with State v. Johnson*, 112 Ohio St. 3d 210, 215-16, 858 N.E.2d 1144, 1157 (2006) (rejecting defendant's argument that he could not be convicted of kidnapping as victim had "died before being restrained" where evidence showed that defendant "hogtied and carried him to the basement" while still alive), *cert. denied*, 552 U.S. 836, 169 L. Ed. 2d 55, 128 S. Ct. 74 (2007). Without a factual basis that defendant confined, removed, or restrained Mr. Richardson while he was alive, the trial court erred in accepting defendant's guilty plea to first degree kidnapping.

In sum, we vacate defendant's guilty plea to second degree murder, first degree kidnapping, and accessory after the fact to first degree murder as well as the judgments based on that plea. Because of our disposition of this appeal, we do not address defendant's additional arguments. We remand the matter to the trial court "for such proceedings as the state may elect to pursue." *State v. Sinclair*, 301 N.C. 193, 199, 270 S.E.2d 418, 422 (1980).

Vacated and remanded.

Judges STEELMAN and STEPHENS concur.

GREENE v. BARRICK

[198 N.C. App. 647 (2009)]

ANN B. GREENE, IN HER CAPACITY AS WIFE OF TED D. HORTON AND AS ADMINISTRATRIX OF THE ESTATE OF TED D. HORTON, AND STATE OF NORTH CAROLINA, *EX REL.*, ANN B. GREENE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF TED D. HORTON, PLAINTIFFS v. BENJAMIN THOMAS BARRICK, TOM BARRICK, ROBERT TWOMEY, BRAD BARRICK, SCOTT WHALEY, NETSTAR AIR RESCUE, INC. D/B/A NORTHEAST TENNESSEE SEARCH & TACTICAL AIR RESPONSE, JERRY W. JONES, IN HIS OFFICIAL CAPACITY AS SHERIFF OF FRANKLIN COUNTY, NORTH CAROLINA AND INDIVIDUALLY, FRANKLIN COUNTY, NORTH CAROLINA, FRANKLIN COUNTY SHERIFF'S OFFICE, WESTERN SURETY COMPANY, SOUTHEASTERN HELICOPTERS, INC., KEITH A. SVADBA, AND THOMAS M. JONES, DEFENDANTS

No. COA08-1358

(Filed 4 August 2009)

1. Appeal and Error— appealability—interlocutory order—governmental immunity—partial summary judgment granted

The granting of partial summary judgment based on governmental immunity was immediately appealable even though interlocutory because a substantial right was affected. The same type of issues are called into question by this appeal as in the denial of summary judgment based on immunity.

2. Workers' Compensation— *Pleasant* claim—sheriff—employer—summary judgment

The trial court did not err by granting summary judgment for defendant sheriff on a willful and wanton negligence claim under *Pleasant v. Johnson*, 312 NC 330, because the sheriff here was the employer rather than a co-employee, as in *Pleasant*.

3. Workers' Compensation— *Pleasant* claim—deputy in official capacity—maintenance and operation of helicopter—governmental function

Governmental immunity protected a deputy (in his official capacity) involved in a helicopter program from a *Pleasant* claim except to the extent immunity was waived by a surety bond, and the court's summary judgment for the deputy (defendant Barrick) recognized this fact and was proper. Contrary to plaintiff's contention, the maintenance and operation of the helicopter was incident to the police power of the sheriff.

4. Workers' Compensation— *Woodson* claim—sheriff's department—operation of helicopter

Summary judgment was correctly granted for a sheriff's deputy involved in a helicopter program on a *Woodson* claim

where the claim could be asserted only to the extent it constituted an action against the employer-sheriff, and the sheriff was protected by governmental immunity because maintenance and operation of a helicopter are incidental to the police power.

Appeal by plaintiffs from an order entered 9 June 2008 by Judge Kenneth C. Titus in Franklin County Superior Court. Heard in the Court of Appeals 7 April 2009.

Tharrington Smith, L.L.P., by F. Hill Allen, for plaintiffs-appellants.

Frazier, Hill & Fury, RLLP, by William L. Hill and Torin L. Fury, for Franklin County Sheriff's Office and Jerry Jones, defendants-appellees.

Batton & Guin, by David R. Guin, for Franklin County, defendants-appellees.

Ortiz & Schick, PLLC, by Michael R. Ortiz and Melinda C. Hemphill, for defendant-appellee Benjamin Barrick in his official capacity.

JACKSON, Judge.

Ann B. Greene ("plaintiff") appeals the 9 June 2008 order granting summary judgment, in part, in favor of, *inter alia*, Benjamin Thomas Barrick in his official capacity ("Barrick"), Sheriff Jerry Jones in his official and individual capacities ("Sheriff Jones"), Franklin County Sheriff's Office ("the sheriff's office"), and Western Surety Company ("Western") (collectively "defendants"). For the reasons stated below, we affirm.

In October 2003, Deputy Ted Horton ("Deputy Horton") contacted Barrick of NETSTAR Air Rescue, Inc. ("NETSTAR") to assist the sheriff's office in establishing a helicopter program. Deputy Horton acted as an intermediary between Barrick and Sheriff Jones. In December 2003, Deputy Horton and Sheriff Jones went to Elizabethton, Tennessee to look at Barrick's helicopter. Barrick understood that the sheriff's office wanted a helicopter to do search and rescue, law enforcement, and drug eradication in Franklin County and the surrounding areas.

On 22 January 2004, Barrick and Sheriff Jones signed an agreement for their agencies—NETSTAR and the sheriff's office—to provide mutual aid to each other if necessary. On or about 20 February

2004, Barrick and Sheriff Jones signed an agreement for the sheriff's office to lease or purchase a helicopter from NETSTAR, pursuant to which the sheriff's office was to commence leasing the helicopter on 1 March 2004. Barrick applied for a position with the sheriff's office on or about 10 March 2004, noting on his application that he was recruited with the helicopter program. He was hired as a sheriff's deputy on or about 15 March 2004.

A ribbon-cutting ceremony was held on 14 April 2004. On 13 May 2004, Barrick and Deputy Horton used the helicopter to assist Vance County's search for suspects in a home invasion. During the flight, they noticed marijuana plants. On 14 May 2004, Barrick and Deputy Horton took the helicopter out on a drug eradication flight in the area where marijuana was spotted the previous day. As they were returning to the airport, the helicopter lost its tail rotor, causing the helicopter to crash, killing Deputy Horton.

Plaintiff, in her individual capacity as Deputy Horton's wife and her official capacity as the administrator of his estate, filed a complaint on 5 May 2006 setting forth claims of (1) negligence; (2) gross negligence; (3) breach of express and implied warranties; (4) joint venture and proprietary functions; (5) specific performance; (6) punitive damages; as well as (7) a willful, wanton and reckless negligence claim based upon *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985); (8) a gross negligence claim based upon *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991); (9) a claim on sheriff's bond; and (10) a claim against Sheriff Jones in his individual capacity.

On 6 May 2008, defendants filed a motion for summary judgment, alleging, *inter alia*, the protections of governmental immunity. The trial court heard defendants' motion on 15 May 2008 and filed its order granting summary judgment on 9 June 2008. The court granted summary judgment as to all claims except (a) the *Pleasant* claim against Barrick in his individual capacity, (b) the punitive damages claim against Barrick in his individual capacity, and (c) the *Pleasant* claim against Barrick in his official capacity and Western, to the extent coverage is available pursuant to the sheriff's surety bond. Plaintiff appeals.

[1] The order appealed from did not dispose of the entire case; therefore, it is interlocutory. *See Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (order granting partial summary judgment is interlocutory), *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005) (per curiam). Although ordinarily interlocutory orders are not immediately appeal-

able, an interlocutory order may be appealed immediately if it affects a substantial right of the parties. *See* N.C. Gen. Stat. § 1-277 (2007). This Court has held that "when the moving party claims sovereign, absolute or qualified immunity, the denial of a motion for summary judgment is immediately appealable." *Moore v. Evans*, 124 N.C. App. 35, 39, 476 S.E.2d 415, 420 (1996) (citations omitted). Even though this case involves the grant, rather than the denial of sovereign immunity, we believe the same type of issues are called into question by the appeal, and therefore, plaintiff's appeal is properly before this Court.

An order granting 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 burden of showing that no triable issue of fact exists rests upon the moving party. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citation omitted). One means of carrying this burden is to show that the non-moving party cannot surmount an affirmative defense which would bar the claim. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted).

This Court reviews a trial court's rulings on summary judgment motions *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citing *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006)). In deciding a motion for summary judgment, a trial court is to consider the evidence 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) (citing *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). The trial court should deny a motion for summary judgment if there is any evidence of a genuine issue of material fact. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004).

[2] As to the *Pleasant* claim, plaintiff argues that the evidence supports submission of the claim to a jury. We disagree.

In *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), our Supreme Court carved out a narrow exception to this State's workers' compensation law, allowing a common law action for "willful, wanton and reckless negligence" against a co-employee notwithstanding the fact that the employee received workers' compensation benefits. *Id.* at 716, 325 S.E.2d at 249. The Supreme Court acknowledged at the

time that "[t]he concept of willful, reckless and wanton negligence inhabits a twilight zone which exists somewhere between ordinary negligence and intentional injury." *Id.* at 714, 325 S.E.2d at 247. Although *Pleasant* created an exception to bring suit against a co-employee, it did not extend that exception to an employer. *Id.* at 717, 325 S.E.2d 250.

Plaintiff's *Pleasant* claim was asserted against Barrick, Sheriff Jones, and Western. The summary judgment order denied summary judgment as to Barrick in his individual capacity, and as to Western and Barrick in his official capacity to the extent of coverage on the surety bond. Sheriff Jones is not a co-employee; Sheriff Jones is the employer. Therefore, plaintiff's *Pleasant* action must fail as it pertains to him as a matter of law. Accordingly, the trial court did not err in granting summary judgment as to Sheriff Jones on this claim.

[3] As to plaintiff's *Pleasant* claim against Barrick in his official capacity, Barrick is protected by governmental immunity, except to the extent that coverage is available pursuant to the surety bond.

Governmental immunity is a doctrine by which a municipality is not held liable for the torts of its officers and employees if those torts are committed while the officers or employees are performing a governmental function. *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994) (citations omitted). "Ordinarily, a municipality providing police services is engaged in a governmental function for which there is no liability." *Coleman v. Cooper*, 89 N.C. App. 188, 192, 366 S.E.2d 2, 5, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988) (citation omitted), *disapproved of on other grounds by Hunt v. N.C. Dept. of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998). "That immunity is absolute unless the [municipality] has consented to being sued or otherwise waived its right to immunity." *Schlossberg v. Goins*, 141 N.C. App. 436, 440, 540 S.E.2d 49, 52 (2000), *disc. rev. denied*, 355 N.C. 215, 560 S.E.2d 136 (2002) (citations omitted). A sheriff may waive governmental immunity by purchasing a bond. *Sellers v. Rodriguez*, 149 N.C. App. 619, 624, 561 S.E.2d 336, 339 (2002) (citing N.C. Gen. Stat. § 58-76-5) (additional citation omitted).

Plaintiff contends the activities at issue—the maintenance and operation of a helicopter—were not governmental functions; therefore, Barrick is not protected by governmental immunity. However, the maintenance and operation of the helicopter was incident to the

police power of the sheriff's office—a governmental function. *See Lewis v. Hunter*, 212 N.C. 504, 509, 193 S.E. 814, 817 (1937) ("[W]hether he was engaged in repairing or testing the radio . . . and anything that he did for the city with the automobile in the scope of his employment was done as an incident to the police power of the city—a purely governmental function."); *Dobrowolska v. Wall*, 138 N.C. App. 1, 6, 530 S.E.2d 590, 594 (2000) ("[W]e hold as a matter of law that the repair and subsequent return of the van was incident to the police power of the City, a governmental function."), *disc. rev. improvidently allowed*, *appeal dismissed*, 355 N.C. 205, 558 S.E.2d 174 (2002). Because these activities were incident to a governmental function, Barrick, in his official capacity, is immune from liability, except to the extent that the immunity was waived by the surety bond. This fact was recognized in the trial court's order which denied summary judgment to the extent of coverage on the bond.

[4] With respect to her *Woodson* claim, plaintiff asserts that the warnings to Barrick about the helicopter and the lack of responsibility of the other appellees support her claim under these circumstances. We disagree. We note that plaintiff asserted in oral argument that she was "not putting her eggs in the *Woodson* basket" and that a *Woodson* claim is hard to prove.

In addition to showing that no triable issue of fact exists by demonstrating that the non-moving party cannot surmount an affirmative defense, a moving party may carry its burden on summary judgment by proving (1) that an essential element of the non-moving party's claim is nonexistent, or (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim. *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427. Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case. *Id.*

In *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), our Supreme Court created a second narrow exception to this State's worker's compensation law, holding

> that when 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.

Id. at 340-41, 407 S.E.2d at 228. "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), *disc. rev. denied*, 343 N.C. 308, 471 S.E.2d 74 (1996).

Our law is well-settled. " 'A sheriff is liable for the acts or omissions of his deputy as he is for his own.' " *Prior v. Pruett*, 143 N.C. App. 612, 621, 550 S.E.2d 166, 172 (quoting *Cain v. Corbett*, 235 N.C. 33, 38, 69 S.E.2d 20, 23 (1952)), *disc. rev. denied*, 355 N.C. 493, 563 S.E.2d 572 (2001). *See also Sutton v. Williams*, 199 N.C. 546, 548, 155 S.E. 160, 162 (1930). Therefore, plaintiff could assert a *Woodson* claim against Barrick to the extent the claim constitutes an action against the employer sheriff, not against Barrick personally as he was decedent's co-employee. *See Hamby v. Profile Prods., L.L.C.*, 179 N.C. App. 151, 155, 632 S.E.2d 804, 807 (2006) ("[T]he Act bars 'a worker who is injured in the course of his employment from suing a co-employee whose negligence caused the injury.' " (quoting *Pleasant*, 312 N.C. at 713, 325 S.E.2d at 247)), *reversed and remanded on other grounds*, 361 N.C. 630, 652 S.E.2d 231 (2007). However, for the same reasons that Barrick—in his official capacity—is protected by governmental immunity from plaintiff's *Pleasant* claim, the employer—the sheriff's office, and by extension Sheriff Jones—is protected from liability.

Pursuant to the Workers' Compensation Act,

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative *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 such injury or death.

N.C. Gen. Stat. § 97-10.1 (2007) (emphasis added). *Pleasant* and *Woodson* provide the only exceptions to this provision. Plaintiff received an award of workers' compensation benefits as a result of

her husband's death. Her *Pleasant* claim as to Barrick in his individual capacity survives and is inapplicable to Sheriff Jones because of his status as her husband's employer. Barrick in his official capacity is protected by governmental immunity to the extent of coverage pursuant to the sheriff's surety bond. Similarly, the sheriff's office and Sheriff Jones are protected against her *Woodson* claim, which has no merit in any event. All other claims brought forward in this appeal are excluded by the Workers' Compensation Act. Therefore, the trial court did not err in granting summary judgment as to those remaining claims.

For the reasons stated above, the order of the trial court is affirmed.

Affirmed.

Judges ERVIN and HUNTER, Jr., Robert N. concur.

