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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. JIMMY WAYLON WARD

No. COA08-978

(Filed 18 August 2009)

1. Evidence— prior crimes or bad acts—drug seizures—prior incident ending in dismissal—admissibility

Evidence of drug seizures in an earlier incident in which the charges were subsequently dismissed for insufficient evidence was permissible in this case under N.C.G.S. § 8C-1, Rule 404(b) for the purpose of showing intent, knowledge, identity, and the existence of a common plan or scheme to sell drugs. The time between events was relatively short (February of 2005 to August of 2006) and the similarities substantial.

2. Evidence— prior crimes or bad acts—drug possession—prior incident ending in dismissal—no probative value

Under an N.C.G.S. § 8C-1, Rule 403 analysis, the probative value of an earlier incident in which defendant had in his possession prescription medicine depended upon a finding that defendant then possessed unlawful controlled substances. Since defendant was acquitted of the earlier offenses, the admission of evidence of the earlier incident was error.

3. Evidence— prior crimes or bad acts—drug possession—prior incident—prejudicial as to similar drugs—not prejudicial for unrelated substances and charges

The erroneous admission of evidence that defendant possessed prescription medication on an earlier occasion would not

have affected convictions in a current prosecution involving unrelated substances and paraphernalia not usually associated with prescription drugs. However, there is a reasonable possibility that the erroneous admission of the earlier seizure of prescription medications from defendant affected his chances for a more favorable outcome on current charges involving prescription drugs, as well as maintaining a dwelling and a vehicle for the purpose of keeping and selling drugs.

4. Evidence— expert testimony—controlled substances—visual identification

The trial court erred in an unlawful drug prosecution by allowing an expert witness to identify controlled substances based on a visual examination rather than a chemical analysis. The visual procedure used here does not provide adequate indices of reliability sufficient to support the admission of expert testimony.

Appeal by Defendant from judgment entered 14 January 2008 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 23 February 2009.

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

Paul F. Herzog, for Defendant.

ERVIN, Judge.

Jimmy Waylon Ward (Defendant) appeals a judgment entered 14 January 2008 based upon his convictions for six counts of trafficking in opium based on indictments returned in File Nos. 06 CrS 60670 and 06 CrS 60685,[1] and single counts of intentionally maintaining a dwelling for keeping or selling controlled substances,[2] possession of cocaine, and intentionally maintaining a vehicle for the keeping or selling controlled substances, which reflected charges set out in the first, second, and third counts of the indictment returned in File No. 06 CrS 60686.[3] The trial court's judgment also reflected a jury verdict

1. In the present cases, Defendant was charged with trafficking in opium by sale, transportation, and possession on 22 August 2006 in File No. 06 CrS 60670 and by manufacturing, possession, and transportation on 23 August 2006 in File No. 06 CrS 60685.

2. The controlled substances that Defendant allegedly kept at or sold from his dwelling were "Lorcet, Valium, Ritalin, Lortab, Percocet, Xanax, Oxycodone, Cocaine and Adderall."

3. The controlled substances that Defendant allegedly kept at or sold from the vehicle in question included "Lorcet and Lortab."

convicting Defendant of possession of Ritalin with the intent to sell or deliver, possession of Xanax with the intent to sell or deliver, and possession of Valium with the intent to sell or deliver, which were charged in the first, second, and third counts of the indictment returned in File No. 06 CrS 60687, and possession of drug paraphernalia, which was charged in the fourth count of the indictment returned against Defendant in File No. 06 CrS 60689. The jury also convicted Defendant of possessing Oxycodone with the intent to sell or deliver, which was charged in the third count of the indictment returned in File No. 06 CrS 60688.[4] After accepting the jury's verdict, the trial court arrested judgment in connection with Defendant's conviction for possessing Oxycodone with the intent to sell or deliver. The trial court consolidated all of the remaining charges for judgment[5] and imposed an active term of ninety to one hundred and seventeen months imprisonment in the custody of the North Carolina Department of Correction as required by N.C. Gen. Stat. § 90-95(h)(4)b. The trial court also required Defendant to pay a $100,000.00 fine. From this judgment, Defendant appeals.

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4. The jury found Defendant not guilty of possession with intent to sell or deliver Percocet, which was charged in File No. 06 CRS 60688.

5. In addition to the convictions discussed in the text, the trial court included two convictions for possession of Schedule II controlled substances from File No. 06 CrS 60688 in the list of offenses for which Defendant was being sentenced in the consolidated judgment. After careful study of the record, we believe that the trial court's decision to include these two counts in the list of offenses for which Defendant was sentenced in the consolidated judgment to reflect a clerical error. In the indictment returned against Defendant in File No. 06 CrS 60688, the grand jury charged Defendant with possessing Lortab, Percocet, and Oxycodone, all of which are Schedule II substances, with the intent to sell and deliver. The record reveals, however, that the trial court dismissed the Lortab possession count in response to Defendant's motion; that the jury acquitted Defendant of possessing Percocet; and that the trial court arrested judgment following Defendant's conviction for possessing Oxycodone with the intent to sell and deliver. We see no basis in the record for including two counts of possessing a Schedule II controlled substance with the intent to sell and deliver in File No. 06 CrS 60688 in the list of convictions for which Defendant was being sentenced in the judgment imposed by the trial court. Even though Defendant does not raise this argument on appeal, we exercise our discretion under N.C.R. App. P. 2 to address this error. *See State v. Owens*, 160 N.C. App. 494, 498, 586 S.E.2d 519, 522 (2003) (addressing an error not raised by the defendant on appeal, pursuant to N.C.R. App. P. 2, regarding a trial court's judgment convicting the defendant of both felonious larceny and illegal possession based on the taking and possession of the same items, which was inconsistent with *State v. Perry*, 305 N.C. 225, 236-37, 287 S.E.2d 810, 817 (1982), and ruling that the consolidation of the convictions for judgment did not "cure the error"). As a result, we request the trial court to examine the record and, as appropriate, correct the judgment entered against Defendant on remand to the extent that these two offenses should not have been included in the list of convictions for which Defendant was being sentenced.

We grant Defendant a new trial on certain charges based on our belief that the trial court erred by (1) allowing the admission of evidence relating to prior bad acts for which Defendant had been acquitted and (2) admitting testimony identifying certain drugs as controlled substances based on a visual identification process. As a result, we remand this case to the trial court for a new trial on certain charges and modification of the judgment entered against Defendant to reflect the outcome of any new trial conducted with respect to these charges and any other corrections that should be made to the judgment in light of our decision.

I: Factual Background

On 22 August 2006, Mandy Pope (Pope) visited the New Hanover County Sheriff's Office for the purpose of discussing Defendant's drug-related activities with law enforcement officers. Pope had known Defendant for approximately two and one-half years, and had purchased prescription pain medications for her own use and that of her mother from him on a regular basis.

At the request of Officer Chris Robinson (Officer Robinson), Pope telephoned Defendant and arranged to meet him for the purpose of buying pain medications. Pope was provided with a recording device, which she carried in her purse, and $300, part of which was to be used in her transaction with Defendant.

Officer Nancy Willaford (Officer Willaford) accompanied Pope to Carolina Beach Exxon in a minivan. Defendant met them there in a black Monte Carlo. Pope got out of the minivan and entered the car driven by Defendant, while Officer Willaford stayed in the minivan.

Following a short conversation with Pope, Defendant exited the Monte Carlo and opened the trunk. Upon returning to the passenger compartment, Defendant sold thirty blue, oval-shaped pills to Pope for $180. Pope testified that the pills she purchased from Defendant were Lorcets. Before leaving, Pope agreed to meet Defendant for sex in an hour.

After Defendant drove away, Pope and Officer Willaford returned to the New Hanover County Sheriff's Office. The thirty blue, oval-shaped pills that Pope received from Defendant were turned over to the officers. At that point, Officer Robinson procured a warrant for Defendant's arrest. A search warrant for Defendant's home, which was located at 6514 Myrtle Grove Road, was issued on the following day.

As investigating officers undertook surveillance of Defendant's home, Officer Robinson identified Defendant as the driver of a vehicle outside the residence and conducted an investigatory stop of that vehicle. The officers discovered three pill bottles and a small amount of cash on Defendant's person at that time. One pill bottle bore Defendant's name, and another bore the name of Manuel Ward.

According to Defendant, the car was owed by Manuel Ward, his cousin from California. Defendant denied knowing what was in the trunk, stated that the trunk was broken, and claimed that he did not have access to it. A search of the trunk resulted in the seizure of several bottles containing various substances and cash. In addition, another prescription bottle and additional cash were discovered below the carpeting in the trunk.

A subsequent search of Defendant's home revealed the presence of prescription bottles bearing several different names, some of which contained pills and others which did not; a white, rock-like substance, which was later identified as cocaine; digital scales with a chalky residue; fictitious identification cards; and firearms. A prescription bottle bearing the name of Manuel Ward that contained ninety-three pills was seized from a large storage shed outside Defendant's home.

At trial, Special Agent Irvin Lee Allcox (Special Agent Allcox), a chemist employed by the State Bureau of Investigation, testified as an expert in the field of the chemical analysis of drugs and forensic chemistry. Special Agent Allcox testified that he performed a chemical analysis or visual examination of the evidence seized from Defendant, Defendant's car, Defendant's home, and the storage shed outside Defendant's home. According to Special Agent Allcox, these substances included Cocaine, Dihydrocodeinone (an opium derivative), Hydrocodone (an opium derivative), Oxycodone (an opium derivative)[6], Amphetamine (Adderall), Alprazolam (Xanax), Diazepam (Valium), Carisoprodol (Soma)[7], and Methylphenidate (Ritalin). Special Agent Allcox identified certain of the seized substances based upon a chemical analysis.[8] However, Special Agent

6. Special Agent Allcox testified that Percocet was a combination of Oxycodone and acetaminophen.

7. Carisoprodol (Soma) is not a controlled substance.

8. Special Agent Allcox identified the following drugs based on a chemical analysis: three grams of Cocaine; one-hundred and twenty-five tablets of Dihydrocodeinone (an opium derivative) discovered on Defendant's person, in his bedroom, in a shed outside his residence, or in the trunk of his car on 23 August 2006; eighty-five tablets of

Allcox identified certain other substances on the basis of a visual examination of the size, shape, color of and markings on the tablets in question.[9]

Defendant denied possessing most of the drugs found at 6514 Myrtle Grove Road. Defendant testified that the drugs might have belonged to Manuel Ward or Manuel Ward's girlfriend. Defendant claimed to have last seen Manuel Ward not long before his arrest. In addition, Manuel Ward's sister, Pearl Bellerose (Bellerose), testified that Manuel Ward left Wilmington fifteen years before the trial, came back to Wilmington seven to eight months prior to the trial, and then returned to Spokane, Washington. Defendant also presented evidence tending to show that he had filled prescriptions at local pharmacies, including multiple refills for Oxycodone and Hydrocodone. According to Defendant, some of the bottles seized on 23 August 2006 contained his personal prescription medications.

II: Procedural History

On 23 and 24 August 2006, warrants for arrest were issued charging Defendant with six counts of trafficking in opium; single counts of maintaining a vehicle and dwelling for the purpose of keeping and selling various prescription medications, possession of cocaine with the intent to sell and deliver, possession of Ritalin with the intent to sell and deliver, possession of Xanax with the intent to sell and deliver, possession of Valium with the intent to sell and deliver, possession of Lortab with the intent to sell and deliver, possession of Percocet with the intent to sell and deliver, possession of Oxycodone with the intent to sell and deliver, possession of Adderall with the intent to sell and deliver, and possession of drug paraphernalia; and two counts of possession of Lorcet with the intent to sell and deliver. On 25 September 2006, the New Hanover County grand jury returned

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Hydrocodone (an opium derivative) discovered in the trunk of Defendant's car on 23 August 2006; and thirteen tablets of Amphetamine (Adderall) discovered in the trunk of Defendant's car on 23 August 2006.

9. Special Agent Allcox identified the following drugs based on the visual inspection process discussed later in this opinion: thirty Hydrocodone (an opium derivative) tablets received as a result of the 22 August 2006 transaction between Defendant and Pope; three tablets and tablet fragments of Amphetamine (Adderall) and an undisclosed number of Carisoprodol (Soma) tablets, seized as a result of the search of Defendant's shed and bedroom on 23 August 2006; eighty-three and one-half tablets of Alprazolam (Xanax), fourteen tablets of Diazepam (Valium), and fifteen and one-half tablets of Methylphenidate (Ritalin) seized from Defendant's person on 23 August 2006; and more than 23 tablets of Oxycodone (an opium derivative), five and one-half tablets of Methylphenidate (Ritalin), and an undisclosed amount of Carisoprodol (Soma) seized from the trunk of Defendant's car on 23 August 2006.

true bills of indictment charging Defendant with six counts of trafficking in opium, maintaining a dwelling for the purpose of keeping and selling various prescription medications and cocaine, possession of cocaine with the intent to sell and deliver, maintaining a vehicle for the purpose of keeping and selling various prescription medications, possession of Ritalin with the intent to sell and deliver, possession of Xanax with the intent to sell and deliver, possession of Valium with the intent to sell and deliver, possession of Lortab with the intent to sell and deliver, possession of Percocet with the intent to sell an deliver, possession of Oxycodone with the intent to sell and deliver, two counts of possession of Lorcet with the intent to sell and deliver, possession of Adderall with the intent to sell and deliver, and possession of drug paraphernalia.

The cases against Defendant came on for trial at the 7 October 2008 session of the New Hanover County Superior Court. At the conclusion of the State's evidence, the trial court granted Defendant's motion to dismiss the possession of Lortab with the intent to sell and deliver charge, the possession of Lorcet with the intent to sell and deliver charges, and the possession of Adderall with the intent to sell and deliver charge. After hearing all of the evidence and the trial court's instructions, the jury convicted Defendant of six counts of trafficking in opium, maintaining a dwelling for keeping or selling controlled substances, possession of cocaine, maintaining a vehicle for keeping or selling controlled substances, possession of Ritalin with the intent to sell or deliver, possession of Xanax with the intent to sell or deliver, possession of Valium with the intent to sell and deliver, possession of Oxycodone with the intent to sell or deliver, and possession of drug paraphernalia. On the other hand, the jury acquitted Defendant on the possession of Percocet with the intent to sell and deliver charge. After arresting judgment in the Oxycodone possession charge, the trial court consolidated all of Defendant's convictions for judgment and imposed the mandatory sentence for individuals convicted of trafficking in opium in an amount between 14 and 28 grams required by N.C. Gen. Stat. § 90-95(h)(4)b. Defendant noted an appeal to this Court from the trial court's judgment.

III: Substantive Legal Analysis

A: Admissibility of Prior Bad Act Evidence

Defendant first contends that the trial court erred by admitting evidence of certain prior bad acts allegedly committed by Defendant contrary to N.C. Gen. Stat. § 8C-1, Rule 404(b). More specifically,

Defendant challenges the admission of evidence relating to evidence seized at the time of his 10 February 2005 arrest for alleged violations of the controlled substance laws similar to those under consideration in this case. After careful consideration, we conclude that the trial court erred by admitting evidence that Defendant possessed certain prescription medications on that occasion and that Defendant is entitled to a new trial in the cases with which he has been charged with prescription drug-related offenses.[10]

1: General Principles of Rule 404(b) Analysis

N.C. Gen. Stat. § 8C-1, Rule 404(b), has been characterized as a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one *exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature . . . charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in the original). Even so, given "the perils inherent in introducing [evidence of] prior crimes under Rule 404(b), several constraints have been placed on the admission of such evidence." *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007).

First, in order for evidence relating to the prior crime to be admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b), it must have some relevance to the issue of the defendant's guilt of the crime for which he or she is on trial. N.C. Gen. Stat. § 8C-1, Rule 401 (2005) (stating that " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). As noted above, however, the evidence in question must be relevant to some issue other than the defendant's "propensity

10. In addition to the arguments discussed in the text, Defendant also contends that evidence seized in connection with his 10 February 2005 arrest was obtained as the result of an unconstitutional search and seizure and should have been excluded pursuant to the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 20 of the North Carolina Constitution. In response, the State contends that Defendant has not properly preserved this issue for appellate review and that the 10 February 2005 search and seizure was conducted consistently with applicable constitutional standards. This Court has previously upheld the lawfulness of the search and seizure that made the evidence that is the subject of this portion of Defendant's challenge to his convictions available to the State. *State v. Ward* (No. COA08-5240) (2009). As a result, for the reasons set forth in our decision rejecting Defendant's search and seizure claim in connection with his earlier appeal, we conclude that the challenged evidence was not obtained as the result of an unconstitutional search and seizure.

or disposition to commit an offense of the nature . . . charged." *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54.

In addition, otherwise relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . or [by] needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403. The decision as to whether to exclude evidence under N.C. Gen. Stat. § 8C-1, Rule 403 is committed to the trial court's discretion. *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. A discretionary decision made by a trial judge under N.C. Gen. Stat. § 8C-1, Rule 403 will be left undisturbed on appeal unless it "is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133 (1993).

Finally, "the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *State v. al-Bayyinah*, 356 N.C. 150, 155, 567 S.E.2d 120, 123 (2002). In order to satisfy the "similarity" requirement, evidence of a prior bad act must constitute "substantial evidence tending to support a reasonable finding by the jury that the defendant committed the similar act." *State v. Stager*, 329 N.C. 278, 303, 406 S.E.2d 876, 890 (1991) (quotation omitted). A prior act or crime is " 'similar' if there are 'some unusual facts present in both crimes[.]' " *Stager*, 329 N.C. at 304, 406 S.E.2d at 890 (citations omitted). "[R]emoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Stager*, 329 N.C. at 307, 406 S.E.2d at 893.

2: Evidence Admitted by Trial Court

Prior to trial, Defendant filed a motion *in limine* seeking the exclusion of evidence concerning evidence obtained in connection with his 10 February 2005 arrest, which led to his subsequent indictment, pursuant to N.C. Gen. Stat. §§ 8-C, Rules 401, 402, 403, 404(b), and 608(b). In his motion *in limine*, Defendant contended that the evidence in question lacked probative value and that its admission would be unduly prejudicial. More specifically, the motion *in limine* alleged that:

> Evidence of any prior bad act or acts of the Defendant, Jimmy Waylon Ward, will have no probative value toward the issue of

> this particular case and will only go to prejudice the jury against the Defendant, Jimmy Waylon Ward. In addition, our rules of evidence would not allow such a statement to be entered [in]to evidence and the admittance of which evidence would be prejudicial error.

In arguing this motion, Defendant pointed out that the trial judge had dismissed some of the charges arising from his 10 February 2005 arrest for evidentiary insufficiency and contended that it was inappropriate for the State to be allowed to present evidence of prior bad acts that resulted in charges which were eventually dismissed as lacking adequate evidentiary support.

The trial court allowed Defendant's motion *in limine* in part and denied it in part, stating that "I'm going to allow the testimony with regards to . . . what the search revealed of his house and the prescription containers . . . in the house. I'm going to allow the motion . . . as to the firearms, and order the State not to make reference . . . to the firearms found in the previous case." The trial court denied Defendant's motion relating to the evidence seized from Defendant's person on 10 February 2005, thus allowing the admission into evidence of testimony that police "found in [Defendant's] pocket two black containers, one containing nine pills, [and] the other containing several pieces of crack cocaine." When asked whether the officer would be able to testify as to "what [he thought] was" in the prescription containers, the trial court responded, "[h]e'll be able to testify [as to] what was . . . on the labels" of the prescription bottles. However, the trial court specifically denied the officer the right to "talk[] about his conclusions as to what [actual drugs were contained in the prescription bottles];" instead, the trial court stated that "[the officer will] be able to say, 'I found these,' and that's where the inquiry ends. . . . He's not going to say, 'I've looked at the PDR (Physician's Desk Reference) and . . . this pill looks like this, which has been identified as [a certain prescription drug]." According to the trial court, the evidence admitted pursuant to the trial court's ruling showed Defendant's "intent, his knowledge, and . . . a plan, which would be admissible." The trial court also concluded that "the probative value [of the evidence] outweigh[ed] any unfair prejudice to the defendant." After admitting the disputed evidence, the trial court instructed the jury that testimony regarding the events that occurred at and about the time of Defendant's 10 February 2005 arrest was "received solely for the purpose of showing that the defendant had the intent, which is a necessary element of some of the crimes charged in these cases,

and that there existed in the mind of the defendant a plan, scheme, system or design involving the crimes charged in these cases.[11]"

In light of the trial court's ruling, the State presented the testimony of Jonathan Hart, a sergeant with the New Hanover County Sheriff's Department (Sergeant Hart). Sergeant Hart testified, in pertinent part, that he went to Defendant's residence, which was then located at 620 Inlet Acres, on 10 February 2005 as part of an investigation into complaints that Defendant possessed narcotics. As he approached Defendant's residence, he observed Defendant driving a white Dodge Caravan away from that location. After stopping Defendant and initiating a search of his person, Sergeant Hart found two small black pill containers, one of which contained six blue oval pills and three white round tablets and the other of which contained several pieces of crack cocaine. At the time he was stopped, Defendant presented a driver's license with the name of Manuel Ward. Defendant continued to claim to be Manuel Ward until after he was processed. A subsequent search of Defendant's residence resulted in the seizure of a digital scale and numerous prescription bottles, "some with labels" and "some without," and three black containers. Sergeant Hart testified that Defendant stated that there was 2.8 grams of crack cocaine in one of the black containers, 1.2 grams of crack cocaine in the second black container, and .3 grams of crack cocaine in the third black container. According to Sergeant Hart, the prescription bottles that he seized in Defendant's residence included a bottle that lacked patient information containing 19 white round tablets and was labeled as containing Trazedone; a bottle bearing the name of Manuel Ward containing 37 white round tablets and labeled as containing Soma; a prescription bottle bearing "the name of Jason King" containing 26 orange oval tablets and labeled as containing Adderall; a bottle bearing the name of Manuel Ward containing 18 blue oval tablets and labeled as containing Hydrocodone; a prescription bottle bearing the name of Jean Duncan containing eight round blue tablets and labeled as containing Xanax; a prescription bottle bearing Defendant's name containing twelve round white tablets and labeled as containing Oxycodone; and a prescription bottle bearing the name of Manuel Ward and labeled as containing Hydrocodone.

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11. In his instructions to the jury at the conclusion of all the evidence, the trial court made a slight modification to the list of purposes for which the jury was allowed to consider the evidence in question. At that time, the trial court instructed the jury that it could consider the disputed evidence for the purposes of showing identity, intent, and the existence of a common plan or scheme.

As the result of this incident, Defendant was charged with possession of cocaine with the intent to sell and deliver, possession of drug paraphernalia, maintaining a dwelling for keeping or selling drugs, possession of Adderall, possession of Valium, possession of Hydrocodone, possession of Xanax, and resisting arrest by providing identification bearing the name of Manuel Ward rather than his own. During the course of Defendant's trial on these charges, the trial judge dismissed the possession of drug paraphernalia, possession of Valium, possession of Hydrocodone, possession of Adderall, possession of Xanax, and resisting arrest charges due to the insufficiency of the State's evidence to support a conviction.[12] Subsequently, the jury convicted Defendant of possessing cocaine with the intent to sell and deliver and maintaining a dwelling for the keeping and selling of cocaine. This Court upheld Defendant's convictions in an unreported opinion filed on 17 March 2009. *State v. Ward* (No. COA08-524) (2009).

3: Application of Traditional Rule 404(b) Analysis

[1] On appeal, Defendant argues that "the State was collaterally estopped from submitting any evidence at his trial for the August 2006 offenses concerning the charges [the trial court previously] dismissed for insufficiency of the evidence." In support of this assertion, Defendant relies on *State v. Solomon*, 117 N.C. App. 701, 704, 453 S.E.2d 201, 203 (1995), and *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990). As a result, the principal argument that Defendant has advanced on appeal with respect to the admissibility of the evidence obtained as a result of his 10 February 2005 arrest rests on collateral estoppel principles.

In *Solomon*, this Court quoted the decision of the United States Supreme Court in *Ashe v. Swenson*, 397 U.S. 436, 443, 25 L. Ed. 2d 469, 475 (1970), for the proposition "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Solomon*, 117 N.C. App. at 704, 453 S.E.2d at 203. The *Solomon* Court applied this principle in examining the admissibility of evidence pertaining to charges for which a defendant had previously been acquitted. In *Solomon*, an officer searched the defendant's vehicle and discovered a cigarette case containing rolling papers, marijuana, cocaine powder, and part of a marijuana cigarette. The defendant was acquitted in District Court of possession of marijuana

12. Sergeant Hart admitted as much on cross-examination.

and possession of drug paraphernalia; the defendant's trial in Superior Court addressed the issue of his guilt of possession of cocaine. This Court held that the trial court did not err by admitting evidence of the defendant's possession of marijuana and rolling papers during the Superior Court proceeding despite the defendant's acquittal of marijuana possession and possession of drug paraphernalia in the District Court because the challenged evidence formed an "integral and natural part of an account of the [defendant's] crime" of possession of cocaine. *Solomon*, 117 N.C. App. at 706, 453 S.E.2d at 205.

In *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990), our Supreme Court reached a similar result. In *Agee*, the Supreme Court upheld the admission of evidence that the defendant possessed marijuana in a case arising out of the same incident in which the defendant was charged with possessing LSD even though he had been acquitted of possessing marijuana at an earlier proceeding. In reaching this conclusion, the Court stated:

> Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

Agee, 326 N.C. at 548, 391 S.E.2d at 174 (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (1985)). However, the admissibility of evidence "form[ing] an integral and natural part of an account of the crime" is still "subject to the weighing of probative value versus unfair prejudice mandated by Rule 403." *Agee*, 326 N.C. at 549, 391 S.E.2d at 175. According to the Supreme Court, "[b]ecause the evidence of defendant's marijuana possession served the purpose of establishing the chain of circumstances leading up to his arrest for possession of LSD, Rule 404(b) did not require its exclusion as evidence probative *only* of defendant's propensity to possess illegal drugs." *Agee*, 326 N.C. at 550, 391 S.E.2d at 175-76 (emphasis in original).

Both *Agee* and *Solomon* involve instances in which the same essential evidence underlay charges that were subject to adjudication in two separate trials. In each instance, the facts underlying the charges for which the defendant had been acquitted were an "integral and natural part of an account of the [defendant's] crime[.]" The same cannot be said for the facts at issue here, which relate to a seizure

that occurred on an entirely different occasion. For that reason, we do not find either *Agee* or *Solomon* directly relevant to the present controversy. As a result, we will first examine the challenged evidence in light of the principles traditionally employed in evaluating challenges to evidence admitted pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b), which focus on the similarity between the prior incident and the incident that underlies the current charges against the defendant. *See Dowling v. United States*, 493 U.S. 342, 348, 107 L. Ed. 2d 708, 717 (1990) (holding that a prior acquittal does not preclude the admission of evidence of a defendant's other alleged crimes in a prosecution for the bank robbery on the basis of collateral estoppel principles "because . . . the prior acquittal did not determine an ultimate issue in the present case").

To be sure, the events of 10 February 2005 and 22-23 August 2006 were not absolutely identical. For example, the charges that resulted from Defendant's 10 February 2005 arrest did not rise to the level of trafficking.[13] Furthermore, the residence searched on 10 February 2005 arrest was located on Inlet Acres Drive instead of Myrtle Grove Road. As a result, there were certainly some differences between the facts at issue in connection with Defendant's 10 February 2005 arrest and the facts underlying the charges before the trial court and jury in this case.

On the other hand, these dissimilarities pale in comparison to the numerous similarities between the two sets of facts. For example, in each instance, quantities of crack cocaine and items that appeared to be prescription drugs were seized from Defendant. Defendant had numerous prescription bottles, some of which bore Defendant's name and some of which bore other names, on his person and in his residence on both occasions. On both occasions, Defendant carried identification bearing his own name and that of Manuel Ward, including identification bearing Manuel Ward's name and Defendant's picture. Defendant claimed that someone else owned the drugs seized from him on both 10 February 2005 and 23 August 2006. Defendant was found in possession of digital scales in both residences. The two sets of events occurred about a year and a half apart and in the same county. As a result, there were also substantial similarities and a relatively short interval between the events of 10 February 2005 and 22-23 August 2006.

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13. In the present cases, Defendant was charged with trafficking in opium by sale, transportation, and possession on 22 August 2006 in File No. 06 CrS 60670 and by manufacturing, possession, and transportation on 23 August 2006 in File No. 06 CrS 60685.

After careful consideration of the evidentiary record, we conclude that the substantial similarities between the two sets of events and the relatively short lapse of time between these incidents renders the introduction of evidence relating to the seizures made from Defendant's person and residence on 10 February 2005 at a trial arising from the events that occurred on 23 August 2006 permissible under N.C. Gen. Stat. § 8C-1, Rule 404(b), for the purpose of showing intent, knowledge, identity and the existence of a common plan or scheme to engage in the unlawful sale of controlled substances in New Hanover County. *State v. Stevenson*, 169 N.C. App. 797, 611 S.E.2d 206 (2005) (upholding admission in a trial in which the defendant was charged with possession of cocaine with the intent to sell and deliver of evidence describing incidents in which the defendant possessed cocaine in the same location and acted in the same general manner).

4: Rule 403 Analysis

[2] Although the disputed evidence meets the standards for admissibility enunciated in N.C. Gen. Stat. § 8C-1, Rule 404(b), we must still examine the extent to which this evidence should be excluded pursuant to N.C. Gen. Stat. § 8C-1, Rule 403. In *State v. Scott*, 331 N.C. 39, 413 S.E.2d 787 (1992), the Supreme Court stated in requiring the exclusion of evidence otherwise admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) under N.C. Gen. Stat. § 8C-1, Rule 403, that:

> [W]here the probative value of such evidence depends upon defendant's having in fact committed the prior alleged offense, his acquittal of the offense in an earlier trial so divests the evidence of probative value that, as a matter of law, it cannot outweigh the tendency of such evidence unfairly to prejudice the defendant. Such evidence is thus barred by N.C. R. Evid. 403.

Id., 331 N.C. at 41, 413 S.E.2d at 788. According to the Supreme Court, this holding rested "on the proposition that the presumption of innocence continues with the defendant after his acquittal and so erodes the probative value of the evidence of the previous crime that it is more prejudicial than probative, making it inadmissible under N.C.G.S. § 8C-1, Rule 403." *State v. Lynch*, 337 N.C. 415, 419, 445 S.E.2d 581, 582 (1994).[14]

14. The principle enunciated in *Scott* does not bar the admission of testimony relating to other bad acts for which the defendant was acquitted if the other bad acts and the crime charged were "part of a single continu[ous] transaction." *State v. Bell*, 164 N.C. App. 83, 87-88, 594 S.E.2d 824, 826-27 (2004).

Although the principle set forth in *Scott* would not operate to bar the presentation of evidence that Defendant possessed cocaine and digital scales on 10 February 2005 given Defendant's subsequent conviction for possession of cocaine with the intent to sell and deliver and possession of drug paraphernalia, *See Stager*, 329 N.C. at 303, 406 S.E.2d at 890 (holding that a prior conviction may be a bad act for purposes of Rule 404(b) if substantial evidence supports a finding that defendant committed both acts, and the "probative value is not limited solely to tending to establish the defendant's propensity to commit a crime such as the crime charged"), it does operate the bar the presentation of evidence tending to show that Defendant possessed various prescription drugs which he was acquitted of possessing. *State v. Allen*, 144 N.C. App. 386, 388, 548 S.E.2d 554, 555 (2001) (holding that the dismissal of criminal charges for evidentiary insufficiency is an acquittal for purposes of the double jeopardy clause). After careful review of the evidence and the applicable law, we conclude that the relevance of evidence that Defendant possessed various types of prescription medications on 10 February 2005 under each of the theories enunciated by the trial court in deciding that the evidence should be admitted hinges on a finding that Defendant did, in both instances, possess unlawful controlled substances, rendering that evidence inadmissible under the principle enunciated in *Scott*.[15] We will now explain our reasons for reaching this conclusion in more detail.

Among the charges lodged against Defendant arising from the events of 22-23 August 2006 were accusations that Defendant possessed various prescription drugs with the intent to sell and deliver. For that reason, several of the charges for which the Defendant was on trial in this case included a specific intent element. "Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused." *State v. McClain*, 240 N.C. 171, 175, 81 S.E.2d 364, 366 (1954). As a result, evidence tending to show that Defendant possessed prescription medications with the intent to sell or deliver on other occasions would clearly support a conclusion that Defendant possessed the requisite intent at the time of the alleged commission of the offenses charged. *State v. Morgan*, 329 N.C. 654, 661, 406

15. Admittedly, the only theories that were mentioned in the trial court's instructions to the jury were identity, intent, and common plan or scheme. However, we will address the knowledge issue as well in the interests of completeness.

S.E.2d 833, 837 (1991). However, the mere fact that Defendant possessed a collection of miscellaneous bottles containing a variety of unidentified pills would not tend to show that Defendant possessed the required mental state. Thus, the probative value of the evidence that prescription medications were seized from Defendant on 10 February 2005 for purposes of showing Defendant's intent on 22-23 August 2006 "depends upon [his] having . . . committed the prior alleged offenses." *Scott*, 331 N.C. at 41, 413 S.E.2d at 788.

Similarly, in order to be guilty of unlawfully possessing prescription medications, Defendant had to know the identity of the substances in question. *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702-03 (1985). "Where guilty knowledge is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite guilty knowledge, even though the evidence reveals the commission of another offense by the accused." *McClain*, 240 N.C. at 175, 81 S.E.2d at 367. For that reason, evidence tending to show that Defendant unlawfully possessed prescription medications on prior occasions tends to show the existence of the requisite guilty knowledge on 22-23 August 2006. *Weldon*, 314 N.C. at 403, 333 S.E.2d at 703. On the other hand, evidence that Defendant possessed a collection of miscellaneous bottles containing unidentified pills does not tend to show that Defendant had the requisite knowledge. Thus, the probative value of evidence that various prescription medications were seized in connection with Defendant's 10 February 2005 arrest for purposes of showing that he had the requisite guilty knowledge on 22-23 August 2006 "depends upon [his] having in fact committed the prior alleged offense." *Scott*, 331 N.C. at 41, 413 S.E.2d at 788.

In addition, "[w]here the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged." *McClain*, 240 N.C. at 175, 81 S.E.2d at 367. Thus, evidence that Defendant unlawfully possessed prescription drugs on both 10 February 2005 and 22-23 August 2006 might tend to identify him as the individual who possessed those drugs on both occasions. *State v. Reid*, 175 N.C. App. 613, 624, 625 S.E.2d 575, 584 (2006) (holding that evidence that the defendant and a witness sold drugs together was relevant to prove how the witness knew the defendant). However, evidence that Defendant possessed various bottles and a collection of

unidentified pills on 10 February 2005 does not tend to show that he was the individual who possessed a variety of prescription medications on 22-23 August 2006. As a result, "the probative value of" evidence relating to the seizure of prescription medications at the time of Defendant's 10 February 2005 arrest "depends upon [his] having in fact committed the prior alleged offense." *Scott*, 331 N.C. at 41, 413 S.E.2d at 788.

Finally, "[e]vidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." *McClain*, 240 N.C. at 176, 81 S.E.2d at 367. As a result, evidence that Defendant was involved in a long-standing plan to possess and sell or deliver prescription medications as evidenced by proof of the commission of prior bad acts is, under this State's decisional law, admissible for the purpose of proving that Defendant possessed prescription drugs with the intent to sell and deliver on 22-23 August 2006 in furtherance of that same common plan or scheme. *State v. Houston*, 169 N.C. App. 367, 372-73, 610 S.E.2d 777, 781-82 (2005), *disc. review denied and appeal dismissed*, 359 N.C. 639, 617 S.E.2d 281 (2005) (holding evidence of uncharged prior cocaine sales with numerous similarities to those for which the defendant was on trial admissible for, among other purposes, showing the existence of a common plan involving the prior sales and the transactions which were the subject of the charges pending against the defendant). Evidence that Defendant possessed a number of miscellaneous bottles and a collection of unidentified pills would not tend to show the existence of such a common scheme or plan. Thus, "the probative value of" evidence relating to items seized as part of Defendant's 10 February 2005 arrest "depends upon [his] having in fact committed the prior alleged offense." *Scott*, 331 N.C. at 41, 413 S.E.2d at 788.

In summary, for the reasons stated above, we hold that each of the reasons listed by the trial court as justifications for the admission of the disputed evidence hinged upon a determination that Defendant actually committed an offense for which he was later acquitted. Thus, the trial court contravened the principle enunciated in *Scott* by admitting evidence that Defendant possessed Adderall, Hydrocodone, Oxycodone, and Xanax at the time of his arrest on 10 February 2005.

5: Prejudice

[3] Finally, we must now determine the extent to which "there is a reasonable possibility that, had the error not been committed, a dif-

ferent result would have been reached at trial." *Scott*, 331 N.C. at 46, 413 S.E.2d at 791; *see also State v. Fluker*, 139 N.C. App. 768, 776, 535 S.E.2d 68, 73-74 (2000) (holding that the erroneous admission in a misdemeanor larceny case of evidence elicited on cross-examination that the defendant had been detained in another store, resulting in charges for which she was later acquitted, was harmless given the overwhelming evidence against the defendant); *State v. Robinson*, 115 N.C. App. 358, 362, 444 S.E.2d 475, 477 (1994) (holding that, in a felonious breaking or entering and possession of housebreaking implements case, the erroneous admission of evidence that the defendant had committed a similar breaking or entering on another occasion, for which he was later acquitted, constituted harmless error given the overwhelming evidence of the defendant's guilt). After careful consideration, we are unable to ascertain how the erroneous admission of evidence that Defendant possessed various types of prescription medications on 10 February 2005 would have affected his convictions for possession of or trafficking in unrelated substances such as cocaine or opium.[16]

In addition, we are unable to see how the admission of this evidence would have prejudiced Defendant's chances for a more favorable verdict on the possession of drug paraphernalia charge given that the alleged drug paraphernalia did not include items usually associated with the possession or use of prescription medications. However, given the relatively close connection in time and the general similarity of the prescription medications possessed on both occasions, we believe that there is a reasonable possibility that the erroneous admission of the evidence that various prescription medications were seized from Defendant on 10 February 2005 affected his chances for a more favorable outcome in the cases in which he was convicted of possessing Ritalin, Xanax, and Valium with the intent to sell and deliver and the cases in which Defendant was convicted of maintaining a dwelling and a vehicle for the purpose of keeping and

16. Although Defendant's trafficking in opium convictions relating to events occurring on 22 August 2006 in File No. 06 CrS 60670 involved substances identified by Special Agent Allcox as Hydrocodone, we vacate Defendant's convictions in File No. 06 CrS 60670 for other reasons and so need not determine the extent to which the trial court's erroneous admission that Defendant possessed a bottle labeled as containing Hydrocodone on 10 February 2005 necessitates an award of appellate relief. In addition, as we understand the record, there is evidence of Defendant's involvement with a sufficient quantity of opiates other than Hydrocodone on 23 August 2006 to render the trial court's error in admitting evidence that Defendant possessed a bottle labeled as containing Hydrocodone on 10 February 2005 harmless for purposes of File No. 06 CrS 60685.

selling various drugs, including prescription medications. In reaching this conclusion, we rely upon a number of factors, such as the inherently subjective nature of a determination of Defendant's intent and the fact that Defendant denied possessing certain of the controlled substances in question. As a result, we conclude that Defendant is entitled to a new trial in the cases in which he is charged with possession of Ritalin with the intent to sell and deliver, possession of Xanax with the intent to sell and deliver, possession of Valium with the intent to sell and deliver, maintaining a vehicle for keeping and selling controlled substances, and maintaining a dwelling for keeping and selling controlled substances.

B: Identification of Controlled Substances by Visual Inspection

[4] Defendant next contends that the trial court erred by allowing an expert witnesses to identify certain substances allegedly found in his possession as controlled substances on the basis of a visual examination rather than a chemical analysis. After careful consideration of the briefs and record, we agree with Defendant's challenge to the admission of this expert testimony.

1: Legal Framework Governing Admission of Expert Testimony

N.C. Gen. Stat. § 8C-1, Rule 702(a) provides that, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." *Id.* The Supreme Court established a three-step inquiry for use in evaluating the admissibility of expert testimony in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995):

> (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) (citing *Goode* at 527-29, 461 S.E.2d at 639-41). As a result of the fact that Defendant has not challenged Special Agent Allcox's qualifications in the field of the chemical analysis of drugs and forensic chemistry and the fact that correctly identifying the relevant drugs was critical to the State's case against Defendant, the remainder of our analysis necessarily focuses on issues revolving around the first step specified in *Goode*.

In examining the reliability of the challenged method of proof employed by Special Agent Allcox, "a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two." *Goode*, 341 N.C. at 530, 461 S.E.2d at 641. "Initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable." *Howerton*, 358 N.C. at 459, 597 S.E.2d at 687. "[W]e do not adhere exclusively to the formula, enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and followed in many jurisdictions, that the method of proof 'must be sufficiently established to have gained general acceptance in the particular field in which it belongs.' " *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990). However, "when specific precedent justifies recognition of an established scientific theory or technique advanced by an expert, the trial court should favor its admissibility, provided the other requirements of admissibility are likewise satisfied." *Howerton*, 358 N.C. at 459, 597 S.E.2d at 687 (citing *State v. Williams*, 355 N.C. 501, 553-54, 565 S.E.2d 609, 640 (2002)).

In instances in which no precedent is available, our Supreme Court has enunciated the following nonexclusive "indices of reliability" for use in determining whether the expert's proffered scientific or technical method of proof is sufficiently reliable: "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked 'to sacrifice its independence by accepting [the] scientific hypotheses on faith,' and independent research conducted by the expert." *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687. In describing the manner in which these factors should be applied, the Supreme Court has emphasized the fundamental "distinction between the admissibility of evidence and its weight, the latter of which is a matter traditionally reserved for the jury." *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687 (citing *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940) (stating that "[t]he competency, admissibility, and sufficiency of the evidence is a matter for the court to determine. [Its] credibility, probative force, and weight is a matter for the jury")).

"[A] trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. "An abuse of discretion occurs when a trial judge's ruling is manifestly unsupported by reason." *State v. Summers*, 177

N.C. App. 691, 697, 629 S.E.2d 902, 907 (2006) (citations omitted). As a result, the ultimate issue which the Court must resolve in connection with Defendant's challenge to the admissibility of Special Agent Allcox's testimony identifying certain items as controlled substances using a visual inspection process is whether the trial court abused its discretion by effectively finding that the approach he employed was "sufficiently reliable."

2: Procedures Employed by Special Agent Allcox

At trial, Special Agent Allcox testified that he "examined State's exhibit 3-A and . . . made notes of pharmaceutical markings on State's Exhibit 3-A [and other exhibits listed in footnote eight of this opinion] and then used . . . medical literature . . . called Micromedics Literature[,]" a "publication that is used by the doctors in hospitals and pharmacies to identify prescription medicine[s]." According to Special Agent Allcox, the State Bureau of Investigation "subscribe[s] to" the Micromedics Literature and has "been using it in the SBI crime laboratory for the 35 years that [he has] been associated with the crime laboratory." Special Agent Allcox testified that the Micromedics Literature lists "all the pharmaceutical markings to identify the contents, the manufacturer and the type of substances in the tablets[.]" In essence, the approach used by Special Agent Allcox to identify certain of the substances that the State seized from Defendant's person, residence, and outbuilding as controlled substances involved a visual examination of the appearance of and pharmaceutical markings on the medications in question and a comparison of the information derived from that process to information contained in the Micromedics Literature. Special Agent Allcox utilized this analytical approach in rendering opinions that Exhibit 3-A contained Hydrocodone; that Exhibit 26-A-4 contained Amphetamine (Adderall); that Exhibit 26-B-3 contained Alprazolam (Xanax), Diazepam (Valium), and Methylphenidate (Ritalin); that Exhibit 26-B-5 contained Oxycodone; that Exhibit 26-B-6 contained Methylphenidate (Ritalin); and that Exhibit 26-B-9 contained Oxycodone.[17] Defendant's challenge to the admission of that portion of Special Agent Allcox's testimony involving the use of this process presents an issue of first impression in this jurisdiction, which is whether visual identification provides a sufficiently reliable basis for

17. Special Agent Allcox performed a chemical analysis on State's Exhibit 26-A-1, which tested positive for cocaine, and Exhibits 26-A-3, 26-B-1, 26-B-4, 26-B-7, 26-B-12, 26-B-13, which tested positive for Dihydrocodeinone or Hydrocodone.

the admission of expert testimony identifying alleged prescription medications as controlled substances.

3: Precedent Addressing Admissibility of Visual Identification Testimony Relating to Controlled Substances

The first issue that we must address is examining existing precedent relating to the appropriateness of identifying particular items as controlled substances on the basis of visual analysis. The appellate courts in this jurisdiction have addressed the admissibility of evidence identifying particular items as containing controlled substances on the basis of visual inspection on several occasions. *See State v. Fletcher*, 92 N.C. App. 50, 373 S.E.2d 681 (1988), *State v. Freeman*, 185 N.C. App. 408, 648 S.E.2d 876, 881-82 (2007), *State v. Llamas-Hernandez*, 189 N.C. App. 640, 659 S.E.2d 79 (2008), *rev'd*, 363 N.C. 8, 673 S.E.2d 658 (2009). Not all of these decisions involved testimony from individuals treated as experts; none of them relate to the identification of prescription medications; and none of them involved the exact technique employed by Special Agent Allcox. Even so, we will begin our analysis of the admissibility of Allcox's testimony by examining these decisions, since they do tend to illuminate the analysis that we should utilize in determining the admissibility of the challenged testimony.

In the first of these cases, this Court upheld the admission of testimony by two law enforcement officers that a substance sold to the defendant was marijuana. *Fletcher*, 92 N.C. App. at 58, 373 S.E.2d at 685. The officers, one of whom had been in law enforcement for sixteen and a half years, were permitted to testify as expert witnesses. This Court concluded that the two officers, through "study and experience," were better qualified than the jury to form an opinion as to the identity of the alleged controlled substance, rendering their testimony admissible. However, *Fletcher* was decided before *Goode* and *Howerton*, so we did not evaluate the "reliability" of the procedures employed by the officers and focused almost exclusively on the second *Goode* criterion instead. In reaching this result, the Court reasoned:

> Admittedly, it would have been better for the State to have introduced evidence of chemical analysis of the substance, especially in light of the fact that testimony indicated the State Bureau of Investigation had conducted an analysis. However, the absence of such direct evidence does not, as the appellant suggests, prove fatal. Though direct evidence may be entitled to

> much greater weight with the jury, the absence of such evidence does not render the opinion testimony insufficient to show the substance was marijuana.

Fletcher, 92 N.C. App. at 57, 373 S.E.2d at 686 (citation omitted). At bottom, we do not believe that *Fletcher* is controlling here in light of the clarification of the required analysis relating to the admissibility of expert testimony worked by *Goode* and the fact that the identification of marijuana is different in both degree and kind from the identification of prescription medications. As a result, this Court's reasoning in *Fletcher* does not justify upholding the methodology employed by Special Agent Allcox as "sufficiently reliable."

A few years later, this Court ruled in *State v. Freeman*, 185 N.C. App. 408, 648 S.E.2d 876 (2007), that the trial court did not err by allowing lay testimony that a substance was crack cocaine, even though the only basis for the officer's identification testimony was his "training and experience." In finding the officer's lay testimony admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 701, we explained:

> Officer Miller testified that two of the pills in the pill bottle seized during defendant's arrest were crack cocaine and that he based his identification of the pills as crack cocaine on his extensive training and experience in the field of narcotics. Officer Miller, who had been with the police department for eight years at the time, testified that he had come into contact with crack cocaine between 500 and 1000 times. As Officer Miller's testimony on this issue was helpful for a clear understanding of his overall testimony and the facts surrounding defendant's arrest, the trial court did not abuse its discretion, much less commit plain error, in permitting Officer Miller to testify as to his opinion that the pills were crack cocaine.

Freeman, 185 N.C. App. at 414, 648 S.E.2d at 882. As a result, the effect of *Freeman* was to extend the logic of *Fletcher* from marijuana to crack cocaine.

Shortly thereafter, in *State v. Llamas-Hernandez*, 189 N.C. App. at 640, 659 S.E.2d at 79, the defendant challenged the admission of lay opinion testimony from two detectives to the effect that a particular substance was powder cocaine. A divided panel of this Court upheld the trial court's decision in reliance on *Freeman*. In reaching this result, the majority noted that "the visual characteristics of cocaine in powder form are not unique to that substance alone." *Llamas-*

Hernandez, 189 N.C. App. at 646, 659 S.E.2d at 83 (citing Michael D. Blanchard & Gabriel J. Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Prosecutions*, 47 Am. U. L. Rev. 557 (1998)). However, after admitting that "the holding in *Freeman* concerns us[,] the majority felt "bound to follow it." *Llamas-Hernandez*, 189 N.C. App. at 647, 659 S.E.2d at 83. In dissent, Judge Steelman noted that the trial court first deprived the State of the ability to introduce a laboratory report concerning the alleged controlled substance as a sanction for a discovery violation, but then allowed the investigating officers to testify that the substance at issue was cocaine. *Id.*, 189 N.C. App. at 651, 659 S.E.2d at 86. Next, Judge Steelman noted that the General Assembly had adopted "a technical, scientific definition of cocaine." *Llamas-Hernandez*, 189 N.C. App. at 652, 659 S.E.2d at 86. More particularly, Judge Steelman noted that:

> There are different definitions of isomers for different controlled substances. For purposes of cocaine, isomer means "the optical isomer or diastereoisomer." N.C. Gen. Stat. § 90-87(14a). Optical isomers are compounds with the same molecular formula but which act in opposite ways on polarized light. *See* Ducor, *New Drug Discovery Technologies and Patents*, 22 Rutgers Computer & Tech. L.J. 369, 379 (footnote 47) (1996). Diastereoisomers are compounds whose molecules are not mirror images but each molecule rotates polarized light. *See* Strong, *FDA Policy and Regulation of Stereoisomers: Paradigm Shift and the Future of Safer, More Effective Drugs*, 54 Food Drug L.J. 463 (1999).

Llamas-Hernandez, 189 N.C. App. at 652, 659 S.E.2d at 86. As a result, "[b]y enacting such a technical, scientific definition of cocaine," Judge Steelman concluded that "it is clear that the General Assembly intended that expert testimony be required to establish that a substance is in fact a controlled substance." *Id.*, 189 N.C. App. at 652, 659 S.E.2d at 86. Judge Steelman further reasoned that, given the technical definition of a controlled substance and the existence of statutory procedures for the admission of laboratory reports and the discovery of both those reports and underlying materials, the General Assembly never "intended . . . that an officer could make a visual identification of a controlled substance." *Id.*, 189 N.C. App. at 653, 659 S.E.2d at 87. The Supreme Court reversed this Court's decision in *Llamas-Hernandez* on the basis of Judge Steelman's dissent without further comment. Although the Supreme Court did not directly over-

rule *Freeman*, it is hard to square the result reached in that case with the "technical, scientific definition" logic utilized by Judge Steelman in dissent with the subsequent approval of the Supreme Court. As a result, existing precedent suggests that controlled substances defined in terms of their chemical composition can only be identified through the use of a chemical analysis rather than through the use of lay testimony based on visual inspection.

4: Reliability of Identification Method Employed in this Case

Next, we will employ the *Goode* methodology to evaluate the admissibility of Special Agent Allcox's identification testimony. After careful consideration, we conclude that the approach employed by Special Agent Allcox is not consistent with the general thrust of existing precedent concerning how controlled substances should be identified in criminal trials and that the methodology he utilized is not sufficiently reliable for other reasons as well.

First, we are convinced that the essential logic underlying the Supreme Court's decision in *Llamas-Hernandez* militates against the use of the visual identification approach employed by Special Agent Allcox. Special Agent Allcox identified both Schedule II and Schedule IV controlled substances using this approach in this case. As was the case with the cocaine at issue in *Llamas-Hernandez*, the Schedule II and Schedule IV controlled substances identified by Special Agent Allcox using the challenged methodology have a "technical, scientific definition." For example, N.C. Gen. Stat. § 90-90(1)a defines Schedule II controlled substances to include "[o]pium and opiate and any salt, compound, derivative, or preparation of opium and opiate, excluding apomorphine, nalbuphine, dextorphan, naloxone, naltrexone, and nalmefene and their respective salts, but including" substances such as "Hydrocodone" and "Oxycodone." Moreover, N.C. Gen. Stat. § 90-90(1)b expands the definition of a Schedule II controlled substance to incorporate "[a]ny salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph 1 of this subdivision [of N.C. Gen. Stat. § 90-90(1)], except that these substances shall not include the isoquinoline alkaloids of opium." Similarly, N.C. Gen. Stat. § 90-90(2) defines a Schedule II controlled substance as including "[a]ny of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation unless specifically exempted or listed in other

schedules[,]" including "[d]ihydrocodeine." Additionally, N.C. Gen. Stat. § 90-90(3) treats "[a]ny material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the nervous system unless specifically exempted or listed in another schedule" as a Schedule II controlled substance, including "[a]mphetamine[,] its salts, optical isomers, and salts of its optical isomers" and "Methylphenidate." Finally, N.C. Gen. Stat. § 90-92(a)(1) provides that, "[u]nless specifically excepted or unless listed in another schedule," the category of Schedule IV controlled substances includes "any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:" "Alprazolam" and "Diazepam." A cursory reading of these statutory provisions demonstrates that they define various controlled substances in "technical, scientific" ways, a fact that suggests, consistently with the approach adopted by the Supreme Court in *Llamas-Hernandez*, that identification testimony should rest on a chemical analysis rather than visual identification. Although some of these definitions include references to specific substances such as "Hydrocodone" or "Diazepam," that fact does not exempt such substances from the full force of the logic of the Supreme Court's decision in *Llamas-Hernandez*, since those names are either the names of products that have a specific chemical composition, such as Hydrocodone, or are the names of chemical compounds themselves, such as Diazepam. As a result, we conclude that the visual identification procedure employed by Special Agent Allcox, as explained in his expert testimony, is inconsistent with existing precedent.

Secondly, since existing precedent does not directly address the proper manner in which to identify prescription medications such as those at issue here, we will also examine the nonexclusive "indices of reliability" specified in *Goode* to determine whether the expert's proffered scientific or technical method of proof is sufficiently reliable: "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked 'to sacrifice its independence by accepting [the] scientific hypotheses on faith,' and independent research conducted by the expert." *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687. Although Special Agent Allcox has an extensive background in the field of drug analysis, we do not believe the record in this case provides an adequate basis for concluding that his visual identification methodology

was sufficiently reliable to support the admission of expert opinion testimony identifying particular items as controlled substances.

As we have already noted, the approach utilized by Special Agent Allcox involved a visual inspection of the tablets and fragments in question and a comparison of the information gained through that process to material contained in a medical reference book. We are not persuaded that, given the record in this case, such an approach is sufficiently reliable, particularly given the fact that, in North Carolina, controlled substances are statutorily defined in terms of their chemical composition. First, the record does not contain any information tending to show that Special Agent Allcox received any sort of specialized training in the use of Micromedics Literature to identify particular medications; in fact, Special Agent Allcox admitted, "I have not received specialized training, specifically, in pharmaceuticals." Secondly, except for Special Agent Allcox's claim to be able to recognize counterfeit controlled substances, the record contains no indication of the degree to which the approach adopted by Special Agent Allcox is a reliable one. Thirdly, although the record does reflect that hospitals and emergency room personnel use the Micromedics Literature to identify medications, the testimony of Special Agent Allcox, taken in context, suggests that this approach has been adopted because of the rapidity with which it can be used to identify medications in emergency situations rather than because it has the degree of reliability required to support expert witness testimony. In addition, Special Agent Allcox did not provide any testimony addressing the reliability of the methodology that he employed. Finally, in light of the reality of counterfeit drugs, *see* 8 Wake Forest Intell. Prop. L.J. 387, 389 (stating that "[t]he World Health Organization estimates that up to 60% of drugs sold in developing countries and up to 20% sold in developed countries are counterfeit"), we are troubled by the significant risk of misidentification that appears to be inherent in the methodology employed by Special Agent Allcox. Thus, given the record in this case, we conclude that the visual identification procedure utilized here does not provide adequate "indices of reliability" sufficient to support the admission of expert testimony.

5: Conclusion

As a result, we conclude that the trial court abused its discretion by admitting expert testimony regarding the identification of the following drugs, which Defendant was convicted of possessing with the

intent to sell or deliver: Alprazolam (Xanax), Diazepam (Valium), and Methylphenidate (Ritalin).[18] In light of the importance that testimony identifying particular items as controlled substances necessarily had in those cases, we are constrained to conclude that the trial court's error in those cases prejudiced Defendant's chances for a more favorable outcome at trial. In addition, while the State presented sufficient evidence based on a chemical analysis to support Defendant's convictions for trafficking in opium on 23 August 2006, the same cannot be said for Defendant's convictions for trafficking in opium on 22 August 2006, which rest on the sort of visual identification testimony that we have held to be inadmissible. Once again, given the centrality of the identification issue to the issue of Defendant's guilt of trafficking in opium on 22 August 2006, we conclude that the trial court's error prejudiced Defendant in those cases as well. Finally, the trial court's error clearly prejudiced Defendant's chances for a more favorable outcome at trial with respect to the cases in which he was convicted of maintaining a dwelling and a vehicle for the purpose of keeping and selling controlled substances, each of which involved allegations that Defendant kept and sold controlled substances that were identified solely using the visual identification evidence that we have concluded was erroneously admitted. In each instance, it is not at all clear to us that, except for the erroneous admission of this visual identification evidence, the evidence would have sufficed to support a conviction. As a result, we conclude that Defendant is entitled to a new trial in connection with each of those convictions.

IV: Conclusion

Thus, for the reasons stated above, we find that the trial court erred by admitting certain testimony relating to items seized in connection with Defendant's 10 February 2005 arrest and by admitting testimony by Special Agent Allcox identifying certain items as controlled substances on the basis of a visual identification process. As a result of the fact that we have left Defendant's convictions for trafficking in opium on 23 August 2006 and possession of cocaine undisturbed, the fact that the trial court consolidated all of Defendant's convictions for judgment, and the fact that the sentence imposed upon Defendant by the trial court was the mandatory sentence for a single count of trafficking in opium in an amount between 14 and 28

18. In view of the fact that the trial court arrested judgment in connection with Defendant's conviction for possessing Oxycodone with the intent to sell and deliver, we need not determine whether the admission of Special Agent Allcox's testimony identifying certain items as Oxycodone prejudiced Defendant.

grams, we vacate Defendant's convictions for maintaining a vehicle for the purpose of keeping and selling controlled substances, maintaining a dwelling for keeping and selling controlled substances, possession of Ritalin with the intent to sell and deliver, possession of Xanax with the intent to sell and deliver, possession of Valium with the intent to sell and deliver, and three counts of trafficking in opium arising from events occurring on 22 August 2006; award Defendant a new trial with respect to the issue of his guilt of each of those offenses; and remand this case to the trial court for the correction of the judgment entered against Defendant in light of our decision and the results of any new trial that may be conducted in these cases.

NO ERROR in part; NEW TRIAL in part.

Chief Judge MARTIN and Judge WYNN concur.

JOHN AND SYLVIA GUYTON, PLAINTIFFS v. FM LENDING SERVICES, INC., DEFENDANT

No. COA08-614

(Filed 18 August 2009)

1. Statutes of Limitation and Repose— Rule 41—timeliness

Plaintiffs' claims were not barred by N.C. Gen. Stat. § 1A-1, Rule 41(a) even though plaintiffs failed to refile their second complaint within one year after voluntarily dismissing their first complaint.

2. Statutes of Limitation and Repose— fraud—negligent misrepresentation—date upon which plaintiffs initially learned the facts necessary to establish a claim

Plaintiffs' claims were not barred by the statute of limitations for fraud and negligent misrepresentation in an action arising from the purchase of property in a flood hazard area. The validity of defendant's statute of limitations defense hinges on when plaintiffs initially learned the necessary facts.

3. Insurance— preemption—negligent misrepresentation property not in special flood hazard areas—unfair and deceptive trade practices—fraud

In an action arising from the concealment of knowledge that property was in a flood zone, defendant cannot be held liable to

plaintiffs under the National Flood Insurance Act but a legal duty of the type claimed by plaintiffs does exist under the North Carolina Mortgage Lending Act.

4. Negligence— misrepresentation—fraud—unfair and deceptive trade practices—motion to dismiss—sufficiency of evidence

While plaintiffs have adequately stated claims for fraud and unfair and deceptive trade practices, plaintiffs' complaint does not state a claim for negligent misrepresentation sufficient to survive a dismissal motion under N.C.G.S. § 1A-1, Rule 12(b)(6).

Appeal by Plaintiffs from order entered 13 March 2008 by Judge Ripley E. Rand in Wake County Superior Court. Heard in the Court of Appeals 13 January 2009.

The Law Offices of Michele A. Ledo, by Michele A. Ledo, Esquire, for Plaintiffs-Appellants.

Manning, Fulton & Skinner P.A., by William C. Smith, Jr., for Defendant-Appellee.

ERVIN, Judge.

John and Silvia Guyton (Plaintiffs) appeal from an order entered by the trial court on 13 March 2008 granting a motion to dismiss filed by FM Lending Services, Inc. (Defendant), pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). After careful consideration of the record and the applicable law, we conclude that the trial court's order is reversed in part.

In their complaint,[1] Plaintiffs allege that they applied for a loan from Defendant on 22 October 2003 in order to purchase a tract of real property located at 4812 Winterlochen Road in Raleigh, North Carolina. The Federal Emergency Management Administration (FEMA), which is part of the United States Department of Homeland Security, identifies property located within the one-hundred year flood plain and designates these properties as special flood hazard areas (SFHA). On 23 October 2003, Defendant obtained a flood certification from First American Flood Data Services which stated that the property was located in a FEMA-designated SFHA. Defendant

1. Consistently with the required standard of review, the statement of facts is based on the allegations set out in Plaintiffs' complaint. We recognize that Defendant disputes the accuracy of many of the factual statements set out in the text.

also obtained, prior to closing, a copy of a survey which contained the same information. Defendant did not, however, disclose the fact that the property was located in an SFHA to Plaintiffs at that time. In addition, Defendant failed to provide Plaintiffs with copies of either the flood certification or the survey prior to closing.

On 27 October 2003, Plaintiffs closed on the purchase of the property without ever learning that it was located in a FEMA-designated flood plain. Subsequently, Defendant informed Plaintiffs that the property was located in an SFHA. On 14 November 2003, Defendant provided Plaintiffs with a copy of the flood certification upon which the date that Defendant received the document—23 October 2003—had been whited out. Defendant also gave Plaintiffs an incomplete copy of the survey.

As a result of the fact that the property was located in an SFHA, Plaintiffs were obligated to procure flood insurance for the life of their thirty year mortgage. The initial cost of the required flood insurance was $1,600.00 per year. By the time that Plaintiffs filed their complaint, they were paying $2,200.00 per year in flood insurance costs and anticipated future cost increases.

Plaintiffs initially filed a complaint against Defendant with the Commissioner of Banks. In response, Defendant affirmatively stated that it did not receive the flood certification report until the date of closing, 27 October 2003, and that the flood certification that it received at that time was incomplete. In addition, Defendant represented to the Commissioner that the information in its possession prior to closing indicated that the property was not located in an SFHA. Based on this evidence, the Commissioner found no evidence of any violation of law by Defendant.

Plaintiffs then filed a complaint in Wake County Superior Court asserting claims for breach of contract and negligence against Defendant. Plaintiffs voluntarily dismissed this complaint without prejudice on 15 November 2004.

After the dismissal of Plaintiffs' original civil action, Defendant's Senior Vice President of Operations, Kathleen Sue Carpenter (Carpenter), was deposed in related litigation. At that time, Carpenter revealed that Defendant altered the flood plain certification to conceal the date upon which it had been received by Defendant. Carpenter's deposition testimony represented the first occasion on which Plaintiffs learned that Defendant was aware, prior to closing,

that the property was located in an SFHA without disclosing this information to Plaintiffs.

After gaining this additional information, Plaintiffs filed a second complaint against Defendant in the Wake County Superior Court asserting fraud, negligent misrepresentation, and unfair and deceptive practices claims. On 16 November 2007, Defendant filed a motion to dismiss Plaintiffs' claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Defendant's motion was heard on 18 February 2008. On 13 March 2008, the trial court entered an order granting Defendant's dismissal motion in which it stated that "Plaintiffs have not stated a claim upon which relief could be granted and . . . judgment as a matter of law at this stage in the proceedings is appropriate." From this order, Plaintiffs appealed to this Court.

I: Standard of Review

"The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (2007). "On a motion to dismiss, the complaint's material factual allegations are taken as true." *Owen*, 181 N.C. App. at 512, 640 S.E.2d at 429. Legal conclusions, however, are not entitled to a presumption of validity. *Peterkin v. Columbus County Bd. of Educ.*, 126 N.C. App. 826, 828, 486 S.E.2d 733, 735 (1997). "Dismissal is proper 'when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Owen*, 181 N.C. App. at 512, 640 S.E.2d at 429.

II: Voluntary Dismissal: N.C. Gen. Stat. § 1A-1, Rule 41

[1] First, we address Defendant's contention that Plaintiffs' claims are barred by N.C. Gen. Stat. § 1A-1, Rule 41(a), given that Plaintiffs failed to re-file their second complaint within one year after voluntarily dismissing their first complaint on 15 November 2004. We conclude that Plaintiffs' claims are not barred by N.C. Gen. Stat. § 1A-1, Rule 41(a).

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1), provides, in pertinent part, as follows:

> 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.

Id. (emphasis added). Defendant contends that, since the record clearly indicates that Plaintiffs voluntarily dismissed their first complaint on 15 November 2004 and did not file the current complaint until 16 October 2007, Plaintiffs' second complaint against Defendant is barred by N.C. Gen. Stat. § 1A-1, Rule 41(a).

This Court stated in *Whitehurst v. Transportation Co.*, 19 N.C. App. 352, 198 S.E.2d 741 (1973), that:

> It was the opinion of writers at the time of the adoption of Rule 41 that the provisions of that rule follow G.S. 1-25 without change, and the wording of the rule would so indicate. . . . It has long been held that G.S. 1-25 did not apply when the party would not otherwise be barred from his right of action by the lapse of time prescribed by the statute of limitation relating to the cause of action. When the General Assembly adopted the provisions of G.S. 1-25 into Rule 41(a)(1), it is our opinion that it adopted also that body of case law interpreting G.S. 1-25, the effect being that it is an extension of time beyond the general statute of limitation rather than a restriction upon the general statute of limitation. In other words, a party always has the time limit prescribed by the general statute of limitation and in addition thereto they get the one year provided in Rule 41(a)(1). But Rule 41(a)(1) shall not be used to limit the time to one year if the general statute of limitation has not expired.

Whitehurst, 19 N.C. App. at 355-56, 198 S.E.2d at 742 (citations omitted). Thus, it is important to note that, under N.C. Gen. Stat. § 1A-1, Rule 41(a), a plaintiff may "dismiss an action that originally was filed within the statute of limitations and then refile the action after the statute of limitations ordinarily would have expired." *Clark*

v. Visiting Health Prof'ls, Inc., 136 N.C. App. 505, 508, 524 S.E.2d 605, 607 (2000). On the other hand, as noted in *Whitehurst*, N.C. Gen. Stat. § 1A-1, Rule 41(a), does not operate to shorten the applicable statute of limitations. Therefore, Defendant's argument that Plaintiffs' claims are time-barred by virtue of N.C. Gen. Stat. § 1A-1, Rule 41(a), because more than one year has passed since they voluntarily dismissed their first complaint against Defendant necessarily fails. As a result, the extent to which Plaintiffs' claims are time barred depends on the proper application of the relevant statute of limitations rather than upon the operation of N.C. Gen. Stat. § 1A-1, Rule 41(a).

III: Statute of Limitations

[2] Next, we address whether Plaintiff's claims are time-barred pursuant to the operation of the statute of limitations applicable to claims of fraud and negligent misrepresentation.[2] After careful consideration of the record in light of the relevant legal principles, we conclude that neither Plaintiffs' fraud nor negligent misrepresentation claims are barred by the applicable statute of limitations.

The statute of limitations applicable to negligent misrepresentation claims is three years. *See* N.C. Gen. Stat. § 1-52(5); *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 488 S.E.2d 215 (1997). "[A] claim for negligent misrepresentation 'does not accrue until two events occur: first, the claimant suffers harm because of the misrepresentation, and second, the claimant discovers the misrepresentation.' " *Barger*, 346 N.C. at 666, 488 S.E.2d at 224 (quoting *Jefferson-Pilot Life Ins. Co. v. Spencer*, 336 N.C. 49, 57, 442 S.E.2d 316, 320 (1994)). The applicable statute of limitations for fraud is three years as well. *See* N.C. Gen. Stat. § 1-52(9). N.C. Gen. Stat. § 1-52(9) provides that, "[f]or relief on the ground of fraud or mistake[,] the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." *Id.* As a result, "the three-year statute of limitations for fraud or mistake does not commence to run . . . until the discovery by the aggrieved party of the facts constituting the fraud or mistake." *Lee v. Keck*, 68 N.C. App. 320, 326, 315 S.E.2d 323, 328 (1984), *dis. review denied*, 311 N.C. 401, 319 S.E.2d 271 (1984) (quotation omitted). Thus, the validity of any statute of limitations defense that Defendant might assert hinges on the date upon which Plaintiffs initially learned the facts

2. Given that Defendant has not argued on appeal that Plaintiffs' unfair and deceptive practices claim is barred by the applicable statute of limitations, we need not address the statute of limitations issue with respect to that claim.

necessary to establish a claim against Defendant relating to the purchase of the property sounding in fraud or mistake.

The Plaintiffs' claims for negligent misrepresentation and fraud rest upon the contention that Defendant knew that the property purchased by Plaintiff was located in an SFHA before the date of closing, but refrained from disclosing this information until after that date. As we read the complaint, the allegations of which must be taken as true given the procedural posture in which this case has come before us, Plaintiffs have alleged that they first learned that Defendant knew that the property was located in an SFHA prior to the closing and failed to disclose that information to Plaintiffs until Carpenter's 11 May 2006 deposition. As a result, the allegations of the complaint indicate that Plaintiffs' causes of action for fraud and negligent misrepresentation against Defendant did not accrue until that date. Thus, the allegations of the Complaint do not establish that Plaintiffs' claims for negligent misrepresentation and fraud are time-barred.

IV: Failure to State a Claim

The essential substantive issues raised by Plaintiffs' appeal are: (1) whether a lender with knowledge that the property to be purchased by borrower is located in a flood plain owes a legal obligation arising under North Carolina law to disclose that fact to the borrower, given that the resulting purchase obligates the borrower to procure flood insurance for the life of the resulting loan; (2) assuming *arguendo* that such a legal obligation exists under state law, whether claims asserted for breach of that duty are pre-empted by federal law; and (3) whether Plaintiffs have pled claims for relief in a manner sufficient to survive a dismissal motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). After careful review of the record in light of the applicable law, we conclude that the trial court erred in part by dismissing Plaintiffs' complaint.

A: Existence of a Legal Duty

[3] The first issue that we must address is the extent to which a legal duty exists under either federal or North Carolina law which might support a finding of liability under the theories alleged in the complaint. After carefully reviewing the applicable legal principles, we conclude that Defendant cannot be held liable to Plaintiff under the National Flood Insurance Act (NFIA), either directly or indirectly, but that a legal duty of the type claimed by Plaintiffs does exist under the North Carolina Mortgage Lending Act.

Congress enacted the NFIA "in order to make flood insurance available on reasonable terms and conditions to those in need of such protection." *Peal v. N.C. Farm Bureau Mut. Ins. Co.*, 212 F. Supp. 2d 508, 512 (E.D.N.C. 2002) (citing *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 598 (4th Cir. 2002); 42 U.S.C. § 4001). 42 U.S.C. § 4001(a) states, in pertinent part, that:

> The Congress finds that (1) from time to time flood disasters have created personal hardships and economic distress which have required unforeseen disaster relief measures and have placed an increasing burden on the Nation's resources; (2) despite the installation of preventive and protective works and the adoption of other public programs designed to reduce losses caused by flood damage, these methods have not been sufficient to protect adequately against growing exposure to future flood losses; (3) as a matter of national policy, a reasonable method of sharing the risk of flood losses is through a program of flood insurance which can complement and encourage preventive and protective measures; and (4) if such a program is initiated and carried out gradually, it can be expanded as knowledge is gained and experience is appraised, thus eventually making flood insurance coverage available on reasonable terms and conditions to persons who have need for such protection.

42 U.S.C. § 4001(a). In addition, the enactment of the NFIA reflected Congressional concern about the increasing amount of federal flood relief expenditures. *See Till v. Unifirst Fed. S. & L. Ass'n*, 653 F.2d 152 (1981) (stating that "[t]he principal purpose in enacting [NFIA] was to reduce, by implementation of adequate land use controls and flood insurance, the massive burden on the federal fisc of the ever-increasing federal flood disaster assistance"). More particularly, the NFIA attempts to reduce the risk to the public treasury created by federally-backed or regulated loans for real property that are not protected by adequate flood insurance. *Till*, 653 F.2d at 159 ("Congress was interested . . . in protecting the lending institutions whose deposits the federal regulatory agencies insured"). For that reason, 42 U.S.C. § 4104a(a)(1) states, in pertinent part, that:

> Each Federal entity for lending regulation (after consultation and coordination with the Financial Institutions Examination Council) shall by regulation require regulated lending institutions, as a condition of making, increasing, extending, or renewing any loan secured by improved real estate or a mobile home

> that the regulated lending institution determines is located or is to be located in an area that has been identified by the Director under this title or the Flood Disaster Protection Act of 1973 as an area having special flood hazards, *to notify the purchaser or lessee (or obtain satisfactory assurances that the seller or lessor has notified the purchaser or lessee) and the servicer of the loan of such special flood hazards, in writing, a reasonable period in advance of the signing of the purchase agreement, lease, or other documents involved in the transaction.* The regulations shall also require that the regulated lending institution retain a record of the receipt of the notices by the purchaser or lessee and the servicer.

42 U.S.C. § 4104a(a)(1) (emphasis added).

Plaintiffs and Defendant agree that a party injured by a violation of the requirement that lending institutions "notify the purchaser . . . of such special flood hazards, in writing, a reasonable period in advance of the signing of the purchase agreement . . . or other documents involved in the transaction" set out in 42 U.S.C. § 4104a(a)(1), has no express or implied private federal right of action against the lender or any other party arising from a violation of that requirement. *See Mid-America Nat. Bank v. First Sav. & Loan Ass'n*, 737 F.2d 638 (1984) (stating that "[n]either Section 4012a(b) nor Section 4104a expressly create[] a federal cause of action in favor of borrowers against mortgage lenders where the lenders do not direct borrowers to purchase flood insurance in the amount of the loan or where lenders do not notify borrowers of the HUD flood-risk area designation[,]" and holding that, because there was no "indication that Congress intended to authorize a federal cause of action in favor of borrowers against lenders under Sections 4012a(b) and 4104a," the court would not imply a new cause of action); *Till*, 653 F.2d 152; *Hofbauer v. Northwestern Nat. Bank of Rochester*, 700 F.2d 1197 (1983); *Arvai v. First Fed. Sav. & Loan Ass'n*, 698 F.2d 683 (1983); *Ford v. First Am. Flood Data Servs.*, 2006 U.S. Dist. LEXIS 74350 (2006) (stating that the "Fourth Circuit has clearly held that there is neither an express nor an implied private right of action by a borrower for an alleged violation of the flood zone determination and notification requirements of the Act"). The question of whether a cause of action independent of 42 U.S.C. § 4104a(a)(1) that arises from a factual scenario encompassing a violation of that statutory provision may be maintained under North Carolina law is, however, an issue of first impression.

1: Independent State Law Cause of Action

Having decided that there is no express or implied federal private right of action under the NFIA, we next examine whether Defendant owed a legal duty to Plaintiffs under North Carolina law. In opposing Plaintiffs' efforts to establish the existence of such a legal duty, Defendants argue that North Carolina should not adopt 42 U.S.C. § 4104a(a)(1) as the standard to be independently applied to situations of this nature under state law and that North Carolina does not recognize an independent disclosure duty arising under these facts. After carefully examining Defendant's arguments, we are constrained to disagree.

In arguing that North Carolina should not recognize an independent state law claim for relief based on facts that would constitute a violation of 42 U.S.C. § 4104a(a)(1), Defendant places considerable reliance on *Ford*, 2006 U.S. Dist. LEXIS 74350. In *Ford*, the District Court pointed out that "[n]o North Carolina court has yet ruled upon the issue of whether a borrower has a private state law cause of action against either a lender or a third-party flood zone determination company based on a violation of the Act." *Ford*, 2006 U.S. Dist. LEXIS 74350. After noting that "there is neither an express nor an implied federal private right of action by a borrower for an alleged violation of the flood zone determination and notification requirements of the Act," the *Ford* court stated that, "[i]n addition to disallowing private federal claims under the Act, some federal courts have also refused to allow common law and other state law claims by borrowers under the Act." *Id.* However, the *Ford* court acknowledged that "[m]ost . . . federal courts . . . have determined that whether a state law claim based on the violation of a federal statute may be brought is a matter of state law for state courts to decide[.]" *Id.*; *see also Hofbauer*, 700 F.2d at 1201 (holding that, although a federal statute may create a standard of conduct the violation of which suffices to support a claim arising under state law, whether such a claim exists is a question best left entirely to state courts); *Till*, 653 F.2d at 161-62 (holding that the existence of state law claims depends upon state rather than federal law and remanding the plaintiff's claims to state court). As a result of the fact that the absence of a federal private right of action under the NFIA does not inherently preclude the recognition of a state law claim that encompasses conduct prohibited by 42 U.S.C. § 4104a(a)(1), we are now called upon to decide whether a lender is liable under North Carolina law for damages resulting from a failure to disclose the fact that property is located in a flood plain.

In determining whether such a state law claim should be recognized in North Carolina, we find the analysis of the United States Court of Appeals for the Fifth Circuit in *Till*, 653 F.2d 152, to be instructive. In *Till*, the Fifth Circuit, like many other federal courts, held that there was no express or implied federal private right of action pursuant to the NFIA. However, the *Till* court went on to hold that the district court erred in "granting a summary judgment on all claims, since its holding dismissed the Mississippi common law claims with prejudice." *Till*, 653 F.2d at 162. The court reasoned:

> The [district] court held that "inasmuch as all of Plaintiffs' claims herein are dependent upon the implication of a private cause of action, Plaintiffs' claims must be dismissed." Appellees, attempting to support the court's decision, reason that state common law does not provide all the elements of the asserted fraud or negligence. They assert that both causes of action require a breach of duty and that the only duty here arises from federal enactments. Therefore, they contend, there must exist a private cause of action in the federal statutes themselves before appellants can recover from the state based claims. . . . *Whether this is true is a matter of state law.*

Till, 653 F.2d at 161 (emphasis added). Essentially, *Till* holds that the responsibility of determining whether a state law claim arising from facts that establish a violation of 42 U.S.C. § 4104a(a)(1) exists is a matter for the state and not the federal courts and must be decided on the basis of state law rather than federal law principles.

The first basis on which we might find the existence of a legal duty of the type necessary to support Plaintiffs' claim against Defendant would come from treating 42 U.S.C. § 4104a(a)(1) as establishing the required legal standard for purposes of a state law claim. Although utilizing federal statutes as the basis for recognizing a state law duty is undoubtedly appropriate in some instances, we are not convinced that doing so in this instance is appropriate for two different reasons.