CHARLES E. PIGG, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CORRECTIONS, DEFENDANT

No. COA08-1373

(Filed 4 August 2009)

1. Tort Claims Act— inmate—medication—failure to warn about side effects

The Industrial Commission did not err in a tort claims case involving an inmate who was injured in a fall by failing to issue a conclusion about whether defendant's failure to warn plaintiff of Percocet's side effects proximately caused his injuries. The Commission found that plaintiff's injuries were caused by a syncopal episode and not any possible side effects of Percocet; even if defendant had warned plaintiff about those side effects, plaintiff did not prove that the side effects were the proximate cause of his injuries.

2. Tort Claims Act— inmate—fall after medication—causation

The Industrial Commission did not err in a tort claims case involving an inmate who was injured in a fall in its focus on whether Percocet caused unconsciousness as opposed to

whether the Percocet caused plaintiff's fall and injury. Whether Percocet proximately caused the syncopal episode was material because the Commission found that the fall and injury were caused by a syncopal episode and loss of consciousness. The Commission also found that there was no evidence that the Percocet caused the syncopal episode.

Appeal by Plaintiff from a Decision and Order entered 15 July 2008 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 22 April 2009.

Michele Luecking-Sunman, for Plaintiff-Appellant.

Attorney General Roy Cooper, by Special Counsel James Peeler Smith, for the Defendant-Appellees.

BEASLEY, Judge.

Charles E. Pigg (Plaintiff) appeals from a Decision and Order of the North Carolina Industrial Commission (Commission) concluding that Plaintiff failed to state a claim under the North Carolina Tort Claims Act. The Commission found that because Plaintiff "failed to meet his burden of proving . . . that Defendant breached the applicable standard of care and proximately caused the injuries [for] which Plaintiff complains[,]" Plaintiff was not entitled to recover damages from Defendant. We affirm.

In July 1998, Plaintiff was an inmate in the North Carolina Department of Correction (Defendant), housed at North Carolina Central Prison (Prison) in Raleigh, North Carolina. Because Plaintiff had an infected, ingrown toenail, he was prescribed an antibiotic for the infection and Tylenol and Percocet (also known as Roxicet) for the pain. "There [was] neither any testimonial nor any documentary evidence indicating that Plaintiff experienced any side effects from the administration of these initial doses of Percocet/Roxicet."

The Commission's findings of fact state that on 13 July 1998, a physician's assistant at the Prison administered an antibiotic, Tylenol, and Percocet to the Plaintiff. The Commission found that "there [was] no indication in the medical records that any of the staff . . . discussed with Plaintiff any of the side effects associated with either Percocet/Roxicet or any of the other medications prescribed to him. . . ." On the evening of 14 July 1998, a nurse at the Prison administered two doses of Percocet to Plaintiff. "There

[was] neither any testimonial nor any documentary evidence indicating that Plaintiff experienced any side effects from the administration of these initial doses of Percocet/Roxicet." The Commission found that in the absence of such evidence, "Plaintiff orally ingested the initial doses of Percocet/Roxicet without any adverse effects or complaints."

On the morning of 15 July 1998, a nurse again administered two doses of Percocet to Plaintiff. Plaintiff testified that when he asked the nurse what the pills were, she said, "it was a pain killer," and did not tell him the possible side effects of the medicine. Plaintiff testified that it was his understanding that the term "pain killers" referred to Ibuprofen or Tylenol. Shortly after taking the medication, Plaintiff became nauseous, and as he was standing to use the restroom, passed out and fell face first onto the concrete floor. Plaintiff "sustained head trauma, including lacerations over his right eye requiring sutures, a broken nose, and four (4) broken teeth, which had to be extracted later."

Plaintiff filed a claim against Defendants under N.C. Gen. Stat. § 143-291 and a hearing was held on 12 February 2003 before Deputy Commissioner Nancy W. Gregory (Gregory). Gregory found that Defendant's staff breached its duty of care to Plaintiff by not counseling patient on the side effects of Percocet and that this breach proximately resulted in Plaintiff's injuries. Gregory concluded that "[p]laintiff has proven by the greater weight of the evidence . . . that defendant owed plaintiff a duty to provide appropriate medical care . . . which includes counseling plaintiff on the side effects of prescription medication." As a result of Defendant's negligence, Gregory awarded Plaintiff damages in the amount of $16,150.00.

Defendant appealed the Decision and Order to the Commission and a hearing was held on 16 October 2003. On 18 March 2004, the Commission reopened and remanded the case to gather additional evidence on the potential side effects of Percocet.

On 19 February 2008, the Commission re-heard this case. On 15 July 2008, the Commission reversed the decision and order of Gregory. The Commission denied Plaintiff's claim for money damages stating that he had "failed to meet his burden of proving . . . that Defendant breached the applicable standard of care and proximately caused the injuries of which Plaintiff complains." From this order, Plaintiff appeals.

STANDARD OF REVIEW

For an appeal from the Full Commission's decision, the standard of review:

> "shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." As long as there is competent evidence in support of the Commission's decision, it does not matter that there is evidence supporting a contrary finding.

Simmons v. Columbus Cty. Bd. of Educ., 171 N.C. App. 725, 727-28, 615 S.E.2d 69, 72 (2005) (quoting N.C. Gen. Stat. § 143-293 [2007]). " '[O]ur Court 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.' " *Thornton v. F.J. Cherry Hosp.*, 183 N.C. App. 177, 180, 644 S.E.2d 369, 372 (2007) (quoting *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998)), *aff'd*, 362 N.C. 173, 655 S.E.2d 350 (2008).

I.

[1] Plaintiff first argues that the Commission erred by its failure to make a conclusion of law with respect to whether Defendant's failure to warn Plaintiff about the side effects of Percocet proximately caused Plaintiff's injuries. We disagree.

Under the North Carolina Tort Claims Act, the Industrial Commission:

> shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C. Gen. Stat. § 143-291 (2007). Plaintiff "must show that " '(1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury.' " *Drewery v. N.C. Dep't of Transp.*, 168 N.C. App. 332, 337, 607 S.E.2d 342, 346 (2005) (quoting *Wollard v. N.C. Dept. of Transportation*, 93

N.C. App. 214, 217, 377 S.E.2d 267, 269 (1989)). " 'Under the Tort Claims Act negligence . . . and proximate cause . . . are to be determined under the same rules as those applicable to litigation between private individuals.' " *Medley v. N.C. Department of Correction*, 330 N.C. 837, 840-41, 412 S.E.2d 654, 657 (1992) (quoting *Barney v. Highway Comm.*, 282 N.C. 278, 284, 192 S.E.2d 273, 277 (1972)). " '[T]he burden of proof as to [negligence is] on the plaintiff.' " *Drewery*, 168 N.C. App. at 337, 607 S.E.2d at 346 (quoting *Bailey v. N.C. Dept. of Mental Health*, 2 N.C. App. 645, 651, 163 S.E.2d 652 (1968)).

During his hearing, Plaintiff called Linda Cross (Cross), a pharmacist employed by Defendant, as a witness. Cross testified that the common side-effects of Percocet included dizziness, light-headed, euphoria, nausea, and some hypotension. The Commission made a finding of fact that "[Cross] testified that orally ingesting Percocet/Roxicet is *not a likely cause of—sudden unconsciousness*,' which is a complete syncopal episode"; therefore, she testified, it would be unreasonable to expect a person to pass out immediately from ingesting Percocet. (emphasis added).

"Because the [Plaintiff] does not challenge the trial court's findings of fact as being unsupported by the evidence, its findings are conclusive on this appeal." *Rite Color Chemical Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 22, 411 S.E.2d 645, 650 (1992). The Commission found that:

> Plaintiff has not put on any expert witness testimony either opining that Defendant and its agents breached the applicable standard of care owed to Plaintiff, *or setting forth a causal relationship between any alleged breach in the applicable standard of care and damages of which Plaintiff complains*. Furthermore, Plaintiff has not put on any expert witness testimony setting forth that complete syncopal episodes are a common side effect, or even an uncommon side effect, of orally ingesting Percocet/ Roxicet. . . . *This record is completely devoid of any testimony relating a complete syncopal episode, which is what Plaintiff experienced, by his own admission, and the oral ingestion of Percocet/Roxicet.*

(emphasis added). "The burden of proof as to this issue was on the plaintiff." *Bailey*, 2 N.C. App. at 651, 163 S.E.2d at 656. Plaintiff failed to prove that Defendant had a legal duty to the Plaintiff and that the negligent breach of this legal duty was the proximate cause of his

injury. Plaintiff failed to show that his syncopal episode was a common side effect, uncommon side effect, or that it even had any relation to his ingestion of Percocet. "Evidence is usually not required in order to establish and justify a finding that a party has failed to prove that which he affirmatively asserts. It usually occurs and is based on the absence or lack of evidence." *Id.*

The Commission concluded that:

> Plaintiff failed to meet his burden of proving, by the greater weight of the evidence of record, that Defendant breached the applicable standard of care and proximately caused the injuries of which Plaintiff complains.

Plaintiff failed to meet his burden of proof when he did not show any relation between the syncopal episode and his ingestion of Percocet. Because the Commission found that his injuries were caused by the syncopal episode and not any possible side effects of Percocet, it follows that the Commission did not err in failing to find whether the absence of warnings to Plaintiff about Percocet's possible side-effects proximately caused his injuries. Assuming arguendo that Defendant had warned Plaintiff about Percocet's common and uncommon side-effects, Plaintiff's argument would fail because Plaintiff has not proven that his injuries were proximately caused by any side-effects of Percocet. After reviewing the evidence in the record, we conclude that we are bound by the Commission's findings of fact because they are supported by competent evidence and find Plaintiff's arguments unconvincing. This assignment of error is overruled.

II.

[2] In Plaintiff's second argument, he contends that the Commission erred in its focus on whether Percocet caused unconsciousness as opposed to whether the Percocet caused Plaintiff's fall and injury. Plaintiff argues that a determination of whether Percocet caused unconsciousness is not a material fact. We disagree.

The Commission made a finding that:

> less than an hour after Plaintiff orally ingested the Percocet/Roxicet at 7:00 a.m. on July 15, 1998, he experienced an episode of nausea and lightheadedness, promptly followed by a complete syncopal episode. *As a result of this complete syncopal episode*, Plaintiff fell face first onto a concrete floor and struck his face and head on the floor.

(emphasis added). Because the Commission's findings of fact are supported by competent evidence, they are binding on this appeal. *See Simmons*, 128 N.C. App. at 405, 496 S.E.2d at 793. The Commission found that the syncopal episode, loss of consciousness, caused Plaintiff's fall and injury. Therefore, it was material that the Commission find whether the Percocet proximately caused the syncopal episode.

The Commission further found that "[t]here [was] no evidence in the record to suggest that orally ingesting Percocet/Roxicet on an empty stomach [would] cause a complete syncopal episode" and that the "record [was] completely devoid of any testimony relating a complete syncopal episode, which is what Plaintiff experienced, by his own admission, and the oral ingestion of Percocet/Roxicet." Because the Commission found that the syncopal episode caused Plaintiff's injuries and because the Commission found that Plaintiff had failed to produce any evidence that the Percocet caused the syncopal episode, Plaintiff's argument fails. This assignment of error is overruled.

For the foregoing reasons, we

Affirm.

Judges McGEE and HUNTER, Robert C. concur.

FRANK CANNIZZARO, EMPLOYEE, PLAINTIFF v. FOOD LION, EMPLOYER, SELF-INSURED, (RISK MANAGEMENT SERVICES, INC., SERVICING AGENT), DEFENDANT

No. COA08-1381

(Filed 4 August 2009)

Workers' Compensation— work-related injury—psychological condition

The Industrial Commission did not err in a workers' compensation case by determining that plaintiff's current psychological condition was caused by a compensable work-related injury and by awarding total disability compensation because: (1) although the doctors disagreed as to whether plaintiff suffered from a conversion/somatoform disorder, both doctors agreed that plaintiff suffered from a mild traumatic brain injury; (2) both doctors agreed that plaintiff's clinical presentation did not indicate malin-

gering, and both doctors agreed that the symptoms plaintiff was experiencing were related to his work injury; (3) although defendant contends Dr. Stein, a licensed psychologist with a doctorate in neurological and cognitive psychology, was not sufficiently qualified to render an opinion as to the causation of plaintiff's current symptoms and diagnosis and that he did not provide competent medical testimony, his experience in treating individuals with traumatic brain injuries was sufficient to qualify him to give expert medical testimony on the cause of plaintiff's condition; and (4) although defendant contends there was conflicting evidence regarding plaintiff's condition, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

Appeal by defendant from opinion and award entered 10 July 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 May 2009.

Brumbaugh, Mu & King, P.A., by Angela D. Vandivier-Stanley, for plaintiff-appellee.

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

BRYANT, Judge.

Food Lion (defendant) appeals from an Opinion and Award determining plaintiff Frank Cannizzaro's current psychological condition was caused by a compensable, work-related injury and awarding plaintiff total disability compensation. We affirm.

Facts

Plaintiff worked for defendant as a truck driver. On 19 December 2003, plaintiff was unloading stock when a box of Gatorade fell from two feet above his head and struck plaintiff in the center of his forehead. Plaintiff fell to the floor, hit the back of his head, and was knocked unconscious for approximately five minutes. Plaintiff was transported to Pender Memorial Hospital emergency department, then transferred to the New Hanover Medical Center where x-rays of plaintiff's spine and left shoulder were obtained. Both x-rays indicated normal results. CT scans of plaintiff's brain and chest were also conducted and normal results were indicated. Plaintiff was diagnosed with a concussion and neck strain and was kept at the hospital overnight for observation.

On 23 December 2003, plaintiff presented to the Cape Fear Valley Health System emergency department complaining that he was experiencing pain on the top of his head. Plaintiff was diagnosed with head injury, status post mild concussion syndrome and released.

On 4 February 2004, plaintiff began treatment with Dr. Bruce Solomon, a neurologist practicing with Pinehurst Neurology, P.A. Plaintiff complained of several ailments including an inability to speak; recurring severe headache; pain behind his right eye and in his upper extremities; muscle spasms; and mild memory deficiencies. Plaintiff also indicated he was unable to return to work. After completing a physical examination, Dr. Solomon diagnosed plaintiff as suffering from post-concussive syndrome and recommended that plaintiff undergo speech therapy and receive a neuropsychological evaluation.

Over the course of the next few months, plaintiff continued to receive treatment from Dr. Solomon who prescribed pain medicine for plaintiff's headaches and recommended that plaintiff undergo an MRI scan to determine the source of the pain plaintiff was experiencing behind his right eye. The results of the MRI scan revealed no cause of plaintiff's pain. Plaintiff thereafter began to see some improvement and received normal neurological examination results. Dr. Solomon recommended that plaintiff undergo a formal driving evaluation before returning to work and, on 2 August 2004, released plaintiff to return to full work duty. Plaintiff began working on 3 August 2004.

On 22 October 2004, plaintiff underwent a medical exam by Dr. Pamela Jessup for a DOT driving test. The exam revealed no abnormal findings and Dr. Jessup cleared plaintiff to drive. Plaintiff continued to drive for defendant until 10 February 2005 when plaintiff's family physician, Dr. Cammie Fulp, wrote plaintiff out of work for an undetermined period of time for treatment of diabetes, depression and cervical radiculopathy. On 11 February 2005, plaintiff was seen by Dr. Szwejbka who determined plaintiff had no signs of spinal cord injury or polyradiculopathy and that based on the MRI report, there was no specific etiology for plaintiff's symptoms.