First, we have concerns about adopting this approach that are highlighted by the Fifth Circuit's interpretation of 42 U.S.C. § 4012a(e)(1) in *Wentwood Woodside I, LP v. GMAC Commercial Mortg.*, 419 F.3d 310 (5th Cir. 2005). As the Fifth Circuit stated, 42 U.S.C. § 4012a(e)(1) provides, in pertinent part, that "[i]f . . . at any time during the term of a loan[,] . . . the servicer for the loan deter-

mines that the [SFHA property] is not covered by flood insurance . . . the servicer shall notify the borrower [of this deficiency.]" 42 U.S.C. § 4012a(e)(1); *Wentwood Woodside*, 418 F.3d at 323, f.11. The *Wentwood Woodside* court went on to hold that "the statute cannot be read to impose an unconditional duty on servicers to determine whether their serviced properties are adequately insured against flood damage[,]" reasoning:

> Significantly, the statute does not *require* a servicer to *know* that a serviced property has been designated as being within an SFHA. Rather, the statute creates a duty of notification only *if* the servicer learns that the serviced property falls within an SFHA. By using the conditional "if," the statute implicitly contemplates that there will be circumstances in which a servicer does not determine that an under-insured SFHA property is in fact under-insured.

Wentwood Woodside, 419 F.3d at 322-23, f.11 (emphasis in original). Applying the logic of *Wentwood Woodside* to this case,[3] we recognize that, although mortgage lenders are required to obtain and disclose flood zone determinations when making a loan, *see Duong v. Allstate Ins. Co.*, 499 F. Supp. 2d 700, 702 (E.D. La. 2007), there may be instances in which a lender does not know that a property has been designated as located within an SFHA through no fault of its own, arguably placing itself in violation of 42 U.S.C. § 4104a(a)(1) by failing to notify the purchaser of such designation without having violated any other provision of law.[4] We do not, for obvious reasons, believe that recognizing a state law claim which holds a lender liable for violating the requirements of 42 U.S.C. § 4104a(a)(1) despite the

3. We note that, unlike 42 U.S.C. § 4012a(e)(1), 42 U.S.C. § 4012a requires a mortgage lender to perform a flood zone determination when it makes a loan. *See* 42 U.S.C. § 4012a (2007); *Duong*, 499 F. Supp. 2d at 702 (E.D. La. 2007); *Lukosus v. First Tenn. Bank Nat'l Ass'n*, No. 02-84, 2003 U.S. Dist. LEXIS 11941, 2003 WL 21658263 (W.D. Va. 2003); *Cruey v. First American Flood Data Services, Inc.*, 174 F. Supp. 2d 525, 527 (E.D. Ky. 2001) (stating that "[i]n essence, the Act provides that lending institutions subject to federal regulation may not make loans for improved real estate without insuring that such loans are secured by flood insurance in an amount at least equal to the outstanding balance of the loan").

4. Something of that nature appears to have occurred in *Ford*, 2006 U.S. Dist. LEXIS 74350, in which First American, "a company that provides flood zone determinations for lenders," failed "to correctly determine that the Property was located in an SFHA[.]" *Id.* The lender merely received and relied upon First American's determination. *Dollar v. Nationsbank of Georgia, N.A.*, 244 Ga. App. 116, 117, 534 S.E.2d 851, 853 (2000), provides another example, in which Albany Real Estate Services, Inc., appraised a residence for NationsBank, the lender, and determined that whether the residence was located in a flood hazard zone was "too close to call."

perfectly-understandable absence of any knowledge that the property in question was located in a flood plain would be appropriate.

Secondly, treating 42 U.S.C. § 4104a(a)(1) as creating an independent state law duty would have the practical effect of recognizing an implied private right of action under that statute in all but name. Like other courts that have considered this approach,[5] we believe that it would inappropriately circumvent the widely-accepted understanding that Congress did not intend to create a federal private right of action under 42 U.S.C. § 4104a(a)(1) to directly utilize that statutory provision as the basis for a state law claim. As a result, we believe that a state law claim of the type that Plaintiffs have sought to assert against Defendant, if any, must rest on a legal duty arising under one or more provisions of state law totally independent of 42 U.S.C. § 4104a(a)(1).

In determining whether North Carolina law recognizes a legal duty that might be applicable to Plaintiffs' claim against Defendant, we must, of necessity, keep in mind the basic thrust of Plaintiffs' claim. As described in the complaint, Defendant's conduct amounted to more than a negligent failure to notify Plaintiffs that the property in question was located in a designated flood plain in violation of 42 U.S.C. §4104a(a)(1). On the contrary, Plaintiffs claim that Defendant actively and intentionally withheld the information that the property

5. *See Ford*, 2006 U.S. Dist. LEXIS 74350 (holding that "any duty First American owed to Plaintiff, either from the contract between First American and USAA or from an ordinary negligence standard, would have arisen from the Act, a breach of which would violate the Act[,]" and because "Plaintiff's claims are based directly on alleged violations of the Act[,]" they may not be maintained); *Lehmann v. Arnold*, 137 Ill. App. 3d 412, 484 N.E.2d 473, 481(1985) (ruling that legislative intent and federalism concerns prohibit implied state law claims for Act violations); *R.B.J. Apartments, Inc. v. Gate City Sav. & Loan Ass'n*, 315 N.W.2d 284, 290 (1982) (refusing to recognize an implied state law cause of action for a violation of the Act, reasoning that separation of powers and federalism concerns militate against utilizing a federal statute to establish the standard of care in a negligence action when the statute allows no express or implied private right of action); *Pippin v. Burkhalter*, 276 S.C. 438, 279 S.E.2d 603, 604 (1981) (holding that there can be no implied right of action in favor of the purchaser under the Act because it was intended to protect a class of loans rather than purchasers); *Jack v. City of Wichita*, 23 Kan. App. 2d 606, 933 P.2d 787, 793 (1997) (holding that the plaintiffs' multiple negligence-based claims against a number of defendants, including the mortgage company, the land surveyor, and the City of Wichita, could not be maintained because the "the weight of authority is that the federal statutes establishing the National Flood Insurance Program do not create a duty which would support a claim for negligence"); *Callahan v. Country Wide Home Loans, Inc.*, 20 Fla. L. Weekly Fed. D 227 (2006) (holding that "[o]ther than its violation of the NFIA, [the plaintiff] has not alleged any basis for a duty towards her on the part of Countrywide[,]" and for that reason, the plaintiff's complaint did "not state a cause of action against Countrywide for negligence.").

lay in a flood plain—including retention of surveys and certifications that contained relevant information and affirmative obstruction of Plaintiffs' access to important information—in order to induce Plaintiffs to purchase the property.

Assuming that Plaintiffs are able to establish the factual validity of these allegations, we believe that they have alleged conduct on the part of Defendant sufficient to establish a violation of a legal duty established under North Carolina state law independent of 42 U.S.C. § 4104a(a)(1). More particularly, we believe the General Assembly intended to prohibit such conduct through N.C. Gen. Stat. § 53-243.11, a provision of the Mortgage Lending Act. N.C. Gen. Stat. § 53-243.11 provides, in pertinent part, as follows:

> In addition to the activities prohibited under other provisions of this Article, it shall be unlawful for any person in the course of any mortgage loan transaction:
>
> (1) To misrepresent or conceal the material facts or make false promises likely to influence, persuade, or induce an applicant for a mortgage loan or a mortgagor to take a mortgage loan, or to pursue a course of misrepresentation through agents or otherwise.
>
> (8) To engage in any transaction, practice, or course of business that is not in good faith or fair dealing or that constitutes a fraud upon any person, in connection with the brokering or making of, or purchase or sale of, any mortgage loan.

N.C. Gen. Stat. § 53-243.11(1) and (8) (2007). Although N.C. Gen. Stat. § 53-243.11 does not directly address the specific set of factual circumstances present in this case, we conclude that this statutory provision was intended to protect buyers against the sort of activity that is alleged to have occurred here.

In reaching this conclusion, we note that the relevant statutory language expressly prohibits "misrepresent[ation] or conceal[ment] [of] the material facts . . . likely to influence, persuade, or induce an applicant for a mortgage loan or a mortgagor to take a mortgage loan[.]" N.C. Gen. Stat. § 53-243.11(8). According to Plaintiffs' complaint, Defendant "misrepresented that the Property was not in a[n] SFHA;" claimed "that it had no knowledge prior to the closing that the Property was located in a[n] SFHA;" and "subsequently engaged in a practice and course of business of covering up the fact that it

did have knowledge that the Property was located in a[n] SFHA prior to the closing in an effort to prevent the Guytons . . . from discovering its deception." Assuming that Defendant did, in fact, engage in the conduct described in Plaintiffs' complaint, Defendant would have clearly violated N.C. Gen. Stat. § 53-243.11. As a result, there is ample basis in North Carolina law, considered without regard to 42 U.S.C. § 4104a(a)(1), for concluding that Defendant would have violated a legal duty owed to Plaintiffs if it acted as described in Plaintiffs' complaint.[6]

2: Federal Preemption

Having concluded that the NFIA does not foreclose the possibility that a party is entitled to maintain a state law cause of action stemming from a set of facts that would also constitute a violation of 42 U.S.C. § 4104a(a)(1) and that North Carolina law recognizes a duty that might be implicated by Defendant's alleged conduct, we next address the question of whether Plaintiffs' claims are nonetheless pre-empted by 42 U.S.C. § 4001, *et seq*., to the extent that the answer to this question is not inherent in our analysis of the NFIA as set out above. Based upon a careful review of the applicable legal materials, we conclude that Plaintiffs' claims are not preempted by federal law.

Federal law can preempt state law on the basis of three different legal theories: express preemption, field preemption, and conflict preemption. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 115, 120 L. Ed. 2d 73, 95 (1992). Express preemption requires "explicit pre-emptive language." *Gade*, 505 U.S. at 115, 120 L. Ed. 2d at 95, Souter, J., dissenting (citing *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 203, 75 L. Ed. 2d 752 (1983)). "Field pre-emption is wrought by a manifestation of congressional intent to occupy an entire field such that even without a federal rule on some particular matter within the field, state regulation on that matter is pre-empted, leaving it untouched by either state or federal law." *Gade*, 505 U.S. at 115, 120 L. Ed. 2d at 95. Conflict preemption exists when compliance with both state and federal requirements is impossible, or "where state law

6. To be absolutely clear, because we hold that the legal duty upon which Plaintiff seeks to rely does not depend on an alleged violation of 42 U.S.C. § 4104a(a)(1), we are definitely *not* implying a private right of action pursuant to 42 U.S.C. § 4104a(a)(1) of any type in this case, and have not, for that reason, addressed the four-factor test for determining when a court may imply a private cause of action from a federal statute. *See Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26 (1975).

stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Elec. Co.*, 496 U.S. 72, 79, 110 L. Ed. 2d 65, 74 (1990). Whether federal law preempts state law under any of these theories is essentially a question of Congressional intent. *N.W. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509, 103 L. Ed. 2d 509, 527 (1989).

Federal courts have concluded that the NFIA does not expressly or impliedly preempt state law claims, *see Bleecker v. Standard Fire Ins. Co.*, 130 F. Supp. 2d 726, 734 (E.D.N.C. 2000); *Till*, 653 F.2d at 155 f.2, on the basis of determinations that Congress did not expressly declare that state common law claims are preempted by the NFIA or pervasively regulate the field of flood insurance. *See*, *e.g.*, *Bleecker*, 130 F. Supp. 2d at 735 (stating that "[s]tripping insurance claimants of protections offered by state law from the tortious conduct of insurers would leave a gapping hole in the flood insurance field which Congress did not intend"); *see also Peal*, 212 F. Supp. 2d at 514 (stating that "[t]he vast majority of courts considering [the] language [of the Act] have concluded that it does not expressly preempt state law causes of action arising from claims handling[,]" and, "[a]s with express preemption, most courts have declined to find field preemption in the flood insurance context . . . [because] Congress did not pervasively regulate the field of flood insurance"); *see also Studio Frames*, *Ltd. v. Vill. Ins. Agency*, *Inc.*, 2003 U.S. Dist. LEXIS 5450 (D.N.C. 2003) (stating that "[t]he majority of courts that have addressed the issue of extra-contractual claim preemption and flood insurance have decided that express preemption and field preemption are not applicable).[7] As a result of the absence of expressly preemptive language in the NFIA and our belief that the NFIA does not regulate the flood insurance arena so completely as to exclude all state regulation, we conclude that the NFIA does not expressly preempt, or preempt through field preemption,

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7. A more persuasive argument may be made for field pre-emption in the context of claims arising under the FEMA-created WYO (Write-Your-Own) insurance program, which are, in fact, heavily regulated. *See Studio Frames*, 2003 U.S. Dist. LEXIS 5450 (stating that "the majority of courts who have considered the preemption issue have concluded that WYO insurers should not be subject to potential tort liability, such as bad faith or unfair and deceptive trade practices, for their conduct in the handling of claims"). *Studio Frames*, 2003 U.S. Dist. LEXIS 5450 (citing *Gibson v. American Bankers Ins. Co.*, 289 F.3d 943 (6th Cir. 2002) (discussing cases); *Jamal v. Travelers Lloyds of Texas Ins. Co.*, 129 F. Supp. 2d 1024 (S.D. Tex.2001); *Messa v. Omaha Prop. & Cas. Ins. Co.*, 122 F. Supp. 2d 513, 522-23 (D.N.J. 2000)). Since Plaintiffs' claims do not arise from a transaction conducted under the WYO program, we need not decide whether state law claims are preempted in the WYO context.

civil actions against lenders arising in the flood insurance context based on state common law.

Finally, we address whether state law claims are barred by the doctrine of conflict preemption. Conflict preemption comes in two different forms. "The first is found when compliance with both state and federal law is impossible, [and] the second when a state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' " *Gade*, 505 U.S. at 115, 120 L. Ed. 2d at 95 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581 (1941)). "The legislative history of [the] NFIA [has been interpreted to] suggest[] that Congress intend[ed] to preserve [in some instances] a plaintiff's right to obtain tort relief in state courts." *Bleecker*, 130 F. Supp. 2d at 734. "The legislative history behind section [42 U.S.C. § 4053] states that while claimants may file lawsuits in federal courts, claimants can "also avail themselves of legal remedies in State courts." *Bleecker*, 130 F. Supp. 2d 726, 734 (citing H. Rep. No. 90-1585, reprinted in 1968 U.S.C.C.A.N. 2873, 3022). After a thorough examination, we conclude that neither the relevant statutory nor regulatory provisions provide a clear indication that Congress intended to preempt all state law claims against lenders arising in the flood insurance context. *Bleecker*, 130 F. Supp. 2d 726, 734.

In considering the conflict preemption issue, we believe that Plaintiffs' claims against Defendant are distinguishable from the overwhelming majority of NFIA-based preemption decisions: Plaintiffs here have asserted claims against the lender, not a WYO flood insurer, while the majority of cases in which state law claims have not been allowed to go forward involve factual scenarios in which plaintiffs assert claims against a FEMA-created WYO insurer or other flood insurer subject to thorough regulation under the NFIA. This fact alone allows the possibility of a lender's compliance with both state and federal law, because the applicable provisions of state law do not " 'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]" *Gade*, 505 U.S. at 115, 120 L. Ed. 2d at 95. In fact, we recognize that Plaintiffs' claims tends to further the Congressional objective of requiring lenders to notify purchasers if properties they are proposing to buy lie in designated flood plain areas by providing lenders with an additional incentive to do so. Since Congress has not provided a federal remedy for conduct by private lenders that would constitute a violation of 42 U.S.C. § 4102(a) outside the WYO context, a decision that state law claims such as those asserted by Plaintiffs in this case are preempted would effec-

tively immunize private lenders from any injury sustained by a purchaser no matter how egregious the lender's conduct may have been. We do not believe that Congress intended such a result. As a result, we hold that Plaintiffs' right to assert otherwise proper state law causes of action are not pre-empted by 42 U.S.C. § 4001, *et seq.*

B. Sufficiency of Plaintiff's Complaint to State Recognized State Law Claims for Relief

[4] We next address whether Plaintiffs' complaint states a claim for relief under some recognized legal theory sufficient to withstand Defendant's motion for dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). As a result of the fact that Defendant has not contended on appeal that the complaint fails to state a claim for fraud or unfair and deceptive practices in the event that Defendant's alleged conduct implicates a duty to disclose arising under North Carolina law independent of the relevant provisions of the NFIA and the fact that our review of Plaintiffs' complaint indicates that they have adequately stated claims for fraud and unfair and deceptive practices, we hold that these portions of the complaint are sufficient to withstand a dismissal motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

We do not, however, reach the same conclusion with respect to Plaintiff's negligent misrepresentation claim. Even though Defendant has not argued on appeal that Plaintiffs failed to adequately allege a negligent misrepresentation claim arising exclusively under North Carolina law, we are still compelled to address this issue given the fact that the trial court's order failed to specify any particular grounds for concluding that Plaintiff's complaint was subject to dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

"[T]he tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991); *see also Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 511 S.E.2d 309 (1999). As we have already noted, Defendant had a duty to disclose material information to Plaintiffs pursuant to N.C. Gen. Stat. § 53-243.11(1) and (8).

In their complaint[8], Plaintiffs make the following allegations in support of their negligent misrepresentation claim:

> 37. Pursuant to N.C. Gen. Stat. § 53-243.11(1), Defendant FM Lending owed a duty to the Guytons to refrain from misrepresenting or concealing material facts likely to influence, persuade or induce the Guytons to enter into a mortgage loan agreement with it.
>
> 38. Pursuant to N.C. Gen. Stat. § 53-243.11(8), Defendant FM Lending owed a duty to the Guytons to refrain from engaging in any transaction, practice or course of business that was not in good faith or fair dealing or that constituted a fraud upon the Guytons in connection with the making of any mortgage loan.
>
> 39. In direct violation of these duties, Defendant FM Lending misrepresented that the Property was not in a[n] SFHA and, further, misrepresented that it had no knowledge prior to the closing that the Property was located in a[n] SFHA.
>
> 40. In direct violation of these duties, Defendant FM Lending subsequently engaged in a practice and course of business of covering up the fact that it did have knowledge that the Property was located in a[n] SFHA prior to the closing in an effort to prevent the Guytons, the Commissioner and this Court from discovering its deception.
>
> 41. Absent Defendant FM Lending's statutory violations, the Guytons would have: (a) delayed the closing and investigated further; (b) decided to forego purchasing the Property; (c) refrained from entering into a loan agreement with Defendant FM Lending; and[/]or (d) renegotiated the purchase price of the Property based upon the fact that it was located in a[n] SFHA.

Taking the foregoing allegations as true, we believe that Plaintiffs have failed to sufficiently allege a claim for negligent misrepresentation. Although Plaintiffs have sufficiently alleged that the Mortgage Lending Act creates a duty of care, independent of 42 U.S.C. § 4104a(a)(1), requiring disclosure of information that property to be purchased is located in a flood plain, and that Plaintiffs justifiably

8. In addition to the material quoted in the text, Plaintiffs' complaint also sets out the basic factual material laid out in the factual statement that appears at the beginning of the opinion in support of each of the claims for relief that we discuss in the text.

relied to their detriment on Defendants' omissions, Plaintiffs have failed to sufficiently allege an unintentional failure to act in a manner inconsistent with the applicable standard of care or that the provision of information, upon which Plaintiffs had reasonably relied had not been prepared with reasonable care. By alleging that Defendant acted intentionally without ever advancing an alternative allegation that Defendant acted unintentionally or negligently, Plaintiffs have simply failed to state a claim for negligent misrepresentation (as compared to a claim for fraud). As a result, while we believe that Plaintiffs have adequately stated claims for fraud and unfair and deceptive practices, we conclude that Plaintiffs' complaint does not state a claim for negligent misrepresentation sufficient to survive a dismissal motion lodged pursuant to under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

Conclusion

Thus, for all of these reasons, we conclude that the trial court erred by granting Defendant's dismissal motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), with respect to Plaintiffs' fraud and unfair and deceptive practice claims. However, we also conclude that the trial court appropriately dismissed Plaintiffs' negligent misrepresentation claim. In reaching this conclusion, we are heavily influenced by the applicable standard of review, which requires us to treat the allegations of Plaintiffs' complaint as true and to disregard the extent to which Plaintiffs will actually be able to prove the allegations that they have made. Needless to say, the extent to which the Plaintiffs are actually able to prove the conduct that they have alleged will have a significant effect on whether this case survives any motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, or for a directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50, that Defendant ultimately chooses to pursue. At this point, however, we believe that Plaintiffs have advanced allegations sufficient to survive a dismissal motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) with respect to its fraud and unfair and deceptive practices claims. As a result, we reverse in part the trial court's order granting Defendant's motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and remand this case to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED and REMANDED IN PART.

Judges WYNN and HUNTER, Robert C. concur.

EDGAR D. BROWN AND PAMELA BROWN, CO-ADMINISTRATORS OF THE ESTATE OF JULIAN DAVID BROWN, AND KAREN M. HELMS, ADMINISTRATRIX OF THE ESTATE OF MATTHEW M. HELMS, PLAINTIFFS v. ERIC R. METER, FRENCH SOCCER NETWORK, EUROPEAN SOCCER NETWORK, NORTH CAROLINA YOUTH SOCCER ASSOCIATION, INC., THE GOODYEAR TIRE & RUBBER COMPANY, GOODYEAR DUNLOP TIRES EUROPE B.V., GOODYEAR LUXEMBOURG TIRES SA, GOODYEAR SA, GOODYEAR LASTIKLERI T.A.S. AND GOODYEAR DUNLOP TIRES FRANCE, SA., DEFENDANTS

No. COA08-944

(Filed 18 August 2009)

1. Appeal and Error— sufficiency of findings of fact—mixed findings of fact and conclusions of law

Several of the trial court's findings of fact were improperly classified, at least in part, as findings of fact rather than conclusions of law, and those portions will not be considered when reviewing the sufficiency of the findings of fact.

2. Jurisdiction— personal jurisdiction—long-arm statute—general jurisdiction—due process—stream of commerce

The trial court did not err by exercising personal jurisdiction over defendants in an action seeking damages for the deaths of two thirteen-year-old soccer players resulting from a bus accident in Paris, France. The trial court's findings of fact were supported by competent evidence and the findings supported the conclusion of law that defendants purposefully injected their product into the stream of commerce without any indication that they desired to limit the area of distribution of their product so as to exclude North Carolina.

Appeal by Defendants from order entered 1 May 2008 by Judge Gary E. Trawick in Onslow County Superior Court. Heard in the Court of Appeals 10 February 2009.

Bell, Davis & Pitt, P.A., by William K. Davis, Charlot F. Wood, and Kevin G. Williams, for Defendants-Appellants.

Kirby & Holt, L.L.P., by David F. Kirby and William B. Bystrynski, for Plaintiffs-Appellees.

ERVIN, Judge.

Goodyear Luxembourg Tires SA (Goodyear Luxembourg), Goodyear Lastikleri T.A.S. (Goodyear Turkey), and Goodyear Dunlop

Tires France SA (Goodyear France) (collectively, Defendants) appeal from an order entered 1 May 2008 denying their motions to dismiss for lack of personal jurisdiction and concluding that the "[e]xercise of general jurisdiction over defendants comports with Due Process and does not offend traditional notions of fair play and justice." After a thorough review of the record and the applicable law, we affirm the trial court's order.

Matthew Helms and Julian Brown (Decedents), two thirteen-year-old soccer players who resided in North Carolina, died from injuries suffered in a bus wreck on 18 April 2004 outside Paris, France. Decedents were traveling to Charles de Gaulle Airport in preparation for returning to North Carolina at the time of the accident. According to the amended complaint filed by Edgar D. Brown and Pamela Brown, co-administrators of the estate of Julian Brown, and Karen M. Helms, Administratrix of the estate of Matthew Helms (together, Plaintiffs), on 17 April 2006, one of the bus tires "designed, manufactured and distributed" by Defendants failed when its plies separated. The tire that failed was a Goodyear Regional RHS tire manufactured by Goodyear Turkey, which operates a manufacturing plant located in that country. Plaintiffs sought relief from a series of Goodyear affiliates, including Goodyear France, Goodyear Luxembourg, and Goodyear Turkey on a number of theories arising from an alleged negligent "design, construction, testing, and inspection" of and a failure to warn about alleged latent defects in the Goodyear Regional tire in question.[1]

On 9 March 2007, Defendants filed motions to dismiss predicated on an alleged lack of personal jurisdiction pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2).[2] The dismissal motions filed by Defendants and other Goodyear affiliates were supported by affidavits executed by Philippe Degeer, the Director and Vice President Consumer Tires E.U. of Goodyear Dunlop Tires Europe B.V.; Hermann Lange, the Finance Director of Goodyear Luxembourg Tires SA and Goodyear SA; Ersin Özkan, Sales and Marketing Director of Goodyear Lastikleri T.A.S., and Korhan Ul'un Beyani, Corporate Secretary of Goodyear Lastikleri T.A.S.; and Olivier Rousseau, General Manager of Goodyear Dunlop Tires France S.A. On 7 June 2007, Plaintiffs filed the affidavit of

1. In addition to Goodyear France, Goodyear Luxembourg, and Goodyear Turkey, Plaintiffs initially sought relief from the Goodyear Tire and Rubber Company, Goodyear SA, and Goodyear Dunlop Tires Europe B.V. in the amended complaint.

2. Dismissal motions were also filed on behalf of Goodyear SA and Goodyear Dunlop Tires Europe B.V.

Robert C. Ochs, P.E., P.C. (Ochs). The trial court heard arguments on Defendants' dismissal motions on 11 June 2007, after which it took Defendants' dismissal motions under advisement. On 28 September 2007, Plaintiffs took the deposition of Donn P. Kramer, Director of Product and Supply Chain Management for Commercial Systems for Goodyear Tire and Rubber Company, pursuant to N.C. Gen. Stat. § 1A-1, Rule 30(b)(6). On 6 December 2007, an affidavit executed by Kramer containing additional information relating to the delivery of tires manufactured by Defendants into North Carolina was filed. A final hearing on Defendants' dismissal motion was held at the 10 December 2007 session of the Onslow County Superior Court.[3]

On 1 May 2008, the trial court entered an order denying Defendants' dismissal motions. In denying Defendants' motions, the trial court made the following findings of fact:

1. Matthew Helms of Jacksonville and Julian Brown of Charlotte, two 13-year-old youth soccer players, died from injuries suffered in a bus wreck that occurred on April 18, 2004, near Paris, France. Plaintiffs have alleged that as the decedents rode on a bus headed to the airport in Paris to return home to North Carolina, one of the bus' tires, designed, manufactured and distributed by the Goodyear defendants, failed when its plies separated, causing the bus to leave the highway and overturn.

2. Defendants Goodyear [Luxembourg]; Goodyear [Turkey]; and Goodyear [France] (hereinafter "defendants") moved to dismiss for lack of personal jurisdiction, pursuant to Rule 12(b)(2) of the N.C. Rules of Civil Procedure and N.C.G.S. § 1-75.4.

3. The subject tire that allegedly failed was a Goodyear Regional tire, which was manufactured by defendant Goodyear [Turkey].

4. The subject tire contained information that was written entirely in English, including warnings and directions, U.S. Department of Transportation markings placed on the tire to allow it to be sold in the United States, and markings to show it was manufactured as qualified for sale in the United States.

3. Plaintiffs voluntarily dismissed their claims against Goodyear SA and Goodyear Dunlop Tires Europe B.V. on 12 December 2007.

5. The subject Goodyear Regional tire has a U.S. code listing load and pressure ratings that conform to United States standards set by the Tire and Rim Association, the standardizing organization for the tire industry in the United States. The tire also contains a "Safety Warning," written in English, which conforms to the warnings found on all tires for sale in the United States.

6. During the period from 2004 through a portion of 2007, at least 5906 tires made by Goodyear [Turkey] were shipped into North Carolina for sale, although not by the original manufacturer.

7. During the period from 2004 through a portion of 2007, at least 33,923 tires made by Goodyear [France] were shipped into North Carolina for sale, although not by the original manufacturer.

8. During the period from 2004 through a portion of 2007, at least 6402 tires made by Goodyear [Luxembourg] were shipped into North Carolina for sale, although not by the original manufacturer.

9. The number of tires shipped into North Carolina from each of these manufacturers may actually be substantially higher, in that The Goodyear Tire and Rubber Company (hereinafter "Goodyear"), after being noticed for a 30(b)(6) deposition, failed to determine how many vehicles equipped with tires from these foreign defendant manufacturers are imported into the U.S. and shipped into North Carolina for sale each year.

10. The defendants, on a continuous and systematic basis, caused tires to be sent into the United States for sale, and knew or should have known that some of those tires were distributed for sale to North Carolina residents, and the defendants continue to send tires for sale into the United States and know or should know that some of those tires continue to be sold to North Carolina residents on a continuous and systematic basis.

11. The sale of these tires generates substantial revenue for Goodyear, these defendant companies and its related companies.

12. The defendants, as manufacturers, did not have their own distribution system for the sale of their tires, but instead used their Goodyear parent and affiliated companies to distribute the tires they manufactured to the United States and North Carolina.[4]

13. The defendants knew or should have known that tires they manufactured were shipped to the United States through their Goodyear parent and affiliated companies and sold in North Carolina on a continuous and systematic basis.

14. The defendants purposefully and deliberately availed themselves of the North Carolina market for tires and substantially profited from sales of their tires in North Carolina.

15. The defendant companies have continuous and systematic contacts with North Carolina and are conducting substantial activity within North Carolina.

16. Defendant Goodyear [Turkey] is a wholly owned subsidiary of defendant, [t]he Goodyear Tire and Rubber Company, which is based in the United States. All three of the foreign defendant companies are subsidiaries of Goodyear in the United States and as such have additional, abundant ties to the United States.

17. The defendant companies have deliberately attempted to take advantage of the tire market in North Carolina by designing, manufacturing and causing tires to be distributed for sale to the North Carolina market, and those tires are sold in North Carolina.

18. Because all three companies have manufactured tires shipped into North Carolina for sale that by clear implication and inference are used on thousands of vehicles throughout North Carolina, they could reasonably anticipate being haled into court in North Carolina.

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4. According to Kramer, the ties between the Goodyear Tire and Rubber Company and Goodyear France, Goodyear Luxembourg, and Goodyear Turkey, respectively, were "indirect[.]" For example, Goodyear has "sales marketing offices that develop business plans, sales plans" and determine how the needs associated with those plans would be met. Goodyear's sales marketing office would decide how to obtain the needed product, including whether any needed product would be obtained from a European affiliate. After making this determination, the needed tires would be manufactured, shipped to the United States, and distributed to retailers and similar entities using Goodyear's existing distribution system.

19. The quantity of the defendants' contacts with North Carolina, which includes sales of between 5,900 and 34,000 tires within the state, generating substantial revenues and substantial commercial activity in North Carolina, weighs in favor of a finding of general jurisdiction over the defendants.

20. The quality of those contacts, which include systematic and repeated contacts with the state of North Carolina for the purpose of commerce, along with the defendants' ownership by U.S. corporations doing substantial business in North Carolina, weighs in favor of a finding of general jurisdiction over the defendants.

21. The cause of action in this case is closely related to the contacts with the defendants, in that the defendants are causing substantial quantities of tires they manufactured to be sold in North Carolina, and plaintiffs seek to exercise jurisdiction related to a defect in a tire designed, manufactured, distributed or sold by the defendants.

22. North Carolina has a substantial interest in allowing its citizens a forum for the redress of grievances, especially where two of its citizens have been killed, allegedly by the negligence of the defendants.

23. The foreign Goodyear defendants are not inconvenienced by the trial of this action in North Carolina, in that they do substantial and continuous business in North Carolina, they are subsidiaries of a United States corporation that does substantial and continuous business in North Carolina, and they are represented by the same attorneys as are representing their U.S. parent corporation.

24. The plaintiffs, parents of the deceased boys, would be substantially inconvenienced by litigating this case in foreign countries.

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

1. The defendants have continuous and systematic ties with the State of North Carolina.

2. The defendants' activities in North Carolina are substantial.

3. The quantity of the defendants' contacts with North Carolina; the nature and quality of those contacts; the source and con-

nection of the cause of action to the contacts; the interest of North Carolina in this cause of action and the convenience of the parties, all weigh in favor of the exercise of general jurisdiction over the defendants.

4. Exercise of general jurisdiction over the defendants comports with Due Process and does not offend traditional notions of fair play and justice.

Based on these findings and conclusions, the trial court denied Defendants' dismissal motions. Defendants have noted an appeal to this Court from the trial court's ruling.

On appeal, Defendants contend that the trial court erred in denying their motion for lack of personal jurisdiction. We disagree.

When evaluating personal jurisdiction, the trial court must engage in a two-step inquiry: first, the trial court must determine whether a basis for jurisdiction exists under the North Carolina "long-arm statute," N.C. Gen. Stat. § 1-75.4 (2007), and second, if so, the trial court must determine whether the assertion of personal jurisdiction over the defendant is consistent with applicable due process standards. *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 283, 350 S.E.2d 111, 113 (1986). "When personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry[,]" which is whether defendant has the "minimum contacts necessary to meet the requirements of due process." *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 671, 541 S.E.2d 733, 736 (2001). Specifically, this Court has held that, "when evaluating the existence of personal jurisdiction pursuant to G.S. § 1-75.4(1)(d)," "the question of statutory authorization 'collapses into the question of whether [the defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process.' " *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 617, 532 S.E.2d 215, 218, *disc. review denied and appeal dismissed*, 353 N.C. 261, 546 S.E.2d 90 (2000) (quoting *Hanes Companies v. Ronson*, 712 F. Supp. 1223, 1226 (M.D.N.C. 1988)).

In examining the legal sufficiency of the trial court's order, our review on appeal focuses initially on "whether the findings are supported by competent evidence in the record[.]" *Better Bus. Forms, Inc. v. Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995). "If the findings of fact are supported by competent evidence, we conduct

a *de novo* review of the trial court's conclusions of law and determine whether, given the facts found by the trial court, the exercise of personal jurisdiction would violate defendant's due process rights." *Deer Corp. v. Carter*, 177 N.C. App. 314, 322-23, 629 S.E.2d 159, 166 (2006) (citing *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694-95, 611 S.E.2d 179, 183 (2005) (stating that "it is this Court's task to review the record to determine whether it contains any evidence that would support the trial judge's conclusion that the North Carolina courts may exercise jurisdiction over defendants without violating defendant's due process rights")). Except as discussed in detail below, Defendants do not dispute that the majority of the trial court's findings of fact are supported by adequate evidentiary support; therefore, we will base the factual component of our analysis on the undisputed information contained in the trial court's order.

According to N.C. Gen. Stat. § 1-75.4(1)(d), "[a] court of this State . . . has jurisdiction over a person" "[i]n any action, whether the claim arises within or without this State, in which a claim is asserted against a party" who "[i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." *Id.* N.C. Gen. Stat. § 1-75.4(1)(d) was "intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977). "[B]y its plain language the statute requires some sort of 'activity' to be conducted by the defendant within this state." *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006), *rehearing denied*, 361 N.C. 371, 643 S.E.2d 591 (2007).

Similarly, "[d]ue process [considerations] prohibit[] our state courts from exercising [personal] jurisdiction unless the defendant has had certain 'minimum contacts' with the forum state such that 'traditional notions of fair play and substantial justice' are not offended by maintenance of the suit." *Cameron-Brown*, 83 N.C. App. at 284, 350 S.E.2d at 114 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945)). Although a determination of whether the required minimum contacts are present necessarily hinges upon the facts of each case, there are several factors a trial court typically evaluates in determining whether the required level of contacts exists: "(1) quantity of the contacts between the defendant and the forum state, (2) quality and nature of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest in the

forum state, and (5) convenience of the parties." *Cameron-Brown*, 83 N.C. App. at 284, 350 S.E.2d at 114.

Jurisdiction exercised under North Carolina's long-arm statute can be classified as either specific or general. "Specific jurisdiction exists when the cause of action arises from or is related to defendant's contacts with the forum." *Id.*, 361 N.C. at 122, 638 S.E.2d at 210. "General jurisdiction exists when the defendant's contacts with the state are not related to the cause of action but the defendant's activities in the forum are sufficiently continuous and systematic" to permit the General Court of Justice to exert personal jurisdiction over that defendant. *Skinner*, 361 N.C. at 122, 638 S.E.2d at 210 (quotation omitted). "[G]eneral personal jurisdiction" may be exercised pursuant to N.C. Gen. Stat. § 1-75.4(1)(d). *Lang v. Lang*, 157 N.C. App. 703, 706, 579 S.E.2d 919, 921 (2003). "The threshold level of minimum contacts sufficient to confer general jurisdiction is significantly higher than for specific jurisdiction." *Woods Intern., Inc.*, 436 F. Supp. 2d at 748 (quotation omitted).

The present dispute is not related to, nor did it arise from, Defendants' contacts with North Carolina. As a result, the issue raised in this case involves general rather than specific jurisdiction. For that reason, the relevant question before both the trial court and this Court is whether Defendants' "activities in the forum are sufficiently continuous and systematic[,]" *Skinner*, 361 N.C. at 122, 638 S.E.2d at 210, a "higher threshold" than that required to support the exercise of specific jurisdiction. *Bruggeman*, 138 N.C. App. at 618, 532 S.E.2d at 219. As a result, we must determine on appeal whether the trial court's findings of fact support its legal conclusion that Defendants had "continuous and systematic contacts with North Carolina," thereby justifying the exercise of general personal jurisdiction over Defendants.

The "continuous and systematic contacts" required for the assertion of general personal jurisdiction must result from actions by Defendant rather than from mere happenstance or coincidence or the actions of others. In order for nonresidents like Defendants to be subject to the general personal jurisdiction of the General Court of Justice, they "must engage in acts by which they purposely avail themselves of the privilege of conducting activities within the forum State[.]" *Lulla v. Effective Minds, LLC*, 184 N.C. App. 274, 279, 646 S.E.2d 129, 133 (2007) (quotation omitted). "The purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or unilateral

activity of another party or a third person." *Adams, Kleemeier, Hagan, Hannah & Fouts, PLLC v. Jacobs*, 158 N.C. App. 376, 381, 581 S.E.2d 798, 802, *rev'd on other grounds*, 357 N.C. 651, 588 S.E.2d 465 (2003) (quotation omitted). A "critical factor" in assessing "whether a nonresident defendant has made purposeful availment of the privilege of conducting activities within the forum State" is whether the party "initiat[ed] the contact[.]" *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 698, 611 S.E.2d 179, 185 (2005), *motion denied*, 2006 NCBS 2 (2006). (quotation omitted).

The necessary "purposeful availment" has been found where a corporation "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298, 62 L. Ed. 2d 490, 502 (1980). In such cases, the United States Supreme Court has reasoned that:

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

World-Wide Volkswagen, 444 U.S. at 297-98, 62 L. Ed. 2d at 501-02. However, the Supreme Court disagreed over the proper interpretation of the principle enunciated in *World-Wide Volkswagen* in *Asahi Metal Ind. Co. v. Superior Court of California*, 480 U.S. 102, 94 L. Ed. 2d 92 (1987).

In *Asahi Metal*, Justice O'Connor writing for herself, Chief Justice Rehnquist, and Justices Powell and Scalia, stated that:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels

> for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state.

Asahi Metal, 480 U.S. 102, 94 L. Ed. 2d 92. On the other hand, in a concurrence joined by Justices White, Marshall, and Blackmun, Justice Brennan stated that:

> A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether the participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.