Plaintiff traveled to Lancaster, Pennsylvania on 15 March 2005 where he was seen by Dr. Robert Stein, a clinical neuropsychologist. Dr. Stein conducted an evaluation of plaintiff and determined that plaintiff's symptoms were caused by a traumatic brain injury.

In October of 2005, plaintiff was treated by Dr. C. Thomas Gaultieri, a neuropsychologist. Although plaintiff complained of severe headaches, neck and back pain, fatigue, memory problems, depression symptoms, and mood swings, Dr. Gaultieri determined there was no neurological evidence that plaintiff had suffered a brain injury. Dr. Gaultieri diagnosed plaintiff as having conversion disorder, a psychiatric disorder where emotional and psychological problems coalesce and are expressed through physical symptoms.

Defendant paid plaintiff disability through 3 August 2004. Plaintiff was taken out of work on 10 February 2005 and did not return. On 16 November 2005, plaintiff filed a Form 33 Request for Hearing alleging that he was entitled to temporary total disability benefits and medical compensation. Defendant contended plaintiff's current condition was unrelated to plaintiff's original compensable injury and denied compensation.

On 5 January 2007, plaintiff's claims came on for hearing before Deputy Commissioner Wanda Blanche Taylor. Deputy Commissioner Taylor filed an opinion and award concluding plaintiff suffered a closed head injury and was entitled to temporary total disability compensation. Defendant appealed to the Full Commission.

On 10 July 2008, the Full Commission filed an opinion and award affirming Deputy Commissioner Taylor's opinion and award with some modifications. Defendant appeals.

On appeal, defendant argues: (I) the Commission erred by concluding plaintiff's current psychiatric condition was caused by his work related injury; (II) if the Commission erred by concluding plaintiff's current condition was caused by his work-related injury, plaintiff is not entitled to additional medical compensation; and (III) if the Commission erred by concluding plaintiff's current condition was caused by his work-related injury, plaintiff is not entitled to additional temporary total disability benefits.

Standard of Review

"Our review of the Commission's opinion and award is limited to determining whether competent evidence of record supports the findings of fact and whether the findings of fact, in turn, support the conclusions of law." *Rose v. City of Rocky Mount*, 180 N.C. App. 392, 395, 637 S.E.2d 251, 254 (2006), *review denied*, 361 N.C. 356, 644 S.E.2d 232 (2007). The Commission's findings "are conclusive on appeal

when supported by competent evidence, even though there is evidence that would have supported findings to the contrary." *Hollman v. City of Raleigh*, 273 N.C. 240, 245, 159 S.E.2d 874, 877 (1968). The Commission makes the finding of facts and "is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citations and quotations omitted).

I

Defendant argues the Full Commission erred by concluding that plaintiff's current condition was caused by his injury by accident that occurred on 19 December 2003. Defendant challenges the following finding of fact made by the Full Commission:

> 28. The Commission gives greater weight to the expert opinions of Dr. Stein and to Dr. Gualtieri to the extent that his opinions are consistent with those of Dr. Stein, than to the opinions of Dr. Schmickley and Ms. Montgomery. Therefore, the Commission finds by the greater weight of the evidence that plaintiff's psychiatric conditions are causally related to the compensable injury by accident and are therefore compensable.

Defendant contends the Commission's finding is not supported by competent evidence in the record. Specifically, defendant contends that because Dr. Stein's opinion conflicted with Dr. Gaultieri's opinion regarding the cause of plaintiff's symptoms, the Commission's finding did not "make sense" since the opinions of the doctors were inconsistent.

Our review of the deposition testimony of both doctors, however, does not reveal that their opinions were wholly inconsistent. Indeed, although the doctors disagreed as to whether plaintiff suffered from a conversion/somatoform disorder, both doctors agreed that plaintiff suffered from a mild traumatic brain injury. Also, both doctors agreed that plaintiff's clinical presentation did not indicate malingering. More significantly, both doctors agreed that the symptoms plaintiff was experiencing were related to his work injury. Based on the doctors' deposition testimonies, the Commission's finding of fact number 28 was supported by competent evidence.

We note that defendant cites *Brewington v. Rigsbee Auto Parts*, 69 N.C. App. 168, 316 S.E.2d 336 (1984), in support of its argument that "conversion disorder/somatoform disorder is not a compensable condition when a workplace accident is merely a triggering event and

not the cause of the psychological condition." In *Brewington*, the plaintiff's back was injured when he slipped and fell at work. *Id.* at 168, 316 S.E.2d at 337. Subsequently, although his treating physicians could find no outward signs of physical injury, the plaintiff became paralyzed. The Commission found that the plaintiff's condition was not caused by the work related injury and denied the plaintiff's request for workers' compensation benefits. *Id.* This Court reviewed the record before it and determined the Commission's finding that the plaintiff's paralysis was not caused by the work accident was supported by competent evidence. *Id.* at 170, 316 S.E.2d at 338.

Like the instant case, the *Brewington Court* was tasked with determining whether competent evidence supported the Commission's findings. Unlike the instant case, the Commission in *Brewington* found that the plaintiff's condition was *not* caused by the work accident and, although conflicting evidence was presented, there was competent evidence to support the Commission's finding. Here, the Commission found that plaintiff's condition *was* caused by the work-related accident. This Court must now determine whether competent evidence supports the Commission's finding.

Defendant essentially asks this Court to depart from the well-settled rule that our review of an opinion and award by the Industrial Commission *does not* involve re-weighing the evidence and determining which of two conflicting testimonies should be relied upon. *See Rose*, 180 N.C. App. at 395, 637 S.E.2d at 254 (review is limited to determining whether findings were supported by competent evidence and, in turn, support the conclusions of law). The Commission alone is tasked with finding the facts and solely judges "the credibility of the witnesses and the weight to be given their testimony." *Adams*, 349 N.C. at 680, 509 S.E.2d at 413.

Defendant contends no competent medical evidence supports the Commission's conclusion that plaintiff's condition was caused by his work-related injury. Specifically, defendant argues Dr. Stein was not "sufficiently qualified to render an opinion as to the causation of Plaintiff's current symptoms and Plaintiff's current diagnosis" and that Dr. Stein's testimony was not competent medical testimony. We disagree.

During his deposition testimony, Dr. Stein testified that in his opinion, to a reasonable degree of medical certainty, plaintiff's chronic pain was directly related to the injury plaintiff sustained on 19 December 2003. Defendant argues that Dr. Stein was not suffi-

ciently qualified to give an opinion on the cause of plaintiff's condition because Dr. Stein "has a doctorate in neurological and cognitive psychology" and is not a medical physician.

Opinion testimony given by an expert witness is competent when evidence is presented showing "that, through study or experience, or both, the witness has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *Terry v. PPG Industries, Inc.*, 156 N.C. App. 512, 518-19, 577 S.E.2d 326, 332 (2003) (holding a licensed clinical psychologist was competent to give an opinion on whether the plaintiff was unable to return to work because of her pain). "The qualifications of a medical expert are judged according to the same standards as those of expert witnesses in general: The common law does not require that the expert witness on a medical subject shall be a person *duly licensed to practice medicine*." *Maloney v. Hospital Systems*, 45 N.C. App. 172, 178, 262 S.E.2d 680, 683, *disc. review denied*, 300 N.C. 375, 267 S.E.2d 676 (1980) (quoting 2 Wigmore on Evidence § 569, pp. 667-68 (3d ed.1940)) (emphasis in original).

Dr. Stein testified that he was a licensed psychologist with a doctorate in neurological and cognitive psychology. Dr. Stein served as the director of a brain injury rehabilitation center for six years after which he started a private practice where half of his clientele were individuals who had experienced traumatic brain injury. Because of Dr. Stein's experience in treating individuals with traumatic brain injuries, we hold Dr. Stein was sufficiently qualified to give expert medical testimony on the cause of plaintiff's condition.

Having determined that Dr. Stein's opinion regarding the cause of plaintiff's current condition was competent evidence, we hold the Full Commission's conclusion that plaintiff's current condition was caused by the work-related injury is supported by the findings. Although Dr. Gaultieri testified that in his opinion, plaintiff's current condition was not directly related to the injury sustained by plaintiff, the Commission "is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (citations and quotations omitted). Defendant's assignment of error is overruled.

II & III

For the reasons stated herein, we need not address defendant's remaining arguments. Therefore, the opinion and award of the Full Commission is affirmed.

Affirmed.

Judges CALABRIA and ELMORE concur.

REGINA K. NOLAN, PLAINTIFF v. DERRICK LAMONT COOKE AND WARREN COUNTY, A BODY POLITIC AND CORPORATE, NORTH CAROLINA ASSOCIATION OF COUNTY COMMISSIONERS—LIABILITY AND PROPERTY INSURANCE POOL FUND, AN UNINCORPORATED ASSOCIATION, DEFENDANTS

No. COA08-1371

(Filed 4 August 2009)

1. Insurance— uninsured motorist—county insurance pool fund—North Carolina Motor Vehicle Safety and Responsibility Act

The trial court erred when it ordered the NC Association of County Commissioners Liability and Property Insurance Pool Fund (Fund) to provide $2,000,000 in coverage to plaintiff deputy sheriff, who was injured during a motor vehicle collision with an uninsured driver, after erroneously determining the policy was governed by North Carolina Motor Vehicle Safety and Responsibility Act (MVSR Act) because: (1) the MVSR Act's provisions do not apply to the policy between the county and the Fund since the Act itself specifically exempts county-owned vehicles and accidents involving county employees in the line of employment, and both parties agree the vehicle driven by plaintiff during the accident was owned by the county and that plaintiff was operating the vehicle in the course of her employment; (2) the county was not obligated to specifically select that its uninsured liability coverage would be less than $2,000,000 when the plain language of N.C.G.S. § 20-279.32 itself excluded its application to these facts; and (3) the coverage for plaintiff's accident was capped at $100,000 as specified in the policy.

2. Workers' Compensation— set-off—county insurance policy

The trial court did not err as a matter of law by holding that the $197,193.75 that plaintiff deputy sheriff had received in workers' compensation could not be directly set off from the coverage limits in the county's policy because: (1) the language of the pertinent policy would not have left the amount of set-off to the trial

court's discretion, but rather would have required the full amount of damages awarded to plaintiff under workers' compensation to be set off; (2) the language in the policy calling for the entire amount of plaintiff's workers' compensation award to be set off from the policy limits was in direct conflict with the Court of Appeals's interpretation of N.C.G.S. § 97-10.2, which left that determination to the sound discretion of the trial court judge; and (3) *Curry*, —— N.C. App. ——, is controlling in this case, and thus any ambiguous language in the policy between the county and the Fund is construed in plaintiff's favor. Any amount paid by the county to plaintiff through the Workers' Compensation Act shall not be deducted from the coverage limits, but instead shall constitute a lien against any amount recovered in accordance with N.C.G.S. § 97-10.2.

Appeal by defendants from order entered 4 December 2006 by Judge Henry W. Hight, Jr., in Warren County Superior Court. Heard in the Court of Appeals 25 March 2009.

Banzet, Thompason, & Styers, PLLC, by Mitchell G. Styers, for plaintiff.

Teague, Campbell, Dennis & Gorham, LLP, by George H. Pender, William A. Bulfer, and Courtney C. Britt, for defendants.

ELMORE, Judge.

The facts of this case are undisputed. On 21 February 2002, Regina Nolan (plaintiff) was on patrol as a deputy sheriff, operating a car owned by Warren County and insured by the North Carolina Association of County Commissioners Liability and Property Insurance Pool Fund (the Fund) (collectively, defendants). Plaintiff was injured during a motor vehicle collision with Derrick Cooke's vehicle, which was uninsured.

Plaintiff filed a workers' compensation claim with the North Carolina Industrial Commission seeking compensation for her injuries. She has received $197,193.75 in compensation as a result of this claim.

With regard to motor vehicle insurance coverage, Warren County self-insures by participating with other North Carolina counties in a risk pool operated by the Fund. Warren County's policy with the Fund provides a $2,000,000.00 coverage limit for general vehicle liability

but only $100,000.00 in uninsured motorist coverage for county-owned vehicles. The policy includes the following relevant language:

> 5. Limit of Liability for Section III Uninsured/Underinsured Motorist Coverage.
>
> a. Regardless of the number of Covered Auto's [*sic*], Covered Persons, claims made, or vehicles involved in the accident, the most the Fund will pay for all damages resulting from any one accident is the limit of Uninsured/Underinsured Motorist Coverage of this Section III shown in the Declarations Page.
>
> b. Any amount payable under Section III, E. Uninsured/Underinsured Motorist Coverage shall be reduced by:
>
> (1) all sums paid or payable under any workers' compensation, disability benefits, or similar law exclusive of non-occupational disability benefits; and
>
> (2) all sums paid by or for anyone who is legally responsible, including all sums paid under the Contract's liability coverage; and
>
> (3) all sums paid or payable under any policy of property insurance.
>
> c. Any amount paid under this coverage will reduce any amount a Participant may be paid under the Contract's liability coverage.

Plaintiff brought an action seeking determination of the amount of coverage of the vehicle policy maintained by Warren County. The trial court held that the North Carolina Motor Vehicle Safety and Responsibility Act (the MVSR Act) required the Fund to provide $2,000,000.00 in general liability coverage, despite the policy limit of $100,000.00 for uninsured motorists. The trial court also held that the $197,193.75 in workers' compensation that plaintiff had received could not be directly set off from the coverage amount. Rather, the trial court held, the workers' compensation damages constituted a lien, leaving the amount set off from Warren County's coverage to be determined by the trial court.

Defendants appeal those two orders of the trial court. For the reasons stated below, we reverse in part and affirm in part.

ARGUMENTS

I.

[1] Defendants argue that the trial court erred when it ordered the Fund to provide $2,000,000.00 in coverage after determining that the policy was governed by the MVSR Act. We agree.

We review a trial court's construction of statutory provisions *de novo*. *Ramey v. Easley*, 178 N.C. App. 197, 199, 632 S.E.2d 178, 180 (2006) (citations omitted).

By its 6 December 2006 order, the trial court concluded that N.C. Gen. Stat. § 20-279.32 exempted county-owned vehicles from the MVSR Act. Despite this exemption, the trial court further concluded that, because Warren County had purchased insurance for its vehicles, the insurance policy itself was subject to the MVSR Act and "should be held to the same standards and laws as other automobile policies written in this state[.]" Under the trial court's reasoning, N.C. Gen. Stat. section 20-279.21 of the MVSR Act would have required Warren County to specifically select that it wanted the coverage for uninsured motorist claims to be different than its general motor vehicle liability coverage limit, which was $2,000,000.00. However, "Warren County did not specifically select a different uninsured/underinsured motorist coverage limit[.]" Since the trial court determined that the policy was subject to the MVSR Act, the trial court held that "the coverage limits for uninsured motorists [under Warren County's policy] . . . is [*sic*] the same as those selected for liability coverage." As such, the trial court ruled that the Fund was required to provide $2,000,000.00, rather than $100,000.00, in coverage for plaintiff's accident.

The question on appeal, therefore, is whether the vehicle insurance policy between Warren County and the Fund is actually subject to the MVSR Act. We reverse the trial court on this point and hold that the policy is not subject to the MVSR Act and that the uninsured motorist coverage limit applies to plaintiff's claim.

The MVSR Act's provisions do not apply to the policy between Warren County and the Fund because the Act itself specifically exempts county-owned vehicles and accidents involving county employees in the line of employment:

> This Article does not apply to any motor vehicle owned by a county or municipality of the State of North Carolina, nor does

> it apply to the operator of a vehicle owned by a county or municipality of the State of North Carolina who becomes involved in an accident while operating such vehicle in the course of the operator's employment as an employee or officer of the county or municipality.

N.C. Gen. Stat. § 20-279.32 (2007). Both parties agree that the vehicle driven by plaintiff during the accident was owned by Warren County and that plaintiff was operating the vehicle in the course of her employment. As such, the plain language of the statute itself excludes its application to these facts, which means that Warren County was not obligated to specifically select that its uninsured liability coverage would be less than $2,000,000.00.

Additionally, this precise scenario has been addressed by our Supreme Court. In *Watson v. American National Fire Insurance Company*, the plaintiff's vehicles were excluded from the MVSR Act by N.C. Gen. Stat. § 20-279.32, but the plaintiff argued that his insurance policy itself was still subject to N.C. Gen. Stat. § 20-279.21(b)(4)'s requirement that he specifically select uninsured and underinsured motorist coverage limits. 106 N.C. App. 681, 685-86, 417 S.E.2d 814, 817 (1992). When the case reached our Supreme Court, the Court held that "[b]y its plain words N.C.G.S. § 20-279.32 says that N.C.G.S. § 20-279.21(b)(4) does not apply in this case. The plaintiff has only such coverage as is provided in the policy." *Watson v. American National Fire Ins. Co.*, 333 N.C. 340, 340, 425 S.E.2d 696, 697 (1993). As in *Watson*, the vehicle in the present case is specifically excluded from the MVSR Act's provisions, and, therefore, Warren County was not obligated to specifically select its uninsured motorist coverage per N.C. Gen. Stat. § 20-279.21(b)(4). Accordingly, the coverage for plaintiff's accident is capped at $100,000.00 as specified in the policy. Plaintiff contends that the "court's rationale [in *Watson*] implies that the vehicles . . . were exempt from the Motor Vehicle Safety and Responsibility Act because there are [additional Federal Interstate Commerce] regulations governing those policies." However, our Supreme Court specifically stated that "[i]t is not the [Federal Interstate Commerce] regulations that preempt the plaintiff from underinsured motorist coverage. It is the statutes of this state which do not provide for underinsured motorist coverage in this case." *Watson*, 333 N.C. at 340, 425 S.E.2d at 697-98.

For the reasons stated above, we hold that the trial court erred by concluding as a matter of law that the policy between Warren County and the Fund was subject to the MVSR Act. Therefore, Warren County

was not required to specifically select that its uninsured motorist coverage would be less than $2,000,000.00, and the maximum coverage for plaintiff's accident is capped at $100,000.00, per the language of the policy with the Fund.

II.

[2] Defendants next argue that the trial court erred as a matter of law by holding that the $197,193.75 that plaintiff had received in workers' compensation could not be directly set off from the coverage limits in Warren County's policy. We disagree.

The policy between Warren County and the Fund provides that any amount paid by workers' compensation would be directly set off from the policy's coverage limit, which, as determined above, is $100,000.00 in this particular instance. "[T]he purpose of set-off provisions is to prevent double recoveries" that would allow a plaintiff to recover damages from both a third party under motor vehicle insurance and from her employer's workers' compensation fund. *N.C. Counties Liability & Prop. Joint Risk Mgmt. Agency v. Curry*, 191 N.C. App. 217, 224, 662 S.E.2d 678, 683 (2008) (citation omitted). In the present case, the trial court held that the set-off provision was in direct conflict with N.C. Gen. Stat. § 97-10.2. This statute allows the trial court to award a lien to an employer for any damages recovered by an injured employee from a third party, so that the employer does not have to pay the entire cost of its employee's injury while the employee receives compensation from the third party. *See Allen v. Rupard*, 100 N.C. App. 490, 493-94, 397 S.E.2d 330, 332 (1990). However, the amount of this lien is in the discretion of the trial court, which could "allow[] plaintiff a double recovery at the expense of the employer or carrier[.]" *Id.* at 494, 397 S.E.2d at 332 (quotations and citation omitted). The language of the policy in the present case would not have left the amount of set-off to the trial court's discretion, but rather would have required the full amount of the damages awarded to plaintiff under workers' compensation to be set off.

The policy between Warren County and the Fund specifically states that "[i]f any of the provisions of this Contract conflict with the laws or statutes of any jurisdiction in which this contract applies, this Contract is amended to conform to such laws or statutes." The language in the policy calling for the entire amount of plaintiff's worker compensation award to be set off from the policy limits is in direct conflict with this Court's interpretation of N.C. Gen. Stat. § 97-10.2, which leaves that determination to the sound discretion of the trial

court judge. *Id.*; *Pollard v. Smith*, 90 N.C. App. 585, 588, 369 S.E.2d 84, 86 (1988), *rev'd on other grounds*, 324 N.C. 424, 378 S.E.2d 771 (1989). As such, the policy itself dictates that its language addressing set-offs be amended in accordance with the holdings of *Allen* and *Pollard*, leaving this matter to the discretion of the trial judge.

Additionally, this Court's recent decision in *Curry* concerned a policy between the Fund and another North Carolina County that contained precisely the same language as the policy in the present case. 191 N.C. App. at 218, 662 S.E.2d at 679. In *Curry*, this Court held:

> [T]he structure and language of the policy support [the plaintiff's] interpretation of the set-off provisions as requiring a deduction from the total damages rather than a deduction from the policy limits. Even though [the Fund's] view is also reasonable, the existence of two reasonable constructions means that the policy . . . is ambiguous. Under well-established principles, this ambiguity requires that we accept the construction that favors the insured.

Id. at 224, 662 S.E.2d at 682-83 (citation omitted). That is, the policy was ambiguous as to precisely how the set-off would be calculated, and, therefore, the language was construed against the Fund.

Curry involved a policy with the exact same language as the present case, and its rationale was based upon a survey of how other states had handled similar policy language. We do not agree with defendants' argument that *Curry* should be overruled as "clearly erroneous." As defendants themselves concede, our Supreme Court has held that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Our Supreme Court chose not to review this Court's decision in *Curry*. *N.C. Counties Liab. & Prop. Joint Risk Mgmt. Agency v. Curry*, 362 N.C. 509, 668 S.E.2d 29 (2008). As such, *Curry* is controlling here, and the language in the policy between Warren County and the Fund is construed in plaintiff's favor.

For the reasons stated above, we affirm the trial court's order and hold that any amount paid by Warren County to plaintiff through the Workers' Compensation Act shall not be deducted from the coverage

limits, but instead shall constitute a lien against any amount recovered in accordance with N.C. Gen. Stat. § 97-10.2.

Reversed in part, affirmed in part.

Judges BRYANT and STEELMAN concur.

CAROLINE D'AQUISTO, EMPLOYEE, PLAINTIFF v. MISSION ST. JOSEPH'S HEALTH SYSTEM, EMPLOYER, CAMBRIDGE INTEGRATED SERVICES, CARRIER, DEFENDANTS

No. COA08-1238

(Filed 4 August 2009)

1. Workers' Compensation— appellate attorney fees—reversed under one statute—granted under another

The Industrial Commission did not abuse its discretion by awarding appellate attorney fees to claimant under N.C.G.S. § 97-88 where the Supreme Court had reversed attorney fees awarded as a sanction under N.C.G.S. § 97-88.1. Evaluation of the unreasonableness of a defense is not a statutory factor to be weighed in granting attorney fees for a claimant defending an appeal under N.C.G.S. § 97-88, and the failure to award attorney fees under N.C.G.S. § 97-88.1 does not bar an award of attorney fees under N.C.G.S. § 97-88.

2. Workers' Compensation— appellate attorney fees—awarded by Industrial Commission

The contention that the Industrial Commission was not permitted to award appellate attorney fees because a claimant was no longer before the Industrial Commission was misplaced. The reasoning cited for the contention is no longer good law.

3. Workers' Compensation— appellate attorney fees—continuing jurisdiction

A workers' compensation claimant was not barred from requesting additional attorney fees under N.C.G.S. § 97-88 because the Commission entered "final judgment" on the issue in an order. Contrary to courts of general jurisdiction, the Industrial Commission is vested with continuing jurisdiction to adjudicate all aspects of workers' compensation claims brought before it.

Furthermore, the Commission did not address appellate attorney fees in its original order and was permitted to review the matter on remand.

Appeal by defendant-employer from Opinion and Award entered 18 June 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 March 2009.

Ganley & Ramer, PLLC, by Thomas F. Ramer; and The Sumwalt Law Firm, by Vernon Sumwalt for claimant-appellee.

Van Winkle Buck Wall Starnes & Davis, P.A., by Allan R. Tarleton for employer-appellant.

HUNTER, JR., Robert N., Judge.

This appeal contests an award of attorney's fees under N.C. Gen. Stat. § 97-88 by the Industrial Commission ("Commission") for claimant-plaintiff, Caroline D'Aquisto ("claimant"), and her attorney's fees expended in the appeal subsequent to the initial award of compensation. Employer-defendant Mission St. Joseph's Health System ("employer")[1] contends that this award is inconsistent with the decision of the Supreme Court in *D'Aquisto II* involving application of a companion statute N.C. Gen. Stat. § 97-88.1; that the Commission may not award fees for appeals outside of the Commission's proceedings; and that claimant was procedurally barred from making this request. We disagree and affirm the decision of the Commission.

I. Procedural History

The procedural history of this case is set forth in *D'Aquisto v. Mission St. Joseph's Health Sys.*, 171 N.C. App. 216, 614 S.E.2d 583 (2005) (*D'Aquisto I*) which was reversed in part by *D'Aquisto v. Mission St. Joseph's Health Sys.*, 360 N.C. 567, 633 S.E.2d 89 (2006) (*D'Aquisto II*). Initially the Commission held and this Court affirmed that the award of attorney's fees for claimant under N.C. Gen. Stat. § 97-88.1 was not to be deducted from claimant's award but was to be taxed against employer because its defense of the claim was unreasonable. This sanction was reversed by the Supreme Court which held that "defendant's defense of the matter was not without reasonable grounds." The Supreme Court remanded the case "to the Court of Appeals for remand to the Industrial Commission for further proceedings not inconsistent with this opinion."

1. Employer is currently known as "Mission Hospitals, Inc."

Remand to the Full Commission

On 5 January 2007, claimant moved the Full Commission for entry of an Opinion and Award on remand in compliance with the Supreme Court's decision in *D'Aquisto II*. In its motion, claimant requested that, instead of awarding attorney's fees as a penalty, the Full Commission amend the award so that attorney's fees could be paid out of the accrued and future benefits of claimant.[2]

On 29 January 2007, Commissioner Thomas Bolch, on behalf of the Full Commission, entered a new Opinion and Award, which removed all references to employer's unreasonable defense of this matter, and made the following award of attorney's fees to claimant:

> 4. Defendants shall pay to plaintiff's counsel a reasonable attorney fee in the amount of 25 percent (25%) of the compensation awarded herein, both past and future. *Such fee shall be deducted from the accrued and future benefits* and paid directly to the plaintiff's counsel.

(Emphasis added.) On 14 February 2007, employer mailed checks to claimant and claimant's counsel in the respective amounts of $110,595.60 and $26,966.97.

Award of Appellate Attorney's Fees

On 30 April 2007, claimant filed a motion with the Commission requesting that, pursuant to N.C. Gen. Stat. § 97-88, she be awarded attorney's fees incurred in defense of employer's appeals. On 4 October 2007, Commissioner Christopher Scott awarded attorney's fees to claimant's counsel in the amount of $36,273.30 pursuant to N.C. Gen. Stat. § 97-88, as the result of "defendants' multiple but unsuccessful appeals" in the case.

Appeal of Award of Appellate Attorney's Fees

On 18 June 2008, the Full Commission affirmed the award of appellate attorney's fees to claimant, pursuant to N.C. Gen. Stat. § 97-88 and made the following relevant findings of fact and conclusion of law:

> 12. Defendant's appeals have been unsuccessful in terminating plaintiff's award of TTD and medical benefits as awarded by

2. Pursuant to N.C. Gen. Stat. § 97-90, all attorney's fees are subject to the approval of the Commission.

the Opinion and Award of Deputy Commissioner Garner on August 7, 2003. Accordingly, pursuant to N.C. Gen. Stat. § 97-88, the Full Commission has discretion to award a reasonable attorney fee for the plaintiff's counsels. [sic]

. . . .

14. Based upon its sound discretion, the Full Commission finds the award of attorney's fees and costs of $36,276.30 pursuant to N.C. Gen. Stat. § 97-88 to be reasonable. . . .

. . . .

CONCLUSIONS OF LAW

1. The appeals of this matter were brought by defendant. Defendant has been ordered to make, or to continue to make payments of benefits to plaintiff. Therefore, in the exercise of its discretion pursuant to N.C. Gen. Stat. § 97-88, the Full Commission may award attorney's fees to plaintiff.

Defendant appeals.

II. Issues

On appeal, employer assigns error to the Full Commission's award of appellate attorney's fees to claimant under N.C. Gen. Stat. § 97-88. Employer argues that (1) the award of attorney's fees under N.C. Gen. Stat. § 97-88 is inconsistent with the Supreme Court's decision in *D'Aquisto II*, which reversed the award of attorney's fees under N.C. Gen. Stat. § 97-88.1; (2) the Full Commission was not permitted to award claimant attorney's fees for appeals outside the Commission; and (3) claimant was procedurally barred from requesting attorney's fees under N.C. Gen. Stat. § 97-88.

III. Standard of Review

"This Court reviews the Commission's ruling on a motion for attorney's fees for an abuse of discretion." *Cox v. City of Winston-Salem*, 171 N.C. App. 112, 119, 613 S.E.2d 746, 750 (2005). 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." ' " *Goforth v. K-Mart Corp.*, 167 N.C. App. 618, 624, 605 S.E.2d 709, 713 (2004) (quoting *Long v. Harris*, 137 N.C. App. 461, 465, 528 S.E.2d 633, 636 (2000) (citation omitted)).

IV. Analysis

A. Basis of Award of Fees under N.C. Gen. Stat. §§ 97-88 and 97-88.1

[1] Employer argues that the Full Commission's award of attorney's fees under N.C. Gen. Stat. § 97-88 is inconsistent with the Supreme Court's reversal of attorney's fees under N.C. Gen. Stat. § 97-88.1 in *D'Aquisto II*. Employer's premise is that, because the defense of claimant's claim was adjudicated to be reasonable for purposes of avoiding sanctions under N.C. Gen. Stat. § 97-88.1, this finding would foreclose an award of fees under N.C. Gen. Stat. § 97-88. Because evaluation of the "unreasonableness" of a defense claim is not a statutory factor to be weighed in granting attorney's fees for a claimant defending an appeal under N.C. Gen. Stat. § 97-88, employer's argument has no merit.

The sanction imposing attorney's fees under N.C. Gen. Stat. § 97-88.1 against an employer involves an evaluation of whether the employer's defense of an initial claim is "unreasonable." The award of attorney's fees under N.C. Gen. Stat. § 97-88 involves an evaluation as to whether the employer lost an appeal. The failure to award attorney's fees under N.C. Gen. Stat. § 97-88.1 does not bar an award of attorney's fees under N.C. Gen. Stat. § 97-88. The two statutes serve different purposes and provide different remedies. N.C. Gen. Stat. § 97-88.1 only provides attorney's fees for the initial hearing before the Commission, while § 97-88 governs attorney's fees accrued in defending an insurer's unsuccessful appeal. *See* N.C. Gen. Stat. §§ 97-88 and 97-88.1 (2007).