Asahi Metal, 480 U.S. at 117, 94 L. Ed. 2d at 108, *Brennan, J., concurring in part and concurring in the judgment.* Justice Brennan described Justice O'Connor's stream of commerce "plus" standard as "a marked retreat from the analysis in *World-Wide Volkswagen*[.]" *Id.*, 480 U.S. at 118, 94 L. Ed. 2d at 107. According to Justice Brennan, a "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Asahi Metal*, 480 U.S. at 119, 94 L. Ed. 2d at 107. As a result, Justice Brennan concluded that sufficient minimum contacts existed in *Asahi Metal* because "Asahi was aware of the distribution system's operation, and it knew that it would benefit economically from the sale in California of products incorporating its components." *Asahi Metal*, 480 U.S. at 121, 94 L. Ed. 2d at 107.[5] This Court has addressed the issue debated in *Asahi Metal* on several occasions, and has expressly declined in

5. Justice Stevens also concluded that California lacked the authority to assert jurisdiction over the person of the defendant in *Asahi Metal* on the basis of a number of factors, such as the fact that all parties to the litigation in question were foreign nationals, that it would be highly inconvenient for the defendant to be haled into court in California, that all of the relevant events occurred outside the forum state, and that the forum state had no interests that would be protected by an assertion of jurisdiction. However, Justice Stevens did not join the approach adopted by Justice O'Connor in reaching this conclusion. Needless to say, the facts in *Asahi Metal* are distinguishable from the facts at issue here in a number of respects.

those cases to follow the approach to the "purposeful availment" issue advocated by Justice O'Connor in that case.

In *Bush v. BASF Wyandotte Corp.*, 64 N.C. App. 41, 306 S.E.2d 562 (1983), this Court addressed a case brought by a North Carolina plaintiff who was injured while operating a washing machine in connection with her employment. The machine had been manufactured by a Swedish corporation which sold several such machines to a New York distributor, which then, in turn, sold a washing machine to the plaintiff's employer. *Bush*, 64 N.C. App. 41, 306 S.E.2d 562. The defendant corporation made no attempt to exclude North Carolina from the area in which its products were distributed. The Court concluded in *Bush* that, because the defendant corporation "purposefully injected [its] product into the stream of commerce without any indication that it desired to limit the area of distribution of its product so as to exclude North Carolina[,] . . . the courts of North Carolina may lawfully assert personal jurisdiction over" the defendants. *Id.*, 64 N.C. App. at 51, 306 S.E.2d at 568.[6] Thus, the rule applicable in North Carolina prior to *Asahi Metal* was not consistent with the position enunciated in Justice O'Connor's opinion.

A few years later, in *Warzynski v. Empire Comfort Systems, Inc.*, 102 N.C. App. 222, 229, 401 S.E.2d 801, 805 (1991), this Court noted that "[a] majority of the [United States Supreme] Court did not join in the section of the *Asahi* opinion that attempts to question the stream of commerce doctrine;" for that reason, we concluded that "Asahi does not overrule previous cases that follow the stream of commerce theory, including *Bush v. BASF*." *Warzynski*, 102 N.C. App. at 228, 401 S.E.2d at 805. As a result, the *Warzynski* Court concluded that, because the defendant manufacturer, a Spanish company, gave the defendant seller "an exclusive right to sell the heaters in the United States with no limit as to North Carolina[,]" the defendant manufacturer therefore "injected its product into the stream of commerce and subjected itself to the jurisdiction of the courts of this state." *Id.*, 102 N.C. App. at 227-29, 401 S.E.2d at 804.

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6. The trial court exercised jurisdiction in *Bush* pursuant to N.C. Gen. Stat. § 1-75.4(4)(b), which provides that personal jurisdiction is proper "in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury" that "[p]roducts, materials or thing processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade[.]" N.C. Gen. Stat. § 1-75.4(4)(b) does not apply to this case because the accident in which Decedents were killed did not occur within North Carolina.

Similarly, in *Cox v. Hozelock, Ltd.*, 105 N.C. App. 52, 57, 411 S.E.2d 640, 643, *disc. review denied*, 331 N.C. 116, 414 S.E.2d 752, *cert. denied*, 506 U.S. 824, 121 L. Ed. 2d 42 (1992), this Court stated that:

> [W]e cannot agree that the impact of *World-Wide* has been significantly lessened due to the recent Supreme Court decision in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 94 L. Ed. 2d 92 (1987)[,]" because "[t]he Court was evenly split . . . as to the ramifications of *World-Wide* and whether intentionally placing a product in the stream of commerce, without more, provided a sufficient basis for jurisdiction over a foreign defendant."

Hozelock, 105 N.C. App. at 57, 411 S.E.2d at 644 (1992). In light of that determination, we held that "the sole act of a manufacturer's intentional injection of his product into the stream of commerce provides sufficient grounds for a forum state's exercise of personal jurisdiction over the foreign manufacturer defendant," thus allowing "the North Carolina court [to] properly invoke personal jurisdiction[.]" *Id.*, 105 N.C. App. at 574, 11 S.E.2d at 644.[7]

In *Carswell Distrib. Co. v. U.S.A.'s Wild Thing*, 122 N.C. App. 105, 107-08, 468 S.E.2d 566, 568-69 (1996), this Court stated:

> Minimum contacts can be found when the out-of-state defendant injects products into the "stream of commerce" with the expectation that the products will reach the forum state. *World-Wide Volkswagen Corp.*, 444 U.S. at 298, 62 L. Ed. 2d at 502. North Carolina courts have applied stream of commerce analysis to support the exercise of personal jurisdiction in defective product cases. *E.g.*, *Warzynski v. Empire Comfort Systems*, 102 N.C. App. 222, 228-29, 401 S.E.2d 801, 805 (1991) (holding a corporation subject to the jurisdiction of our courts when it has "purposefully injected" a product into "the stream of commerce" without limiting the area of distribution "so as to exclude North Carolina"). North Carolina cases that use stream of commerce analysis have not been overruled by the United States Supreme Court's decision in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987). *Cox v. Hozelock, Ltd.*, 105 N.C. App. 52, 57, 411 S.E.2d 640, 644, *disc. review denied*, 331 N.C. 116, 414 S.E.2d 752, *cert. denied*, 506 U.S.

7. Personal jurisdiction in *Hozelock* was also determined to be proper pursuant to N.C. Gen. Stat. § 1-75.4(4)(b).

824, 121 L. Ed. 2d 42, 113 S. Ct. 78 (1992); *Warzynski*, 102 N.C. App. at 229, 401 S.E.2d at 805.

U.S.A.'s Wild Thing, 122 N.C. App. at 107-08, 468 S.E.2d at 568-69. In *U.S.A.'s Wild Thing*, the defendant "entered into a manufacturing agreement with . . . a company that served as the distributor for [a product manufactured by the defendant] throughout the United States, Mexico, and Canada." *Id.*, 122 N.C. App. at 108, 468 S.E.2d at 568. According to this Court, "[b]y shipping [its product] to plaintiff in North Carolina pursuant to this agreement [the distributor] intentionally injected its [product] into the stream of commerce and purposefully availed itself of the benefit of North Carolina markets." *Id.*

After reviewing these decisions, we conclude that the appropriate question that must be answered in order to determine whether Defendants are "subject to the jurisdiction of the courts of this state" is whether Defendants have "purposefully injected [their] product into the stream of commerce without any indication that [they] desired to limit the area of distribution of [their] product so as to exclude North Carolina." *Bush*, 64 N.C. App. at 51, 306 S.E.2d at 568; *but see Putnam v. Triangle Publications, Inc.*, 245 N.C. 432, 96 S.E.2d 445 (1957) (holding that personal jurisdiction could not be exercised over a foreign defendant who sold magazines to distributors within this State, but delivered and surrendered title to the magazines to carriers outside North Carolina); *Moss v. City of Winston-Salem*, 254 N.C. 480, 119 S.E.2d 445 (1961) (holding that personal jurisdiction was not present, even though the Illinois defendant lawn mower manufacturer intentionally placed a lawn mower in the stream of interstate commerce and sold it to an unrelated distributor, which then sold the mower to a business in North Carolina).[8] Thus, we must evaluate the validity of the trial court's decision that Goodyear France, Goodyear Luxembourg, and Goodyear Turkey were subject to the jurisdiction of the Onslow County Superior Court by examining whether the trial court's findings of fact, considered in their entirety, provide an adequate basis for a conclusion that Defendants had "continuous and systematic contacts with North Carolina" in light of the well-established legal principle outlined above.

[1] As an initial matter, we note that several of the trial court's "findings of fact" are improperly classified, at least in part, as findings of

8. *Putnam* and *Moss* antedate *World-Wide Volkswagen*; as a result, this Court has stated that "[t]he precedential value of both *Moss* and *Putnam*, by their own reasoning, must therefore yield to the rationale of *World-Wide*." *Hozelock*, 105 N.C. App. at 57, 411 S.E.2d at 643.

fact rather than conclusions of law. In these improperly classified findings of fact, the trial court stated that:

> 14. The defendants purposefully and deliberately availed themselves of the North Carolina market for tires and substantially profited from sales of their tires in North Carolina.
>
> 15. The defendant companies have continuous and systematic contacts with North Carolina and are conducting substantial activity within North Carolina.

See State ex rel. Utilities Com. v. Eddleman, 320 N.C. 344, 351, 358 S.E.2d 339, 346 (1987), *later proceeding*, 322 N.C. 689, 370 S.E.2d 567 (1988) (stating that "[f]indings of fact are statements of what happened in space and time"). In light of the fact that these findings involve statements that Defendants "purposefully and deliberately availed themselves of the North Carolina market," "have continuous and systematic contacts with North Carolina," and "are conducting substantial activity within North Carolina," and the fact that these statements amount to determinations that the applicable legal standards have been met rather than "statements of what happened in space and time," we will not include these portions of finding of fact numbers 14 and 15 in our analysis of the sufficiency of the factual findings in the trial court's order to support its conclusion that Defendants were subject to the jurisdiction of the Onslow County Superior Court.

In addition, as another preliminary matter, the trial court stated in finding of fact numbers 17 and 21 that Defendants "caused" a certain number of tires to be shipped into North Carolina. However, the record appears to be devoid of evidence that Defendants took any affirmative action to cause tires which they had manufactured to be shipped into North Carolina. On the contrary, the available evidence tends to show that other entities were responsible for the shipment of tires manufactured by Defendants to the United States and, as a part of that process, the tires arrived in North Carolina. As a result, our analysis of the trial court's findings is informed by our understanding that Defendants, as separate corporate entities, were not directly responsible for the presence in North Carolina of tires that they had manufactured.

Defendants also argue that finding of fact numbers 4 and 5 are not supported by competent evidence because they were "based solely on incompetent statements in Mr. Och's affidavit[.]" We disagree. Findings of fact numbers 4 and 5 state the following:

4. The subject tire contained information that was written entirely in English, including warnings and directions, U.S. Department of Transportation markings placed on the tire to allow it to be sold in the United States, and markings to show it was manufactured as qualified for sale in the United States.

5. The subject Goodyear Regional tire has a U.S. code listing load and pressure ratings that conform to United States standards set by the Tire and Rim Association, the standardizing organization for the tire industry in the United States. The tire also contains a "Safety Warning," written in English, which conforms to the warnings found on all tires for sale in the United States.

Ochs's affidavit reveals that he "traveled to France and personally inspected the tire that is at issue in this case." Ochs discovered the following pertinent information as a result of his inspection of the tire: (1) "[b]ased on the serial number on the tire, which is required by the U.S. Department of Transportation for tires sold in the United States, the tire was manufactured at a Goodyear plant in Izmit, Turkey, owned by Goodyear Lastikleri T.A.S."; (2) "[t]he tire at issue contained additional U.S. Department of Transportation markings that were placed there to allow the tire to be sold in the United States"; (3) "[t]he tire at issue contained information showing that it was manufactured as qualified for sale in the United States"; (4) "[t]he tire at issue had a U.S. code listing load and pressure ratings that conform to United States standards set by the Tire and Rim Association, the standardizing organization for the tire industry in the United States"; (5) "[t]he tire at issue contains a "Safety Warning," written in English, that conforms to the warnings found on every tire for sale in the United States"; (6) "[a]ll of the information found printed on the tire is written in English, and the tire was manufactured and labeled in such a way as to allow it to be sold in the United States"; (7) "[b]ased on my knowledge of tire manufacturing and the European tire market, this tire was designed, manufactured and marketed for sale worldwide, including sale in the United States and North Carolina." These excerpts from Ochs' affidavit contain competent evidence to support the trial court's finding of fact numbers 4 and 5. *See Fox v. Gibson*, 176 N.C. App. 554, 558, 626 S.E.2d 841, 844 (2006) (upholding findings of fact in the context of personal jurisdiction as supported by competent evidence based on information contained in various affidavits). The associated assignments of error are without merit. Because Defendants do not dispute the validity of the remain-

ing findings of fact on appeal, we must now "conduct a *de novo* review of the trial court's conclusions of law and determine whether, given the facts found by the trial court, the exercise of personal jurisdiction would violate defendant's due process rights." *Deer Corp.*, 177 N.C. App. at 322, 629 S.E.2d at 166.

[2] The trial court's factual findings which were either undisputed by Defendant or supported by competent evidence indicate that the tire that Plaintiffs allege was involved in the accident resulting in Decedents' deaths "contained additional U.S. Department of Transportation markings that were placed there to allow the tire to be sold in the United States" and also "contained information showing that it was manufactured as qualified for sale in the United States." More particularly, the tire had "a U.S. code listing load and pressure ratings that conform to United States standards set by the Tire and Rim Association, the standardizing organization for the tire industry in the United States." Moreover, the tire contained "a 'Safety Warning,' written in English[.]" Although Kramer opined that the presence of "DOT specifications" on the relevant Goodyear Regional RHS tire "doesn't necessarily mean that the tire is destined to be used in the United States," the existence of these markings does indicate, as the trial court found, that the tire in question was manufactured in such a manner that it could, if business conditions supported such a move, be sold in the United States. Thus, at an absolute minimum, the manufacturer contemplated that the tire might be sold in this country.

Furthermore, the trial court's findings establish that tires manufactured by Defendants were shipped to the United States for sale and that there was no attempt to keep these tires from reaching the North Carolina market. The evidence tends to show that the extent to which tires manufactured by Defendants were sold in the United States depended on the extent to which Goodyear affiliates responsible for distributing tires in the United States exercised the option that was available to them of having tires needed for sale in the United States manufactured by one of the Defendants. In addition, the trial court found that tires manufactured by each Defendant were actually sold in North Carolina. From 2004 to 2007, 6,402 tires manufactured by Goodyear Luxembourg were ultimately shipped to locations in North Carolina. Similarly, 33,923 tires manufactured by Goodyear France reached North Carolina during the same period. Finally, 4,059 tires manufactured by Goodyear Turkey were shipped into North Carolina for sale during this interval. Furthermore, as the trial court noted, other tires manufactured by Defendants may have

reached North Carolina during this time, since the figures set forth above do not include "vehicles equipped with tires from [Defendants] imported into the [United States] and shipped into North Carolina for sale each year." According to the trial court's findings, the distribution chain through which tires manufactured by Defendants were shipped into the United States and, eventually, into North Carolina, was "a continuous and systematic" process rather than a sporadic or episodic one. As a result, the trial court's findings indicated that, through a regular process employed within the Goodyear organization, a substantial number of tires manufactured by the Defendants were imported into the United States and distributed to various entities in North Carolina.

In addition to the evidence reflecting Defendants' contacts with North Carolina, the trial court's findings reflect that North Carolina has an interest in this proceeding given that Plaintiffs seek redress for injuries sustained by North Carolina citizens. In addition, the record reflects that requiring Plaintiffs, who have no ties to France, to litigate their claims in the French courts would impose a considerable burden on them. Although there is no question but that requiring Defendants to defend an action in the General Court of Justice would be burdensome as well, that burden is alleviated to some extent by the fact that Defendants have corporate affiliates in the United States with business interests in North Carolina, a fact which is simply not true of Plaintiffs.

As in *Bush*, *Warzynski*, *Hozelock*, and *U.S.A.'s Wild Thing*, Defendants have, without question, purposefully and intentionally manufactured tires and placed them in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina. Defendants also knew or should have known that a Goodyear affiliate obtained tires manufactured by Defendants and sold them in the United States in the regular course of business. The record further demonstrates that several thousand tires manufactured by each of the Defendants eventually found their way into North Carolina markets through the operation of a continuous and highly-organized distribution process. The number of tires at issue in this case is much greater than the number of sales that have been deemed sufficient in other cases, such as *Dillon*, 291 N.C. 674, 231 S.E.2d 626 (deeming 27 sales in North Carolina sufficient to support a finding of general jurisdiction), and *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E.2d 640, *cert. denied*, 297 N.C. 300, 254 S.E.2d 920 (1979) (deeming sales of "wire art" in North Carolina to a "substantial

extent" sufficient to support a finding of general personal jurisdiction). Finally, North Carolina has a well-recognized interest in providing a forum in which its citizens are able to seek redress for injuries that they have sustained, and a greater burden would be imposed upon Plaintiffs in the event that they were required to litigate their claims in France compared to the burden that would be imposed upon Defendants in the event that they are required to defend Plaintiffs' claims in the General Court of Justice. In light of all these facts, Defendants could, consistently with considerations of due process and fundamental fairness, reasonably expect to be subject to the jurisdiction of the North Carolina courts, so that the exercise of personal jurisdiction over Defendants would not violate the due process clause.

Defendants' principal challenge to the trial court's order rests on the assertion that "stream of commerce" analysis simply does not apply in instances involving general, as compared to specific, jurisdiction. Defendants have not cited a North Carolina case to this effect, and we know of none. On the other hand, *U.S.A.'s Wild Thing* does not appear to involve an exercise of specific jurisdiction. Instead of adopting a general rule precluding the use of stream of commerce analysis to support a finding of general personal jurisdiction, we believe that the real issue is the extent to which Defendants' products were, in fact, distributed in North Carolina markets. Although we might agree with Defendants' contention in the event that the record demonstrated that only a few tires reached North Carolina through a limited distribution process, that is not the situation present here. Instead, the trial court's findings reflect that thousands of tires manufactured by each of the Defendants were distributed in North Carolina as the result of a highly organized distribution process that involved Defendants and other Goodyear affiliates. Thus, we believe that, on the facts of this case, sufficient basis exists to support a finding of general personal jurisdiction under N.C. Gen. Stat. § 1-75.4(1)d and the due process clause.

As a result, after a thorough review of the record, and consistent with the principles outlined by this Court in *U.S.A.'s Wild Thing*, 122 N.C. App. 105, 468 S.E.2d 566, *Hozelock*, 105 N.C. App. 52, 411 S.E.2d 640, *Warzynski*, 102 N.C. App. 222, 401 S.E.2d 801, and *Bush*, 64 N.C. App. 41, 306 S.E.2d 56, we hold that the facts found in the trial court's order support its conclusion that Defendants "purposefully injected [their] product into the stream of commerce without any indication that [they] desired to limit the area of distribution of [their] product

so as to exclude North Carolina," *Bush*, 64 N.C. App. at 51, 306 S.E.2d at 568, and thereby purposefully availed themselves of the protection of the laws of this State. The trial court's findings are supported by competent evidence, and the findings in turn support the conclusion that the exercise of general personal jurisdiction over Goodyear Luxembourg, Goodyear Turkey, and Goodyear France was appropriate pursuant to N.C. Gen. Stat. § 1-75.4(1)(d) and the due process clause. As a result, the trial court did not err in exercising general jurisdiction over Defendants and denying their dismissal motions pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2). Thus, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges WYNN and STEPHENS concur.

IN THE MATTER OF: MICHAEL CHARLES HAYES, RESPONDENT

No. COA08-894

(Filed 18 August 2009)

1. Appeal and Error— preservation of issues—public interest—dispositions available at recommitment hearing—Rule 2

The issue of whether a conditional release was a possible disposition at a recommitment hearing for an inmate involuntarily committed following an insanity verdict was addressed by the Court of Appeals under Appellate Rule 2 despite not being properly preserved for review. The question will arise in every recommitment hearing of a person found not guilty by reason of insanity, and the question of dispositions available to the trial court is critical to the protection of the public's safety and the respondent's rights.

2. Mental Illness— recommitment hearing—conditional release—available disposition

A trial court has authority following a hearing under N.C.G.S. §§ 122C-268.1 and -276.1 to order a conditional release of an insanity acquittee. In this case, it was apparent that the trial court's assumption that it had no authority to award a conditional

release played a fundamental role in its decision, and the commitment order was reversed and remanded for a hearing *de novo*.

Appeal by respondent from order entered 1 October 2007 by Judge Steve A. Balog in Forsyth County Superior Court. Heard in the Court of Appeals 29 January 2009.

Attorney General Roy Cooper, by Assistant Attorney General Diane Martin Pomper, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for respondent-appellant.

GEER, Judge.

Respondent Michael Charles Hayes was found not guilty by reason of insanity following a murder trial. Pursuant to N.C. Gen. Stat. § 15A-1321(b) (2007), he was involuntarily committed to a state mental health facility. Since then, the trial courts have recommitted him following each recommitment hearing. In this appeal, he challenges the trial court's 1 October 2007 order again recommitting him to involuntary inpatient treatment for a period not to exceed 365 days. He argues (1) that the trial court erred in failing to consider a conditional release as a dispositional option and (2) that the evidence did not support the trial court's findings of fact and conclusions of law that respondent failed to prove he was no longer dangerous to others as defined by North Carolina law.

It is apparent from the record that the trial court believed its only options following the hearing were either to recommit Hayes to Dorothea Dix Hospital or to unconditionally release him. Because the trial court was unaware that it had the option of conditionally releasing Hayes, it made its findings of fact and conclusions of law under a misapprehension of the law. We, therefore, reverse the 1 October 2007 order and remand for reconsideration in light of the availability of a conditional release as a potential disposition.

Facts

In 1988, Hayes was charged with four counts of first degree murder, five counts of felonious assault with a deadly weapon, and two counts of assault on a law enforcement officer. Hayes was found not guilty by reason of insanity of all the charges and was involuntarily committed to a state mental health facility pursuant to N.C. Gen. Stat.

§ 15A-1321(b). Since his initial commitment, Hayes has had annual recommitment hearings under N.C. Gen. Stat. § 122C-276.1 (2007). Each time, the trial court has ordered Hayes' recommitment. Hayes has appealed several of the recommitment orders, all of which were upheld by this Court. *See In re Hayes*, 111 N.C. App. 384, 432 S.E.2d 862, *appeal dismissed*, 335 N.C. 173, 436 S.E.2d 376 (1993); *In re Hayes*, 139 N.C. App. 114, 532 S.E.2d 553 (2000); *In re Hayes*, 151 N.C. App. 27, 564 S.E.2d 305, *appeal dismissed and disc. review denied*, 356 N.C. 613, 574 S.E.2d 680 (2002). Prior to the hearing giving rise to this appeal, Hayes' last contested recommitment hearing was in January 2001.

On 11 September 2007, Hayes' treating physician at Dorothea Dix Hospital, Dr. Reem Utterback, filed with the clerk of superior court a Request for Hearing, stating that a recommitment hearing needed to be scheduled. The request form required Dr. Utterback to specify the reason the hearing was necessary, including whether it was to "determine the appropriateness" of Hayes' "Continued inpatient treatment," "Outpatient treatment," "Discharge," or "Conditional release." Dr. Utterback indicated on the form that the rehearing was to determine the appropriateness of Hayes' discharge.

In the Examination and Recommendation form attached to the hearing request, Dr. Utterback reported that Hayes "has progressed through the forensic program and currently has extensive off grounds privileges, which include full time work, AA/NA and family visits." Dr. Utterback also noted that Hayes has "been living in the independent living program without any problems or difficulties"; that "[h]e has had no symptoms of mental illness for many years and is on no psychotropic medications"; and that "[h]e presents as well groomed, alert, oriented, cooperative, pleasant [with] no signs of aggressive violence."

The recommitment hearing requested by Dr. Utterback was held on 17 September 2007, and numerous mental health professionals testified. At the 2001 hearing, six years earlier, the court-appointed independent expert, Dr. Jonathan J. Weiner, expressed his view that Hayes was still mentally ill and dangerous. In the 2007 hearing, however, Dr. Weiner explained that because of Hayes' progress since 2001, he has now concluded that Hayes is not mentally ill under North Carolina law and that "there is not a reasonable probability that the conduct which resulted in his being committed almost 20 years ago would be repeated[.]" Dr. Weiner emphasized Hayes' full-time employment for three years, his active participation in Alcoholics

Anonymous, and his 13 years of sobriety. He believes that the risk of Hayes' relapsing into alcohol dependence is "very, very small" and has concluded that Hayes not only no longer needs inpatient commitment, but that it is no longer therapeutically sound to keep Hayes in Dorothea Dix Hospital as an inpatient.

Dr. Peter Barboriak, the medical director of forensic psychology services at Dorothea Dix Hospital, and Dr. Mark Hazelrigg, chief forensic psychologist at the Hospital, each expressed his medical opinion that Hayes did not meet the legal definitions of being mentally ill or dangerous to others. Dr. Barboriak, who treated Hayes from March 2007 to June 2007, testified that, in his opinion, Hayes does not need to be hospitalized and should be discharged. He does not believe that Hayes shows any sign of active mental illness. Dr. Hazelrigg noted that, as a result of a 2006 consent order setting out Hayes' off-campus privileges, Hayes currently spends more time away from Dorothea Dix Hospital than in the Hospital. Although Dr. Hazelrigg acknowledged that if Hayes resumed using drugs and alcohol, he could have another psychotic episode, he emphasized that Hayes does not have a risk of violence except in the context of substance abuse-induced psychosis, and substance abuse is unlikely to recur given Hayes' demonstrated commitment to staying drug- and alcohol-free.

Dr. Charles Vance, who treated Hayes from 2001 to 2007, and Dr. Utterback, Hayes' current treating physician, both of Dorothea Dix Hospital, agreed that Hayes is neither mentally ill nor dangerous to others under North Carolina law. Dr. Vance reported that no clinician at Dorothea Dix Hospital considers Hayes to be mentally ill any longer. Although he recognized that Hayes' risk for violent conduct is greater than that of an average person, he stressed that it is "a very, very small risk such that I feel comfortable saying he does not pose a substantial risk to the health and safety of others." Edwin D. Munt, who had provided therapy to Hayes at Dorothea Dix Hospital from December 1992 to August 2004, explained that he had ended therapy treatment with Hayes in 2004 because, in his opinion, Hayes was no longer mentally ill. Munt also testified that he does not believe that there is a reasonable probability that Hayes would repeat his violent behavior in the future.

In addition, Hayes presented the testimony of two forensic psychiatrists and a forensic psychologist from outside of Dorothea Dix Hospital who had evaluated Hayes over a substantial period of time. Dr. Seymour Halleck has been involved in Hayes' treatment since

1991. He testified that, in his medical opinion, Hayes is not mentally ill and that there is not a reasonable probability that he is dangerous to others. He acknowledged that there is a risk that Hayes could become psychotic and violent if he abuses substances in the future, but that the risk is small in light of nearly 19 years free of psychosis. Dr. James Bellard explained that he has worked with Hayes on a pro bono basis since 1996. Dr. Bellard testified that based on his decade-long involvement in Hayes' case, he does not believe that Hayes is currently mentally ill. Although he admits there is some risk that Hayes could return to substance abuse and some risk for violence if he becomes psychotic again, he believes the risk that Hayes would be dangerous to others is "extremely low." Hayes' final witness, clinical psychologist Dr. Christopher Norris, agreed with each of the other medical experts that Hayes "does not suffer from any mental illness as determined by North Carolina law" and is not dangerous to others. He testified that there is a risk that a return to substance abuse could lead to a psychotic break in the future, but that the risk of Hayes' relapse into substance abuse is low.

The State presented the testimony of one expert witness, Dr. Robert S. Brown, Jr., a forensic psychiatrist from Virginia. Dr. Brown testified that, in his medical opinion, Hayes is mentally ill with diagnoses of personality disorder not otherwise specified with narcissistic features, substance dependence, and sleep apnea. When asked if he had an opinion whether "Mr. Hayes has any risk for future violence should he be released from the hospital[,]" Dr. Brown stated that the risk was "small or slight." Dr. Brown, however, believes that even a slight risk is unacceptable. Although Dr. Brown does not think Hayes should be unconditionally released from Dix Hospital, he added: "I'm just suggesting that a successful 19-year stay at Dorothea Dix, if it's any way possible, can be concluded with a rational and safe and appropriate discharge plan, that's what I'm in favor of." He explained further: "[H]e's made progress at Dorothea Dix and I think he needs a discharge plan that contains some reasonable supervision in it to help guarantee success in—in the discharge."

In an order entered 1 October 2007, the trial court found, with respect to the issue of mental illness, that Hayes met the criteria for being diagnosed with the mental disorders of "[p]olysubstance [d]ependance" and "[p]ersonality [d]isorder NOS [Not Otherwise Specified], with antisocial and narcissistic traits." The trial court further determined that "these mental disorders so lessen the capacity of Michael Charles Hayes to use self-control, judgment and discretion in

the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance or control and thus, they constitute mental illnesses as defined by G.S. 122C-3(21)."

On the issue of dangerousness, the trial court found:

> The four homicides and seven felonious assaults committed by the respondent on July 27, 1988, are episodes of dangerousness to others in the relevant past which in combination with his past and present mental condition, his multiple mental illnesses and his conduct since admission to Dorothea Dix Hospital since 1989 and up to and including his conduct in the hospital during the previous years indicated there is a reasonable probability that the respondent's seriously violent conduct will be repeated and that he will be dangerous to others in the future *if unconditionally released with no supervision at this time*. There is a reasonable probability that if the respondent were released today he may relapse into his previous pattern of multi-substance abuse/dependence and relapse into a situation repeating his exposure to the same ordinary life stressors at least as serious as, if not more so, than those which were present in 1988 at the time of the killings. Should these kinds of relapses occur, the respondent will run the risk of future violent behavior.

(Emphasis added.)

Based on these findings, the trial court ultimately concluded that Hayes had failed to prove by a preponderance of the evidence that he is no longer mentally ill or dangerous to others and, therefore, had "failed to bear his burden of proof that he meets either criteria for release under N.C.G.S. 122C-276.1." The trial court recommitted Hayes to inpatient treatment for a period of 365 days. Hayes timely appealed to this Court.

Discussion

Pursuant to N.C. Gen. Stat. § 15A-1321(b), when a defendant is found not guilty by reason of insanity, "the presiding judge shall enter an order finding that the defendant has been found not guilty by reason of insanity of a crime and committing the defendant to a Forensic Unit operated by the Department of Health and Human Services, where the defendant shall reside until the defendant's release in accordance with Chapter 122C of the General Statutes." N.C. Gen. Stat. § 122C-268.1(a) (2007) provides for a commitment hearing

within 50 days of the initial commitment. At that hearing, under § 122C-268.1(i), the respondent may be recommitted for a subsequent period of 90 days. At the end of the 90-day period, the respondent may be recommitted for an additional 180-day period under N.C. Gen. Stat. § 122C-276.1(c). After that, N.C. Gen. Stat. § 122C-276.1(d) provides for annual commitment hearings.

N.C. Gen. Stat. § 122C-268.1(i) sets out the standard governing the trial court's review for the first hearing:

> The respondent shall bear the burden to prove by a preponderance of the evidence that he (i) no longer has a mental illness as defined in G.S. 122C-3(21), or (ii) is no longer dangerous to others as defined in G.S. 122C-3(11)b. If the court is so satisfied, then the court shall order the respondent discharged and released. If the court finds that the respondent has not met his burden of proof, then the court shall order that inpatient commitment continue at a 24-hour facility designated pursuant to G.S. 122C-252 for a period not to exceed 90 days. The court shall make a written record of the facts that support its findings.

The standard is the same for the second hearing, N.C. Gen. Stat. § 122C-276.1(c), and for any subsequent hearing, N.C. Gen. Stat. § 122C-276.1(d).

[1] Hayes first argues on appeal that Chapter 122C provides for three possible dispositions at recommitment hearings. According to Hayes, the trial court is authorized: "(1) to order the recommitment of a respondent to inpatient hospitalization, (2) to order the unconditional release of a respondent, or (3) to order the conditional release of a respondent." The State contends, as a threshold matter, that Hayes failed to present his argument regarding conditional release in the trial court and, therefore, waived appellate review of the issue.

Rule 10 of the Rules of Appellate Procedure "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.' " *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 195, 657 S.E.2d 361, 363 (2008) (quoting N.C.R. App. P. 10(b)(1)). Review of the record reveals that Hayes failed to present any argument to the trial court that conditional release is a dispositional alternative under N.C. Gen. Stat. § 122C-276.1.

Although Hayes' counsel asked several of the mental health professionals testifying at the hearing about the potential benefits of a "transitional program" or "conditional release" for Hayes, counsel also argued to the trial court that "it's an either or decision" regarding unconditional release or recommitment. Without presenting a distinct argument to the trial court that a conditional release was a possible disposition, Hayes failed to properly preserve the issue for appellate review.

In cases where a party has failed to preserve an argument for appellate review, "Rule 2 permits the appellate courts to excuse a party's default . . . when necessary to 'prevent manifest injustice to a party' or to 'expedite decision in the public interest.' " *Dogwood*, 362 N.C. at 196, 657 S.E.2d at 364 (quoting N.C.R. App. P. 2). In this case, all the parties and the trial court assumed at the hearing that the case presented an "either/or" proposition—Hayes would be either recommitted or unconditionally released. *See Potter v. Homestead Pres. Ass'n*, 330 N.C. 569, 576, 412 S.E.2d 1, 5 (1992) (electing to suspend appellate rules under Rule 2 to consider plaintiff's dismissed claim where record reflected parties and trial court operated under "erroneous[] assum[ption]" regarding statute of limitations).

The prejudice of the parties' assumption to the proceedings in this case is readily apparent from a review of the testimony (including the expert testimony presented by the State that must have formed the basis for the trial court's order), the State's closing argument, and the trial court's order itself. Significantly, the State's only expert witness candidly explained that a conditional release—a release with a discharge plan—is "what I'm in favor of." The State, however, argued in closing:

> And as the Court is aware, *if you release him, you have to release him unconditionally*. He can go wherever he wants, he can do whatever he wants, he can associate with whomever he'd like to, he can go to AA meetings or not go to AA meetings. *There's no way for the Court or society to have any checks or balances on him with regard to what he does.*
>
> If you release him, I submit based on the situation that he has created for himself, he's essentially walking into a—and that stressful environment has simply created too much of a risk that he might start down that slippery slope. And once he starts down, increasing his—at abusing substances again, it's a risk that I submit to you that this community should not have to bear

> based in part or in large part on the extremely violent and homicidal conduct that he has already exhibited he is capable of by abusing substances.

(Emphasis added.) The prejudicial effect of the assumption then manifests itself in the trial court's finding that "there is a reasonable probability that the respondent's seriously violent conduct will be repeated and that he will be dangerous to others in the future *if unconditionally released with no supervision* at this time." (Emphasis added.)

Thus, the assumption that the only alternative to recommitment was an unconditional release was a fundamental aspect of the State's argument for continued inpatient commitment and a critical component of the trial court's order. Indeed, if a conditional release were a lawful disposition, the impact of the State's sole expert's testimony could be very different since his testimony can be read as endorsing a conditional release over recommitment. In our discretion, we believe it is necessary to address this issue to prevent manifest injustice to Hayes.

Moreover, an appellate court may elect, in its discretion under Rule 2, to address important issues that frequently arise in order to expedite decision in the public interest. *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986) ("[O]n rare occasions, when . . . issues of importance which are frequently presented to state agencies and the courts require a decision in the public interest, this Court will exercise its inherent residual power or its authority under Rule 2 of the North Carolina Rules of Appellate Procedure and address those issues though they are not properly raised on appeal.").

The issue presented by this appeal will arise in every recommitment hearing of a person who has been committed by virtue of having been found not guilty by reason of insanity. The question of the dispositions available to a trial court is critical to the protection of the public's safety and the protection of the respondent's rights. As then Justice Sharp reminded us in *In re Tew*, 280 N.C. 612, 618, 187 S.E.2d 13, 17 (1972) (internal quotation marks and citations omitted):

> A verdict of not guilty due to insanity constitutes a full acquittal, and one thus acquitted is entitled to all the protection and constitutional rights as if acquitted upon any other ground. . . . The commitment of such a person following an acquittal is imposed for the protection of society and the individual con-

> fined—not as punishment for crime. He can be confined in an asylum *only* until his mental health is restored when he will be entitled to his release, like any other insane person.

The need for resolution of this significant issue is well demonstrated by Hayes' case: this issue will recur every year at his recommitment hearing. It is in the public's interest that this issue be resolved now.

[2] On the merits of the issue, Hayes contends that even though neither N.C. Gen. Stat. § 122C-268.1(i) nor N.C. Gen. Stat. § 122C-276.1(c) explicitly authorize a conditional release, other provisions in Chapter 122C contemplate a conditional release as a dispositional option. Hayes argues that construing these statutes *in pari materia* leads to the conclusion that a trial court is authorized to order a conditional release in § 122C-268.1 and § 122C-276.1 hearings. The State, on the other hand, maintains that the language in N.C. Gen. Stat. §§ 122C-268.1(i) and -276.1(c) provides for only two dispositional alternatives—commitment or unconditional release—and, therefore, the trial court's authority is necessarily limited to those two options.

Significantly, both N.C. Gen. Stat. § 122C-268.1(i) and N.C. Gen. Stat. § 122C-276.1(c) refer to a respondent being "*discharged* and *released*." (Emphasis added.) A fundamental principle of statutory interpretation is that "a statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage." *State v. Williams*, 286 N.C. 422, 431, 212 S.E.2d 113, 119 (1975). If, as the State argues, the General Assembly had intended that the trial court have only the options of discharge or recommitment, the word "released" would be synonymous with the word "discharged" and would be a mere redundancy.

Under traditional statutory construction principles, some meaning—independent of that ascribed to "discharge"—must be given to the word "release." *See Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155, 167, 166 S.E.2d 78, 86 (1969) (holding that where statute or ordinance contains multiple terms or requirements, it is presumed that "none of them is a mere repetition of the others"); *State v. Ward*, 31 N.C. App. 104, 106, 228 S.E.2d 490, 491 (1976) ("It is presumed that no meaningless or useless words or provisions are used in a statute, but that each word or provision is to be given some effect.").

"The primary rule of construction . . . is to ascertain the intent of the legislature and to carry out such intention to the fullest ex-

tent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). To effectuate that intent, "[s]tatutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Bd. of Adjustment of the Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993). *Accord Redevelopment Comm'n of Greensboro v. Sec. Nat'l Bank of Greensboro*, 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960) ("It is a fundamental rule of statutory construction that sections and acts *in pari materia*, and all parts thereof, should be construed together and compared with each other."). Words and phrases of a statute are to be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the statute permits. *Underwood v. Howland*, 274 N.C. 473, 479, 164 S.E.2d 2, 7 (1968).

Chapter 122C of the General Statutes codifies the Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985. Within Chapter 122C is Article 5, which outlines the "Procedures for Admission and Discharge of Clients." Article 5 includes Part 7, entitled "Involuntary Commitment of the Mentally Ill; Facilities for the Mentally Ill." Part 7 includes not only N.C. Gen. Stat. § 122C-268.1 and § 122C-276.1, but also N.C. Gen. Stat. § 122C-277 (2007), entitled "Release and conditional release; judicial review."

Pertinent to this case, N.C. Gen. Stat. § 122C-277 provides:

> (a) Except as provided in subsections (b) and (b1) of this section, the attending physician shall discharge a committed respondent unconditionally at any time he determines that the respondent is no longer in need of inpatient commitment. However, if the attending physician determines that the respondent meets the criteria for outpatient commitment as defined in G.S. 122C-263(d)(1), he may request the clerk to calendar a supplemental hearing to determine whether an outpatient commitment order shall be issued. Except as provided in subsections (b) and (b1) of this section, *the attending physician may also release a respondent conditionally* for periods not in excess of 30 days on specified medically appropriate conditions. . . .
>
> . . . .
>
> (b1) If the respondent was initially committed pursuant to G.S. 15A-1321, 15 days before the respondent's discharge or *con-*

> *ditional release* the attending physician shall notify the clerk of superior court. The clerk shall calendar a hearing and shall give notice as provided by G.S. 122C-264(d1). . . . The hearing shall be conducted under the standards and procedures set forth in G.S. 122C-268.1. Provided, that in no event shall discharge or *conditional release* under this section be allowed for a respondent during the period from automatic commitment to hearing under G.S. 122C-268.1.