N.C. Gen. Stat. § 97-88.1 provides that:

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

Id. (emphasis added). The purpose of this section is to prevent stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees. *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54, 464 S.E.2d 481, 485 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996).

N.C. Gen. Stat. § 97-88 provides:

> If the Industrial Commission . . . shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

Id. This statute allows an injured employee to move that his appellate attorney's fees be paid when (1) an insurer appeals the Commission's order directing that the employer pay benefits to claimant, and (2) the order to pay benefits is affirmed. *See* N.C. Gen. Stat. § 97-88; *Troutman*, 121 N.C. App. at 53, 464 S.E.2d at 485.

The determination of whether claimant should be awarded attorney's fees under N.C. Gen. Stat. § 97-88 is not controlled by the decision whether to award attorney's fees under N.C. Gen. Stat. § 97-88.1. *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 359, 581 S.E.2d 778, 789 (2003). Contrary to N.C. Gen. Stat. § 97-88.1, an award of attorney's fees under N.C. Gen. Stat. § 97-88 concerns only appellate attorney's fees and is permitted even if the insurer who institutes the proceeding has reasonable grounds for bringing the appeal. *See Brown v. Public Works Comm'n*, 122 N.C. App. 473, 470 S.E.2d 352 (1996).

Subsequently, claimant moved for an award of appellate attorney's fees under N.C. Gen. Stat. § 97-88 to compensate her counsel for time spent in defending multiple appeals brought by employer, and the Commission granted claimant's motion. Here, the Full Commission was within its discretion to award claimant appellate attorney's fees under N.C. Gen. Stat. § 97-88 because employer, who is self-insured, appealed the award of benefits to claimant and the award was affirmed on appeal. Accordingly, our Supreme Court's reversal of attorney's fees under N.C. Gen. Stat. § 97-88.1 is not inconsistent with the Commission's subsequent award of attorney's fees to claimant under N.C. Gen. Stat. § 97-88. This assignment of error is overruled.

B. Discretion of the Full Commission

[2] Second, employer asserts that pursuant to *Buck v. Procter & Gamble*, 58 N.C. App. 804, 806, 295 S.E.2d 243, 245 (1982), *cert. denied*, 308 N.C. 543, 304 S.E.2d 236 (1983), the Full Commission was not permitted to award attorney's fees for claimant because there was

no longer an appeal before the Industrial Commission. Employer's reliance on *Buck* is misplaced because the reasoning that employer cites is no longer good law.

In *Buck*, our Court held that, pursuant to *Taylor v. J. P. Stevens*, 57 N.C. App. 643, 292 S.E.2d 277 (1982) ("*Taylor I*"), the Commission was only permitted to award attorney's fees "when an appeal is before it to review a hearing commissioner's decision" and did not have discretion to award attorney's fees for services rendered before an appellate court. *Buck*, 58 N.C. App. at 806, 295 S.E.2d at 245. However, in *Taylor v. J. P. Stevens Co.*, 307 N.C. 392, 398, 298 S.E.2d 681, 685 (1983) ("*Taylor II*"), our Supreme Court concluded that the Court in *Taylor I* erred in holding that the Commission does not have the authority to award attorney's fees for work done in furtherance of an appeal. *Id.* As far as its reliance on *Taylor I*, the proposition that employer cites in *Buck* is no longer valid. This assignment of error is overruled.

C. Final Judgment

[3] Employer contends that claimant was procedurally barred from requesting additional attorney's fees under N.C. Gen. Stat. § 97-88 because the Commission entered "final judgment" on the issue in its 29 January 2007 order. We disagree.

Employer asserts that claimant waived her request for appellate attorney's fees by failing to raise the matter on remand. When claimant filed her motion for entry of an Opinion and Award on remand, she requested that her award be amended in compliance with *D'Aquisto II*, so that attorney's fees were not assessed as a penalty, but instead were payable out of her benefits. Employer contends that all of claimant's attorney's fees were "fixed and determined" when the Commission granted her request in its 29 January 2007 order.

In support of its argument, employer refers to the Latin maxim *interest rei publicae ut sit finis litum*, which states that " 'there should be an end of litigation for the repose of society.' " *Croom v. Department of Commerce*, 143 N.C. App. 493, 498, 547 S.E.2d 87, 91 (2001) (quoting *Hicks v. Koutro*, 249 N.C. 61, 64, 105 S.E.2d 196, 199-200 (1958)). The public policy of *interest rei publicae ut sit finis litum*

> "requires a lawsuit to be tried as a whole and not as fractions . . . [and] the entry of a single judgment which will completely and

> finally determine all the rights of the parties. A party should be required to present his whole cause of action at one time in the forum in which the litigation has been duly constituted."

Id. (citation omitted).

However, "this principle [*interest rei publicae ut sit finis litum*] does not have the strict application in proceedings for workmen's compensation that it has as regards [to] proceedings in the courts." *Hall v. Chevrolet Co.*, 263 N.C. 569, 577, 139 S.E.2d 857, 862 (1965). "[I]t is well established that the Worker's Compensation Act ' "should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation." ' " *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 597, 532 S.E.2d 207, 210 (2000) (quoting *Hall*, 263 N.C. at 576, 139 S.E.2d at 862 (1965)). Contrary to courts of general jurisdiction, the Commission is vested with continuing jurisdiction to adjudicate all aspects of workers' compensation claims brought before it. *Pearson v. C.P. Buckner Steel Erection Co.*, 348 N.C. 239, 241-42, 498 S.E.2d 818, 820 (1998), *disc. review denied*, 353 N.C. 379, 547 S.E.2d 434 (2001).

Furthermore, in the Commission's 29 January 2007 order, it did not address appellate attorney's fees, and therefore, the Commission was permitted to review the matter. The assignment of error is overruled.

V. Conclusion

Accordingly, we overrule employer's assignments of error and affirm the Full Commission's award of attorney's fees to claimant pursuant to N.C. Gen. Stat. § 97-88.

Affirmed.

Judges HUNTER, Robert C., and CALABRIA concur.

STATE OF NORTH CAROLINA v. BRANDON ALLEN POTTER

No. COA08-1398

(Filed 4 August 2009)

1. Sentencing— two offenses—same conduct—sentences in presumptive range

An appeal was dismissed where defendant was contesting sentencing for robbery with a dangerous weapon and habitual misdemeanor assault based on assault on a female, but the sentences were within the presumptive range. Defendant was not entitled to appeal as of right under N.C.G.S. § 15A-1340.17(c), and did not petition for *certiorari*.

2. Appeal and Error— ineffective assistance of counsel—underlying issue dismissed

An appeal alleging ineffective assistance of counsel based on failure to object to submission of a misdemeanor assault charge and imposition of a sentence based on that charge was dismissed where the issue of whether defendant's conduct was covered by a conviction for armed robbery was dismissed elsewhere in the opinion.

Judge GEER concurring in the result only.

Appeal by defendant from judgments entered 7 May 2008 by Judge John L. Holshouser, Jr. in Iredell County Superior Court. Heard in the Court of Appeals 9 April 2009.

Attorney General Roy Cooper, by David L. Elliot, Director, Victims and Citizens Services, for the State.

Don Willey for defendant-appellant.

BRYANT, Judge.

Defendant appeals from judgments and commitments entered 7 May 2008 for robbery with a dangerous weapon and habitual misdemeanor assault. Defendant was sentenced to a term of 100 to 129 months active imprisonment for the robbery followed by a term of seven to nine months suspended sentence for the habitual misdemeanor assault, and defendant was placed on supervised probation for 36 months. For the reasons stated herein, we dismiss defendant's appeal.

The evidence presented at trial tended to show that on the evening of 19 October 2007 Heather Devries stopped at Walmart on her way from work. An hour later, Devries was walking through the parking lot to her car. She had a large shoulder bag which contained cash, her wallet, keys, a cell phone, make-up, and paperwork. While walking, she felt a tug on her shoulder and heard a voice say, "Give me your purse." Devries turned to face a man and saw a gray knife, similar to a carpet knife. Devries tried to pull her purse away, but the man hit her in the stomach, hit her on her side, then ran away with the purse. Devries screamed for someone to call the police and chased the man until he got into a car with a female passenger and drove away.

Shortly thereafter, a law enforcement officer for the Town of Mooresville stopped defendant and his companion because they matched the description of the suspects. Devries was transported by another law enforcement officer to the scene of the stop, where she identified both defendant and his female companion as the individuals who drove away with her handbag. In defendant's vehicle was found a gray knife and, subsequent to defendant's arrest, cash in his front pocket. Devries' handbag was found along the roadside between the intersection where defendant was stopped and the Walmart where Devries was hit and her handbag taken. Inside the handbag was found Devries' driver's license and credit cards but no cash. Devries again identified both defendant and his companion in court.

Defendant was indicted for robbery with a dangerous weapon and habitual misdemeanor assault premised on the charge of assault on a female. At the close of the evidence, a jury returned guilty verdicts for robbery with a dangerous weapon and assault on a female. Out of the presence of the jury, defendant stipulated to prior convictions for misdemeanor assault on a government official on 23 February 1996 and misdemeanor assault with a deadly weapon on 21 January 1998. The trial court entered judgment and commitment for robbery with a dangerous weapon and habitual misdemeanor assault. Defendant appeals.

Defendant raises the following two issues on appeal: (I) whether the trial court committed sentencing error by entering judgment for both robbery with a dangerous weapon and misdemeanor

assault[1]; and (II) whether defense counsel provided ineffective assistance of counsel.

I

[1] First, defendant contends that the trial court committed sentencing error under N.C. Gen. Stat. § 14-33 by entering judgment on both robbery with a dangerous weapon and habitual misdemeanor assault based on misdemeanor assault on a female. Defendant argues that the conduct used to support his conviction for assault on a female under N.C. Gen. Stat. § 14-33(c)(2)[2] was also used to support his conviction for robbery with a dangerous weapon under N.C. Gen. Stat. § 14-87. We dismiss this argument.

Under the North Carolina General Statutes, section 15A-1444(a1),

> [a] defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(a1) (2007).

Here, defendant was convicted of robbery with a dangerous weapon, a Class D felony, and was sentenced as a record level III felony offender to an active sentence of 100 to 129 months. Convicted

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1. We note the State's contention that defendant's argument is not properly before this Court because it raises constitutional issues that were not raised at trial, *see State v. Anthony*, 354 N.C. 372, 389, 555 S.E.2d 557, 571 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal") (citation omitted); *State v. Sloan*, 180 N.C. App. 527, 531, 638 S.E.2d 36, 39 (2006) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." (citation omitted)). However, as we deem defendant's argument subject to dismissal on other grounds, we need not further address the State's contentions.

2. N.C. Gen. Stat. § 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments. (c) *Unless the conduct is covered under some other provision of law providing greater punishment*, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she: . . . (2) Assaults a female, he being a male person at least 18 years of age[.] (Emphasis added).

of habitual misdemeanor assault, carrying the sentence of a Class H felony, defendant was sentenced as a record level II misdemeanor offender, received a suspended sentence of seven to nine months, and was placed on supervised probation for 36 months. The minimum levels of both sentences are within the presumptive range. *See* N.C. Gen. Stat. § 15A-1340.17(c) (2007). Pursuant to N.C.G.S. § 15A-1444(a1), defendant is not entitled to appeal as a matter of right the issue of whether his sentence is supported by evidence introduced at the trial. *See* N.C.G.S. § 15A-1444(a1) (2007). Moreover, defendant has not petitioned this Court to review the merits of his appeal by writ of certiorari. Therefore, we hold defendant's argument is not properly before us, and accordingly, this argument is dismissed.

II

[2] Next, defendant argues defense counsel provided ineffective assistance of counsel by failing to object to the submission of the misdemeanor assault charge to the jury and the imposition of a sentence based on the misdemeanor assault on the grounds that the conduct punished was in perpetuation of the robbery.[3]

As we have dismissed on procedural grounds the issue of whether defendant's conduct punished by a conviction for assault on a female under N.C. Gen. Stat. § 14-33(c)(2) was covered by the conviction for robbery with a dangerous weapon under N.C. Gen. Stat. § 14-87, we will not address whether defense counsel's failure to object to the submission of the misdemeanor assault charge to the jury and the imposition of a sentence based on the misdemeanor assault amounted to ineffective assistance of counsel.

Accordingly, this issue is dismissed without prejudice to defendant's right to raise these arguments in a motion for appropriate relief filed in the trial court. *See State v. Duncan*, 188 N.C. App. 508, 656 S.E.2d 597 (Hunter, J., dissenting) ("[i]f 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."), *rev'd per curiam for reasons stated in the dissenting opinion*, 362 N.C. 665, 669 S.E.2d 738 (2008). *See also* N.C. Gen. Stat. § 15A-1415 (2009) (grounds for appropriate relief which may be asserted by defendant after verdict).

3. Defendant's motion to amend his brief to add a reference to Assignment of Error No. 9 was allowed by this Court on 20 March 2009.

Dismissed.

Judge STEPHENS concurs.

Judge GEER concurs in the result only in a separate opinion.

GEER, Judge, concurring in the result only.

I do not agree that N.C. Gen. Stat. § 15A-1444(a1) (2007) applies in the circumstances of this case. Defendant is arguing that he should have been sentenced only for robbery with a dangerous weapon and not also for habitual misdemeanor assault. If he were to prevail on this argument, the judgment for habitual misdemeanor assault would be arrested, and he would not be subjected to the suspended consecutive seven to nine month sentence. This argument does not seem to me to fall within the intended scope of § 15A-1444(a1).

In any event, I believe that defendant's argument is precluded by *State v. Richardson*, 279 N.C. 621, 185 S.E.2d 102 (1971), and *State v. Hines*, 166 N.C. App. 202, 600 S.E.2d 891 (2004). In *Richardson*, our Supreme Court held that "when separate indictments for armed robbery and felonious assault based on separate features of one continuous course of conduct are tried together, and verdicts of guilty as charged are returned, these verdicts provide support for separate judgments." 279 N.C. at 633, 185 S.E.2d at 111. Here, defendant's conviction of armed robbery is supported by the evidence that he took the victim's purse by confronting her with a knife. Defendant also, in the course of the robbery, struck the victim in her stomach and in her side—separate features of the course of conduct that supported the conviction of assault on a female that was the basis for the habitual misdemeanor assault conviction.

Defendant, however, argues that *Richardson* did not involve a statute, such as the statute governing assault on a female, that provides for punishment for assault "[u]nless the conduct is covered under some other provision of law providing greater punishment . . . ." N.C. Gen. Stat. § 14-33(c) (2007). *Hines*, however, involved precisely such a statute, and this Court rejected the argument made by defendant in this case.

Relying upon N.C. Gen. Stat. § 14-32.1(e) (2003), which allowed for punishment for assault on a handicapped person "[u]nless [defendant's] conduct is covered under some other provision of law providing greater punishment[,]" the defendant in *Hines* argued that

she could not be sentenced for both robbery with a dangerous weapon and aggravated assault on a handicapped person. 166 N.C. App. at 208, 600 S.E.2d at 896. This Court rejected that argument, holding that "the statutory language cited by defendant bars punishment under both this provision and another provision of an assault statute." *Id.* at 209, 600 S.E.2d at 897. Because the defendant had been convicted of robbery with a dangerous weapon (not a violation of an assault statute), she could also be convicted of assault on a handicapped person. *Id.* I believe *Hines* is indistinguishable from this case.