N.C. Gen. Stat. § 122C-277(a) and (b1) (emphasis added).

The plain language in N.C. Gen. Stat. § 122C-277 indicates that the General Assembly intended conditional release as a dispositional option in the insanity acquittee involuntary commitment context. Even the State acknowledges that the trial court has authority to order a conditional release under § 122C-277. As the broad language indicates, the only time conditional release is not an option in judicial review proceedings is during the 50-day period between the automatic commitment pursuant to N.C. Gen. Stat. § 15A-1321 and the initial hearing under N.C. Gen. Stat. § 122C-268.1.

Construing N.C. Gen. Stat. §§ 122C-268.1, -276.1, and -277 *in pari materia*, it is reasonable to read these statutes as providing the same dispositional alternatives—recommitment, discharge, or conditional release—regardless whether the hearing was initiated by a respondent's treating physician or whether it was automatically calendared pursuant to a statutory mandate. The State has presented no logical rationale for its position that the trial court's authority to order a conditional release is limited to those instances when a physician intends to conditionally release an insanity acquittee. The more reasonable construction of the statute is that if a trial court may order a conditional release when requested by a treating physician, then the trial court itself has commensurate authority under N.C. Gen. Stat. §§ 122C-268.1 and -276.1 to order a conditional release in an automatically calendared proceeding.

The procedure in this case demonstrates the irrationality of construing the statutes to grant the trial court authority to order a conditional release if a treating physician requests a hearing under N.C. Gen. Stat. § 122C-277—as Dr. Utterback did here—but to deprive the trial court of the authority to do so if the hearing is deemed not to be initiated by the treating physician, as the State apparently assumes to be the case here. Consistent with N.C. Gen. Stat. § 122C-277, Hayes' treating physician submitted a Request for Hearing to obtain an or-

der regarding the discharge of Hayes.[1] Nonetheless, the parties all have treated this hearing as if it were an automatic one not initiated by the treating physician, with the result, according to the State, that the trial court could only recommit or unconditionally release Hayes. We do not believe the General Assembly intended such a curious result—that the trial court's dispositional authority could be defined by the label placed on the hearing by the parties.

The Legislature's intent to provide for conditional release as an option in § 122C-268.1 or § 122C-276.1 hearings is further evidenced by the notice provisions set out in N.C. Gen. Stat. § 122C-264(d1) (2007):

> For hearings and rehearings pursuant to G.S. 122C-268.1 and G.S. 122C-276.1, the clerk of superior court shall calendar the hearing or rehearing and shall notify the respondent, his counsel, counsel for the State, and the district attorney involved in the original trial. . . . Upon receipt of the notice, the district attorney shall notify any persons he deems appropriate, including anyone who has filed with his office a written request for notification of any hearing or rehearing concerning discharge or *conditional release* of a respondent.

(Emphasis added.) Notably, no other hearing pursuant to any other statute is mentioned in § 122C-264(d1)—§ 122C-268.1 and § 122C-276.1 hearings are the sole subjects of the statute.

The plain language of this statute requires that notice of § 122C-268.1 and -276.1 hearings be given to anyone who has requested notice of a hearing "concerning discharge or conditional release." N.C. Gen. Stat. § 122C-264(d1). Thus, the statute recognizes that hearings under § 122C-268.1 and -276.1 are hearings that may involve a conditional release. If, as the State urges, a conditional release is not an option in these hearings, then the General Assembly did not need to reference a conditional release in § 122C-264(d1). The State's interpretation cannot be reconciled with longstanding prin-

1. The fact that Hayes' treating physician checked the box next to "[d]ischarge" should not necessarily mean that a conditional release is not available under § 122C-277. As Hayes' doctor's testimony reveals, she selected this option because, in her medical opinion, Hayes is neither mentally ill nor dangerous to himself or others as defined by North Carolina law, and, therefore, should be unconditionally discharged. The trial court, in this case, was, however, unpersuaded by Hayes' treating physician's testimony. We are unwilling to hold that a trial court's statutory authority to order the disposition it believes supported by the evidence can be limited by a doctor's completion of a form.

ciples of statutory construction. *See State v. Harvey*, 281 N.C. 1, 19-20, 187 S.E.2d 706, 718 (1972) ("In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant if they can reasonably be considered as adding something to the act which is in harmony with its purpose.").

In sum, construing § 122C-264(d1) and § 122C-277(b1) as part of a comprehensive whole with § 122C-268.1 and § 122C-276.1, we do not believe that the General Assembly intended to grant a trial court authority to order a conditional release only if the commitment proceeding was initiated by a treating physician under § 122C-277(b1) and intended to deprive the trial court of authority to order a conditional release when the hearing automatically came up under § 122C-268.1 or § 122C-276.1. In addition, § 122C-264(d1)—the notice statute—specifically references § 122C-268.1 and § 122C-276.1 hearings and indicates that they are hearings "concerning discharge or conditional release of a respondent." N.C. Gen. Stat. § 122C-264(d1). We conclude that N.C. Gen. Stat. §§ 122C-264, -268.1, -276.1, and -277—read *in pari materia*—establish the trial court's authority to order a conditional release as a dispositional option in § 122C-268.1 and § 122C-276.1 hearings.

The Supreme Court's decision in *Tew* supports our conclusion. In *Tew*, 280 N.C. at 618-19, 187 S.E.2d at 18, the Supreme Court held that N.C. Gen. Stat. § 122-86 (1964) ("Persons acquitted of crime on account of mental illness; how discharged from hospital.")—a precursor to N.C. Gen. Stat. §§ 122C-268.1 and -276.1—did not comport with due process because it required an insanity acquittee's release to be certified by the superintendents of the state's mental facilities. The Court held that the certification requirement unconstitutionally "circumscribed" the trial court's authority to discharge an insanity acquittee. *Tew*, 280 N.C. at 619, 187 S.E.2d at 18.

In remanding the case to the trial court for a trial de novo, the Court stressed: "[W]e perceive no legal reason why [the petitioner] could not be granted a conditional probationary release if his mental condition be found to justify it. *See* G.S. § 122-67 (1964)." *Id.* at 621, 187 S.E.2d at 19. Like the current statute, N.C. Gen. Stat. § 122-67 (1964) did not specifically authorize the trial court to order a conditional release, although it did authorize the superintendent of the hospital at which an insanity acquittee was confined to "release [an insanity acquittee] on probation" if "suitable provision[s] c[ould] be

made . . . ." If, in *Tew*, N.C. Gen. Stat. § 122-67 permitted the trial court to order conditional release, although not explicitly authorizing the court to do so, we see no reason that the same conclusion should not arise with respect to the current provisions: N.C. Gen. Stat. §§ 122C-268.1 and -276.1.

The State asserts that the Supreme Court's discussion in *Tew* of this issue was *dicta*. To the contrary, this holding addressed a specific argument raised by the petitioner. The petitioner had argued to the Court that the trial court's "findings that he is now sane and safe require[d] his unconditional release." *Tew*, 280 N.C. at 617, 187 S.E.2d at 17. In responding to this argument, the Court concluded that Tew should not be unconditionally released, but rather that there should be a trial de novo, following which he could be (1) granted an unconditional release, (2) returned to the custody of Dorothea Dix Hospital, or (3) granted a conditional release. *Id.* at 621, 187 S.E.2d at 19. The Court's determination that the trial court had authority to grant a conditional release thus is not *dicta*.

Our construction of the word "release" to authorize both conditional and unconditional releases is also consistent with the statutory framework's purpose. *See In re Appeal of Bass Income Fund*, 115 N.C. App. 703, 705, 446 S.E.2d 594, 595 (1994) (" 'The words and phrases of a statute must be interpreted contextually,' and read in a manner which effectuates the legislative purpose." (quoting *In re Kirkman*, 302 N.C. 164, 167, 273 S.E.2d 712, 715 (1981))). In *Tew*, 280 N.C. at 618, 187 S.E.2d at 17, the Supreme Court explained that the Legislature had a dual purpose in requiring automatic commitment for insanity acquittees: "The commitment of such a person following an acquittal is imposed for the protection of society and the individual confined—not as punishment for crime."

Likewise, in *In re Rogers*, 78 N.C. App. 202, 204, 336 S.E.2d 682, 684 (1985), *disc. review denied*, 316 N.C. 194, 341 S.E.2d 578 (1986), this Court confirmed that N.C. Gen. Stat. § 122-58.13 (Supp. 1983) (repealed 1985), a precursor to the judicial review statute N.C. Gen. Stat. § 122C-277, "creates an additional procedural safeguard for the public while, simultaneously, providing the respondent the opportunity for release afforded others similarly committed." This Court stressed that the statute "balances society's right to be protected from violent crimes against respondent's right to be released when he no longer needs hospitalization." *Rogers*, 78 N.C. App. at 204, 336 S.E.2d at 684.

It is apparent that the same dual purposes undergird the current statutory framework. *See also Jones v. United States*, 463 U.S. 354, 368, 77 L. Ed. 2d 694, 708, 103 S. Ct. 3043, 3051-52 (1983) ("The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness."). If, however, one of the primary purposes is to protect the public from insanity acquittees, then it is illogical to construe the word "release" in a manner that provides less protection to the public than the public receives in connection with involuntary commitments under other statutes.

With respect to other people who have been involuntarily committed, they can be transitioned into society through a conditional release or outpatient commitment program. The State would have us hold, however, that the General Assembly intended to deprive trial courts of the authority to similarly transition insanity acquittees into society through a conditional release. The State's closing argument in this case set out precisely the increased risk resulting from an unconditional release when compared to a conditional release. Yet, the State asks us to hold that a trial court has a choice only of (1) unconditionally releasing an insanity acquittee—creating a risk to the public—or (2) recommitting the insanity acquittee even though he is ready to take steps to return to society. This approach cannot be reconciled with the dual purposes of the statutory framework.

Finally, construing the statutes to preclude a conditional release would raise constitutional concerns. *See State v. Fulcher*, 294 N.C. 503, 526, 243 S.E.2d 338, 353 (1978) (holding that statutes should be construed to avoid "conflict with the superior voice of the Constitution"). A prison inmate—necessarily convicted of a crime—who is committed to Dorothea Dix Hospital during imprisonment would, if the inmate's sentence expired while committed, be entitled to a conditional release. The State's construction of the statute would deprive an insanity acquittee of the same opportunity. In *Foucha v. Louisiana*, 504 U.S. 71, 86, 118 L. Ed. 2d 437, 452, 112 S. Ct. 1780, 1789 (1992), the United States Supreme Court held unconstitutional a Louisiana statute that treated criminals and insanity acquittees differently without a "convincing reason."

Moreover, the United States Supreme Court has held that "[t]he Due Process Clause 'requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.' " *Jones*, 463 U.S. at 368, 77 L. Ed. 2d at 708, 103 S. Ct. at 3052 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738, 32

L. Ed. 2d 435, 451, 92 S. Ct. 1845, 1858 (1972)). Interpreting our statutes to preclude a trial court's conditional release of an acquittee would raise a serious question whether such a statute bears a reasonable relation to the State's interest in protecting the public.

Conclusion

We, therefore, hold that a trial court has authority following a hearing under N.C. Gen. Stat. § 122C-268.1 and § 122C-276.1 to order a conditional release of an insanity acquittee. Here, it is apparent from the trial court's findings of fact that its assumption that it had no authority to order a conditional release played a fundamental role in its decision in this case. The trial court found that "there is a reasonable probability that the respondent's seriously violent conduct will be repeated and that he will be dangerous to others in the future *if unconditionally released with no supervision at this time*." The trial court did not make findings of fact that such a reasonable probability exists in the absence of an unconditional release. We cannot determine that the trial court, if aware that a conditional release was a legal disposition, would have still recommitted Hayes. *See Tew*, 280 N.C. at 621, 187 S.E.2d at 19 (vacating commitment order and remanding for hearing de novo when "at the time [the trial judge] made his findings he was under a misapprehension as to the applicable law" regarding commitment of insanity acquittee).

We, therefore, must reverse the trial court's 1 October 2007 commitment order and remand for a hearing de novo to decide whether Hayes has met his burden of proof and, if he has, whether he should be conditionally or unconditionally released. We leave to the discretion of the trial court whether to base the new decision on the existing record or whether to hear additional evidence given the parties' focus, in the first hearing, on recommitment versus unconditional release. Due to our disposition of this appeal, we do not address Hayes' other arguments on appeal.

Reversed and remanded.

Judges ROBERT C. HUNTER and STEELMAN concur.

PATRICK JEFFERS, PLAINTIFF v. DONALD F. D'ALESSANDRO, M.D., THE MILLER ORTHOPAEDIC CLINIC, INC., RICHARDSON SPORTS LIMITED PARTNERSHIP D/B/A CAROLINA PANTHERS, AND PFF, INC., DEFENDANTS

No. COA08-813

(Filed 18 August 2009)

1. Appeal and Error— law of the case—prior interlocutory appeal

The law of the case doctrine did not preclude a challenge to an order compelling arbitration where a prior appeal had been deemed interlocutory with no substantial right involved. That decision necessarily did not resolve the issue presented here: whether the trial court erred in compelling arbitration.

2. Contracts— collective bargaining—professional football—medical treatment—state claims preempted

The trial court did not err by determining that a professional football player's claims involving medical treatment were preempted by the Labor Management Relations Act (LMRA). Plaintiff's claims are substantially dependent upon analysis of the NFL Collective Bargaining Agreement and the player's contract, and those claims are therefore preempted by Section 301 of the LMRA.

3. Arbitration and Mediation— arbitration—professional football player—medical treatment—collective bargaining agreement

The trial court properly granted a motion to compel arbitration of claims by a professional football player arising from medical treatment. The NFL's collective bargaining agreement provided for arbitration of any dispute involving the interpretation of, application of, or compliance with the agreement or contract; these claims concern the interpretation or application of the agreement's medical rights provisions, and are subject to arbitration.

Appeal by plaintiff from order entered 1 April 2004 by Judge Robert C. Ervin and judgment entered 27 March 2008 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 January 2009.

Lewis A. Cheek; and Allen, Moore & Rogers, L.L.P., by John C. Rogers, III, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Samuel H. Poole, Jr. and Jaye E. Bingham; and Robinson, Bradshaw & Hinson, P.A., by Mark W. Merritt, for defendants-appellees Richardson Sports Limited Partnership and PFF, Inc.

GEER, Judge.

Plaintiff Patrick Jeffers appeals from the trial court's order compelling arbitration and the court's subsequent judgment confirming the arbitrator's award dismissing his claim against defendants Richardson Sports Limited Partnership and PFF, Inc. (collectively "the Carolina Panthers"). It is undisputed that Jeffers, a former player for the Carolina Panthers, was subject to the NFL Collective Bargaining Agreement (the "CBA") entered into by the NFL Management Council and the NFL Players Association. The primary issue at the trial level was, and on appeal is, whether Jeffers' claims—arising out of surgery on his knees by the Carolina Panthers' team physician—are preempted by Section 301 of the Labor Management Relations Act ("LMRA"). We agree with the trial court that resolution of Jeffers' claims substantially depends upon analyzing the CBA and, therefore, Jeffers' claims are preempted. Further, the trial court properly determined that, assuming Jeffers' complaint stated a Section 301 claim for breach of the CBA, he was required to arbitrate that claim. We, therefore, affirm.

Facts and Procedural History

On 22 April 1999, Jeffers, an NFL wide receiver, was acquired by the Carolina Panthers as a restricted free agent. Jeffers signed a one-year standard player's contract, negotiated between the NFL Management Council, which represents all NFL teams, and the NFL Players Association, the exclusive bargaining representative of all present and future NFL players. The player's contract incorporates by reference the CBA, which, in turn, "represents the complete understanding of the parties on all subjects covered herein . . . ." Article XLIV of the CBA sets out the "Players' Rights to Medical Care and Treatment."

Jeffers was injured during a 2000 preseason game, tearing his right anterior cruciate ligament ("ACL"). He agreed to allow the Carolina Panthers' team physicians, Dr. Donald F. D'Alessandro and Dr. Patrick M. Conner, both with The Miller Orthopaedic Clinic, Inc.,

to repair his right ACL and to perform some "minor" arthroscopic procedures on his left knee. The surgeries were performed on 20 August 2000 at Carolinas Medical Center in Charlotte, North Carolina. Dr. Connor repaired Jeffers' right ACL, while Dr. D'Alessandro performed additional procedures on both of Jeffers' knees.

Over the next year, Jeffers was able to completely rehabilitate his right knee, but continued to have weakness in his left knee, loss of speed and strength, and recurring pain and swelling in both knees. Although Jeffers played in some games during the 2001 season with the Carolina Panthers, the team ultimately terminated his contract in August 2002.

On 12 August 2003, Jeffers filed an action asserting a medical malpractice claim against Dr. D'Alessandro and The Miller Orthopaedic Clinic and claims against the Carolina Panthers for negligent retention, for intentional misconduct under *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), and for breach of implied warranty. In his complaint, Jeffers alleged that, during the 20 August 2000 surgery, Dr. D'Alessandro performed additional, unauthorized procedures that went beyond Jeffers' informed consent.[1]

On 23 October 2003, the Carolina Panthers moved to dismiss Jeffers' complaint for lack of subject matter jurisdiction as to the claims against the Panthers, arguing that because of the CBA, Jeffers' claims were preempted by Section 301 of the LMRA. The Carolina Panthers alternatively requested that the trial court compel arbitration of Jeffers' claims against the team and stay the matter pending arbitration. On 23 January 2004, Jeffers took a voluntary dismissal of his breach of implied warranty claim against the Carolina Panthers.

In an order entered 1 April 2004, the trial court denied the Carolina Panthers' motion to dismiss, but granted their motion to compel arbitration. The trial court agreed with the Carolina Panthers' contention that Jeffers' negligent retention and *Woodson* claims were preempted by Section 301 of the LMRA based on *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 109 L. Ed. 2d 362, 110 S. Ct. 1904 (1990). The trial court concluded, however, that the factual allegations in the complaint could be read as stating a claim for relief under Section 301 for breach of the CBA. The court, therefore, denied the motion to dismiss. The trial court then determined that, under the

1. Jeffers voluntarily dismissed without prejudice his medical malpractice claim against Dr. D'Alessandro and The Miller Orthopaedic Clinic on 17 April 2006.

terms of the CBA, Jeffers' claims were subject to arbitration. It, therefore, granted the Carolina Panthers' motion to compel arbitration.

The trial court, on 30 April 2004, certified its order for immediate appeal under Rule 54(b) of the Rules of Civil Procedure. Jeffers' subsequent appeal to this Court was, however, dismissed as being an improper interlocutory appeal, *Jeffers v. D'Alessandro*, 169 N.C. App. 455, 612 S.E.2d 447, 2005 N.C. App. LEXIS 714, *13-14, 2005 WL 757178, *5 (April 5, 2005) (unpublished), and the Supreme Court denied discretionary review, 359 N.C. 633, 616 S.E.2d 235 (2005).

On 27 July 2005, Jeffers submitted a demand for arbitration under the CBA to the NFL Players Association. The NFL Management Council, which received a copy, construed the demand as a grievance under the CBA and, on behalf of the Carolina Panthers, denied the grievance as untimely and without merit. On 16 August 2005, Jeffers appealed the denial of his grievance and renewed his demand for arbitration. The parties agreed that prior to any hearing on the merits of Jeffers' grievance, the arbitrator would address "two threshold issues: the Club's contention that the grievance must be dismissed as untimely; and Jeffers' contention that the grievance should be dismissed because his claims against the Panthers are not subject to arbitration under the CBA."

In an opinion and award dated 25 March 2008, the arbitrator noted that "Jeffers has not contested the Club's claim that this grievance was not filed within the time limit set forth in Article IX of the CBA" and that Jeffers had limited his arguments to the second issue regarding the arbitrability of the claims. The arbitrator ultimately determined that there was no "compelling basis on which to conclude that Jeffers' claims against the Panthers are not subject to arbitration under the CBA." The arbitrator further concluded that Jeffers' "grievance must be dismissed as untimely under Article IX of the CBA."

The Carolina Panthers filed a motion to confirm the arbitration award on 27 March 2008. The trial court entered a judgment on the same date, confirming the award. Jeffers timely appealed to this Court from the order compelling arbitration and the judgment confirming the arbitration award.

I

[1] As a threshold matter, the Carolina Panthers argue that Jeffers is precluded by the "law of the case" doctrine from challenging the order compelling arbitration. The Carolina Panthers maintain that

this Court has already determined that Jeffers was required to arbitrate his claim when, in Jeffers' prior appeal, this Court stated that "[Jeffers] must be bound by the agreement he signed with the Carolina Panthers which required all disputes be sent to arbitration." *Jeffers*, 2005 N.C. App. LEXIS 714 at *10, 2005 WL 757178 at *3.

Under the law of the case doctrine, "[o]nce an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case." *N.C. Nat'l Bank v. Virginia Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983). The doctrine applies, however, "only to points actually presented and necessary for the determination of the case." *Creech v. Melnik*, 147 N.C. App. 471, 474, 556 S.E.2d 587, 589 (2001), *disc. review denied*, 355 N.C. 490, 561 S.E.2d 498 (2002).

Because this Court expressly declined to consider the merits of Jeffers' prior appeal due to its interlocutory nature and the fact that no substantial right was implicated, this Court necessarily did not resolve the issue presented here: whether the trial court erred in compelling Jeffers to submit his grievance to arbitration. Indeed, the prior panel concluded that a substantial right would not be prejudiced in the absence of immediate appellate review precisely because once the trial court entered judgment consistent with the arbitrator's decision, Jeffers could then, if he elected to do so, appeal the trial court's judgment on that basis. *Jeffers*, 2005 N.C. App. LEXIS 714 at *12-13, 2005 WL 757178 at *4.

II

[2] We next address the trial court's determination that Jeffers' claims are preempted by Section 301 of the LMRA, 29 U.S.C. § 185. Section 301 governs "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . ." 29 U.S.C. § 185(a) (2009). Under Section 301, when the resolution of a state law claim is "substantially dependent" upon the interpretation or application of the provisions in a collective bargaining agreement, "that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 85 L. Ed. 2d 206, 221, 105 S. Ct. 1904, 1916 (1985) (internal citation omitted). *See also Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06, 100 L. Ed. 2d 410, 418-19, 108 S. Ct. 1877, 1881 (1988) ("[I]f the resolution of a state-law claim depends upon the meaning of a collective-

bargaining agreement, the application of state law . . . is pre-empted and federal labor-law principles . . . must be employed to resolve the dispute."). The test for preemption of a state law tort claim is whether "the duty to the employee of which the tort is a violation is created by a collective-bargaining agreement and without existence independent of the agreement." *Rawson*, 495 U.S. at 369, 109 L. Ed. 2d at 373, 110 S. Ct. at 1910.

Jeffers' complaint asserted the following causes of action, and underlying factual allegations, against the Carolina Panthers:

The Carolina Panthers' Requirement That its Players Obtain Medical Care from the Team Physician

24. Jeffers' contracts with the Carolina Panthers were standard form NFL Player Contracts. On information and belief, in both 1999 and 2000, and for many years prior, all Carolina Panthers' football players signed such standard form NFL Player Contracts.

25. On information and belief, in both 1999 and 2000, and for many years prior, the Carolina Panthers sought to acquire football players possessed of special, exceptional, and unique football skills and abilities. Among other things, the standard form NFL Player Contract used by the Panthers during this time frame, including Jeffers' contracts, required each player to represent "that he has special, exceptional and unique knowledge, skill, ability, and experience as a football player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by damages."

26. On information and belief, in both 1999 and 2000, and for many years prior, the Carolina Panthers knew that the maintenance of its football players' special, exceptional, and unique football skills and abilities was essential to their professional football careers, and that the loss or destruction of such skills and abilities could end a player's NFL career.

27. On information and belief, in an effort to maintain and preserve the unique football skills and abilities of its players, the Carolina Panthers retained a team physician and created and maintained a system which required its players, including Jeffers, to establish a physician-patient relationship with, consult with,

submit to examination by, and make full disclosure to, the team physician.

28. On information and belief, the Carolina Panthers sought to ensure that its players, including Jeffers, received medical care and treatment from the team physician. Among other things, the standard form NFL Player Contracts signed by the Carolina Panthers' players, including Jeffers, provided that the Carolina Panthers would furnish its injured players "such medical and hospital care . . . as the Club physician may deem necessary . . . [.]" On information and belief, the Carolina Panthers discouraged its players from receiving medical and surgical care from physicians other than the team physician or his designees, and expressly and impliedly pressured its players to utilize the medical and surgical services of the team physician.

29. Under the system created and maintained by the Carolina Panthers, its players, including Jeffers, placed special trust and confidence in the professional medical skills and abilities of the team physician. Jeffers and the other players reasonably believed that the team physician was highly qualified, skilled, and competent, and reasonably expected that the team physician would not perform or prescribe medical or surgical treatments or procedures which would be detrimental to their professional careers. Among other things, Jeffers and the other players reasonably believed that prior to performing any surgical procedure, the team physician would fully explain the nature of, and the potential risks and benefits of, the procedure and obtain the affected player's informed consent.

30. Upon information and belief, from 1994 through 2001, the Carolina Panthers retained Defendant Dr. D'Alessandro (and perhaps the Miller Clinic as well) as the team physician.

. . . .

SECOND CAUSE OF ACTION
Negligence/Negligent Retention
(Richardson Sports Limited
Partnership and PFF, Inc.)

89. Jeffers realleges and incorporates by reference herein paragraphs 1 through 88 of his Complaint.

90. In selecting and retaining a team physician, in creating and maintaining a system in which players were required to

establish a physician-patient relationship with the team physician, and in seeking to ensure that its players sought and obtained medical care and attention from the team physician, the Carolina Panthers had a duty to exercise reasonable care to protect its football players, including Jeffers, from injury. Among other things, the Carolina Panthers had a duty to select and retain a team physician who was skilled, competent, and duly cognizant of the importance of preserving and maintaining the special and unique skills of the team's players.

91. On information and belief, in his years as team physician for the Carolina Panthers, Dr. D'Alessandro had exhibited a propensity to perform surgical procedures on players which exceeded the scope of the players' informed consent, and to perform surgical procedures which were not indicated or medically required.

92. On information and belief, in his years as team physician for the Carolina Panthers, Dr. D'Alessandro's performance of surgical procedures without consent, and performance of surgical procedures which were not indicated, directly and proximately caused serious injury to team players, including but not limited to career-altering or career-ending injuries.

93. On information and belief, both prior to the time Jeffers joined the Carolina Panthers and prior to the time Dr. D'Alessandro performed the August 20, 2000 surgery complained of herein, the Carolina Panthers had opportunity to observe, and did in fact observe and know of, his performance of surgical procedures which exceeded and therefore were without players' consent, and his performance of surgical procedures which were not indicated.

94. Upon learning of Dr. D'Alessandro's performance of surgical procedures on players without obtaining such players' informed consent and upon learning of his performance of procedures which were not indicated, the Carolina Panthers had a duty to terminate Dr. D'Alessandro as team physician, and to alter the team system under which players received medical care and treatment from team physicians.

95. Despite their prior knowledge of the propensity of Dr. D'Alessandro to perform surgery beyond the scope of the informed consent requested and received, the Carolina Panthers

did not discharge Dr. D'Alessandro as team physician or alter the system under which players received medical care and treatment from team physicians prior to the surgery on Jeffers. On information and belief, Dr. D'Alessandro remained as team physician through 2001, after his performance of the lateral releases, interval releases, and microfracture without Jeffers' knowledge or consent [that] ended Jeffers' NFL career.

96. By retaining Dr. D'Alessandro as team physician and by maintaining a system whereby Carolina Panthers' players were required to form a physician-patient relationship with Dr. D'Alessandro with full knowledge of Dr. D'Alessandro's above-described propensities, and in such other manner as may be proven at trial, the Carolina Panthers failed to exercise ordinary care to protect Jeffers from injury and was negligent.

. . . .

THIRD CAUSE OF ACTION
Intentional Engagement in Misconduct
Substantially Certain to Injure Jeffers
(Richardson Sports Limited
Partnership and PFF, Inc.)

100. Jeffers realleges and incorporates by reference herein paragraphs 1 through 99 of his Complaint.

101. By retaining Dr. D'Alessandro as team physician, and by maintaining a system wherein its players were required to form a physician-patient relationship with Dr. D'Alessandro, in the face of knowledge that (i) Dr. D'Alessandro had a propensity to, and did in fact, perform surgical procedures on Carolina Panthers' players without obtaining such players' informed consent, (ii) Dr. D'Alessandro had a propensity to, and did in fact, perform surgical procedures on Carolina Panthers' players which were not indicated or medically required, and (iii) such surgical procedures had in fact injured players, the Carolina Panthers intentionally engaged in misconduct which the Carolina Panthers knew was substantially certain to cause serious injury.

The Carolina Panthers maintain that any duty it might owe Jeffers with respect to the negligent retention and *Woodson* claims arises out of the following provisions in Article XLIV of the CBA, entitled "Players' Rights to Medical Care and Treatment":

> *Section 1.* Club Physician: Each Club will have a board-certified orthopedic surgeon as one of its Club physicians. The cost of medical services rendered by Club physicians will be the responsibility of the respective Clubs. . . .
>
> . . . .
>
> *Section 3.* Players' Right to a Second Medical Opinion: A player will have the opportunity to obtain a second medical opinion. As a condition of the responsibility of the Club for the costs of medical services rendered by the physician furnishing the second opinion, the player must (a) consult with the Club physician in advance concerning the other physician; and (b) the Club physician must be furnished promptly with a report concerning the diagnosis, examination and course of treatment recommended by the other physician.
>
> *Section 4.* Players' Right to a Surgeon of His Choice: A player will have the right to choose the surgeon who will perform surgery provided that: (a) the player will consult unless impossible (*e.g.*, emergency surgery) with the Club physician as to his recommendation as to the need for, the timing of and who should perform the surgery; and (b) the player will give due consideration to the Club physician's recommendations. Any such surgery will be at Club expense; provided, however, that the Club, the Club physician, trainers and any other representative of the Club will not be responsible for or incur any liability (other than the cost of the surgery) for or relating to the adequacy or competency of such surgery or other related medical services rendered in connection with such surgery.
>
> *Section 5.* Standard Minimum Pre-Season Physical: Each player will undergo a standardized minimum pre-season physical examination, . . . which will be conducted by the Club physician. . . .

In addition, paragraph 9 of Jeffers' player contract states that "if Player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary . . . ."

Our review of the complaint and the CBA convinces us that Jeffers' claims are substantially dependent on the CBA. Article XLIV of the CBA sets out the rights and obligations of both the Clubs and

the players in connection with medical care. While the essence of each of Jeffers' causes of action is that the Carolina Panthers wrongfully retained Dr. D'Alessandro and required Jeffers and other players to have a physician-patient relationship with the doctor, the duty of the Panthers to retain a team physician and the duty of the players to have a physician-patient relationship with that physician arise out of Article XLIV. Without the CBA, the Carolina Panthers would have no obligation to have a team physician at all. *See Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172, 1178 (N.D.N.Y. 1990) ("The Colts did not owe a duty to provide medical care to the plaintiff independent of the relationship established in the [CBA and standard player contract].").

The United States Supreme Court's decision in *United Steelworkers of Am. v. Rawson* is germane here. In *Rawson*, 495 U.S. at 364-65, 109 L. Ed. 2d at 371, 110 S. Ct. at 1907, the plaintiffs, representatives of miners who died in a mine fire, alleged that the miners' union had negligently inspected the mine. The plaintiffs argued, and the Idaho Supreme Court agreed, that "the Union may be liable under state tort law because its duty to perform that inspection reasonably arose from the fact of the inspection itself rather than the fact that the provision for the Union's participation in mine inspection was contained in the labor contract." *Id.* at 370-71, 109 L. Ed. 2d at 374, 110 S. Ct. at 1910.

In reversing the Idaho Supreme Court, the *Rawson* Court held that because the initial duty to inspect arose out of the collective bargaining agreement, the plaintiffs' negligence claim was preempted by Section 301, explaining: "If the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective-bargaining agreement signed by the Union as the bargaining agent for the miners. Clearly, the enforcement of that agreement and the remedies for its breach are matters governed by federal law." *Id.* at 371, 109 L. Ed. 2d at 374-75, 110 S. Ct. at 1910. *See also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394, 96 L. Ed. 2d 318, 328, 107 S. Ct. 2425, 2431 (1987) ("Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' " (quoting *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 859 n.3, 95 L. Ed. 2d 791, 801 n.3, 107 S. Ct. 2161, 2167 n.3 (1987))).

The same is true here. Any duty to use reasonable care in retaining Dr. D'Alessandro arose only because the Carolina Panthers hired

Dr. D'Alessandro as a team physician. *See Gosnell v. Southern Railway Co.*, 202 N.C. 234, 236, 162 S.E. 569, 570 (1932) ("[W]here an employer, in recognition of his legal or moral obligations to his employee, employs a physician or surgeon to render professional services to his employee, who is in need of such services, whether as the result of the negligence of the employer or otherwise, the only duty which the employer owes to such employee, is to exercise reasonable care in the selection and employment of the physician or surgeon."). Yet, the duty to hire Dr. D'Alessandro in the first instance arose solely from the CBA.

In a case similar to this one, a former player with the Indianapolis Colts alleged that "while he was under contract to the Colts, he suffered an injury for which the Colts and their team doctors . . . failed to provide adequate medical care . . . ." *Sherwin*, 752 F. Supp. at 1173. The plaintiff sued for fraud and negligent misrepresentation in failing to disclose his true condition, negligence in the provision of medical care, and intentional and negligent infliction of emotional distress. *Id.* at 1178. In holding that these claims were preempted, the trial court reasoned:

> It is clear that plaintiff's claims are "substantially dependent" upon analysis of the agreements and must be treated as section 301(a) claims under *Allis-Chalmers*. The Colts did not owe a duty to provide medical care to the plaintiff independent of the relationship established in the agreements. The court cannot resolve plaintiff's claims based on inadequate medical care without interpreting the clauses establishing those duties in the agreements. . . . Moreover, the Colts' duties are not those that would be "owed to every person in society," as *Rawson* seems to require to establish independence from the collective bargaining agreement. The Colts owed a duty to provide adequate medical care . . . only to their players covered by the standard player agreement and the CBA.

Id. The court concluded that the plaintiff's claims for negligent and intentional infliction of emotional distress also arose "out of the CBA, in that they are derived from the same circumstances and obligations underlying the other claims." *Id. See also Holmes v. Nat'l Football League*, 939 F. Supp. 517, 527 (N.D. Tex. 1996) ("The touchstone of each of Holmes' state-law tort claims is that he was misled into submitting to the Lions [urine] test. To resolve these claims the court must perforce analyze the CBA and the collectively-bargained Drug Program to ascertain whether the Lions defrauded Holmes, or

instead had the right to request that he submit to a pre-employment drug test.").

In both *Sherwin* and *Holmes*, the courts looked at the essence of the player's state law claims and determined that, at the core, those claims required analysis of the CBA. Likewise, here, the touchstone of Jeffers' claims—no matter how couched or labeled—is that the Carolina Panthers acted improperly in providing him medical care through the team physician. These claims necessarily derive from the obligations in the CBA and will require analysis of the CBA in order to be resolved, just as did the claims in *Sherwin* and *Holmes*.

Jeffers, however, asserts that because his claims do not contend that the Carolina Panthers failed to comply with the specific provisions of the CBA, the claims cannot be preempted. This argument was rejected in *Allis-Chalmers*, in which the Supreme Court reviewed a Wisconsin Supreme Court decision finding no preemption because the plaintiff's claims did not involve a violation of a specific provision of the contract. 471 U.S. at 214-15, 85 L. Ed. 2d at 217-18, 105 S. Ct. at 1912-13.

The Supreme Court first pointed out that the Wisconsin Supreme Court had overlooked the possibility of implied rights under the contract: "The assumption that the labor contract creates no implied rights is not one that state law may make." *Id.* at 215, 85 L. Ed. 2d at 218, 105 S. Ct. at 1913. An arbitrator might construe the labor contract to provide relief implied from the contract. *Id.* According to the Court, for purposes of Section 301, there is no distinction between an explicit contractual duty and an implied duty "[s]ince the extent of either duty ultimately depends upon the terms of the agreement between the parties" and "both are tightly bound with questions of contract interpretation that must be left" to be resolved in accordance with Section 301. *Id.* at 216, 85 L. Ed. 2d at 218, 105 S. Ct. at 1913. The Court concluded as to the possibility of implied rights: "The duties imposed and rights established through the state tort thus derive from the rights and obligations established by the contract." *Id.* at 217, 85 L. Ed. 2d at 219, 105 S. Ct. at 1914.

As applied to this case, Jeffers incorrectly assumes, as did the Wisconsin Supreme Court, that he would only be entitled to relief under the CBA for an explicit violation, such as a Club's failure to have any team orthopedic physician or a Club's prohibiting a player from choosing his own surgeon. That assumption, however, constitutes an interpretation of the CBA and, as was the case in *Allis-*

Chalmers, is a questionable assumption. The CBA expressly states that it is intended to "represent[] the *complete* understanding of the parties on all subjects covered herein[,]" including the "Players' Rights to Medical Care and Treatment." (Emphasis added.) For example, an arbitrator could decide that the CBA requires not only that the Club retain a physician, but that the physician be competent. In other words, an arbitrator could have concluded—if Jeffers proved his allegations regarding Dr. D'Alessandro—that the retention of Dr. D'Alessandro was a violation of the CBA's requirement in Article XLIV that the Club retain a team physician.

Moreover, even in the absence of a direct CBA violation, a court considering Jeffers' claims would be confronted with the provision in Section 4 of Article XLIV: "[P]rovided, however, that the Club, the Club physician, trainers and any other representative of the Club will not be responsible for or incur any liability (other than the cost of the surgery) for or relating to the adequacy or competency of such surgery or other related medical services rendered in connection with such surgery." Jeffers' claims would require analysis and interpretation of this clause of the CBA.

Thus, Jeffers' claims are substantially dependent upon analysis of the CBA and player's contract and those claims are, therefore, preempted by Section 301. Having concluded that Jeffers' state law claims are preempted, we must still address whether the trial court properly determined that, assuming the complaint sets out a Section 301 claim for breach of the CBA, the claim was required to be arbitrated. "If a claim is identified as a section 301 claim, it is subject to the arbitration provisions, if any, of the collective bargaining agreement." *Sherwin*, 752 F. Supp. at 1177.

[3] In considering whether a particular dispute is subject to arbitration, "the trial court should determine (1) the validity of the contract to arbitrate and (2) whether the subject matter of the arbitration agreement covers the matter in dispute." *Ragan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 455, 531 S.E.2d 874, 876, *disc. review denied*, 353 N.C. 268, 546 S.E.2d 129 (2000). "Once the 'court answers these questions in the affirmative, the parties must take up all additional concerns with the arbitrator.' " *Id.* (quoting *Elzinga & Volkers, Inc. v. LSSC Corp.*, 838 F. Supp. 1306, 1309 (N.D. Ind. 1993)). Jeffers does not dispute the validity of the CBA and his standard player contract, but rather contends that the trial court erred in compelling arbitration because he "never agreed to arbitrate his *Woodson* and negligent retention claims against the Panthers."

Article IX of the CBA, entitled "Non-Injury Grievance," provides for arbitration of "[a]ny dispute . . . arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with, any provision of this Agreement, the NFL Player Contract, or any applicable provision of the NFL Constitution and Bylaws pertaining to terms and conditions of employment of NFL players . . . ." Jeffers' claims concern the interpretation or application of Article XLIV's medical rights provisions, which outline the use of team doctors and the physician-patient relationship between the doctors and the team's players, and the Carolina Panther's potential liability. Jeffers' claims are, therefore, subject to arbitration in accordance with the terms of the CBA.