Under both *Richardson* and *Hines*, defendant could properly be sentenced for both robbery with a dangerous weapon and habitual misdemeanor assault. Since there was no error, defendant cannot show ineffective assistance of counsel by defense counsel in failing to raise this issue.

TOWN OF MAIDEN, A NORTH CAROLINA MUNICIPAL CORPORATION PLAINTIFF v. LINCOLN COUNTY, DEFENDANT

No. COA08-1518

(Filed 4 August 2009)

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

The denial of a motion to transfer venue affects a substantial right, and Lincoln County was entitled to immediate appellate review.

2. Venue— motion to change—local government agreements concerning sewer line—location of cause of action

The trial court erred by denying Lincoln County's motion for a change of venue to Lincoln County from Catawba County for claims involving a sewer line agreement between Lincoln County and the Town of Maiden, signed in Catawba County, where the cause of action arose in Lincoln County when Lincoln County and the City of Lincolnton entered an agreement involving the sewer line.

Appeal by Defendant from order entered 5 August 2008 by Judge Nathaniel J. Poovey in Superior Court, Catawba County. Heard in the Court of Appeals 9 June 2009.

Crowe & Davis, P.A., by H. Kent Crowe, for plaintiff-appellee.

Pendleton, Pendleton & Deaton, P.A., by Jeffrey A. Taylor, for defendant-appellant.

WYNN, Judge.

N.C. Gen. Stat. § 1-77(2) (2007) provides that actions against a public officer "must be tried in the county where the cause, or some part thereof, arose[.]" Here, Lincoln County appeals from an order denying its motion for change of venue, arguing the claims alleged by the Town of Maiden in its complaint against the county arose, if at all, in Lincoln County. Because we find that the causes of actions alleged by the Town of Maiden arose in Lincoln County, we reverse the order denying Defendant's motion for change of venue from Catawba to Lincoln County.

On 18 September 1995, the Town of Maiden, located in Catawba County, and Lincoln County entered into an agreement "to extend a sanitary sewer line from the Town of Maiden's existing sewer line to the Larkard Creek Drainage Basin to provide sanitary sewer service" for Lincoln County Industrial Park, located in Lincoln County. Further, the agreement stated that:

> 2. The Town of Maiden does hereby agree to construct and maintain a pumping station and forced main sewer line to furnish sewer service to owners and customers in the Lincoln County Industrial Park, being an approximately three hundred (300) acre tract located near Larkard Creek. The Town of Maiden will charge the customers receiving said sewer at its outside sewer rates, and the Town of Maiden shall read meters to determine the amount to be charged to each customer.
>
> . . .
>
> 7. It is agreed that the Town of Maiden shall be advised of the type of any and all industry to be located within the Lincoln County Industrial Park as soon as the same is known to Lincoln County. The Town of Maiden shall approve any and every tap to be made onto its said sewer line.

On 4 December 2007, the Town of Maiden filed a complaint in Catawba County against Lincoln County and the City of Lincolnton, asserting breach of contract, tortious interference, and "public purpose" claims, and seeking a permanent injunction to enjoin Lincoln

County and the City of Lincolnton "from taking any action to provide sanitary sewer service/wastewater treatment" to Lincoln County Industrial Park. Both Lincoln County and the City of Lincolnton filed motions for change of venue from Catawba County to Lincoln County on 4 January 2008 and 9 January 2008 respectively. In ruling on the change of venue motions, the trial court entered two separate orders: (1) a 7 May 2008 order granting the City of Lincolnton's motion and stating that "all claims asserted against the CITY OF LINCOLNTON must be tried in Lincoln County, as a matter of right"; and (2) a 21 April 2008 order, orally denying Lincoln County's motion, concluding "[t]hat Catawba County is the proper venue for this matter involving Town of Maiden and Lincoln County." In addition to the oral order, the trial court issued a written order denying Lincoln County's motion on 5 August 2008.

Lincoln County appeals, arguing that the trial court erred in denying its motion for change of venue because all four causes of action alleged by the Town of Maiden arose solely in Lincoln County, and pursuant to section 1-77(2), these actions must be tried in the county where the causes of the action arose.

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[1] Preliminarily, we note the Town of Maiden argues that this appeal is premature because the order on appeal is interlocutory. Although an order denying a defendant's motion to change venue is interlocutory, "a denial of a motion to transfer venue affects a substantial right." *Hyde v. Anderson*, 158 N.C. App. 307, 309, 580 S.E.2d 424, 425, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 759 (2003). Accordingly, Lincoln County is entitled to immediate appellate review. *Frink v. Batten*, 184 N.C. App. 725, 727-28, 646 S.E.2d 809, 811 (2007).

[2] N.C. Gen. Stat. § 1-77(2) provides that actions "[a]gainst a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer" "must be tried in the county where the cause, or some part thereof, arose" (emphasis added).[1] " '[A] cause of action may be said to accrue, within the meaning of a statute fixing venue of actions, when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested.' " *Morris v. Rockingham Cty.*, 170 N.C. App. 417, 420, 612 S.E.2d 660, 663 (2005) (quoting *Smith v. State*, 289 N.C. 303, 333, 222 S.E.2d 412, 432 (1976)). Thus, the issue be-

1. Neither party disputes that section 1-77(2) is applicable to the present case.

fore this Court is where "the acts and omissions giving rise to the [] cause[s] of action" occurred. *Frink*, 184 N.C. App. at 730, 646 S.E.2d at 812.

"When reviewing a decision on a motion to transfer venue, the reviewing court must look to the allegations of the plaintiff's complaint." *Ford v. Paddock*, 196 N.C. App. 674 S.E.2d 689, 691 (2009) (citations omitted). Here, neither the Town of Maiden's 4 December 2007 complaint nor the affidavits offered to the trial court specifically allege where the breach of contract, tortious interference, or "public purpose" actions occurred or will occur. However, the Town of Maiden makes the following allegations regarding its claim for breach of contract:

> 19. That pursuant to said Permit granted to Defendant Lincoln County to provide sewer/wastewater treatment to the Lincoln County Industrial Park, Defendant Lincoln County has been obtaining right-of-ways, and begun work and construction on sewer lines to provide said sewer/wastewater treatment to the Lincoln County Industrial Park.
>
> 20. Attached hereto as Exhibit "B,", and incorporated herein is an Agreement between Defendants, Lincoln County, and the City of Lincolnton. Said Agreement provides, among other things, for Lincoln County to construct lines and infrastructure for wastewater from the Lincoln County Industrial Park to a point with the existing wastewater system of the City of Lincolnton. Said Agreement further provides for the City of Lincolnton to treat wastewater from the Lincoln County Industrial Park.
>
> 21. By entering into Exhibit "B", and by constructing lines for sewer service to the Lincoln County Industrial Park, the Defendants, Lincoln County and the City of Lincolnton, County Industrial Park, have breached the Contract and Agreement by and between the Plaintiff and the Defendant, Lincoln County.

The Town of Maiden's complaint also contains the following allegations regarding tortious interference and "public purpose":

> 24. That the Plaintiff has valid contracts and agreements by and with the present ten (10) customers within the Lincoln County Industrial Park for the Plaintiff to provide sanitary sewer service. . . . The Plaintiff also has the right to provide wastewater treatment service to future customers within the Lincoln County

Industrial Park under the 1995 Contract and Agreement, Exhibit "A," herein.

. . .

29. That the Defendants have, or will, interfere with the Plaintiff's Contract and Agreement to provide sanitary sewer service to customers within the Lincoln County Industrial Park, when Defendant Lincoln County provides said sewer service/ wastewater treatment to said customers.

. . .

31. That it would not be in the best interests of the public, and specifically, the citizens of all parties, for a new pump station to be erected, and new sewer lines to be run to provide sanitary sewer service/wastewater treatment to the Lincoln County Industrial Park.

32. That in constructing new infrastructure and running new sewer lines to the Lincoln County Industrial Park, the Defendants would be duplicating sanitary sewer services already provided to the present and future customers of the Lincoln County Industrial Park.

33. That in duplicating said sanitary sewer service/wastewater treatment, by constructing a pump station and necessary infrastructure, and in constructing and maintaining additional duplicate sanitary sewer lines, the same would not be sound environmental policy, and would also be a duplication of tax payer's and the public's expense.

Based on the allegations in the Town of Maiden's complaint, the breach of contract action arose when Lincoln County and the City of Lincolnton entered into an agreement "to construct lines and infrastructure for wastewater from the Lincoln County Industrial Park to a point with the existing wastewater system of the City of Lincolnton" and when Lincoln County began "constructing lines for sewer service to the Lincoln County Industrial Park[.]" The actions allegedly constituting tortious interference by Lincoln County have, or will occur, "when Defendant Lincoln County provides said sewer service/wastewater treatment" to the Lincoln County Industrial Park. Finally, the duplication of sewer and wastewater treatment services or expenses to Lincoln County giving rise to the "public purpose" allegation must have occurred within Lincoln County. All of the actions alleged

against Lincoln County arose either in the City of Lincolnton, the Lincoln County Industrial Park, or Lincoln County itself, all of which are within the geographical location of Lincoln County.

While the Town of Maiden argues throughout its brief that the "action" arose in Catawba County, this argument is without merit. Although the contract and agreement between the Town of Maiden and Lincoln County arguably was negotiated and signed in Catawba County, the creation of the agreement between these parties is not the "action" to which section 1-77(2) refers. Rather, in the present case, the determinative issue is where the causes of action—breach of contract, tortious interference, and "public purpose"—arose. *See Pitts Fire Safety Service, Inc. v. City of Greensboro*, 42 N.C. App. 79, 255 S.E.2d 615 (1979) (where a defendant in Guilford County reached out to and entered into an oral contract with plaintiff in Catawba County, venue was proper under §1-77 in Guilford County because defendant's failure to pay was the basis of the cause of action and that action occurred in Guilford County).

Because all of the alleged causes of action against Lincoln County occurred in Lincoln County and section 1-77(2) requires that these actions be tried in the county "where the cause of action, or some part thereof, arose," we find that the trial court erred in denying Lincoln County's motion for change of venue. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges STROUD and BEASLEY concur.

KENNETH VANN WIGGINS, PLAINTIFF v. CHRISTINE BARWICK BRIGHT, DEFENDANT

No. COA08-557

(Filed 4 August 2009)

1. Child Support, Custody, and Visitation— custody—contempt—statutory authority

The trial court had statutory authority to order plaintiff to pay defendant mother's attorney fees in a child custody action where plaintiff had brought an unsuccessful motion that she be

held in contempt of a custody order. N.C.G.S. § 50-13.6 grants the trial court the authority and discretion to award attorney fees as appropriate due to the frivolous nature of a plaintiff's proceeding. Moreover, attorney fees are also authorized under this statute based upon findings that defendant proceeded in good faith in responding to the motion for contempt and does not have sufficient means to defray the costs and expenses of the matter.

2. Costs— attorney fees—defending child custody contempt motion—findings sufficient

The amount of an attorney fee award was affirmed where plaintiff contended that the court's findings were unsupported by the evidence but did not point specifically to inadequacies in the findings or contrary evidence. Moreover, the court included a detailed finding relating to the reasonableness and amount of the attorney fee award.

Appeal by plaintiff from order entered 21 November 2007 by Judge David B. Brantley in Lenoir County District Court. Heard in the Court of Appeals 15 January 2009.

Dal F. Wooten for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

GEER, Judge.

Plaintiff Kenneth Vann Wiggins appeals from the trial court's order requiring him to pay the attorneys' fees incurred by defendant Christine Barwick Bright in opposing plaintiff's motion seeking that she be held in contempt of the custody order entered by the trial court. On appeal, plaintiff contends the trial court had no statutory authority to award attorneys' fees to defendant. To the contrary, because the trial court concluded that plaintiff's motion was frivolous—a determination not challenged on appeal—the trial court was specifically authorized to award defendant fees by N.C. Gen. Stat. § 50-13.6 (2007). Consequently, we affirm the trial court's order.

Facts

Plaintiff and defendant married on 15 February 1992, separated on or about 20 March 2002, and divorced on 19 May 2003. The parties have one child, who was born on 5 January 1994. On 19 May 2005, plaintiff filed a complaint seeking custody, and on 9 June 2005, defendant filed an answer and counterclaim for custody.

On 28 March 2007, the trial court issued an order, *nunc pro tunc* 21 November 2006, awarding joint legal custody to the parties, with defendant having primary custody and plaintiff having secondary custody. The order also set out a specific schedule of visitation for plaintiff and included provisions for summer visitation by both parents. On 13 July 2007, plaintiff filed a motion in the cause seeking to hold defendant in contempt for failure to comply with the custody order, asserting that defendant was required to notify plaintiff in writing at least 30 days before the last scheduled day in school of the three weeks of summer visitation that defendant was choosing. The motion alleged "[t]hat the Defendant has willfully failed and refused to abide by the terms of the aforesaid Order in that she has failed to notify the Plaintiff of the summer visitation that she was going to exercise for the summer of 2007 in a timely manner."

On 16 July 2007, the trial court entered an order to show cause why defendant was not in contempt, and a hearing was held on 25 September 2007. After the trial court orally denied plaintiff's motion for contempt, defendant's counsel filed an Affidavit for Counsel Fees on 31 October 2007.

On 21 November 2007, the trial court entered an order, *nunc pro tunc* 25 September 2007, dismissing plaintiff's motion for contempt with prejudice. The trial court pointed out that the custody order required "[t]hat in all odd numbered years (i.e. 2007, 2009, etc.), *Plaintiff* shall notify Defendant in writing at least 60 days before the child's last regularly scheduled day in school of the timing of the three weeks that he chooses for that year." (Emphasis added.) The order required defendant to give prior notice "in all even numbered years (i.e. 2008, 2010, etc.)." The trial court found that since it was an odd-numbered year, plaintiff—and not defendant—was required to give written notice of the weeks he chose for summer visitation 60 days prior to the child's last regularly scheduled school day. The court further found that plaintiff had violated the custody order by not giving the required notice. Based on its findings of fact, the trial court concluded first that defendant had not violated the terms of the custody order and was not in contempt of court. The trial court then concluded that "Plaintiff's Motion in the Cause for contempt against Defendant is a 'frivolous motion' and should be dismissed by the Court." Plaintiff has not appealed that order.

On the same day, the trial court entered a separate order requiring plaintiff to pay defendant's attorneys' fees in the amount of $2,836.75. As a basis for this order, the trial court repeated its finding

in the prior order that "Plaintiff's Motion in the Cause for contempt filed against the Defendant was and is 'frivolous' . . . ." The court further found that "the Defendant is proceeding in good faith, does not have sufficient means to defray the costs and expenses of the matter, and the Plaintiff's Motion in the Cause was not justified and in fact was frivolous." Plaintiff timely appealed from this order.

Discussion

[1] Plaintiff first contends the trial court was without authority to order him to pay defendant's attorneys' fees. A trial court cannot award attorneys' fees unless specifically authorized by statute. *United Artists Records, Inc. v. Eastern Tape Corp.*, 18 N.C. App. 183, 187, 196 S.E.2d 598, 602 ("It is settled law in North Carolina that ordinarily attorneys fees are not recoverable either as an item of damages or of costs, absent express statutory authority for fixing and awarding them."), *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973).

N.C. Gen. Stat. § 50-13.6 provides:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; *provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.*

(Emphasis added.) This statute grants the trial court "authority and discretion to award attorney's fees as appropriate under the circumstances due to the frivolous nature of [a] plaintiff's action" or proceeding. *Doan v. Doan*, 156 N.C. App. 570, 576, 577 S.E.2d 146, 151 (2003) (upholding trial court's award of attorneys' fees in a custody and support action).