In arguing that his claims are not subject to arbitration, Jeffers focuses on whether they involve the interpretation or construction of the CBA, but ignores the CBA's reference to "application." "In interpreting contracts, . . . '[t]he various terms of the [contract] are to be harmoniously construed, and if possible, *every word and every provision is to be given effect.*' " *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 629, 588 S.E.2d 871, 875 (2003) (emphasis added) (quoting *Gaston County Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 300, 524 S.E.2d 558, 563 (2000)). Even if we were to agree with Jeffers that his claims do not involve an interpretation of the CBA, which we do not, "application" cannot be read out of the contract. Jeffers' claims involve the application of Article XLIV's requirement that each Club retain a team orthopedic physician.

The trial court, therefore, properly granted the motion to compel arbitration. Because Jeffers makes no further argument as to why the arbitration award should not be confirmed, we affirm.

Affirmed.

Judges STEELMAN and STEPHENS concur.

CARSON v. CARSON

[199 N.C. App. 101 (2009)]

KATHRYN CARSON, PLAINTIFF v. NATHAN BRYAN CARSON, DEFENDANT

No. COA08-1462

(Filed 18 August 2009)

1. Child Support, Custody, and Visitation— retroactive child support—unincorporated separation agreement

A *de novo* review revealed the trial court erred by applying the 2006 North Carolina Child Support Guidelines with regard to the retroactive child support awarded from September 2003 to 31 August 2006 because: (1) the Guidelines do not supercede case law which prohibits retroactive child support from being awarded, absent an emergency situation, where the parties have complied with the payment obligations specified in a valid unincorporated separation agreement; and (2) the terms of the agreement will control until the parent receiving support seeks a child support order from the court. However, having found that the terms of the agreement were not reasonable to meet the child's needs, the court was justified in awarding prospective child support.

2. Child Support, Custody, and Visitation— unreimbursed medical expenses—unincorporated separation agreement

The trial court erred in a child support case by awarding plaintiff unreimbursed medical expenses in the amount of $2,549.25 because: (1) the trial court here was not justified in altering the terms of the Agreement with regard to the child's medical expenses and then applying the new terms retroactively since the trial court cannot alter the terms of a valid, unincorporated separation agreement retroactively absent an emergency situation; and (2) defendant was already responsible for one-hundred percent of the child's reasonable and necessary medical expenses he was aware of, and there was no evidence that defendant had breached the terms of the agreement at any time.

3. Child Support, Custody, and Visitation; Costs— attorney fees—retroactive child support—prospective child support

The trial court abused its discretion in a child support case by awarding plaintiff attorney fees for retroactive child support, but properly awarded attorney fees with regard to plaintiff's claim for prospective child support. The case is remanded with instructions for the trial court to reevaluate the attorney fees award and

make findings as to a reasonable award and order defendant to pay accordingly.

Appeal by defendant from a child support order entered 5 May 2008 by Judge Debra S. Sasser in Wake County District Court. Heard in the Court of Appeals 20 May 2009.

Tharrington Smith, L.L.P., by Jill Schnabel Jackson and Steven D. Mansbery, for the plaintiff-appellee.

Cheshire, Parker, Schneider, Bryan & Vitale, by Jonathan McGirt, and Herring, Mills & Krat, PLLC, by E. Parker Herring, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant appeals from a Child Support Order entered 5 May 2008, which ordered him to pay retroactive child support, a portion of medical expenses incurred for his minor child, and plaintiff's attorney fees. After careful review, we reverse and remand.

Background

Nathan Bryan Carson ("defendant") and Kathryn Carson ("plaintiff") were married on 3 June 1972, separated on 12 March 1998, and later divorced. The parties have three children; however, only Kristen Carson ("Kristen"), born 21 July 1989, was the subject of the Child Support Order (the "Order") at issue.

On 12 March 1998, the parties executed a "Contract of Separation, Interim Property Settlement and Child Custody Agreement—(the "Agreement"). At the time, the parties had two minor children and one adult child. Pursuant to the Agreement, Ashlie Carson, a minor, lived primarily with defendant and Kristen, a minor, lived with each parent alternating on a bi-weekly schedule. The Agreement provided in pertinent part:

> Section 4.2 Child Support. Husband shall maintain a major medical and hospitalization insurance policy on the children during their minority. Husband shall pay directly to the health care provider, upon receipt of statements therefor, the reasonable and necessary medical, hospital, surgical, drug and dental expenses incurred for the children in connection with their health care. Before Wife obligates Husband to pay any above-average medical or dental expenses, such as large or discretionary bills . . . the

> Wife shall advise the Husband of the necessity of such expenditures and shall furnish him with the name and address of the physician or dentist who has recommended such treatment or other medical or dental care. . . .
>
> In addition, beginning April 1, 1998, the Husband shall pay to the Wife the sum of $500 per month for child support. The Husband shall also continue to pay the expenses for the youngest minor child at Sylvan Learning Center until a Consent Order or other agreement is reached. The parties agree to attempt to negotiate the provisions of a child support and custody consent order for entry prior to March 1, 1999. In the event the parties cannot agree on the terms so that a consent order is entered prior to March 1, 1999, either party may file a custody complaint to give the court jurisdiction to enter an order.
>
> . . . .
>
> Section 5.12. Counsel Fees Upon Breach. In the event it becomes necessary to institute legal action to enforce compliance with the terms of this Agreement or by reason of the breach by either party of this Agreement, then the parties agree that at the conclusion of such legal proceeding, the losing party shall be solely responsible for all legal fees and costs incurred by the other party, such fees and costs to be taxed by the court. . . . It is the intent of this paragraph to induce both Husband and Wife to comply fully with the terms of this Agreement to the end that no litigation as between these parties is necessary in the areas dealt with by this Agreement . . . .

The parties never attempted to negotiate the provisions of a child support consent order. Plaintiff could have filed an action seeking additional support at any time, but for over eight years the parties complied with the Agreement. The evidence presented at the hearing tended to show that defendant never violated the terms of the Agreement with regard to the $500 monthly payment.

In 2004, Kristen, age fourteen, began living exclusively with plaintiff. Plaintiff did not seek court ordered child support or a modification of the Agreement. On 31 August 2006, plaintiff filed a Complaint in Wake County District Court alleging that the "amounts paid to plaintiff by defendant [were] not just and reasonable in that the amounts [did] not reflect a fair contribution to plaintiff to meet Kristen's needs and create[d] an unfair financial burden for plaintiff

in meeting Kristen's needs." Plaintiff claimed that she was "entitled to reimbursement from defendant for a portion of the actual expenses incurred for the benefit of the minor child from August 2003 through the present, less any amounts heretofore paid by defendant for child support." Plaintiff further claimed that defendant had "not paid Kristen's unreimbursed medical expenses as required by the Agreement." At the time this action began, Kristen was seventeen years old and the parties' only minor child.

On 6 November 2006, defendant filed a "Motion to Dismiss and Answer" claiming that the trial court lacked subject matter jurisdiction to modify the terms of the Agreement retroactively. Defendant alleged that plaintiff had waived any claim that the Agreement was unfair by accepting the $500 monthly payment since 1998. Defendant also contended that he had "no knowledge of any medical expenses submitted to him by Plaintiff which were not paid." Defendant began voluntarily paying $1,033.21 per month in child support beginning in November 2006 and continued paying this increased amount until January 2008.

A hearing in this matter was held on 6 March 2008 in Wake County District Court. On 5 May 2008, the trial court issued a Child Support Order and concluded as a matter of law:

> 2. The amount of support mutually agreed upon by the parties in their unincorporated separation agreement is not just and reasonable. The presumption that the amount of child support mutually agreed upon is just and reasonable is rebutted by the greater weight of the evidence.
>
> 3. The child's actual reasonable needs during the period from three years prior to the filing of the Complaint, as of the filing of the Complaint in this action, and continuing through January 2008, exceed the child support amount agreed to by the parties in their Agreement. The Court concludes by the greater weight of the evidence that plaintiff has rebutted the presumption that the child support amount in the Agreement is reasonable.

The Order required defendant to pay: 1) $31,036.85 in retroactive and prospective child support for Kristen from September 2003 through January 2008; 2) $2,549.25 in past medical expenses; and 3) $12,887.76 in attorney fees. The trial court granted defendant's motion to terminate child support effective 1 February 2008 since

Kristen was eighteen years old and a high school graduate as of that date.

Defendant appeals the order of the trial court and argues: 1) the trial court erred in granting retroactive child support contrary to established case law; 2) the trial court erred in awarding plaintiff payment for past medical expenses where defendant was not notified of the expenses per the Agreement; and 3) the trial court erred in granting plaintiff attorney fees because defendant was not in breach of the Agreement.

Analysis

I. Retroactive Child Support

[1] Defendant first argues that the trial court erroneously applied the 2006 North Carolina Child Support Guidelines ("the Guidelines") with regard to the retroactive child support awarded from September 2003 to 31 August 2006.[1] Defendant claims that because he paid in accord with the parties' Agreement, the law of this state prohibits retroactive child support absent an emergency situation. Because defendant's argument concerns a matter of law, we will review the issue *de novo*. *See Eakes v. Eakes*, 194 N.C. App. 303, 311, 669 S.E.2d 891, 897 (2008).

As a preliminary matter, we must clarify the difference between prospective and retroactive child support. "Child support awarded *prior* to the time a party files a complaint is properly classified as retroactive child support. . . . Child support awarded, however, from the time a party files a complaint for child support to the date of trial is . . . [termed] prospective child support . . . ." *Taylor v. Taylor*, 118 N.C. App. 356, 361, 455 S.E.2d 442, 446 (1995), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996) (internal citations omitted). Defendant's argument concerns only the award of retroactive child support awarded prior to the time plaintiff filed the complaint in this matter.[2]

The Guidelines at issue in this case, promulgated by the Conference of Chief District Judges ("the Conference") under the

1. The trial court utilized the 2006 Guidelines because plaintiff's claim was heard and decided after 1 October 2006 when the updated Guidelines became effective. North Carolina Child Support Guidelines, 2009 Ann. R. N.C. 41 (Rev. Oct. 2006). We do not address whether the 2002 Guidelines were applicable in the absence of any argument by either party to that effect.

2. We will discuss a second type of retroactive child support *infra*, which is "a retroactive increase in the amount provided in an existing support order." *Cole v. Cole*, 149 N.C. App. 427, 433, 562 S.E.2d 11, 14 (2002).

authority granted them in N.C. Gen. Stat. § 50-13.4(c1) (2007), state in pertinent part:

> North Carolina's child support guidelines apply as a rebuttable presumption in all legal proceedings involving the child support obligation of a parent. . . . If a child's parents have executed a valid, unincorporated separation agreement that determines a parent's child support obligations and an action for child support is subsequently brought against the parent, the court must base the parent's child support obligation on the amount of support provided under the separation agreement rather than the amount of support payable under the child support guidelines unless the court determines, by the greater weight of the evidence taking into account the child's needs and the factors enumerated in the first sentence of G.S. 50-13.4(c), that the amount of support under the separation agreement is unreasonable. *In cases involving a parent's obligation to support his or her child for a period before a child support action was filed (i.e., cases involving claims for "retroactive child support" or "prior maintenance"), a court may determine the amount of the parent's obligation (a) pursuant to the child support guidelines, or (b) based on the parent's fair share of actual expenditures for the child's care.*

Guidelines, 2009 Ann. R. N.C. 41 (emphasis added).

Clearly, the Guidelines permit the trial court to award retroactive child support even where there is a valid, unincorporated separation agreement that states the obligations of the parties. *Id.* Pursuant to the Guidelines, the terms of the agreement must control unless the court finds "that the amount of support under the separation agreement is unreasonable." *Id.* Once the court decides that retroactive child support is warranted, the judge may determine the amount of the parent's obligation utilizing the Guidelines or the parent's fair share of the child's actual expenditures. *Id.*[3] Defendant argues that the Guidelines do not supercede case law, which prohibits retroactive child support from being awarded, absent an emergency situation,

3. This method of calculating retroactive child support differs from that set out in the 2002 Guidelines, which state "[t]he guidelines do not apply to orders for 'prior maintenance' (reimbursement of child-related expenses incurred prior to the date an action for child support is filed) . . . ." North Carolina Child Support Guidelines, Ann. R. N.C. (Rev. Oct. 2002). Here, the trial court applied the 2006 Guidelines to award retroactive child support for 2003 and 2004; however, the court based the 2005 retroactive child support on actual expenditures due to the parties' income level. The trial court's use of the 2006 Guidelines is not at issue in this case.

where the parties have complied with the payment obligations specified in a valid, unincorporated separation agreement. We agree.

Nowhere in the statute does the legislature authorize the Conference to override existing case law in formulating the Guidelines. Although the Guidelines are formulated by the Conference of Chief District Judges pursuant to authority granted them by the legislature in N.C. Gen. Stat. § 50-13.4(c1), the Conference is not a legislative body, and the Guidelines are not codified in the North Carolina General Statutes. "While the guidelines generally must be employed in actions for child support, G.S. § 50-13.4, *et seq.*, the statute's silence with respect to prior, unincorporated agreements suggests that the legislature had no intention of abrogating the holdings of *Fuchs-Williams*[,]" discussed *infra*.[4] *Pataky v. Pataky*, 160 N.C. App. 289, 301, 585 S.E.2d 404, 412 (2003) (citing *Yates v. New South Pizza, Ltd.*, 330 N.C. 790, 808, 412 S.E.2d 666, 677 (1992) ("Absent clear legislative intent to the contrary, we should presume that the legislature was aware of and intended to retain the longstanding common law rule enunciated in [earlier cases]"); *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977) ("In interpreting statutes, . . . it is always presumed that the Legislature acted with full knowledge of prior and existing law.")). Therefore, we find that if the trial court follows the Guidelines in awarding retroactive child support in cases involving unincorporated separation agreements, instead of controlling case law, the court is in error.

Here, the trial court followed the Guidelines in awarding retroactive child support to plaintiff; however, the law of this state, as set forth in *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963), is controlling and is inconsistent with the Guidelines. In *Fuchs*, the parties entered into a separation agreement in which the plaintiff-husband agreed to pay the defendant-wife $100 per month for the support of each of the two minor child in the defendant's custody. *Id.* at 636, 133 S.E.2d at 489. The plaintiff continued to make the child support payments as required by the agreement until the defendant filed an action in the Superior Court of Forsyth County requesting that the plaintiff be required to pay $400 per month for each of the two minor children. *Id.* at 637, 133 S.E.2d at 489. "The [trial] court found no facts relating to the needs of the minor children," but determined that the plaintiff should pay defendant "$190.60 per month for the support of each minor child . . . ." *Id.* at 637, 133 S.E.2d at 490. The court

4. The case of *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964) does not apply to the issues presented in the present case.

"ordered the plaintiff to pay the defendant an additional sum of $1,157.20" representing retroactive "arrears." *Id.* On appeal, our Supreme Court stated, with regard to *prospective* child support:

> [W]e hold that where parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable. We further hold that the court upon motion for an increase in such allowance, is not warranted in ordering an increase in the absence of any evidence of a change in conditions or of the need for such increase, particularly when the increase is awarded solely on the ground that the father's income has increased, therefore, he is able to pay a larger amount.

Id. at 639, 133 S.E.2d at 491. Therefore a rebuttable presumption was instituted in favor of the parties' separation agreement in the context of prospective child support. *Id.* The Court remanded the case because the trial court did not "take into consideration the earnings of the plaintiff and his living expenses as well as the needs of these minor children." *Id.* at 640-41, 133 S.E.2d at 492. The Court went on to state, "[f]urthermore, the order making the increased allowance retroactive . . . without evidence of some emergency situation that required the expenditure of sums in excess of the amounts paid by the plaintiff for the support of his minor children, is neither warranted in law nor equity." *Id.* at 641, 133 S.E.2d at 492. We interpret *Fuchs* to mean that where there is a valid, unincorporated separation agreement, which dictates the obligations of the parent providing support, and the parent complies fully with this obligation, the trial court is not permitted to award *retroactive* child support absent an emergency situation.[5] Thus, the terms of the agreement will control until the parent receiving support seeks a child support order from the court.

This Court has applied *Fuchs* in subsequent cases. In *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000), this Court expanded the *Fuchs* "emergency situation" requirement to retroactive increases

5. In addition to an emergency concerning the child, such an emergency situation could be evidenced by an accident or illness of the custodial parent, which prohibited him or her from seeking a court ordered increase in child support until he or she recovered. In such a situation, the trial court would be justified under *Fuchs* in awarding retroactive child support in excess of that provided for in the separation agreement during that period of time between the emergency and the commencement of court action.

in child support where a court order exists.[6] There, plaintiff-mother sought a retroactive increase in court ordered child support due to additional private school expenses for the parties' child. This Court, relying partially on *Fuchs*, held that an emergency situation must be shown justifying "a retrospective increase of an existing child support order." *Id.* at 303, 524 S.E.2d at 585. In *McKyer v. McKyer*, 179 N.C. App. 132, 632 S.E.2d 828 (2006), *disc. review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007), this Court "uph[e]ld the district court's refusal to award retroactive child support," where there was no showing of an emergency situation, pursuant to *Fuchs* and *Biggs*. *Id.* at 142, 632 S.E.2d at 834 (footnote omitted). Furthermore, this Court in *Cole*, which dealt with prospective child support, noted that—*retroactive* child support . . . is subject to the constraints of *Fuchs* . . . ." *Cole*, 149 N.C. App. at 433, 562 S.E.2d at 14 (citations omitted).

In *Sikes v. Sikes*, 330 N.C. 595, 411 S.E.2d 588 (1992), our Supreme Court again addressed retroactive child support, specifically dealing with the time period between the entry of an interim court order and a final court order.[7] In *Sikes*, the Court held that "a district court may enter an interim order for child support in which it contemplates entering a permanent order at a later time and at such later time enter an order retroactive to the earlier order which requires larger child support payments than originally required." *Id.* at 598, 411 S.E.2d at 590. *Sikes* held *Fuchs* to be inapplicable under those specific circumstances and thus no emergency situation was required to justify retroactive support. *Id.* at 599, 411 S.E.2d at 590. The most important distinction between the present case and *Sikes* is that *Sikes* dealt with a different type of retroactive child support. In *Sikes*, the time period at issue was between court orders, whereas here, the time period is three years prior to the filing of plaintiff's complaint. *Fuchs* deals specifically with the same time period at issue here, in which there is a valid, unincorporated separation agreement. Therefore *Fuchs* is controlling in this instance.

Plaintiff argues that the Agreement in this case was not meant to be final since the parties indicated a willingness to seek court ordered child support by 1 March 1999, and therefore the Agreement

6. Though not explicit, it appears that the court order was final as opposed to an interim court order as seen in *Sikes*, discussed *infra*.

7. In the present case, the retroactive child support at issue is that paid prior to any court action where the parties had an unincorporated separation agreement that was not being breached.

is analogous to an interim court order, as seen in *Sikes*. Nevertheless, the Agreement was in effect until the parties actually sought court action, which did not occur until the filing of plaintiff's complaint, over eight years after the Agreement was signed. There was no clause in the Agreement setting a deadline for court action or placing an expiration date on the Agreement. The parties were free to abide by the Agreement indefinitely, without ever seeking court intervention. Where there is an *interim* court order, the court clearly intends to take further action. A child support clause in an unincorporated separation agreement is binding on the parties and does not necessitate court action. Therefore, plaintiff's contention that the Agreement was intended to be temporary, implicating *Sikes* rather than *Fuchs*, is without merit.

In 2003 this Court addressed, for the first time since enactment of the Guidelines, "the impact . . . of an unincorporated separation agreement that includes allowance for child support on a subsequent claim for child support." *Pataky*, 160 N.C. App. at 293, 585 S.E.2d at 408. While *Pataky* dealt only with prospective child support, the holdings of *Pataky* are relevant to the issues before us in this case.

The Court in *Pataky* analyzed prior case law, with an emphasis on the holding of *Fuchs*, current statutory provisions, and the Guidelines in effect at that time. The Court noted that, "[i]f separation agreements are accorded no deference, parties who enter into them will have no protection from a party who agrees to a support amount but later seeks redress from the courts simply because he or she is unhappy with the decision to enter into the contract." *Id.* at 304, 585 S.E.2d at 414 (footnote omitted).

Ultimately, the Court held "that the *Fuchs-Williams* principles are still applicable and require our courts to examine cases such as the one *sub judice* [where a valid, unincorporated child support agreement exists] differently from those in which no separation agreement is present." *Id.* at 299, 585 S.E.2d at 411. In accord with *Fuchs*, the Court in *Pataky* further outlined a two-prong test for the trial court with regard to *prospective* child support as follows:

> [I]n an initial determination of child support where the parties have executed an unincorporated separation agreement that includes provision for child support, the court should first apply a *rebuttable presumption* that the amount in the agreement is reasonable and, therefore, that application of the guidelines would be "inappropriate." The court should determine the actual

> needs of the child at the time of the hearing, as compared to the provisions of the separation agreement. If the presumption of reasonableness is not rebutted, the court should enter an order in the separation agreement amount and make a finding that application of the guidelines would be inappropriate. If, however, the court determines by the greater weight of the evidence that the presumption of reasonableness afforded the separation agreement allowance has been rebutted, taking into account the needs of the children existing at the time of the hearing and considering the factors enumerated in the first sentence of G.S. § 50-13.4(c), the court then looks to the presumptive guidelines established through operation of G.S. § 50-13.4(c1) and the court may nonetheless deviate if, upon motion of either party or by the court *sua sponte*, it determines application of the guidelines—would not meet or would exceed the needs of the child . . . or would be otherwise unjust or inappropriate."

Id. at 305, 585 S.E.2d at 414-15 (emphasis added) (footnote omitted). *Pataky* is clear on how the trial court is to determine the appropriate amount of prospective child support where there is a valid, unincorporated separation agreement containing a provision for child support. There is a rebuttable presumption that the terms of the agreement are reasonable to meet the child's needs. *Id.* Again, *Pataky* does not specifically address retroactive child support. *Fuchs* is still binding with regard to retroactive child support where there is a valid, unincorporated separation agreement dictating the parties' obligations.

In reviewing the 2006 Guidelines, it appears that the Conference took *Pataky* into account, but incorrectly applied the rebuttable presumption to retroactive child support instead of only prospective child support. Under *Fuchs*, retroactive child support is not permitted where there is a valid, unincorporated separation agreement, which has not been breached, and no emergency situation. Therefore, the trial court's reliance on the Guidelines was error where the Guidelines were not in accord with the mandate of our Supreme Court in *Fuchs* with regard to retroactive child support.

In the case *sub judice*, there is no dispute that defendant made monthly payments pursuant to the terms of the Agreement from the time it became effective until the time plaintiff filed a complaint in district court. Absent an emergency situation, the Agreement was binding, and the trial court had no authority to award retroactive child support in excess of the terms of the Agreement. *Fuchs*, 260

N.C. at 641, 133 S.E.2d at 492. However, having found that the terms of the Agreement were not reasonable to meet the child's needs, the court was justified in awarding prospective child support.[8] *Pataky*, 160 N.C. App. at 305, 585 S.E.2d at 414-15.

Accordingly, we reverse that portion of the trial court's Order that awards retroactive child support and remand for further proceedings not inconsistent with this opinion.

II. Unreimbursed Medical Expenses

[2] Next, defendant contends that the trial court erred in awarding plaintiff unreimbursed medical expenses ("UMEs"). We agree.

Pursuant to the terms of the Agreement, defendant was required to pay one-hundred percent of UMEs that he was made aware of, so long as the expenses were "reasonable and necessary." Defendant argued before the trial court that he was not made aware of any UMEs. There is no evidence in the record to show the existence of medical expenses that defendant was unaware of, and the trial court made no findings regarding any breach of the Agreement by defendant. Nevertheless, the trial court determined that the parties should pay for the child's medical expenses pro rata and ordered defendant to pay $2,549.25 in UMEs.

Because we have held that the trial court cannot alter the terms of a valid, unincorporated separation agreement retroactively absent an emergency situation, the trial court here was not justified in altering the terms of the Agreement with regard to the child's medical expenses and then applying the new terms retroactively.[9] Defendant was already responsible for one-hundred percent of the child's reasonable and necessary medical expenses he was aware of, and since there was no evidence that defendant had breached the terms of the Agreement at any time, the trial court erred in ordering him to pay the $2,549.25 in UMEs. Thus, we reverse that portion of the trial court's order awarding UMEs and remand for further proceedings not inconsistent with this opinion.

III. Attorney Fees

[3] Finally, defendant claims that the trial court erred in awarding attorney fees to plaintiff in the amount of $12,887.76.

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8. Defendant does not argue that the presumption was not rebutted by the evidence, nor does he argue that prospective child support was improperly awarded.

9. Defendant does not argue that the trial court erred in altering the terms of the Agreement prospectively with regard to medical expenses.

> 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.

N.C. Gen. Stat. § 50-13.6 (2007) (emphasis added). "Whether these statutory requirements have been met is a question of law, reviewable on appeal. When the statutory requirements have been met, the *amount* of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion." *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980) (citations omitted).

The trial court found as fact, *inter alia*, that: 1) plaintiff acted in good faith; 2) had insufficient funds to defray the expenses of litigation; 3) "[a]t the time the Complaint was filed in this action, Defendant was paying $500 per month in child support, an amount that is not adequate under the circumstances then existing[]"; and 4) plaintiff's attorney fees exceeded $15,000 and were related "to her claims for prospective and retroactive child support." The trial court made the necessary factual findings pursuant to N.C. Gen. Stat. § 50-13.6; however, we note that the trial court did not find that defendant "refused" to pay an adequate amount pursuant to the language in the statute.

Defendant claims that he did not *refuse* to provide adequate support as he was operating under the terms of the Agreement. We agree with defendant that attorney fees should not have been awarded with regard to plaintiff's claim for retroactive child support; however, attorney fees were proper with regard to plaintiff's claim for prospective child support.

We recognize that the defendant made a similar argument in *Sikes*, that he had not refused to pay child support and was paying in accord with the interim court order. However, the Court upheld the award of attorney fees stating:

> The defendant argues that there was not evidence to support a finding of fact that he had refused to provide adequate child support because the evidence showed he had paid the amount of child support that he had been ordered to pay [under the interim court order]. It is undisputed in this case that the defendant refused to pay the amount set by the court as adequate until he was ordered to do so by the court [under a final court order]. This supports this finding of fact.

Sikes, 330 N.C. at 600, 411 S.E.2d at 591. However, in *Sikes*, the award of retroactive child support, which related to the time frame between an interim court order and a final court order, was upheld.[10] In the case *sub judice*, we hold that retroactive child support is not permitted for the time frame prior to any court action, absent an emergency situation, where there is a valid, unincorporated separation agreement. Since the trial court in this case erred in awarding retroactive child support, we find that it erred in awarding attorney fees based, in part, on the plaintiff's expenses in seeking the retroactive child support.

Even so, the trial court in this case found that defendant was not paying an adequate amount and ordered an increase *prospectively* as well, and defendant does not argue that this finding was in error. Thus, we find that plaintiff was entitled to some measure of attorney fees because defendant was not paying an adequate amount under the terms of the Agreement and plaintiff therefore brought the action in good faith to seek a prospective increase. *See Taylor*, 118 N.C. App. at 365, 455 S.E.2d at 448 ("[T]he question is not whether plaintiff refused to pay any child support but whether he refused to pay *adequate* child support 'under the circumstances existing at the time of the institution of the action.' ") (quotation omitted).

Here, the trial court ordered defendant to pay $12,887.76 of plaintiff's legal fees, which exceeded $15,000. Because we cannot ascertain which portion of the attorney fees is based on the improperly granted retroactive child support award and which portion is

10. The amount of child support in an interim court order is not necessarily adequate. In a separation agreement, the parties are agreeing that the amount of support is adequate, and it is presumed to be so until court action is commenced.

based on the properly awarded prospective child support award, we remand with instructions for the trial court to reevaluate the attorney fees award and make findings as to a reasonable award and order defendant to pay accordingly. We further order the trial court to make the proper finding as to whether defendant "refused" to pay what was adequate.

Conclusion

Based on the foregoing, we hold that the trial court erred in awarding retroactive child support and unreimbursed medical expenses as defendant complied at all times with the terms of the parties' valid, unincorporated separation agreement. We further hold that the trial court erred in awarding attorney fees based, in part, on plaintiff's legal fees related to her improper claim for retroactive child support. Accordingly, we reverse and remand for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

Judges STEELMAN and ERVIN concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER LEE GIDDENS

No. COA08-1385

(Filed 18 August 2009)

Evidence— testimony—sex offenses—witness vouching for children's credibility

The trial court committed plain error in a first-degree sex offense, indecent liberties with a child, and first-degree rape case by allowing a child protective services investigator to testify that her investigation had substantiated defendant as the perpetrator of the abuse alleged by the victims.

Judge BRYANT dissents in a separate opinion.

Appeal by Defendant from judgment entered 9 September 2008 by Judge C. Philip Ginn in Superior Court, Macon County. Heard in the Court of Appeals 9 April 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Pitman, for the State.

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

STEPHENS, Judge.

A jury found Defendant guilty of two counts of first degree sex offense, one count of taking indecent liberties with a child, and one count of first degree rape on 4 June 2008. The trial court entered judgment in accordance with this verdict on 9 September 2008, and sentenced Defendant to a term of 288 to 355 months imprisonment. From this judgment, Defendant appeals.

I. Facts and Procedural History

The State's evidence presented at trial tended to show that Defendant and Amanda Biringer ("Amanda") were married on 21 February 1998. Defendant and Amanda had one daughter, V.G., who was ten years old at the time of trial. Defendant also became the stepfather to Amanda's son, J.B., who was fourteen years old at the time of trial.

J.B. testified at trial to the following: J.B. stated he did not like Defendant because Defendant had abused and sexually abused him on a daily basis. Defendant touched J.B. in his "private areas[,]" and Defendant made "[J.B.] put [J.B.'s] mouth on [Defendant's] penis and put his penis in between [J.B.'s] legs and [Defendant] would try to put his penis up [J.B.'s] butt." Defendant put his penis in J.B.'s mouth between five and ten times. Defendant would also put lotion on J.B.'s legs and simulate intercourse. Defendant always did this with J.B. in Defendant's bedroom and when Amanda and V.G. were out of the house. Defendant sexually abused J.B. from the time J.B. was in fourth grade until he was in sixth grade. J.B. testified that Defendant tried to insert his penis into J.B.'s anus when J.B. was in fourth grade. Defendant told J.B. that if he told anyone what happened, Defendant would kill Amanda.

V.G. testified that she felt disappointed with Defendant because he raped her. V.G. described what she meant by "raped" by stating "[Defendant] placed his wrong private place in mine." Defendant "forced [V.G.'s clothes] off" and removed his own clothes during these times. V.G. testified Defendant committed these acts "maybe two" times over the course of approximately one year. V.G. did not tell any-

one when Defendant was abusing her because Defendant threatened to kill Amanda if she did, and V.G. believed Defendant's threats.

Amanda and Defendant separated on 16 January 2006. On or about 10 November 2006, Amanda was going through the clothes in the backpack V.G. frequently took to visit Defendant, when Amanda and Misty Birch ("Birch") found a pair of torn panties. Amanda asked V.G. what happened to the panties, and V.G. began to cry and then said Defendant had torn the panties. Amanda also testified that she had seen Defendant smack J.B. on the head and push J.B. down. Amanda further testified that she finally left Defendant because "it was getting too dangerous for the kids" and Defendant would not stop drinking and doing drugs.

Amanda contacted Amy Stewart ("Stewart"), the Detective Sergeant over juvenile investigations at the Macon County Sheriff's Department, after hearing what Defendant did to V.G. Stewart testified at trial that she met with Amanda, V.G., and J.B. at their home within a week of receiving Amanda's initial phone call. Stewart first spoke with J.B., and J.B. told her that Defendant had made him "snort white powder up his nose and that it hurt his nose when he did it." J.B. also told Stewart Defendant would make J.B. suck his penis almost every day when Amanda was not home.

Stewart also spoke to V.G., who informed Stewart that Defendant would take off all of V.G.'s clothes and remove his own clothes when no one else was home. V.G. also told Stewart that Defendant kept pictures of children in his safe, and the children were naked and crying. V.G. told Stewart that Defendant "would rub his penis on her pee-pee[,]" and that "it went inside and that it hurt." V.G. told Stewart that this happened approximately ten times.

Kay Kent ("Kent"), a child protective services investigator with the Buncombe County Department of Social Services ("DSS"), testified to the following: Kent received a referral on 20 November 2006 from child protective services for J.B. and V.G. Kent was required to respond within twenty-four hours, which she did by making a home visit the following day, on 21 November 2006. During her visit, Kent first interviewed V.G. using a forensic model designed not to lead the child. V.G. described the same events to Kent that she had shared with Stewart. Kent next met with J.B., whose description of Defendant's actions was consistent with the description he provided Stewart. The forensic interview model Kent used to interview V.G.

and J.B. is used statewide in order to gather information from children that is not leading and that looks for consistency.

After interviewing V.G. and J.B., Kent arranged for a medical examination to be conducted on the children by Dr. Cindy Brown at Mission Children's Clinic, in Asheville, North Carolina. A child medical exam is twofold. There is another forensic interview such as the one Kent conducted and then also a medical exam in which the child is tested for sexually transmitted diseases and other physical concerns. As a result of her investigation of V.G. and J.B., Kent completed a North Carolina Case Decision Summary/Initial Case Plan, which is a mandatory part of the structured assessment case decision process. This form names all of the children and all of the caregivers involved, followed by a section in which the investigator determines whether each caregiver is substantiated as a perpetrator.

Kent testified that Defendant was substantiated as the perpetrator with regard to both V.G. and J.B. The term "substantiated" means that the examiners "found evidence throughout the course of [their] investigation to believe that the alleged abuse and neglect did occur." In determining that Defendant was substantiated as a perpetrator, Kent and the other investigators looked at the case history involved as well as the specific allegations. Kent also conducted a global assessment which involves examining the level of supervision the children receive and whether the children's mental needs are being met in the home.

Jerri Szlizewski ("Szlizewski"), a child forensic interviewer ("CFI") at Mission Children's Clinic, testified next to the following: A CFI "[interviews] children who are alleged to be abused in a non-threatening, non-judgmental developmentally appropriate manner taking care not to lead them in any one direction." Szlizewski interviewed J.B. and V.G. in December 2006, and the children provided information consistent with their prior interviews. During their individual interviews with Szlizewski, the children looked at girl and boy diagrams and indicated what Defendant had done to them.

Dr. Cynthia Brown ("Brown"), the Medical Director of the Child Maltreatment Evaluation Program at Mission Children's Clinic, testified as an expert witness for the State. Brown examined J.B. in December 2006, and J.B.'s anal exam was normal. Brown testified that in cases where anal penetration had occurred, it was common to see findings "maybe five percent or less of the time." One reason for this is that children often wait to disclose their injuries, and these

injuries heal during that time. Mary Ormand, the nurse practitioner in the Mission Children's Clinic, examined V.G., and Brown then reviewed the photographs taken during that examination. Brown did not observe any injuries from the pictures taken of V.G. Brown stated that in her experience and according to national reports, "very few children have findings even when there is genital to genital, penile to genital contact."

At the close of the State's evidence, Defendant made a motion to dismiss all of the charges, which the trial court denied. Defendant testified on his own behalf, and he denied ever physically or sexually abusing J.B. or V.G. Defendant's mother, Catherine Ledford, and Defendant's former landlord, Clara Ball, also testified on Defendant's behalf. At the close of all evidence, Defendant renewed his motion to dismiss, and this motion was denied.

The jury found Defendant guilty of first degree rape of V.G., taking indecent liberties with J.B., and two counts of first degree sex offense with J.B. Defendant renewed his motion to dismiss and made a motion for judgment notwithstanding the verdict. The trial court denied these motions. The trial court consolidated all charges for a single judgment within the presumptive range for a B-1 felony, sentencing Level II. The trial court entered judgment sentencing Defendant to a term of 288 to 355 months imprisonment, lifetime registration as a sex offender, and lifetime satellite-based monitoring. From this judgment, Defendant appeals.

II. Admission of Evidence

Defendant argues the trial court committed plain error by allowing Kent to testify that her investigation had substantiated Defendant as the perpetrator of the abuse alleged by J.B. and V.G. For the following reasons, we must agree.

Defendant failed to object to Kent's testimony at trial, and is thus limited to plain error review. *See* N.C. R. App. P. 10(b)(2), 10(c)(4). In criminal trials, plain error review is available for challenges to jury instructions and evidentiary issues. *Dogwood Development and Management Co., LLC v. White Oak Transport Co., Inc.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). "Reversal for plain error is only appropriate where the error is so fundamental that it undermines the fairness of the trial, or where it had a probable impact on the guilty verdict." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240 (2002).

Defendant argues that Kent's testimony was admitted in error because it resolved the factual issue of Defendant's guilt for the jury by expressing an opinion on J.B.'s and V.G.'s credibility. Defendant contends this case is parallel to our recent opinion in *State v. Couser*, 163 N.C. App. 727, 731, 594 S.E.2d 420, 423 (2004), where we held a medical expert's opinion that the child "probably had been sexually abused" was impermissible and prejudicial because it amounted to an improper opinion on the victim's credibility. In *Couser*, the defendant had been convicted of taking indecent liberties with a child and attempted rape. *Id.* at 729, 594 S.E.2d at 422. The only direct evidence against the defendant was the victim's testimony and corroborative testimony from other witnesses. *Id.* at 731, 594 S.E.2d at 423. "There was no evidence that the victim's behavior or symptoms following the assault were consistent with being sexually abused." *Id.* The only medical evidence presented was that of abrasions which were not specific to, nor diagnostic of, sexual abuse. *Id.* The results of a rape suspect kit were negative, revealing "that the victim had no semen in her or on her clothing and that neither the victim nor defendant had transmitted hairs to each other." *Id.*

> Without the [medical expert opinion testimony], the jury . . . would have been left with only the testimony of the victim and corroborative testimony along with evidence of abrasions not necessarily caused by sexual assault. Thus, the central issue to be decided by the jury was the credibility of the victim. We conclude that the impermissible expert medical opinion evidence had a probable impact on the jury's result because it amounted to an improper opinion on the victim's credibility, whose testimony was the only direct evidence implicating defendant.

Id.

Unlike *Couser*, however, Kent was not qualified as an expert witness. Thus, Kent's testimony did not constitute an impermissible expert opinion regarding the victims' credibility. The State contends that Kent's testimony merely served to corroborate the testimony of V.G. and J.B. "One of the most widely used and well-recognized methods of strengthening the credibility of a witness is by the admission of prior consistent statements." *State v. Locklear*, 320 N.C. 754, 761-62, 360 S.E.2d 682, 686 (1987) (citation omitted). However, the conclusion reached by DSS was not based solely on the children's accounts of what happened, and thus, was not merely a corroboration of their testimony. Rather, DSS conducted its own

investigation to determine whether any of the children's caregivers were participants in the alleged abuse. Kent described DSS's investigation as follows:

> We look at case history being involved and I was investigating these specific allegations that were reported and then I also do a global assessment. I mean I don't just go in and ask about allegations. I ask about anything from their mental needs being met in the home, supervision. Based on all the information I gathered during the course of the investigation I never had any information to substantiate that Misty or Amanda were abusive or neglectful.

The cumulative effect of Kent's testimony was to tell the jury that based upon a thorough investigation, DSS concluded that of the children's three caregivers, Defendant had sexually abused them.

The dissent contends that the present case is analogous to *State v. O'Hanlan*, 153 N.C. App. 546, 570 S.E.2d 751 (2002), in which a law enforcement officer testified that he did not perform a more thorough investigation because the victim had survived her attack and was able to describe and identify the defendant as her attacker. *Id.* at 562, 570 S.E.2d at 761. This Court held that the context in which the law enforcement officer's testimony was given made it clear that he was not offering an opinion as to the defendant's guilt, but rather that he was explaining why he did not conduct further scientific testing of the physical evidence. *Id.* Thus, even if the officer's testimony was admitted in error, any resulting prejudice did not amount to plain error. *Id.* at 563, 594 S.E.2d at 762.

In the present case, however, Kent's testimony was clearly improper, as she testified that DSS had concluded Defendant was guilty of the alleged criminal acts. Our case law has long held that a witness may not vouch for the credibility of a victim. *See State v. Freeland*, 316 N.C. 13, 16, 340 S.E.2d 35, 36 (1986) (harmless error where mother of victim was allowed to give opinion testimony vouching for the veracity of her daughter); *State v. Teeter*, 85 N.C. App. 624, 355 S.E.2d 804 (nurse who interviewed mentally retarded victim about alleged rape should not have been allowed to testify that she believed victim's statement), *appeal dismissed and cert. denied*, 320 N.C. 175, 358 S.E.2d 67 (1987). Kent's testimony that DSS had "substantiated" Defendant as the perpetrator, and that the evidence she gathered caused DSS personnel to believe that the abuse alleged by the children did occur, amounted to a statement that a State agency

had concluded Defendant was guilty. DSS is charged with the responsibility of conducting the investigation and gathering evidence to present the allegation of abuse to the court. Although Kent was not qualified as an expert witness, Kent is a child protective services investigator for DSS, and the jury most likely gave her opinion more weight than a lay opinion. Thus, it was error to admit Kent's testimony regarding the conclusion reached by DSS.

"In deciding whether an error by the trial court constituted plain error, 'the appellate court must examine the entire record and determine if the . . . error had a probable impact on the jury's finding of guilt.' " *State v. Pullen*, 163 N.C. App. 696, 701, 594 S.E.2d 248, 252 (2004) (quoting *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983)). In *Couser*, this Court held that the improperly admitted testimony had a probable impact on the jury's decision where the only other evidence of the defendant's guilt was "the testimony of the victim and corroborative testimony along with evidence of abrasions not necessarily caused by sexual assault." *Couser* at 731, 594 S.E.2d at 423; *see also State v. Delsanto*, 172 N.C. App. 42, 49, 615 S.E.2d 870, 875 (2005) (holding that admission of medical expert's testimony that child was sexually abused by defendant in absence of any physical evidence of abuse constituted plain error); *State v. Ewell*, 168 N.C. App. 98, 105, 606 S.E.2d 914, 919 (holding that it was error for the trial court to allow expert testimony that it was "probable that [the child] was a victim of sexual abuse" when the testimony was not based on physical evidence or behaviors consistent with sexual abuse), *disc. review denied*, 359 N.C. 412, 612 S.E.2d 326 (2005); *State v. Bush*, 164 N.C. App. 254, 259, 595 S.E.2d 715, 718 (2004) (expert's testimony that she diagnosed the victim as having been sexually abused by the defendant was plain error).

However, in *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002), although expert testimony that sexual abuse had in fact occurred was improperly admitted, the overwhelming evidence against the defendant led our Supreme Court to conclude "that the error committed did not cause the jury to reach a different verdict than it otherwise would have reached." In *Stancil*,

> [a]lthough the Supreme Court did not reveal what evidence it relied upon, the prior Court of Appeals opinion in that case noted in addition to testimony of the victim and other corroborating evidence[,] there were two permissible expert opinions that the victim exhibited characteristics consistent with sexual abuse. *State v. Stancil*, 146 N.C. App. 234, 240, 552 S.E.2d 212, 215-16 (2001),

> *per curiam modified and aff'd*, 355 N.C. 266, 559 S.E.2d 788. Further, there was evidence that the defendant had performed oral sex upon the victim and thus it was unlikely any physical evidence would have been left and that the rape suspect kit returned inconclusive. *Id.* Moreover, the victim in that case continued to show symptoms of having been sexually abused five days after the incident and showed intense and immediate emotional trauma after the incident. *Id.*

Couser, 163 N.C. App. at 730-31, 594 S.E.2d at 423. Thus, whereas the trial court erred in *Stancil*, that error did not rise to the level of plain error.

The evidence in the present case more closely resembles the evidence presented in *Couser* in that without Kent's testimony, the jury would have been left with only the children's testimony and the evidence corroborating their testimony. Thus, as in *Couser*, "the central issue to be decided by the jury was the credibility of the victim[s]." *Id.* at 731, 594 S.E.2d at 423. J.B. and V.G. provided detailed and consistent accounts of the sexual abuse they alleged Defendant inflicted upon them. J.B. testified that Defendant had physically and sexually abused him on a daily basis. V.G. testified that Defendant sexually abused her on two occasions over the course of a year. The children's testimony was corroborated by the testimony of Amanda, the Detective Sergeant from Macon County Sheriff's Department, and the child forensic interviewer from Mission Children's Clinic. Although the children's testimony and the corroborating testimony is strong evidence, our prior case law instructs that this alone is insufficient to survive plain error review of the testimony of a witness vouching for the children's credibility.

Accordingly, we are constrained by our analysis in *Couser* to hold it is probable that Kent's testimony that DSS had concluded the abuse did occur and had substantiated Defendant as the perpetrator impacted the jury's determination. We, therefore, must conclude that it was plain error to admit Kent's testimony, and Defendant is entitled to a new trial. Because we grant Defendant a new trial, we need not address Defendant's arguments regarding the denial of his motion to dismiss and his enrollment in satellite-based monitoring.[1]

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1. Although we do not address Defendant's argument regarding satellite-based monitoring, we note that this Court recently held that "retroactive application of the [satellite-based monitoring] provisions do not violate the *ex post facto* clause." *State v. Bare*, —— N.C. App. ——, ——, 677 S.E.2d 518, 531 (2009).

NEW TRIAL.

Judge GEER concurs.

Judge BRYANT dissents in a separate opinion.

BRYANT, Judge dissenting.

Because I do not believe the admission of testimony by DSS child protective services investigator Kay Kent amounted to plain error, I respectfully dissent.

> [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. Thornton, 158 N.C. App. 645, 649, 582 S.E.2d 308, 310 (2003) (citation omitted).

Under our North Carolina Rules of Evidence, section 8C-1, Rule 701,

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2009).

In *State v. O'Hanlan*, 153 N.C. App. 546, 570 S.E.2d 751 (2002), the defendant challenged the admission of a law enforcement officer's testimony as improper opinion testimony tantamount to expert testimony. *Id.* at 561, 570 S.E.2d at 761. The defendant argued that the officer improperly bolstered the credibility of the complaining witness by testifying that she had been assaulted, raped, and kidnapped.

Id. On re-direct examination by the State, following up on cross-examination questions regarding why the officer did not perform a more thorough investigation, the officer testified as follows:

> I had a victim that survived her attack. She could positively identify her assailant, the person that kidnapped, raped, and brutally beat her. If she had died . . . I would have done more fingerprinting, more checking under fingernails, more fiber transfer, because I wouldn't have known who done it. But she positively told me who done it and I arrested him.

Id. at 562, 570 S.E.2d at 761.

This Court held that the officer was not offering his opinion that the victim had been assaulted, kidnapped, and raped by the defendant but rather was explaining the course of his investigation. In accordance with Rule 701, the testimony was rationally based upon the officer's perception and was helpful to the jury in understanding the investigative process. *Id.* at 562-63, 570 S.E.2d at 761-62.

Here, DSS investigator Kent offered lay witness testimony which defendant argues was tantamount to expert opinion testimony that improperly bolstered J.B. and V.G.'s credibility. Kent testified that when interviewing children she uses a forensic model that does not lead the child, and she establishes that the child knows the difference between a truth and a lie. Kent testified that her role, when speaking with children about sexual abuse, is "[t]o see if we get statements that are consistent with the report to see if they disclose any information of concern. With sexual abuse a big piece of that is consistency." After testifying to the interview process followed with J.B. and V.G., as well as the substance of those individual interviews and consistent with the trial testimony of both J.B. and V.G., Kent testified as follows:

> State: And as a result of your investigation with both of these children, did you fill out a North Carolina Case Decision Summary/Initial Case Plan?
>
> . . .
>
> Kent: Yes, that's a mandated form.
>
> . . .
>
> State: Okay, and on that where it lists parent/guardian/custodian would you read out who—who's listed underneath that?

Kent: Amanda G[], Misty Burch who were the housemates at that time. Also, [defendant]. He was the father and stepfather of the children.

. . .

You list each of the children and all of the caregivers involved and then there's a perpetrator section which we go down through each of the caregivers listed and we make a decision to substantiate or not substantiate as far as their being a perpetrator.

State: Okay, and did you make a decision on Amanda G[]?

. . .

Kent: We unsubstantiated.

State: And what about Misty Burch?

Kent: We unsubstantiated.

State: And what about [defendant]?

Kent: We substantiated.

State: And was that on both children?

Kent: Yes.

State: And if you'll explain, please, what substantiated means?

Kent: It means that we found evidence throughout the course of our investigation to believe that the alleged abuse and neglect did occur.

On cross-examination, defendant questioned Kent about the steps taken to insure the veracity of the childrens' statements. In response, Kent stated "[w]e use a forensic interview model that is used Statewide in order to gather information from children that is not leading which they—we look at consistency and we interview everyone separately." Defendant next asked how Kent arrived at the decision to substantiate defendant as a perpetrator and found there was not evidence to substantiate Amanda or Misty Burch.

We look at case history being involved and I was investigating these specific allegations that were reported and then I also do a global assessment. I mean I don't just go in and ask about allegations. I ask about anything from their mental needs being

> met in the home, supervision. Based on all the information I gathered during the course of the investigation I never had any information to substantiate that Misty or Amanda were abusive or neglectful.

DSS investigator Kent testified in accordance with Rule 701 based on her perception, in a manner that was helpful to the jury with regard to the process of her DSS investigation. This testimony—in which she explained that the word "substantiated" written on a standardized DSS form mandated for use in a DSS investigation of child sexual abuse—does not amount to error, or error so fundamental that justice cannot have been done. In fact, much of the testimony about which defendant now complains as amounting to plain error was elicited by defendant on cross examination of Kent.

The majority opinion in analyzing prejudice focuses solely on Kent's testimony, testimony that the majority says, "the jury most likely gave . . . more weight than a lay opinion." Although acknowledging that Kent was not admitted as an expert witness, the majority nevertheless discusses the probable impact of her testimony as if it were indeed expert testimony.

This is not an exceptional case. This is not a case of fundamental or grave error which amounts to a miscarriage of justice as required in a plain error review. *See Thorton*, 158 N.C. App. at 649, 582 S.E.2d at 310. Even assuming arguendo that it was error, lack of objection by defendant notwithstanding, to admit Kent's testimony that DSS had substantiated abuse of the child victims by defendant, my review of the record does not reveal that the error alleged had a probable impact on the jury's verdict of guilty.

Here, two child victims, J.B. and V.G., took the witness stand and testified fully and completely to the acts of sexual abuse committed upon them by defendant three years before. J.B., fourteen years old at the time of trial, testified to being sexually and physically abused by defendant on a daily basis for about two years. V.G., ten years old at the time of trial, testified that defendant committed forcible sexual acts upon her at least two times over the period of a year. Several other witnesses provided strong corroborating testimony regarding the sexual abuse of the children. Further, medical expert testimony was introduced to show that while there was a lack of physical injuries, this was not uncommon, especially when, as in the present case, children do not immediately disclose the abuse and the injuries heal over time.

In light of the clear, competent, and compelling evidence put before the jury, including evidence elicited by defendant regarding how Kent reached her decision on substantiating a case of child sexual abuse, even if the admission of Kent's testimony was error, "it did not rise to the level of plain error." *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789. *Accord Locklear*, 320 N.C. 754, 360 S.E.2d 682; *Teeter*, 85 N.C. App. 624, 355 S.E.2d 804; and *Freeland*, 316 N.C. 13, 340 S.E.2d 35.

For the reasons stated herein, I would find no error in the judgment of the trial court.

JULIA CATHERINE BOSEMAN, PLAINTIFF v. MELISSA ANN JARRELL, DEFENDANT, AND MELISSA ANN JARRELL, THIRD-PARTY PLAINTIFF v. JULIA CATHERINE BOSEMAN AND THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, THIRD-PARTY DEFENDANTS

No. COA08-957

(Filed 18 August 2009)

1. Civil Procedure— Rule 60—relief from adoption decree—failure to exercise discretion

The trial court failed to exercise its discretion when it denied defendant's Rule 60(b)(4) motion for relief from a decree of adoption on the grounds that it did not have jurisdiction to declare void the order of another district court judge. Rule 60(b) motions are an exception to the general rule that one judge may not overrule, modify, or change the judgment of another.

2. Adoption— same sex—not void

A party to a same-sex adoption decree could not question its validity except by showing that it was void *ab initio*. The decree was not void, even if erroneous; the adoption was not explicitly a same-sex adoption and was better characterized as a direct placement adoption with a waiver of the full terms of parental consent and legal obligations. The statutes make clear that a wide range of adoptions are permitted so long as they protect the minor and the specific nature of the parties' relationship was not relevant; the same result would have been reached for an unmarried heterosexual couple.

3. Declaratory Judgments— indexing adoption—moot

A declaratory judgment claim by defendant concerning the Department of Health and Human Services' alleged refusal to index a non-stepparent adoption decree was erroneously dismissed for lack of jurisdiction, but the matter was moot because the adoption decree was not void and cannot be challenged by defendant. Moreover, the court did not err by ruling that plaintiff is a legal parent of the child.

4. Adoption— custody—standard of proof—findings

An argument in a proceeding challenging an adoption that plaintiff has standing to pursue custody was not reached because other findings fully supported the court's custody award. Also, an argument concerning the standard of proof for determining custody failed because it rested on the contention that plaintiff was not a parent, which was rejected above.

Appeal by defendant/third-party plaintiff from judgments entered 14 January 2008, 6 February 2008, 14 February 2008, 20 March 2008, and 16 April 2008 by Judge Lillian B. Jordan in the District Court in New Hanover County. Heard in the Court of Appeals 26 January 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock, for the North Carolina Department of Health and Human Services.

Lea, Rhine, Rosrugh & Chleborowicz, PLLC, by James W. Lea, III, Lori W. Rosbrugh, and Holi B. Newsome, for plaintiff/third-party defendant-appellee.

Ward and Smith, P.A., by John M. Martin and Leslie G. Fritscher, for defendant/third-party plaintiff-appellant.

North Carolina Association of Women Attorneys, National Association of Social Workers, North Carolina Chapter of the National Association of Social Workers, and North Carolina Foster and Adoptive Parents Association, by Ellen W. Gerber, as amici curiae.

BRYANT, Judge.

Defendant/third-party plaintiff Melissa Jarrell appeals from a custody order entered 14 January 2008 which granted joint legal custody

of a minor child to Jarrell and plaintiff/third-party defendant Julia Boseman, a partial summary judgment order entered 6 February 2008 which denied Jarrell's motion to declare void an adoption decree, an order entered 14 February 2008 which denied Jarrell's 12(b)(6) motion to dismiss, an order entered 20 March 2008 which denied Jarrell's Rule 60(b) motion for relief from the adoption decree, an order entered 20 March 2008 which denied Jarrell's 12(b)(1) motion, an order entered 16 April 2008 which dismissed her declaratory judgment claim challenging the validity of an adoption, and an order entered 16 April 2008 which amended the 14 January 2008 order. For the reasons stated below, we affirm in part, and vacate in part and remand.

Boseman and Jarrell were domestic partners in a relationship that began in August 1998. From the beginning, the two discussed their desire to have a child. As a result of artificial insemination, Jarrell gave birth to a child in October 2002. Both Jarrell and Boseman participated in the day-to-day care of the child. The child called Jarrell "Mommy" and Boseman "Mom" and is described as "happy, outgoing, respectful, intelligent, very athletic, friendly, delightful and kind to others." Jarrell's relationship with the child is described as hands-on, loving, and respectful. Boseman's is described as very attentive, loving, hands-on and fun. In 2004, the parties began to explore the option of Boseman adopting the child.

On 3 May 2005, Jarrell filed with the Durham County District Court Clerk a Motion for Waiver of Statutory Provisions by Biological Mother. The motion stated, in pertinent part:

> Melissa Ann Jarrell, the biological mother of [adopted child], hereby requests that the Court waive the statutory provisions established for the benefit of biological parents in N.C.G.S. 48-1-106(c) and N.C.G.S. 43-3-606(9) . . . . [and] Jarrell, the biological mother of adoptee herein, prays that the Court grant a waiver in this adoption of the statutory provisions stating that the consent of the biological mother should contain an agreement to terminate all her parental rights . . . .

In August 2005, a district court judge in the District Court in Durham County ("the adoption court"), filed an order which ruled that the provisions under N.C.G.S. §§ 48-1-106(c) and 48-3-606, requiring the termination of a biological parent's rights upon the adoption of the child, could be waived and that the consent form filed by Jarrell was sufficient for such a purpose.

Additionally, Jarrell filed a Form DSS-1802, Consent to Adoption by Parent Living With Petitioner. In doing so, Jarrell "voluntarily consent[ed] to the adoption of [the child] by petitioner, Julia Catherine Boseman" and "waive[d] [her] right to severance of the relationship of parent and child between [herself] and the minor child when this adoption is entered, so that the minor child shall have two legal parents, [herself and Boseman.]" Boseman petitioned the court for adoption of the minor child and, in a Motion for Waiver of Statutory Provisions by Petitioner, stated that she "seeks to adopt [the child] so that said child will have two legal parents . . . ." Moreover, Boseman requested "that the Court grant a waiver in this adoption of the statutory provisions stating that the consent of the biological parent should contain an agreement to terminate all her parental rights . . . ." On 26 August 2005, the adoption court entered a decree of adoption of the child by Boseman that "does not sever the relationship of parent and child between the individual adopted and that individual's biological mother. Further, the biological mother is not . . . divested of any rights with respect to the adoptee."

In 2005 and 2006, the parties spent significant time apart and eventually separated in May 2006. Despite Jarrell's acknowledgments that Boseman "is a very good parent who love[d] [the child]" and whom the child loved in return, Jarrell limited Boseman's contact with the child.

On 7 February and 20 April 2007, respectively, Boseman filed a complaint and amended complaint in the District Court in New Hanover County ("the trial court") seeking joint custody of the child. The complaint requests that Jarrell retain primary physical custody with Boseman having secondary custody in the form of liberal and extensive visitation. On 24 May, 17 July, and 25 October 2007, respectively, Jarrell filed a Rule 60(b)(4) Motion for Relief from Void Decree of Adoption, Rule 12(b)(1) Motion to Dismiss, Answer, Counter-claims, and Third-Party Class Action Complaint; an amended answer, counterclaims, and third-party class action complaint; and a second amended answer, counterclaims, and third-party complaint. In Jarrell's third-party complaint, she asserted that "the North Carolina Department of Health and Human Services [(the Department)] is the State Agency of the executive oversight of adoptions, including the indexing of final adoptions on the State's permanent retention system and the warehousing of sealed adoption records." Jarrell requested that the trial court "enter a Dec-

laratory Judgment declaring the legal effect of the Department's alleged refusal to index the non-stepparent adoption decree on this State's permanent retention system."

On 26 November 2007, the Department, as third-party defendant, answered Jarrell's third-party complaint requesting that Jarrell "have and recover nothing from [the Department]." On 29 November 2007, Jarrell, as third-party plaintiff, moved for partial summary judgment requesting that the trial court determine the adoption decree was void as a matter of law. On 10 December 2007, the trial court heard arguments based upon Boseman's complaint and Jarrell's counterclaim for custody of the child. On 14 January 2008, the trial court entered an order that "[Boseman] and [Jarrell] shall have joint legal custody of the minor child[,]" and, "[Jarrell] shall have primary physical custody . . . ." In its order, it also concluded that the "Decree of Adoption has not been found to be void . . . ."

On 6 February 2008, the trial court entered an order which denied Jarrell's motion for partial summary judgment to have the Adoption Decree declared void. As a basis, the order states that the trial court did not have jurisdiction to declare void an order or judgment of another district court entered in another judicial district in North Carolina. On 14 February 2008, the trial court entered an order which denied Jarrell's Rule 12(b)(6) motion to dismiss. On 20 March 2008, the trial court entered an order which denied Jarrell's Rule 60(b)(4) Motion for Relief from Void Decree of Adoption, stating that it did not "have jurisdiction to declare void an Order or Decree of another District Court Judge sitting in another judicial district in North Carolina." In another order entered 20 March 2008, the trial court denied Jarrell's Rule 12(b)(1) motion.

On 16 April 2008, the trial court entered an order in which it dismissed the declaratory judgment actions with respect to the validity of the adoption decree. Again, the basis for the ruling was that the court lacked jurisdiction "to declare void an Order or Decree of another District Court Judge sitting in another Judicial District in North Carolina."

On 16 April 2008, the trial court also amended its 14 January 2008 order and inserted the following finding:

> 27. [Jarrell] sought to have the Decree of Adoption declared void in this lawsuit. This Court sitting in New Hanover County,

North Carolina does not have jurisdiction to declare void an Order of another District Court Judge in another Judicial District in North Carolina.

From these orders, Jarrell appeals as both defendant and third-party plaintiff.

On appeal, Jarrell raises the following seven arguments: The trial court erred in (I) concluding that it lacked subject matter jurisdiction to set aside the order of another district court; (II) upholding an adoption decree that was void when entered; (III) dismissing the declaratory judgment action; (IV) ruling that Boseman was a legal parent of the minor child; (V) ruling that Jarrell acted inconsistently with her protected status as a natural parent; (VI) applying an incorrect standard of proof for determining custody; and (VII) denying Jarrell's Rule 12(b)(1) and 12(b)(6) motions.

I and II

[1] Jarrell first contends that the trial court erred in denying her Rule 60(b)(4) motion on grounds that it did not "have jurisdiction to declare void an Order or Decree of another District Court Judge sitting in another Judicial District of North Carolina." We agree.

Appellate review of denial of a Rule 60(b)(4) motion is "limited to determining whether the court abused its discretion." *McLean v. Mechanic*, 116 N.C. App. 271, 276, 447 S.E.2d 459, 462 (1994), *disc. review denied*, 339 N.C. 738, 454 S.E.2d 653 (1995). While the general rule is that one judge may not overrule, modify or change the judgment of another, Rule 60(b) motions are an exception. *Trent v. River Place, LLC*, 179 N.C. App. 72, 79, 632 S.E.2d 529, 534 (2006). "Where a judge refuses to entertain such a motion because he labors under the erroneous belief that he is without power to grant it, then he has failed to exercise the discretion conferred on him by law." *Hoglen v. James*, 38 N.C. App. 728, 731, 248 S.E.2d 901, 903 (1978) (citing *Hudgins v. White*, 65 N.C. 393 (1871)). In *Hoglen*, we held that because the judge "erroneously believed he lacked the power to grant the relief requested, plaintiff . . . never had the proper hearing on his Rule 60(b) motion to which he is entitled." *Id.* at 731, 248 S.E.2d at 904. In that case, we vacated the order and remanded for a hearing so that the trial court could make the required findings of fact and rule on the plaintiff's order. *Id.*

Here, the trial court denied Jarrell's motion under the misapprehension that it lacked the necessary jurisdiction to declare the adoption decree void. This constituted an abuse of discretion by a failure to exercise the discretion conferred by law and we vacate the trial court's Rule 60(b)(4) order. In order to expedite resolution of this matter in the best interest of the minor involved, we next address defendant's second argument: whether the adoption decree was in fact void.

[2] Jarrell moved for relief pursuant to Rule 60(b)(4), contending that the adoption decree entered by the District Court in Durham County ("the adoption court") was void *ab initio*. After careful review, we conclude that the adoption decree, even if erroneous or contrary to law, was not void.

We begin by noting that appeals from final orders of adoption have been severely restricted by our legislature:

> (a) Except as provided in subsections (b) and (c) of this section, after the final order of adoption is entered, no party to an adoption proceeding nor anyone claiming under such a party may question the validity of the adoption because of any defect or irregularity, jurisdictional or otherwise, in the proceeding, but shall be fully bound by the order. No adoption may be attacked either directly or collaterally because of any procedural or other defect by anyone who was not a party to the adoption. The failure on the part of the court or an agency to perform duties or acts within the time required by the provisions of this Chapter shall not affect the validity of any adoption proceeding.

N.C. Gen. Stat. § 48-2-607(a) (2005); *see also Hicks v. Russell*, 256 N.C. 34, 123 S.E.2d 214 (1961). Jarrell, a party to the adoption, cannot question its validity based on "any defect or irregularity, jurisdictional or otherwise." N.C.G.S. § 48-2-607(a). Therefore, the only avenue by which Jarrell can contest the adoption is to show that it was void *ab initio*, a legal nullity. "If a judgment is void, it is a nullity and may be attacked at any time. Rule 60(b)(4) is an appropriate method of challenging such a judgment." *Burton v. Blanton*, 107 N.C. App. 615, 616-17, 421 S.E.2d 381, 383 (1992) (internal citation omitted).

Our State's case law distinguishing void versus voidable judgments is easy to state, but often thorny to apply. "[D]ecrees are not void if the court which rendered them had jurisdiction." *Travis v.*

Johnston, 244 N.C. 713, 719, 95 S.E.2d 94, 99 (1956). "To have validity a judgment must be rendered by a court which has authority to hear and determine the questions in dispute and control over the parties to the controversy or their interest in the property which is the subject matter of the controversy." *Id.* at 719-20, 95 S.E.2d at 99. "In such case, *the judgment is not void even though it may be contrary to law*; it is voidable, but is binding on the parties until vacated or corrected in the proper manner." *Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294 (emphasis added) (citing *Worthington v. Wooten*, 242 N.C. 88, 86 S.E.2d 767 (1955)), *disc. review denied*, 320 N.C. 166, 358 S.E.2d 47 (1987). "[E]rroneous judgments may be corrected only by appeal and Rule 60(b) motions cannot be used as a substitute for appeal." *Burton*, 107 N.C. App. at 617, 421 S.E.2d at 383. However, "[w]here jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). Despite this language, our courts have repeatedly rejected contentions that courts lack subject matter jurisdiction where statutory procedures and requirements are not met, particularly in juvenile proceedings. *See*, *e.g.*, *In re J.T.*, 363 N.C. 1, 2, 672 S.E.2d 17, 17 (2009) (holding that the "failure to name a juvenile as respondent or to serve a summons upon the juvenile in accordance with N.C.G.S. § 7B-1106(a) . . . implicate[s] personal jurisdiction rather than subject matter jurisdiction").

Here, the parties essentially agree on the law as stated above, but differ in their portrayal of the actions of the adoption court. Jarrell argues that the adoption court "had no statutory authority to enter [a] same-sex Adoption Decree," and thus acted in excess of its jurisdiction. Boseman contends that the adoption court had subject matter jurisdiction to handle adoption proceedings involving North Carolina residents pursuant to the explicit terms of Chapter 48, and that any deviations from that Chapter's mandates are, at most, contrary to law. We must look to the language of Chapter 48 as an expression of our General Assembly's intent to determine whether the irregularities in the adoption here exceeded the adoption court's jurisdiction or were merely contrary to law.

Chapter 48 of our General Statutes covers adoptions and establishes subject matter jurisdiction in these special proceedings. The

version of section 48-2-100, titled "Jurisdiction," in force at the time of the adoption at issue here[1], provided, in pertinent part, that

> jurisdiction over adoption proceedings commenced under this Chapter exists if, at the commencement of the proceeding:
>
> (1) The adoptee has lived in this State for at least the six consecutive months immediately preceding the filing of the petition or from birth, and the prospective adoptive parent is domiciled in this State; or
>
> (2) The prospective adoptive parent has lived in or been domiciled in this State for at least the six consecutive months immediately preceding the filing of the petition.

N.C. Gen. Stat. § 48-2-100(b) (2005). Thus, statutory subject matter jurisdiction is determined by the residence of the parties to the adoption. In this case, Jarrell, Boseman and the minor child had all resided in Wilmington, North Carolina for at least several years prior to the adoption proceeding.

Jarrell counters that Chapter 48 does not permit "same-sex adoptions,"[2] and indeed that phrase appears nowhere in the chapter. Chapter 48 specifically addresses three basic types of adoptions of minors: 1) agency placements, in which the agency has obtained custody of the minor through parental relinquishment or the termination of parental rights; 2) direct placement of a child, in which "a parent or guardian . . . personally select[s] a prospective adoptive parent," either with or without the assistance of third-parties; and 3) adoptions by step-parents[3]. *See* N.C. Gen. Stat. §§ 48-3-202, 48-3-203, 48-4-101 (2009).

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1. In 2007, the General Assembly amended this section to remove barriers to adoption of North Carolina children by residents of other states. The main portion of the amendment was to add a third manner for the court to obtain jurisdiction when "[a]n agency licensed by this State or a county department of social services in this State has legal custody of the adoptee." N.C.G.S. § 48-2-100 (b)(3) (2007). This amendment is unrelated to the facts before us here. *See* 2007 N.C. Sess. Laws 151.

2. For convenience, we will adopt the term "same-sex" adoption to refer to situations in which one member of a same-sex couple adopts the biological minor child of the other member of the couple.

3. The factual situation here may appear closest to the latter type of adoption, in which the intent of the biological parent is to maintain her parental rights while expanding the rights and responsibilities of parenthood to another adult already acting in a parental role. Indeed, defendant's "motion for waiver of statutory provisions by biological mother" specifies that in 2005 she sought adoption of the minor by plaintiff in order to provide the minor with "two legal parents." Section 48-4-101 allows a step-

The parties here sought to arrange a direct placement adoption with certain variations from the relevant statutory provisions. Jarrell moved for the waiver required in such adoptions which provides that "the individual executing the consent understands that when the adoption is final, all rights and obligations of the adoptee's former parents or guardian with respect to the adoptee will be extinguished, and every aspect of the legal relationship between the adoptee and the former parent or guardian will be terminated[.]" N.C. Gen. Stat. § 48-3-606(9) (2009). In her motion to the adoption court, Jarrell explained that she wanted her child to have the benefits and protections of "two legal parents" and that obligating Boseman to provide these protections to her child was in the child's best interest and thus consistent with purposes of Chapter 48. The adoption court, after reviewing oral arguments, legal memoranda, a home study and other documents, agreed that the adoption would be in the minor's best interest, granted the waiver, and subsequently entered the decree of adoption. While the factual circumstances of the parties' relationship is discussed in the order granting the waiver, no mention of the parties sexual orientation is contained in the decree, which merely notes that the petitioner (Boseman) was a "single female." Thus, the adoption here was not explicitly a same-sex adoption; it is better characterized as a direct placement adoption with a waiver of the full terms of parental consent and legal obligations specified in N.C.G.S. §§ 48-1-106(c) and 48-3-606.

While we acknowledge that section 48-3-606 is titled "Content of consent; mandatory provisions," the intent and purpose of subsection (9) quoted above are to ensure that a biological parent or guardian is fully informed about the ramifications of adoption and are intended for the protection of that consenting individual, not the minor ("the individual executing the consent understands. . . ." N.C.G.S. § 48-3-606(9) (emphasis added). Similarly, under N.C.G.S. § 48-1-106(c), an adoption decree

> severs the relationship of parent and child between the individual adopted and that individual's biological or previous adoptive parents. After the entry of a decree of adoption, the former parents are relieved of all legal duties and obligations due from them to

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parent to petition to "adopt a minor who is the child of the stepparent's spouse." N.C.G.S. § 48-4-101. However, Chapter 48 defines "stepparent" as "an individual who is the spouse of a parent of a child" and the parties here were never married to each other. *See* N.C.G.S. § 48-1-101(18) (2009). In addition, the adoption documents themselves refer to provisions involving direct placement adoptions.

> the adoptee, except that a former parent's duty to make past-due-payments for child support is not terminated, and the former parents are divested of all rights with respect to the adoptee.

As with section 48-3-606(9), any waiver of this provision accrues to the detriment only of the would-be former parent, while actually conferring benefits on the minor who gains an additional adult who is legally obligated to his care and support. Again, Jarrell herself makes this point in her motion for waiver to the adoption court where she notes that the waiver will avail the minor of additional health and governmental benefits, as well as provide stability and "a legal framework for resolving any disputes regarding custody or visitation that may arise after the adoption." This is exactly the end achieved by the adoption in this case. Following unforeseen circumstances, namely the end of the parties' domestic partnership, the minor's interests, both financial and emotional, are protected. Because of the adoption here, the minor will still be entitled to the support and care of the two adults who have acted as his parents and they will both remain fully obligated to his welfare. This result is fully in accord with the stated intent of Chapter 48:

> (1) The primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents, (ii) facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support, (iii) protecting minors from placement with adoptive parents unfit to have responsibility for their care and rearing, and (iv) assuring the finality of the adoption[.]

N.C.G.S. § 48-1-100(b) (2009). Here, the evidence before the adoption court tended to show that Boseman and Jarrell planned the conception and birth of the minor and both had acted in a parental capacity providing the minor with "love, care, security, and support." In addition, the General Assembly in Chapter 48 seeks "to promote the integrity and *finality* of adoptions" and "to encourage prompt, *conclusive* disposition of adoption proceedings." N.C.G.S. § 48-1-100(a) (emphasis added). Further, our General Assembly has directed that:

> (c) In construing this Chapter, the needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor.

(d) This Chapter shall be liberally construed and applied to promote its underlying purposes and policies.

N.C.G.S. § 48-1-100. Thus, here we must put the minor's "needs, interests, and rights" above those of either Boseman or Jarrell. Finally, because "the right of adoption is not only beneficial to those immediately concerned but likewise to the public, construction of the statute should not be narrow or technical . . . [but rather] fair and reasonable . . . where all material provisions of the statute have been complied with." *Locke v. Merrick*, 223 N.C. 799, 803, 28 S.E.2d 523, 527 (1944). Having reviewed the intent and purposes of Chapter 48, as well as the specific provisions at issue here, we conclude that the adoption court acted within its authority in granting the direct placement adoption decree, and that the grant of waiver of certain provisions was, at most, erroneous and contrary to law. Thus, the adoption decree is not void. We remand to the trial court for entry of an order containing the required findings of fact and denying defendant's Rule 60(b)(4) on grounds that the adoption decree was not void and that N.C.G.S. § 48-2-607(a) prohibits defendant from contesting its validity.

We note that both parties have made extensive arguments related to the same-sex nature of their former relationship and whether our State and its agencies sanction adoptions by same-sex couples. While acknowledging that such issues are matters of great public interest and of personal significance to Boseman and Jarrell, we emphasize that the specific nature of the parties' relationship or marital status was not relevant to resolution of the instant appeal. The same result would have been reached had the parties been an unmarried heterosexual couple. While Chapter 48 does not specifically address same-sex adoptions, these statutes do make clear that a wide range of adoptions are contemplated and permitted, so long as they protect the minor's "needs, interests, and rights."

III and IV

[3] Jarrell sought a declaratory judgment with respect to "the legal effect of the Department's alleged refusal to index the non-stepparent adoption decree on this State's permanent retention system." Based on the same misapprehension of law discussed above, the trial court dismissed this action for lack of jurisdiction. This was error by the trial court, but as discussed above, the adoption decree was not void *ab initio* and cannot be challenged by Jarrell. Therefore, Jarrell's

declaratory judgment action is moot. The order dismissing the declaratory judgment for lack of jurisdiction is vacated and the matter is remanded for entry of an order consistent with this opinion. In addition, based on the validity of the adoption, the trial court did not err in ruling that Boseman was a legal parent of the child. This argument by Jarrell is overruled.

V, VI, and VII

[4] Defendant next argues that the trial court erred in making its fourth conclusion of law in the custody order for the child: "[Boseman] has standing to pursue custody of [the minor] in that [Jarrell] has acted inconsistent [sic] with her paramount parental rights and responsibilities." We need not reach this argument as the trial court's other conclusions, namely that Boseman is a parent of the child based on the adoption decree and that both Boseman and Jarrell are fit and proper persons for custody of the child, fully support its custody award.

Finally, Jarrell also argues that the trial court applied the wrong standard of proof for determining custody, and erred in denying her Rule 12(b)(1) and 12(b)(6) motions. Because these arguments rest on Jarrell's contention that Boseman is a non-parent, they also fail.

Conclusion

Because the adoption decree was not void and Jarrell may not challenge its validity, Boseman is a legal parent of the child. As discussed above, we affirm in part, and vacate and remand in part for entry of orders consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

Chief Judge MARTIN and Judge BEASLEY concur.

STATE OF NORTH CAROLINA v. MISTY KELLER WITHERSPOON, DEFENDANT

No. COA08-1003

(Filed 18 August 2009)

Evidence— demonstration—use of female mannequin's head and newly purchased couch

The trial court did not abuse its discretion in a first-degree murder case by failing to exclude a demonstration using a female mannequin's head and a newly purchased couch to refute defendant's version of the shooting.

Appeal by defendant from judgments entered 16 July 2007 by Judge Kimberly S. Taylor in Iredell County Superior Court. Heard in the Court of Appeals 24 February 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Valerie B. Spalding, for the State.

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

GEER, Judge.

Defendant Misty Keller Witherspoon appeals her first-degree murder conviction for the shooting death of her husband Quinn Witherspoon. Defendant's sole argument on appeal is that the trial court should have excluded testimony using a mannequin's head and a newly-purchased couch to refute defendant's version of the events. Defendant contends that the evidence constituted an experiment conducted under conditions not substantially similar to those at the time of the actual shooting. We conclude, however, that the use of the evidence was a demonstration not requiring substantially similar conditions. Consequently, no error occurred, and we uphold defendant's conviction.

Facts

Defendant and Quinn, a K-9 officer with the Concord Police Department, had been married for 11 years and had three children. At the time of Quinn's death, the couple was experiencing financial problems. In 2004, it was discovered that defendant had taken approximately $18,000.00 from the family's church, where Quinn served as the church's treasurer as well as a deacon. The pastor and

the deacons met and it was agreed that defendant would repay the money, and no police report would be filed.

Defendant was responsible for paying the family's bills and was behind in paying the utility bills and making the mortgage payments. The utility companies would threaten to cut off service to their house. On one occasion, Quinn had to borrow money from his supervisor to make the mortgage payment.

In March 2005, Quinn went to his credit union to discuss a delinquent credit card account. He believed defendant had a spending problem and was concerned that the monthly bills were not being paid promptly by defendant. Quinn had defendant taken off of his credit card account and had the spending limit reduced. He also paid off some debt with a personal loan that was repaid in monthly installments from his paycheck so that he did not have to worry about defendant's making the payments on time. When the credit union manager went over Quinn's credit report with him, Quinn became upset when he found out that there were credit cards and finance companies he did not know about listed on the report.

Defendant confided in her best friend, Leslie Burgess, that she and Quinn "had a lot of bills." Defendant would carry the home phone around with her in the house so that she could answer the phone. When Quinn and defendant were out of town, Burgess would come over to their house, write down the messages from the answering machine on a piece of paper, delete the messages, and put the note in the microwave so that Quinn would not see who had called. There would often be eight to 15 calls a day from creditors.

On 22 August 2005, Duke Power sent a letter stating that the Witherspoons owed $894.02, and on 6 September 2005, it sent a notice that the power would be shut off. Defendant called Duke Power around 1:36 p.m. on 13 September 2005 promising to pay the delinquent bill. Duke Power stated that the bill needed to be paid that day, or the power would be turned off the next day.

At the same time that defendant was talking to Duke Power, Quinn was napping on the couch in the living room. Their oldest child was at school and the two youngest children, twins, were asleep in their room. At approximately 2:08 p.m. on 13 September 2005, the Iredell County 911 call center received a call from defendant who said that she had been bringing Quinn's service pistol to him when she tripped and fell and the gun discharged. Defendant told the dis-

patcher that when the gun went off, it shot Quinn in the head. The call was transferred to the Mooresville Police Department dispatcher, who contacted Officer Corey Barnette.