Here, plaintiff brought this action seeking both custody and support. In this action, plaintiff then brought a proceeding—a motion for

contempt—that the trial court properly determined to be frivolous. As this Court held in *Doan*, N.C. Gen. Stat. § 50-13.6 authorized the trial court, in these circumstances, to order plaintiff to pay a reasonable attorneys' fee to defendant for the costs of defending this frivolous proceeding.

Moreover, attorneys' fees were also authorized under N.C. Gen. Stat. § 50-13.6 based on the findings that defendant was proceeding in good faith in responding to the motion for contempt and does not have sufficient means to defray the costs and expenses of this matter. *See Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (holding that in order to award attorneys' fees under § 50-13.6, "the trial court was required to make two findings of fact: that the party to whom attorney's fees were awarded was (1) acting in good faith and (2) has insufficient means to defray the expense of the suit"). This Court has previously held that when the requisite two findings have been made, a trial court may award attorneys' fees under § 50-13.6 to parties who have successfully pursued a motion for contempt in child support and custody actions. *See Ruth v. Ruth*, 158 N.C. App. 123, 127, 579 S.E.2d 909, 912 (2003) (affirming award of attorneys' fees under § 50-13.6 in connection with filing of motion for contempt even though defendant could not actually be found in contempt because she returned child after filing of contempt motion but before hearing on motion); *Blair v. Blair*, 8 N.C. App. 61, 63, 173 S.E.2d 513, 514-15 (1970) (holding trial court could require defendant found in contempt for failure to pay child support to pay attorneys' fees as condition of purging contempt).

Plaintiff contends, however, that *Ruth* and *Blair* cannot apply to this case because defendant was not both the moving and prevailing party. His suggestion that only the party initiating the proceeding may recover fees is contrary to the plain language of the statute authorizing an award to "an interested party." N.C. Gen. Stat. § 50-13.6. His claim that the party must have prevailed is contrary to *Burr*, in which this Court specifically rejected the appellant's argument that simply "because defendant did not prevail at trial, the award of attorney's fees to defendant was improper." 153 N.C. App. at 506, 570 S.E.2d at 224.

If the proceeding is one covered by N.C. Gen. Stat. § 50-13.6, as is the case here, and the trial court makes the two required findings regarding good faith and insufficient means, then it is immaterial whether the recipient of the fees was either the movant or the pre-

vailing party. Thus, we hold the trial court had statutory authority to award fees to defendant in this case.

[2] Plaintiff also challenges as unsupported by the evidence the trial court's findings of fact that (1) fees in the amount of $2,836.75 are reasonable and necessary and (2) plaintiff should be required to pay the reasonable fees. He further adds that the trial court's conclusion of law regarding the amount of the fees is not supported by findings of fact. In support of these contentions, plaintiff does not, however, include any specific argument pointing to any contrary evidence or any particular inadequacies in the findings of fact. He simply incorporates by reference his argument regarding the trial court's statutory authority.

Even if plaintiff had adequately presented these contentions, the trial court included a detailed finding of fact relating to the reasonableness and amount of the attorneys' fee award. We can see no basis for plaintiff's unexplained assertion that this detailed finding is inadequate to support the ultimate award. In turn, this finding of fact is fully supported by the affidavit submitted by defendant's counsel. *See Middleton v. Middleton*, 159 N.C. App. 224, 227, 583 S.E.2d 48, 49-50 (2003) (rejecting defendant's claim that there was insufficient support in the record for award of attorneys' fees where trial court relied on attorneys' affidavit in finding amount and reasonableness of fees). These remaining arguments of plaintiff are thus meritless, and we affirm the trial court's order awarding attorneys' fees to defendant.

Affirmed.

Judges STEELMAN and STEPHENS concur.

JESSE JENNINGS, III & LINDA G. KING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF JESSE MARQUIL KING, DECEASED, PLAINTIFFS v. THE CITY OF FAYETTEVILLE, NORTH CAROLINA, A BODY POLITIC AND MUNICIPAL CORPORATION, DEFENDANT

No. COA09-92

(Filed 4 August 2009)

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

Although the appeal from an order denying a motion for summary judgment is from an interlocutory order, claims of immunity affect a substantial right and are immediately appealable.

2. Cities and Towns; Immunity— municipality's liability for negligence in storm drain maintenance

The trial court did not err in a wrongful death case arising out of defendant city's negligence in maintaining a storm drain system by denying defendant city's motion for summary judgment based on governmental immunity because: (1) our Supreme Court has stated that a municipality may be held liable for negligence in storm drain maintenance; and (2) although defendant urges the Court of Appeals to reconsider the issue of municipality liability for storm drain maintenance in light of the State's passage of storm water regulations in response to the federal Clean Water Act, another panel of the Court of Appeals has already decided this issue in *Kizer*, 121 N.C. App. 526 (1996), and a subsequent panel is bound by that precedent since it has not been overturned by a higher court.

Appeal by defendant from judgment entered 13 October 2008 by Judge Robert F. Floyd, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 11 June 2009.

Mitchell Brewer Richardson, by Ronnie M. Mitchell and Coy E. Brewer, Jr., for plaintiff.

Lewis, Deese & Nance, LLP, by James R. Nance, Jr., and Karen M. McDonald, for defendant.

ELMORE, Judge.

This case concerns whether the City of Fayetteville (defendant) can face liability arising from its operation of a storm drain system.

In 2005, Jesse Marquil King (decedent) drowned when he was caught in a heavy rainstorm and swept into an open ditch that was under the jurisdiction of defendant. The personal representatives of decedent's estate (plaintiffs) filed suit against defendant in Cumberland County. The trial court denied defendant's motion requesting governmental immunity from liability resulting from the operation of a storm drain system. Defendant filed an interlocutory appeal to this Court. We affirm the trial court's order.

FACTS

On 15 August 2005, decedent, aged seventeen years, was caught in a heavy rainstorm on Spruce Street in Fayetteville. Water flooded a ditch and spread across the paved roadway. Decedent left the roadway and entered private property, presumably to try to get around the water, where he apparently slipped and fell into the ditch. He was pulled underwater and drowned when he became stuck in a drainage pipe that had been clogged with a tree branch.

Plaintiffs filed suit on 7 August 2007, seeking damages for wrongful death as a result of defendant's negligence in maintaining the storm drain system. Defendant alleged, *inter alia*, that it was protected by governmental immunity because the operation of a storm drain system is a governmental activity for which it had not waived immunity. On 29 September 2008, the trial court denied defendant's motion for summary judgment on the basis of governmental immunity. Defendant appealed the ruling to this Court. For the reasons stated below, we affirm the trial court's order.

ARGUMENT

Defendant argues that the trial court erred by denying the motion for summary judgment on the issue of defendant's governmental immunity. We disagree.

[1] An appeal from an order denying a motion for summary judgment is interlocutory because the 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." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Interlocutory appeals are immediately appealable only when they affect a substantial right of the parties. N.C. Gen. Stat. § 1-277(a) (2007). Claims of immunity affect a substantial right, and, therefore, are immediately appealable. *Summey v. Barker*, 142 N.C. App. 688, 689, 544 S.E.2d 262, 264 (2001).

[2] We review a trial court's rulings on summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Summary judgment can be properly granted only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 (c) (2007).

"[M]unicipalities in North Carolina are immune from liability for their negligent acts arising out of governmental activities unless the municipality waives such immunity by purchasing liability insurance." *Anderson v. Town of Andrews*, 127 N.C. App. 599, 600, 492 S.E.2d 385, 386 (1997). However, municipalities do not enjoy immunity for their non-governmental actions. *Evans v. Housing Auth. of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004).

Defendant maintains that its operation of a storm drain system is a governmental activity, and, therefore, defendant should not face liability except for amounts covered by any insurance it has purchased. However, our Supreme Court has stated that a municipality may be held liable for negligence in storm drain maintenance. *Milner Hotels, Inc. v. Raleigh*, 268 N.C. 535, 537, 151 S.E.2d 35, 37 (1966), *modified on reh'g*, 271 N.C. 224, 155 S.E.2d 543 (1967) ("The duty of maintaining sewers and drains in good repair includes the obligation to keep them free of obstruction, and a municipality is liable for negligence in its exercise to any person injured by such negligence."); *Gore v. City of Wilmington*, 194 N.C. 450, 458, 140 S.E. 71, 75 (1927) ("Under the general power to grade and improve streets or construct public improvements beneficial to it, [a city] cannot deprive others of their legal rights in respect of the watercourse or injure the property of others by badly constructed and insufficient culverts or passageways obstructing the free flow of the water without being liable therefor."). Since *Milner*, this Court has considered the issue, with conflicting results. *See Kizer v. City of Sanford*, 121 N.C. App. 526, 528, 466 S.E.2d 336, 338 (1996) ("[S]torm drain maintenance does not enjoy governmental immunity."); *but see Stone v. City of Fayetteville*, 3 N.C. App. 261, 264, 164 S.E.2d 542, 545 (1968) ("[W]hile our Supreme Court recognizes the right of recovery against a municipal corporation for property damage on the theory that one whose property is appropriated for public purposes is entitled to just compensation therefor, it recognizes immunity of a municipal corporation from liability for personal injury or death arising from the maintenance of a ditch used for drainage and sewerage.").

Defendant urges this Court to reconsider the issue of municipality liability for storm drain maintenance in light of this State's passage of storm water regulations in response to the federal Clean Water Act. *See* N.C. Gen. Stat. § 143-214.7(c) (2007) ("The [North Carolina Environmental Management] Commission shall develop model storm water management programs that may be implemented by State agencies and units of local government. Model storm water management programs shall be developed to protect existing water uses and assure compliance with water quality standards and classifications."). Defendant argues that storm drain maintenance should be considered a governmental activity because defendant is performing a duty on behalf of the State pursuant to this legislation. However, in *Kizer*, the sole case on point heard by either this Court or our Supreme Court since the Act's passage, this Court held that "storm drain maintenance does not enjoy governmental immunity" and affirmed the trial court's denial of a municipal defendant's motion for summary judgment based on governmental immunity. *Kizer*, 121 N.C. App. at 528, 466 S.E.2d at 338. As in *Kizer*, the present case deals with a storm drain system where the municipality tried to claim governmental immunity during a time when the Clean Water Act was in effect.

"Where one panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). In the present case, our Supreme Court has not overturned or modified this Court's holding in *Kizer*, and we are bound by its holding that municipalities do not enjoy governmental immunity from liability resulting from their operation of storm drain systems.

For the reasons stated above, defendant's argument is overruled, and we affirm the trial court's order denying summary judgment to defendants on the matter of governmental immunity.

Affirmed.

Judges BRYANT and CALABRIA concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 AUGUST 2009)

GAY v. CITY OF ROCKY MOUNT No. 09-33	Edgecombe (07CVS609)	Affirmed
IN RE A.G., K.Y., J.G., N.S., M.S. No. 09-276	Mecklenburg (06JT0505) (06JT0506) (06JT0507) (06JT0508) (06JT0509)	Affirmed
IN RE A.M. & X.M. No. 09-346	Mecklenburg (08J0407) (08J0408)	Affirmed
IN RE D.R. No. 09-51	Rowan (07JT67)	Affirmed
IN RE D.S.A. No. 09-349	Yadkin (06J48)	Affirmed in part, reversed and remanded in part
IN RE FORECLOSURE OF CARTER No. 08-1503	Catawba (07SP492)	Affirmed
IN RE J.A.A. & G.Q.C. No. 09-392	Wilkes (07JA80) (07JA81)	Affirmed
IN RE K.N.M. & Y.M.M. No. 09-347	Craven (07JT64) (07JT65)	Affirmed
IN RE Q.A.K. No. 09-255	Durham (08J26)	Affirmed
IN RE T.M.S., Z.S., T.S., S.S., R.M. No. 09-372	Harnett (07J13) (07J15) (07J16) (07J17) (07J139)	Affirmed
IN RE T.S., J.M., Z.S., T.S., S.S., T.M., D.M., R.M. No. 09-319	Harnett (07J13-19) (07J139)	Dismissed in part; affirmed in part
IN RE R.D.F. No. 09-283	Mecklenburg (05JT175) (06JT372) (06JT373)	Affirmed

IRWIN v. SUTTON No. 09-68	Haywood (07CVS1409)	Affirmed
MICHAEL v. MICHAEL No. 08-1378	Pasquotank (05CVD713)	Affirmed
MILKS v. MILLS No. 08-1313	Forsyth (07CVS2674)	Affirmed
OLIVER v. COUNTY OF LENOIR No. 08-1483	Lenoir (08CVS650)	Affirmed
PEARMAN v. DENNIS No. 08-1317	Guilford (08CVS2938)	Reversed and Remanded
PHILLIPS v. N.C. STATE UNIV. No. 08-1029	Indus. Comm. (TA18680)	Affirmed in part and remanded with instructions in part
PROFESSIONAL VENDING SERVS., INC. v. SIFEN No. 08-1383	Brunswick (07CVD628)	Reversed and Remanded
RIGSBEE v. SPECIAL FLOWERS, INC. No. 08-1340	Durham (07CVS2965)	Affirmed
SCHAEFFER v. TOWN OF HILLSBOROUGH No. 08-796	Orange (07CVS1634)	Reversed and Remanded
SOUTHERN FURN. CO. OF CONOVER, INC. v. ANDERSON No. 08-1468	Catawba (07CVS1160)	Dismissed
STATE v. BRADSHAW No. 08-1534	Orange (07CRS53192)	Affirmed
STATE v. BRIGGS No. 09-38	Columbus (06CRS54202) (07CRS451)	No Error
STATE v. BRUNSON No. 08-1001	Guilford (00CRS106373) (00CRS106374)	No Error
STATE v. BURGESS No. 09-172	Cabarrus (05CRS55073) (03CRS11979) (03CRS11980) (03CRS11981) (03CRS11982)	Dismissed
STATE v. CAMPBELL No. 09-157	Haywood (08CRS51804)	No Error

STATE v. CARTER No. 08-1545	Guilford (04CRS86217) (05CRS24059)	No Error
STATE v. COLLINS No. 09-87	Montgomery (05CRS51494)	Affirmed
STATE v. CRISTOBAL No. 08-1511	Forsyth (07CRS51427)	No Error
STATE v. GETTYS No. 08-927	Burke (05CRS9984)	No Error
STATE v. HABANA No. 09-41	Yadkin (07CRS52327)	Affirmed
STATE v. HAYES No. 09-144	Richmond (06CRS4202)	Appeal and petition for writ of certiorari dismissed without prejudice to defendant's right to raise the issue of ineffective assistance of counsel in a motion for appropriate relief filed in superior court
STATE v. HOLCOMBE No. 09-147	Buncombe (07CRS64514) (08CRS30) (07CRS64513)	No Error
STATE v. JOHNSON No. 09-36	Hoke (07CRS50741)	Dismissed
STATE v. MARLOW No. 08-1258	Brunswick (06CRS57682) (06CRS57683) (06CRS57688)	No Error
STATE v. McLAURIN No. 09-59	Davidson (07CRS59608)	No Error
STATE v. MIDDLETON No. 09-64	Wayne (07CRS50110) (07CRS50111)	No Error
STATE v. MURRAY No. 08-826	Buncombe (07CRS51493) (07CRS51494) (07CRS51827) (07CRS51828)	Vacated and remanded in part; no error in part
STATE v. PARRISH No. 09-50	Buncombe (07CRS62347) (08CRS4) (08CRS5)	No Error

STATE v. REID No. 09-22	Forsyth (06CRS43619) (06CRS60640)	No Error
STATE v. RICE No. 08-1282	Rowan (00CRS1277) (00CRS1278) (00CRS4208)	Affirmed
STATE v. ROGERS No. 08-1344	Cabarrus (06CRS6847) (06CRS51826) (06CRS51827)	No Error
STATE v. SIMPSON No. 08-1059	Mecklenburg (07CRS226720) (07CRS226721) (07CRS226722) (07CRS57598)	No Error
STATE v. TROMBLEY No. 08-947	Mitchell (06CRS50150) (06CRS50151) (06CRS50157)	Reversed in part; no error in part
STATE v. VLAHAKIS No. 08-1299	Onslow (06CRS61493)	No Error
STATE v. WILLIAMS No. 08-1182	Durham (05CRS53932)	No Error
STATE v. WOOD No. 09-29	Bertie (04CRS51119) (06CRS1039)	No error in part; new trial in part
STREADWICK v. WARREN No. 08-1193	Henderson (05CVS76)	No error in judgment; order affirmed

FORMAL ADVISORY OPINION: 2010-08

October 8, 2010

QUESTION:

Counsel in a personal injury action issues a subpoena duces tecum for medical records to a records custodian during discovery and submits a Health Insurance Portability and Accountability Act (HIPAA) order for a judge to sign so the records custodian may provide the records. May a judge enter such an order without the consent of the opposing party or without a motion and notice providing the opposing party an opportunity to be heard?

Counsel from another state, litigating a personal injury action outside of North Carolina, submits a subpoena along with a HIPAA order for the production of medical records. May a judge enter the order and/or sign the subpoena without the consent of the opposing party, without a motion and notice providing the opposing party an opportunity to be heard, or an order issued by a judge of the forum state requesting the issuance of an order in North Carolina?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined, within the context of a civil proceeding, a judge may not ethically enter an *ex parte* order under HIPAA for the production of medical records by a records custodian, unless an *ex parte* procedure is expressly authorized by statutory or case law. An order is not considered to have been issued *ex parte* if it is entered with the consent of all parties, or all parties are provided proper notice and have an opportunity to be heard.

DISCUSSION:

In the current inquiry, the term *ex parte* refers to a judicial act taken for the benefit of one party without notice to, and an opportunity to be heard by all other parties to that case. Canon 3A(4) of the Code of Judicial Conduct provides: "A judge should accord to every person who is legally interested in a proceeding, or the persons's lawyer, full right to be heard according to law, and except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding."

The North Carolina State Bar has stated clearly in 2001 Formal Ethics Opinion 15, that a lawyer should not approach a judge with an *ex parte* request unless he/she is prepared to give the judge the specific legal authority for the *ex parte* relief. The opinion pro-

vides that the authorization for *ex parte* communication "may not be inferred by the absence in the statute or case law of a specific statement requiring notice to the adverse party or counsel to the *ex parte* communication."

In light of the above, it is incumbent upon a judge to determine whether HIPPA specifically authorizes an *ex parte* procedure for the release of medical records.

Reference:

North Carolina Code of Judicial Conduct
Canon 3A(4)

NC State Bar 2001 FEO 15

HEADNOTE INDEX

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TOPICS COVERED IN THIS INDEX

DEEDS—Continued

Restrictive covenants—requirements—Although defendants properly asserted on appeal that the restrictive covenants were valid real covenants running with the land and binding on the parties and are not void for vagueness or ambiguity, the restrictive covenants did not impose a categorical requirement that plaintiff's driveway be sited at location A and did not restrict plaintiff from locating a driveway at location B if that was the only place NC DOT will approve. **Wein II, LLC v. Porter, 472.**

Restrictive covenants—run with land—The trial court did not err by concluding that the pertinent restrictive covenants were valid and binding on plaintiff even though plaintiff contended the restrictive covenants did not meet the requirements for real covenants that run with the land because: (1) in the instant case the parties were either signatories to the original consent judgment or were their successors in interest, thus sufficiently establishing horizontal privity; and (2) the restrictive covenants touched and concerned the land since they address issues such as plaintiff's obligation to create a buffer between any commercial development and the defendants' neighborhood, setback requirements, etc. **Wein II, LLC v. Porter, 472.**

DISCOVERY

Alleged violations—concealed statement—notice—disclosure provided substance of testimony—The trial court did not err in a double armed robbery and assault with a deadly weapon inflicting serious injury case by concluding there was no discovery violation under N.C.G.S. § 15A-903 even though defendant contends he was not made aware of a witness's testimony prior to trial that defendant stated during the robbery, "I hope this spic is dead" because the State provided defendant with notice that the witness claimed "they hated Mexicans," and this disclosure provided the substance of the witness's testimony and was adequate, for the purpose of the discovery statute, to prevent unfair surprise. **State v. Rainey, 427.**

Sanctions for delay—dismissal—The trial court did not abuse its discretion by dismissing plaintiff's complaint as a sanction for failing to make discovery in a timely fashion. A reasonable judge could conclude that the provision of discovery at a hearing, after an eight-month delay, did not suffice to preclude dismissal. The court was not required to find prejudice, and adequately considered lesser sanctions. **Batlle v. Sabates, 407.**

DIVORCE

Equitable distribution—distribution of property—party's opinion—The trial court did not err in an equitable distribution proceeding by considering a party's opinion regarding the distribution of property under the catch-all provision of the statute. **Plummer v. Plummer, 538.**

Equitable distribution—findings—ability to pay—no evidence on tax consequences—Although plaintiff argued in an equitable distribution action that the trial court erred by ordering him to pay a distributional award without considering tax consequences or his ability to pay, the court found that plaintiff had the ability to pay the award and plaintiff did not present evidence about any alleged tax consequences. **Plummer v. Plummer, 538.**

DIVORCE—Continued

Equitable distribution—real estate debt—distribution—The distribution of debt securing real estate in an equitable distribution proceeding was remanded where it was not clear from the trial court's order whether the debt was to be distributed along with the property or separate from it. There was no abuse of discretion in the valuation of the property. **Plummer v. Plummer, 538.**

Equitable distribution—real property—valuation—The trial court did not err in an equitable distribution action in its valuation of real property where the court had to value the property nine years after the date of separation and no professional appraisals were presented, but the parties presented tax values, outstanding tax bills, and outstanding mortgages. There was competent evidence to support the valuation. **Plummer v. Plummer, 538.**

Equitable distribution—separate checking account—failure to rebut presumption of marital property—The trial court did not err in an equitable distribution case by classifying a checking account held in husband's name only as marital property because defendant failed to rebut by the greater weight of the evidence the presumption that it was marital property. **Cochran v. Cochran, 224.**

Equitable distribution—State Retirement System pension—immediate offset method—The trial court did not err in an equitable distribution case by using the immediate offset method in distributing defendant husband's pension because: (1) the pension benefits did not represent a disproportionate part of the marital estate when defendant's pension constituted only 41% of the marital estate; (2) ample assets existed to divide the estate and immediately distribute the pension; (3) the trial court awarded defendant all of his pension benefits and then awarded plaintiff a larger portion of the remaining assets as permitted by N.C.G.S. § 50-20.1(a); and (4) defendant was fully vested and currently eligible for early retirement. **Cochran v. Cochran, 224.**

Equitable distribution—unequal distribution—findings—not sufficient—The trial court's findings supporting an unequal distribution in an equitable distribution action were not sufficient to allow appellate review and were remanded. **Plummer v. Plummer, 538.**

Equitable distribution—unequal distribution—speculative tax consequences—An unequal distribution of property in an equitable distribution action was remanded because the court considered speculative tax consequences where no evidence of tax consequences was presented. **Plummer v. Plummer, 538.**

Equitable distribution—unequal division of divisible property—The trial court did not err in an equitable distribution case by awarding an unequal division of the divisible property because: (1) the trial court made separate specific findings of fact that addressed each of the statutory factors under N.C.G.S. § 50-20(c); (2) the fact that defendant's pension, when received, will constitute taxable income was not a tax consequence resulting from the ordered equitable distribution; and (3) in regard to the evidence that plaintiff would not be taxed on any gain received upon a sale of the marital home, the evidence presented was merely a speculative tax consequence since there was no evidence that any such sale would be necessary or was imminent. **Cochran v. Cochran, 224.**

PROBATION AND PAROLE

Violation—intensive supervision rules—findings—The evidence was sufficient to support the trial court's findings made in support of revoking defendant's probation where the violation report alleged that defendant failed to report in a reasonable manner during a curfew check and the court interpreted this to mean that defendant violated a condition of the intensive probation program by being drunk and disruptive. **State v. Hubbard, 154.**

Violation report—sufficient notice of violation—A probation violation report gave defendant sufficient notice of the alleged violation pursuant to N.C.G.S. § 15A-1345(e). While the condition of probation which defendant allegedly violated might have been ambiguously stated, the report also set forth the specific facts that the State contended constituted the violation. **State v. Hubbard, 154.**

PROCESS AND SERVICE

Sufficiency of process—service on counsel of record—The superior court did not err by granting respondent university's motion to dismiss based on insufficiency of process and by dismissing a petition for judicial review with prejudice because: (1) N.C.G.S. § 150B-46 provides that a petitioner seeking judicial review of an agency decision must serve his petition for judicial review upon all parties of record to the administrative proceedings within ten days of filing said petition with the trial court; (2) serving respondent's counsel of record was insufficient since she was not a party of record to the administrative proceedings when she was an employee of the Department of Justice and a member of the Attorney General's staff instead of the university; and (3) petitioner's service of the petition on respondent's process agent outside of the ten-day window did not comply with N.C.G.S. § 150B-46. **Follum v. N.C. State Univ. 389.**

RAPE

First-degree rape—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the three first-degree rape charges even though defendant contends the State presented insufficient evidence to establish every element of the offenses and to establish the identity of the perpetrator because giving the State the benefit of all reasonable inferences revealed that: (1) the combined testimony from victim and defendant provided substantial evidence for each essential element of first-degree rape such that a reasonable mind might accept as adequate to support a conclusion that defendant had vaginal intercourse with the victim, the victim was under thirteen years of age, defendant was at least twelve years of age, and defendant was at least four years older than the victim; and (2) testimony from the victim and defendant provided substantial evidence for each essential element of statutory rape as adequate to support a conclusion that throughout the relevant times, defendant had vaginal intercourse or performed sexual acts with the victim; the victim was thirteen, fourteen, and fifteen years of age; defendant was at least six years older than the victim; and defendant was not lawfully married to the victim. **State v. Carter, 297.**

Multiple counts—continuous course of conduct theory not recognized in North Carolina—The trial court did not err by denying defendant's motion to dismiss two of the three first-degree rape charges and one of the indecent liber-

SEARCH AND SEIZURE—Continued

defendant's yard noticed a bulge in defendant's shirt, the smell of marijuana on defendant, and defendant's mouth twitching nervously. **State v. Rivens, 130.**

Frisk—no evidence that defendant armed—no evidence of criminal activity—The purpose of a *Terry* search is not to discover evidence, and the trial court erred by denying defendant's motion to suppress scales and cocaine found during a frisk where none of the evidence would support reasonable suspicion by the officers that defendant was armed or engaged in criminal activity. **State v. Morton, 206.**

Informing jury that officers had probable cause to search—harmless error—Although the trial court erred in a felonious possession of cocaine and possession of drug paraphernalia case by allowing the prosecutor to disclose the trial court's finding that investigating officers had probable cause to search defendant to the jury at trial, the error was not prejudicial because it cannot be concluded that there was a reasonable possibility that the jury would have reached a different result at trial had the prosecutor not made the challenged comment given the overwhelming evidence of defendant's guilt including the admission of the cocaine base and pipe seized at the time of the investigative stop. **State v. Wade, 257.**

Presence of officers in yard—lawfulness—The presence of police officers in defendant's yard, where they questioned and ultimately arrested him, was lawful where they entered the yard for the purpose of a general inquiry regarding a report that shots had been fired. **State v. Rivens, 130.**

Reasonable suspicion to search for weapons—refusal to open fist—evasive answers—threatening gesture—There was no plain error in denying defendant's motion to suppress evidence in a prosecution for felonious possession of cocaine and resisting a public officer where defendant was stopped for a broken headlight; the officer saw that there was something in defendant's closed right fist; defendant was evasive and gave erratic answers, and would not show the officer the contents of his fist; defendant raised his fist in a manner which led the officer to believe he was about to be struck; the officer tased defendant; and defendant dropped a paper towel containing a rock of crack cocaine. The officer had reasonable suspicion to search defendant for weapons based upon the totality of the circumstances informed by his training and experience. **State v. Miller, 196.**

Warrantless search—motion to suppress—person in need of immediate aid or need to protect or preserve life or prevent serious injury—The trial court's decision to deny defendant's suppression motion in a felonious possession of cocaine and possession of drug paraphernalia case was not subject to reversal on appeal because: (1) warrantless searches are permissible when officers believe that persons in the premises to be searched are in need of immediate aid or where there is a need to protect or preserve life or prevent serious injury; and (2) although defendant contends the investigating officers exceeded the scope of the investigative activities that they were allowed to undertake in light of a "be on the lookout" message, the mere fact that investigating officers saw no indication that the pertinent individual had sustained personal harm or that he was under direct physical restraint at the time that he exited the vehicle simply did not suffice to render further investigative activities inappropriate given the concerns relayed to investigating officers that the individual might have

WORKERS' COMPENSATION—Continued

WORKERS' COMPENSATION—Continued

***Pleasant* claim—sheriff—employer—summary judgment—**The trial court did not err by granting summary judgment for defendant sheriff on a willful and wanton negligence claim under *Pleasant v. Johnson*, 312 NC 330, because the sheriff here was the employer rather than a co-employee, as in *Pleasant*. **Greene v. Barrick, 647.**

Set-off—county insurance policy—The trial court did not err as a matter of law by holding that the $197,193.75 that plaintiff deputy sheriff had received in workers' compensation could not be directly set off from the uninsured motorist coverage limits in the county's policy. Any amount paid by the county to plaintiff through the Workers' Compensation Act shall not be deducted from the coverage limits, but instead shall constitute a lien against any amount recovered in accordance with N.C.G.S. § 97-10.2. **Nolan v. Cooke, 667.**

***Woodson* claim—sheriff's department—operation of helicopter—**Summary judgment was correctly granted for a sheriff's deputy involved in a helicopter program on a *Woodson* claim where the claim could be asserted only to the extent it constituted an action against the employer-sheriff, and the sheriff was protected by governmental immunity because maintenance and operation of a helicopter are incidental to the police power. **Greene v. Barrick, 647.**

Work-related injury—psychological condition—The Industrial Commission did not err in a workers' compensation case by determining that plaintiff's current psychological condition was caused by a compensable work-related brain injury and by awarding total disability compensation. **Cannizzaro v. Food Lion, 660.**

ZONING

Subject matter jurisdiction—failure to plead—waivability of ordinance—A board of county commissioners conducted a public hearing less than thirty days after the filing of a rezoning request in violation of provisions of the county zoning ordinance when the time is computed in accordance with Rule of Civil Procedure 6(a), a planning board or a planning official had no authority to modify this time requirement by interpretation, and the thirty-day ordinance requirement could not be waived by the county. **Murdock v. Chatham Cnty., 309.**

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