Officer Barnette, who was the first to arrive at the scene, entered the house and walked into the living room where he saw Quinn laying face down on a couch. Quinn's pistol was on the floor beside the couch along with a yellow children's book. Defendant was standing roughly five feet away from the couch, facing it, with blood on her shorts and shirt. Defendant told Officer Barnette: "I was bringing him his gun and tripped on something and accidentally shot him in the head[.]" Officer Barnette checked Quinn for a pulse, but noticed that the blood on Quinn's head was already drying. He then took defendant and the other family members outside into the front yard.

Trooper Jason Fleming with the North Carolina Highway Patrol was friends with Quinn and quickly drove to the house when he heard that something had happened. Trooper Fleming went up to defendant to let her know that he was "there for her." She told him that she had accidentally shot Quinn: that she was getting something off a shelf, and Quinn's gun fell on the floor. The gun did not look safe to her, so she was carrying it to Quinn to make sure it was safe before she put it back. She slipped on a book, fell against Quinn, and the gun went off. Defendant repeated this statement to Trooper Fleming verbatim two or three times.

While Trooper Fleming was outside talking with defendant, the EMTs arrived and went into the house. They went over to the couch and checked Quinn's carotid artery for a pulse, but Quinn was dead. Detective Todd Marcum with the Mooresville Police Department arrived at the house and saw defendant sitting in the front yard with blood on her shirt and hands. When Detective Marcum entered the house, Officer Barnette advised him of the situation, and they asked the EMTs to leave the house so they could secure the scene for processing. During their walk through, Detective Marcum noticed Quinn's duty belt and some other gear on the floor of the hallway bathroom.

When other officers arrived, Detective Marcum went outside to talk with defendant. He asked her to come with him to the police station for an interview about "what happened in the house." While they drove, Detective Marcum noticed some blood on defendant's foot and her shorts. During the interview, defendant told Detective Marcum that Quinn kept his gun in the holster of his gun belt and

kept his gun belt in the hallway bathroom closet. She said she had been looking in the closet for some lotion. As she was looking through a basket on the back of the shelf, she pulled it forward to see into it better, and Quinn's gun fell out of its holster. Both the gun and the belt then fell out of the closet onto the floor. She thought the flashlight on the gun might have broken and decided to take the gun to her husband to make sure everything was functioning properly before putting it back.

Defendant said she picked up the gun, carrying it away from herself in her right hand. She had walked about half way across the living room when she slipped on a book and started stumbling forward. She fell into Quinn and heard a gunshot. She looked down and saw blood coming from Quinn's mouth and ears. She began looking for the phone and dropped the gun near the loveseat next to the couch when she found the phone in the cushions. Defendant put her right hand over the wound on the back of Quinn's head and stayed on the phone next to him until the police arrived. Detective Marcum wrote out a statement of what defendant had told him; she read it and signed it. Detective Marcum photographed the blood drops on defendant's feet and hands, and defendant gave Detective Marcum her clothes.

After defendant left with family members, Detective Marcum listened to the 911 call. Instead of immediately requesting help, defendant initially described bringing the gun to her husband, tripping and falling into her husband, and the gun going off. When the operator asked defendant about what type of gun had been involved, there was approximately 15 seconds of silence, during which time there were sounds of doors opening and closing and something falling and hitting the floor.

Detective Marcum then went back to the Witherspoons' home. He and other officers performed a walk through of the house based on what defendant told Detective Marcum. The medical examiner arrived, and after the police finished processing the scene, the medical examiner and the police rolled Quinn's body off the couch onto the floor. As they were rolling the body, a shell casing that had been stuck to Quinn's right arm fell onto the couch and rolled onto the floor. In the pillow that had been under Quinn's head, which was face down, they found a bullet.

Detective Marcum was surprised by the location of the shell casing because Quinn's service weapon was a right-ejecting semi-automatic pistol. Based on defendant's statement that she had been

standing at the middle of the front of the couch with the gun in her right hand when it discharged and the fact that Quinn's head was resting on the left side of the couch, the police had expected to find the shell casing toward Quinn's feet and not toward his head.

The investigating officers asked defendant the next day, 14 September 2005, to do a re-enactment of what happened because they believed there were inconsistencies between the physical evidence and defendant's story—particularly the location of the shell casing and blood flow patterns indicating that Quinn's head was not face down when he was shot. The re-enactment did not resolve the officers' concerns, so they asked on 23 September 2005 for defendant to make another written statement as to what happened. On 3 October 2005, and again, on 5 October 2005, the police interviewed defendant at the police station.

During the 5 October 2005 interview, defendant told the police a different version of the events. She claimed that she had intended to kill herself. She explained that at about 1:30 p.m. on 13 September 2005, she had a conversation with Duke Power about their bill, which was several months overdue. Defendant stated that after that, when she was looking through the bathroom closet for the lotion and the gun fell out, "she saw that as a sign" and picked up the gun and went outside. She went into a workshop off the back of the house and was going to shoot herself, but Quinn's K-9 dog, Tank, came in and would not stop nudging her.

She went back into the house and was standing at the middle of the backside of the couch where Quinn was sleeping. She was praying, and her legs got weak, so she put her hands on the back of the couch for support. She said one of the family's cats jumped up onto the back of the couch and ran across her arms, causing her to pull the trigger. She claimed that she did not tell the police what happened when they arrived because she believed that they would take her children away if they thought she was suicidal.

Detective Marcum asked defendant to repeat what happened with the cat, and defendant said that although the cat did run across her hand, that was not why she pulled the trigger. She said that she did not know why she had pulled the trigger. When defendant was asked about the location of the shell casing, she said that after she heard the gunshot and was walking around the head of the couch to find the phone, she almost stepped on it, so she picked it up. It was still warm, and she tossed it toward Quinn's body laying on the couch.

Defendant was arrested on 5 October 2005 and charged with first degree murder. Subsequently, defendant was also charged with three counts each of identity theft and obtaining property by false pretenses, as well as 37 counts of embezzlement. As part of a plea agreement, the charges for obtaining property by false pretenses were dismissed on 30 April 2007, and defendant pled guilty to the remaining 40 property offenses. Defendant pled not guilty to the murder charge and the case proceeded to trial on 25 June 2007.

As part of the State's case, Dr. Donald Jason, the medical examiner who performed the autopsy, testified that he found a gunshot entrance wound on the left side of the head, just above and slightly in front of the ear. There was stippling around the entrance wound. The exit wound was just below the nose on the right side. Doctor Jason further stated that as part of the autopsy, after he had removed the brain, he inserted a probe in the entrance wound and out through the exit wound to track the bullet's trajectory. Based on his measurements, the bullet passed through Quinn's skull "from left to right 25 degrees and downward by 40 degrees." Doctor Jason stated that, in his opinion, Quinn was shot from less than six inches away.

Detective Marcum also testified—over defendant's objection—that he and other officers obtained a mannequin and, based on the autopsy measurements and photographs, inserted wooden dowels in the head, corresponding to the entrance and exit wounds and the trajectory of the bullet. The officers then used the crime scene photographs to position the mannequin on a couch purchased for the trial in order to recreate the position of Quinn's head as they found it.

Detective Marcum testified that based on the reconstruction, defendant could not have been standing where she said she was when the gun discharged. Detective Marcum further testified that in order for the bullet to have entered Quinn's head at the correct angle, defendant would have had to have been standing over Quinn at the arm of the couch at the time the gun went off, as opposed to standing at the middle of the couch as defendant claimed. The approximately 45-degree downward trajectory of the bullet also indicated that the shot was fired from behind the couch rather than from the front, as defendant had first stated.

Finally, Detective Marcum testified that photographs of the blood flow patterns on Quinn's head indicated that his head had to have been "almost level or [at] a slight incline" when he was shot.

Otherwise, "the blood would have been flowing uphill . . . ." Based on the blood flow patterns and the reconstruction, the police believed that Quinn's head had been repositioned after he was shot but before the police arrived.

The State also presented evidence that after Quinn's death, his survivors received $82,102.27 in government death benefits; $91,000.00 in life insurance; and $24,138.68 from a 401(k). In total, defendant received $197,240.95 as a result of Quinn's death.

Although defendant did not testify at trial, she presented expert testimony and testimony from family and friends. Dr. Page Hudson, a forensic pathologist, testified that, based on his review of Quinn's autopsy photographs and reports, he believed that the gun was fired from more than two feet away. In addition, Dr. Jerry Noble, a clinical psychologist, testified that defendant suffered from depression, anxiety, and stress disorders at the time of the shooting. Dr. Noble expressed the opinion that defendant could not "form the specific intent to shoot and kill her husband because she was severely depressed and anxious and [sic] affecting her ability to think, concentrate, and make decisions."

The jury convicted defendant of first degree murder. The trial court sentenced defendant to life imprisonment without parole for the murder conviction, followed by three consecutive presumptive-range terms of 13 to 16 months for the identity theft charges, followed by two consecutive presumptive-range terms of 6 to 8 months for the embezzlement charges. Defendant timely appealed to this Court.

Discussion

Defendant characterizes the State's use of the mannequin head and couch as an in-court "experiment" relating to the State's "hypothesis about the trajectory of the bullet" and defendant's position relative to Quinn when the gun was fired. In arguing that the evidence should have been excluded because conditions in the experiment were not substantially similar to the conditions at the time of the shooting, defendant points to the fact that the police used a different couch and the mannequin head was smaller than Quinn's head because it was a female head.

North Carolina "recognize[s] a distinction between demonstrations and experiments." *State v. Golphin*, 352 N.C. 364, 433, 533 S.E.2d 168, 215 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305, 121 S. Ct. 1379-80 (2001). "An experiment is 'a test made to demon-

strate a known truth, to examine the validity of a hypothesis, or to determine the efficacy of something previously untried.' " *Id.* (quoting *State v. Allen*, 323 N.C. 208, 225, 372 S.E.2d 855, 865 (1988), *death sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601, 110 S. Ct. 1463 (1990)). A demonstration, on the other hand, is " 'an illustration or explanation, as of a theory or product, by exemplification or practical application.' " *Id.* at 434, 533 S.E.2d at 215 (quoting *Allen*, 323 N.C. at 225, 372 S.E.2d at 865).

The distinction between the two is the threshold issue in this appeal. Evidence pertaining to an experiment is "competent and admissible if the experiment is carried out under substantially similar circumstances to those which surrounded the original occurrence." *State v. Locklear*, 349 N.C. 118, 147, 505 S.E.2d 277, 294 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559, 119 S. Ct. 1475 (1999). In contrast, a demonstration does not require substantially similar circumstances. *See Golphin*, 352 N.C. at 437, 533 S.E.2d at 217 ("Although [defendant] argues the circumstances surrounding the demonstration were dissimilar to those surrounding the incident, that is not the focus of our review in the instant case."); *State v. Westall*, 116 N.C. App. 534, 543, 449 S.E.2d 24, 30 ("Defendant claims the procedure was an experiment erroneously admitted because it was not conducted under circumstances reasonably similar to those existing at the time of the robbery. . . . The demonstration . . . was not an experiment requiring substantially similar circumstances."), *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994). Consequently, defendant's arguments regarding substantial similarity hinge on defendant's assumption that the evidence involved an experiment.

In *Golphin*, the defendant argued that when two law enforcement officers were sprayed in the face with pepper spray, that was an experiment performed under circumstances dissimilar to when he was sprayed with pepper spray. 352 N.C. at 433, 533 S.E.2d at 215. In holding that the use of the pepper spray was a demonstration rather than an experiment, the Supreme Court observed that the purpose of the presentation was to "illustrate or explain to the jury the effects of pepper spray by practical application." *Id.* at 436, 533 S.E.2d at 216. Consequently, the Court held that the issue of whether the "circumstances surrounding the demonstration were dissimilar to those surrounding the incident . . . is not the focus of our review in the instant case." *Id.* at 437, 533 S.E.2d at 217.

In this case, the police were not performing an experiment with the mannequin head and couch, but rather were using the model to

"illustrate or explain" the physical conditions existing at the time of the shooting, including the position of Quinn's head and the path and direction of the bullet. *Id.* at 436, 533 S.E.2d at 216. The State then used this recreation of the crime scene to demonstrate that the shooting could not have occurred the way defendant claimed it did.

In *State v. Murillo*, 349 N.C. 573, 509 S.E.2d 752 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87, 120 S. Ct. 103 (1999), the Supreme Court treated virtually identical evidence as a demonstration. In *Murillo*, the victim, who was the defendant's wife, died from a single gunshot wound to her right temple, but the bullet had passed through the victim's right forearm before entering her head. *Id.* at 584, 509 S.E.2d at 758. The victim's sister testified at trial that she was about the same size as the victim and that they wore the same size clothes. *Id.* at 601, 509 S.E.2d at 768. Similar to here, based on autopsy photos, the victim's sister "demonstrated for the jury that her forearm and head could not be positioned such that the bullet holes matched as they did in the victim's body if an accident had occurred in the way defendant claimed." *Id. See also State v. Barnes*, 345 N.C. 184, 213-14, 481 S.E.2d 44, 60 (discussing "demonstration" that included "reconstruction of events" and "three-dimensional evidence involving the mannequins and dowels that [witness] used to illustrate her testimony" regarding "where the shooters and victims were positioned"), *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134, 118 S. Ct. 196 (1997), *and cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473, 118 S. Ct. 1309 (1998); *State v. Hunt*, 80 N.C. App. 190, 193-94, 341 S.E.2d 350, 353 (1986) (holding that officer's showing of how to operate shotgun was demonstration when officer had not performed any tests or experiments on shotgun).

Accordingly, we hold that the evidence of the mannequin and couch in this case amounted to a demonstration and not an experiment. The test for determining whether a demonstration is admissible "is whether, if relevant, the probative value of the evidence 'is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury' " under Rule 403 of the Rules of Evidence. *Golphin*, 352 N.C. at 434, 533 S.E.2d at 215 (quoting *Allen*, 323 N.C. at 225, 372 S.E.2d at 865). The decision whether relevant evidence should be excluded pursuant to Rule 403 is within the discretion of the trial court, and the court's ruling will be reversed on appeal only upon a showing of abuse of discretion. *Id.* Because defendant assumed that the evidence was an experiment, she has not addressed the admissibility of the evidence as a demon-

stration. Nevertheless, under *Murillo*, we hold this evidence was properly admitted.

As the Supreme Court explained in *Murillo*: "Where, as here, the asserted defense is accident, a demonstration tends to 'make the existence of [a] fact that is of consequence . . . more probable or less probable than it would be without the evidence.' " 349 N.C. at 601, 509 S.E.2d at 768 (quoting N.C.R. Evid. 401). Moreover, where the evidence on an issue is conflicting, our appellate courts have "upheld demonstrations intended to illustrate flaws in the prosecution or defense theory, or to rebut a witness's testimony." *State v. Fowler*, 159 N.C. App. 504, 510, 583 S.E.2d 637, 642, *disc. review denied*, 357 N.C. 580, 589 S.E.2d 355 (2003).

Similar to *Murillo*, the central issue at trial in this case was whether the shooting was premeditated or whether it was accidental. The demonstration was probative of premeditation because it related to whether defendant was standing at the middle of the couch, resting her hands on the back of the couch, as she claimed, or whether she was standing over Quinn's head near the armrest when the gun discharged. Thus, the demonstration in this case was relevant to a material issue at trial. *See Murillo*, 349 N.C. at 601, 509 S.E.2d at 768 (finding demonstration relevant under Rule 401 where defendant claimed gun went off accidentally, but evidence showed gun could not have discharged as defendant asserted); *Barnes*, 345 N.C. at 214, 481 S.E.2d at 60 (holding demonstration concerning bullet paths was "probative with respect to premeditation and deliberation").

With respect to the countervailing factor of unfair prejudice under Rule 403, the Supreme Court has "consistently noted that '[n]ecessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree.' " *State v. Hedgepeth*, 350 N.C. 776, 785, 517 S.E.2d 605, 611 (1999) (quoting *State v. Wilson*, 345 N.C. 119, 127, 478 S.E.2d 507, 512-13 (1996)), *cert. denied*, 529 U.S. 1006, 146 L. Ed. 2d 223, 120 S. Ct. 1274 (2000). In *Murillo*, 349 N.C. at 601, 509 S.E.2d at 768, virtually identical evidence to that presented in this case was upheld as not being unfairly prejudicial to the murder defendant. We reach the same conclusion here.

The record indicates that the demonstration was fairly brief and not conducted in an inflammatory manner or intermixed with speculative testimony. *See Fowler*, 159 N.C. App. at 513, 583 S.E.2d at 643 (holding demonstration of how defendant choked victim was not

unfairly prejudicial when demonstration was no longer than necessary, unemotional, and did not involve speculation by testifying witness). Further, although defendant has asserted in a conclusory fashion that the smaller size mannequin head and the slightly different dimensions of the couch "would have an impact on the direction from which the shot could have been fired," defendant has not specifically explained what that impact was—defendant has not demonstrated on appeal that, in the absence of these differences, the demonstration would have been more likely to support defendant's description of what occurred.

Thus, any prejudicial effect of the State's use of the mannequin and couch in this case is "limited to the prejudice inherent in all evidence that rebuts or undermines defense evidence." *Id.* Given the probative value of the demonstration on the contested issue of premeditation versus accident, the trial court did not abuse its discretion in admitting the evidence.

No Error.

Judges McGEE and BEASLEY concur.

STATE OF NORTH CAROLINA v. JAMES DEWARRICK COLE AND KAWAMIE SHONTA COLE

No. COA08-1304

(Filed 18 August 2009)

1. Robbery— victim first separated from property—evidence sufficient

The trial court did not err by denying defendant James Cole's motion to dismiss a robbery charge where the victim was separated from her property by threat of force and the property was then stolen. The fact that she did not know that the property had been taken is immaterial.

2. Kidnapping—restraint—inherent in robbery

The trial court erred by not dismissing a first-degree kidnapping charge where the restraint used against the victim was an inherent part of the robbery; while the duration of the restraint is

relevant, the main question is whether the robber went beyond the requirements of the robbery.

3. Kidnapping— in furtherance of robbery—not guilty of robbery—evidence sufficient

There was sufficient evidence of kidnapping in furtherance of robbery even though defendant Kawamie Cole was found not guilty of robbery. The fact that the jury finds a defendant not guilty is irrelevant to a *de novo* review of whether substantial evidence was offered by the State, and the State is not required to prove the robbery in order to convict a person of kidnapping.

4. Constitutional Law— double jeopardy—kidnapping and robbery—no conviction of robbery

There was no double jeopardy issue in a prosecution for kidnapping to facilitate robbery where defendant was not convicted of the underlying offense.

5. Kidnapping— release in a safe place—victim fleeing—not a release

A kidnapping victim was not released where she escaped by running to a friend's car, notwithstanding defendant James Cole's threat to kill her. Defendant's failure to chase the victim or do any additional harm does not convert her escape into a release.

6. Kidnapping— acquittal of underlying felony—kidnapping verdict accepted

The trial court did not err by accepting a verdict of guilty of kidnapping and not guilty of armed robbery. A defendant need not be convicted of the underlying felony in order to be convicted of kidnapping.

7. Jury— seemingly inconsistent verdicts—demonstration of lenity

The trial court did not err by accepting seemingly inconsistent verdicts of guilty of misdemeanor assault with a deadly weapon and not guilty of possession of a firearm by a felon. Inconsistent verdicts may be viewed as a demonstration of the jury's lenity and need not be set aside; it is simply too difficult to tell what the jury was thinking.

8. Criminal Law— proffered instruction—credibility of witness—no precedential support

The trial court did not err by refusing a proffered jury instruction on the credibility of a witness who used drugs. There was no

precedential support or reasoned argument for the contention that the Pattern Jury Instruction did not give the correct law and led to a different outcome.

9. Criminal Law— instructions—kidnapping—two purposes—both supported by evidence

There was no plain error in instructing the jury on kidnapping to facilitate robbery or flight after robbery where defendant contended that there was no evidence of flight after robbery.

Appeal by defendants from judgments entered 9 January 2008 by Judge Lindsay R. Davis, Jr. in Moore County Superior Court. Heard in the Court of Appeals 21 April 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jason T. Campbell, for the State in response to defendant James Dewarrick Cole.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Alexandra M. Hightower, for the State in response to defendant Kawamie Shonta Cole.

Jarvis John Edgerton, IV, for James Dewarrick Cole, defendants-appellants.

William D. Spence, for Kawamie Shonta Cole, defendants-appellants.

JACKSON, Judge.

James Dewarrick Cole ("James") and Kawamie Shonta Cole ("Kawamie") (collectively, "defendants") appeal from their convictions for criminal charges including robbery with a dangerous weapon, first-degree kidnapping, misdemeanor assault with a deadly weapon, and possession of a firearm by a felon. For the reasons set out below, we hold no error in part, and we vacate in part and remand for resentencing.

In the early morning of 17 February 2007, defendants arrived at the mobile home of Carmella Ross ("Ross"), where she and her friend, Lashunda Collins ("Collins"), were sleeping. Defendants accused Ross and Collins of telling lies about defendants' using or stealing crack cocaine; Ross and Collins denied having spread such rumors. Then, defendants each pulled out a gun, pointed these guns at Ross and Collins, told them to "give everything up," and said, "We're going to rob everybody."

Ross's money was on her person at the time, but she lied and said that her money was out in her car. Kawamie used his gun to escort Ross to her car while James guarded Collins in the trailer. When Kawamie saw that there was no money in the car, Ross again lied and said that her friend Ushanda Goldston ("Goldston") might have taken the money when Goldston borrowed Ross's car the previous evening. James instructed Kawamie to drive Ross to Goldston's boyfriend's home, where Goldston lived, to see if they could find Ross's money.

Once Ross and Kawamie arrived, Ross excused herself to the restroom and took Goldston with her. Kawamie remained close by, trying to keep an eye on Ross. In the bathroom, Ross told Goldston that she was being robbed and to call the police after she and Kawamie left. Not having found any money, Kawamie left with Ross without threatening or robbing anyone else and without showing his gun to anyone else. Kawamie then drove them back to Ross's home.

While Kawamie and Ross were gone, James kept Collins at Ross's home. James began rummaging through the place, taking Ross's jewelry and Collins's cell phone. Before Kawamie and Ross returned, Beverly Spencer ("Spencer"), a family friend, arrived in the driveway. James told Collins to go out and see what Spencer wanted, but warned her, saying, "If you try anything stupid, I'm going to kill you." Collins went out and rushed into the car, telling Spencer to drive her quickly to her brother's house. At this time, Ross and Kawamie returned to Ross's home. Kawamie got out of Ross's car. James confronted Spencer and Collins from outside the car, waived his gun at Spencer, and told her she could "give it up too." Spencer declined to give up anything, and she drove away with Collins.

Ross attempted to drive away, but defendants stopped her. Defendants got into Ross's car with her and told her to "drop them off down . . . at the graveyard." Ross did so. Upon arriving at Zion Grove Cemetery, defendants discussed how they would "use [Ross's] car as the getaway car to rob everybody." When they left, Ross feigned a need for Maxi Pads so that they would stop at a store and so the police might catch them. Defendants stopped at a Dollar General and James followed Ross into the store to make her purchase. Defendants and Ross then drove to the home of Maurice Legrand ("Legrand") on the incorrect belief that it was Legrand who stole Ross's money from her car, the money which was in Ross's clothing at the time. James and Legrand argued about Ross's money. A short time later, having

been unsuccessful in getting any money from Legrand, defendants left with Ross because "someone had said the police were coming."

While on the road, defendants again stated how they were going to "stick everybody up" and leave town. Then, a state trooper attempted to pull them over. James threw his gun, his gloves, and a knife out of the car window. Once Ross stopped the car, Kawamie ran away from the car. Defendants were arrested.

Defendants each were tried on two counts of robbery with a dangerous weapon, two counts of first-degree kidnapping, two counts of felony assault with a deadly weapon, and one count of possession of a firearm by a felon. At the close of the State's evidence and at the close of all evidence, defendants moved to dismiss all charges. The trial court denied defendants' motions to dismiss, but it did drop all charges of felony assault with a deadly weapon with intent to kill to misdemeanor assault with a deadly weapon. On 9 January 2008, a jury convicted James on all counts and convicted Kawamie of two counts of first-degree kidnapping and two counts of misdemeanor assault with a deadly weapon. Defendants appeal.

On appeal, James contends that the trial court erred by (1) denying his motion to dismiss the charge of robbery against Ross for insufficient evidence and (2) denying his motion to dismiss the charge of kidnapping against Collins because any restraint was inherent in the robbery. Kawamie argues on appeal that the trial court erred by (1) denying his motion to dismiss the charges of kidnapping Collins and Ross for insufficient evidence, (2) accepting the jury's verdict of guilty of kidnapping Collins and Ross when the jury found Kawamie not guilty of armed robbery, (3) accepting the jury's verdict of guilty of misdemeanor assault with a deadly weapon against Collins and Ross when the jury found Kawamie not guilty of possession of a firearm by a felon, (4) refusing to instruct the jury as requested concerning witnesses who use drugs, and (5) charging the jury on kidnapping for the purpose of facilitating flight after committing robbery.[1]

[1] In his first argument on appeal, James claims that the State failed to offer evidence of robbery against Ross and the trial court erred in not dismissing the charge of robbery against Ross. We disagree.

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1. Kawamie set forth eleven assignments of error and argued eight of those assignments on appeal. The remaining assignments of error are deemed abandoned. N.C. R. App. P. 28(b)(6) (2007). Many arguments are used by incorporation in more than one issue. For efficiency and clarity, the eight arguments on appeal have been combined into the five issues here addressed.

The standard of review concerning a motion to dismiss is *de novo*. *State v. Robledo*, 193 N.C. App. 521, 524, 668 S.E.2d 91, 94 (2008). In reviewing a motion to dismiss criminal charges, we view all evidence in the light most favorable to the State and give the State every reasonable inference which can be drawn therefrom. *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91, *disc. rev. denied*, 346 N.C. 551, 488 S.E.2d 813 (1997). To overcome a motion to dismiss, the State must have presented substantial evidence of each element of the offense charged and of the defendant's guilt. *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citing *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008) (citations and quotation marks omitted). "Any contradictions or discrepancies in the evidence are for the jury to resolve, and these inconsistencies, by themselves, do not serve as grounds for dismissal." *State v. Thomas*, 134 N.C. App. 560, 567, 518 S.E.2d 222, 227 (1999) (citing *State v. Hamlet*, 312 N.C. 162, 169, 321 S.E.2d 837, 842 (1984)).

The elements of robbery with a dangerous weapon are: "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened." *State v. Gwynn*, 362 N.C. 334, 337, 661 S.E.2d 706, 707-08 (2008) (citations and internal quotation marks omitted); *see* N.C. Gen. Stat. § 14-87(a) (2007).

> [T]his Court has previously stated that
>
> > [t]he word "presence" . . . must be interpreted broadly and with due consideration to the main element of the crime—intimidation or force by the use or threatened use of firearms. "Presence" here means a possession or control by a person so immediate that force or intimidation is essential to the taking of the property. And if the force or intimidation by the use of firearms for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in a continuous course of conduct, the taking is from the "presence" of the victim.

State v. Tuck, 173 N.C. App. 61, 67, 618 S.E.2d 265, 270 (2005) (quoting *State v. Clemmons*, 35 N.C. App. 192, 196, 241 S.E.2d 116, 118-19, *disc. rev. denied*, 294 N.C. 737, 244 S.E.2d 155 (1978)).

Defendants entered the home with weapons and told Ross and Collins that they were being robbed. At this time, Ross's possessions were in her presence. In this case, Ross's person was removed by threat of force from her property, and that property then was stolen in the course of the criminal activity. The fact that Ross did not know that the property had been taken is immaterial; she was taken from her property, and her control over the property was replaced by that of defendants. The trial court did not commit error when it denied James's motion to dismiss the charge of armed robbery of Ross.

[2] In James's second argument on appeal, he contends that the trial court erred by not granting his motion to dismiss the charge of first-degree kidnapping of Collins as an inherent aspect of the robbery of Collins. We agree.

A defendant is guilty of the offense of first-degree kidnapping "if he (1) confines, restrains, or removes from one place to another (2) a person (3) without the person's consent, (4) for the purpose of facilitating the commission of a felony[]" or flight after a felony and (5) did not release the victim in a safe place or injured or sexually abused the victim. *State v. Allred*, 131 N.C. App. 11, 19-20, 505 S.E.2d 153, 158 (1998); N.C. Gen. Stat. § 14-39 (2007). While the act of kidnapping may be for the purpose of "[f]acilitating the commission of any felony," the act of kidnapping must be distinct from such a felony if the perpetrator is to be convicted of both kidnapping and the underlying felony. *Id.* The commission of some crimes, such as armed robbery and forcible rape, requires some degree of confinement or restraint; a victim who is not restrained by force or by threat would leave rather than be the victim of such a crime. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). "[T]he key question 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 underlying felony itself." *State v. Muhammad*, 146 N.C. App. 292, 295, 552 S.E.2d 236, 237 (2001).

To determine when the kidnapping is an inherent part of a related crime, the specific facts must be scrutinized carefully. Holding a group of people while robbing each of them and searching other rooms of the house *does not* constitute a separate crime from the robbery, even though each person was held longer than absolutely necessary to rob that person. *Allred*, 131 N.C. App. at 19-22, 505 S.E.2d at 157-60. Dragging a person into his house for the purpose of robbing him in the house *does* constitute a separate crime from

the robbery. *State v. Boyce*, 361 N.C. 670, 651 S.E.2d 879 (2007). Defendants contend that the State failed to present substantial evidence of the kidnapping of Collins beyond what was inherent to the robbery charge.

In this instance, Collins was held by James while he robbed Collins and Ross. Collins was not moved to another location. She was not held for hours or days, nor was she injured. The restraint used against Collins "was an inherent part of the armed robbery and did not expose [her] to any greater danger than that required to complete the robbery offense." *Allred*, 131 N.C. App. at 20, 505 S.E.2d at 159.

The State emphasizes the fact that Collins was held for thirty minutes, claiming that the restraint lasted longer than necessary for the robbery. We do not believe this is a compelling argument in the instant case. "[R]esort to a tape measure or a stop watch [is] unnecessary in determining whether the crime of kidnapping has been committed." *Fulcher*, 294 N.C. at 522, 243 S.E.2d at 351; *see also Boyce*, 361 N.C. at 675, 651 S.E.2d at 883. While duration of restraint is relevant in analyzing whether a separate kidnapping charge is appropriate, the main question is whether the robber went above and beyond the requirements of the robbery, thereby putting the victim in increased danger. For the reasons set forth above, we vacate James's conviction for the first-degree kidnapping of Collins and remand the matter for resentencing.

[3] Kawamie first argues on appeal that the State failed to present sufficient evidence of all aspects of the kidnapping of either Collins or Ross.[2] Kawamie argues that the State did not prove (1) that either victim was restrained for the purpose of facilitating a robbery, (2) that their restraint was a separate act from the aforementioned robbery, or (3) that Collins was not released in a safe place. We disagree.

Kawamie claims that because the jury found him not guilty of robbery, there was not substantial evidence of the robbery, and therefore any kidnapping could not have occurred to facilitate a robbery. The fact that a jury finds a person not guilty shows that the jury did not find the evidence sufficiently persuasive; it is irrelevant in *de novo* review of whether substantial evidence—evidence sufficient to get a charge to a jury—was offered by the State. *See*, *e.g.*, *State v. Pryor*, 59 N.C. App. 1, 5, 295 S.E.2d 610, 614 (1982). Furthermore, the

2. Since Kawamie was found not guilty of robbery, the analysis related to James's argument does not apply to Kawamie.

North Carolina Supreme Court specifically has stated that in a case like this, the State is not required to prove the robbery in order to convict a person of kidnapping. *State v. Williams*, 295 N.C. 655, 660, 249 S.E.2d 709, 714 (1978) ("In order to prove kidnapping it was only necessary to prove a *purpose* of robbery or the other felonies and not the commission of the felonies themselves." (emphasis in original)), *superseded by statute on other grounds*, *State v. McCullough*, 79 N.C. App. 541, 340 S.E.2d 132 (1986). The jury heard testimony by Collins that she was held at gunpoint in the trailer and was told that she would be shot if she "tr[ied] anything stupid." The jury heard testimony by Ross that she was made to drive to various locations, was stopped from driving away by herself, and was threatened with death if she "was to act crazy." We hold that substantial evidence of the restraint of Ross and Collins in furtherance of robbery was presented by the State, sufficient to reach the jury.

[4] Kawamie claims that any restraint of Collins or Ross was "a mere technical asportation" of the underlying robbery. Kawamie relies on *State v. Irvin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446, (1981), which points out that if the kidnapping is merely an inherent part of the underlying felony, then finding a defendant guilty of both the felony and the kidnapping would punish him twice for the same offense and raise double jeopardy issues. Kawamie was not convicted of the underlying felonies, so double jeopardy is not at issue. We hold that defendant's argument is without merit.

[5] Kawamie also argues that Collins was released, unhurt and unmolested in a safe place, thereby diminishing the appropriate conviction from first-degree kidnapping to second-degree kidnapping.[3] While such a release would diminish the offense to second-degree kidnapping, that is not what occurred in the instant case. *See* N.C. Gen. Stat. § 14-39(b) (2007). Collins was not released at all; rather, Collins escaped, running to Spencer's car, notwithstanding James's threat that if she did anything "stupid" he would kill her. " '[R]elease inherently contemplates an affirmative or willful action on the part of a defendant." *State v. Love*, 177 N.C. App. 614, 626, 630 S.E.2d 234, 242 (2006); *see State v. Jerrett*, 309 N.C. 239, 263, 307 S.E.2d 339, 351 (1981). James's failure to chase or do any additional harm to Collins does not convert her escape into a release. We hold that the State presented substantial evidence, sufficient to present to a jury, on both counts of first-degree kidnapping against Kawamie.

3. Kawamie makes no such argument concerning Ross, who was rescued by police who pointed a gun at her, while James tried to convince her to "play along."

[6] In Kawamie's second argument on appeal, he contends that because the jury found him not guilty of armed robbery (the predicate felony upon which the kidnapping charge was based), that the court erred in accepting the jury's verdict of guilty of kidnapping. We disagree. As stated above, a defendant need not be convicted of the underlying felony in order to be convicted of kidnapping. *Williams*, 295 N.C. at 660, 249 S.E.2d at 714. We hold that the trial court did not err by accepting a jury verdict of guilty of kidnapping Collins and Ross and not guilty of armed robbery.

[7] In his third argument on appeal, Kawamie contends that the trial court erred by accepting the jury's verdict of guilty of misdemeanor assault with a deadly weapon against Collins and Ross when the jury found Kawamie not guilty of possession of a firearm by a felon. We disagree.

> The North Carolina Supreme Court has stated that
>
> inconsistent verdicts in a criminal trial need not be set aside, but may instead be viewed as a demonstration of the jury's lenity.
>
> . . . .
>
> The acquittal may represent the mistake of the jury due to "compromise[] or lenity."
>
> . . . .
>
> "The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable."
>
> . . . .
>
> "[A] rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them [would be imprudent and unworkable]." [It is] simply too difficult to tell exactly what the jury was thinking.

State v. Reid, 335 N.C. 647, 658-59, 440 S.E.2d 776, 782-83 (1994) (internal citations omitted) (quoting *United States v. Powell*, 469 U.S. 57, 65-66, 83 L. Ed. 2d 461, 468-69 (1984)). We hold that the trial court did not err by accepting the seemingly inconsistent verdicts.

[8] In Kawamie's fourth argument on appeal, Kawamie argues that the trial court erred by not giving the jury the special instruction

requested by defendant as to the credibility of a witness who used drugs. We disagree.

Kawamie cites *State v. Ball*, 324 N.C. 233, 238, 377 S.E.2d 70, 73 (1989) for the proposition that a trial court must give a requested jury instruction that is correct in law and supported by the evidence. However, "[f]or an error in the trial court's instructions to be prejudicial error, defendant must show 'that the jury was misled or misinformed by the charge as given, or that a different result would have been reached had the requested instruction been given.' " *State v. Every*, 157 N.C. App. 200, 213, 578 S.E.2d 642, 652 (2003) (quoting *State v. Wilds*, 88 N.C. App. 69, 74, 362 S.E.2d 605, 609 (1987), *disc. rev. denied*, 322 N.C. 329, 368 S.E.2d 873 (1988)). Defendant contends, without precedential support or reasoned argument, that the North Carolina Pattern Jury Instruction concerning the jury judging witnesses' credibility did not give the correct law concerning this case and led to a different outcome in the case than the proffered instructions would have. We find no support for these contentions in Kawamie's brief or in the relevant caselaw. Therefore, we hold that the trial court did not commit error by refusing to use the proffered jury instruction.

[9] In Kawamie's final argument on appeal, Kawamie argues that the trial court erred in instructing the jury concerning kidnapping "for the purpose of facilitating the commission of robbery or flight after committing robbery." We disagree.

Kawamie did not object to the jury instruction given by the trial court. When a defendant fails to object to the trial court's jury instructions, the standard of review on appeal is plain error. *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005). In plain error review, a defendant must show that

> 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.) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513, (1982)).

When a statute allows for conviction upon one of several purposes (*e.g.*, "for the purpose of facilitating the commission of robbery *or* flight after committing robbery"), it is error to instruct the jury on a purpose not supported by the evidence. *State v. Moore*, 74 N.C. App. 464, 467, 328 S.E.2d 864, 866 (1985), *modified on other grounds*, 315 N.C. 738, 340 S.E.2d 401 (1986). It is impossible to know whether the jury convicted on the unsupported purpose. *See Moore*, 315 N.C. at 739-40, 340 S.E.2d at 402-03.

Kawamie contends that there was no evidence of "flight after committing robbery." For the reasons previously stated, there was sufficient evidence of robbery to reach the jury. Additionally, the State presented evidence that Kawamie ran from the police and hid in the woods. We therefore hold that there was evidence of "flight after committing robbery" and that no plain error was committed.

Accordingly, we vacate the portion of the judgment referenced by 07 CRS 50874 regarding the first-degree kidnapping of Collins, and we remand the matter for resentencing. We hold no error with respect to the remainder of the judgment referenced by 07 CRS 50874 and the judgments referenced by 07 CRS 50869, 07 CRS 50871, 07 CRS 50872, 07 CRS 50873, and 07 CRS 50876.

No Error in part; Vacated in part; Remanded.

Judges WYNN and HUNTER, Jr., Robert N. concur.

JUSTIN WAYNE NOBLE AND MATTHEW ALLEN NOBLE, PLAINTIFFS v. HOOTERS OF GREENVILLE (NC), LLC AND HOOTERS OF AMERICA, INC., DEFENDANTS

No. COA08-1144

(Filed 18 August 2009)

Unfair Trade Practices— lack of standing—failure to demonstrate conduct amounting to inequitable assertion of power or actions with capacity or tendency to deceive

The trial court did not err by granting defendants' motions to dismiss plaintiffs' claims for unfair and deceptive trade practices (UDTP) under N.C.G.S. § 75-1.1 arising from defendants' sale and service of the equivalent of 58 beers during a five-hour period to plaintiff patrons and the subsequent failure to undertake reasonable measures to prevent the patrons from leaving the restaurant.

Appeal by Plaintiffs from order entered 3 June 2008 by Judge Paul L. Jones in Greene County Superior Court. Heard in the Court of Appeals 26 February 2009.

White & Allen, P.A., by Matthew S. Sullivan, and Abrams & Abrams, P.A., by Douglas B. Abrams and Margaret S. Abrams, for Plaintiffs.

Guthrie, Davis, Henderson & Staton, P.L.L.C., by Dennis L. Guthrie, John H. Hasty, and Justin N. Davis, for Defendant Hooters of Greenville (NC), LLC.

Arthur A. Vreeland for Defendant Hooters of America, Inc.

STEPHENS, Judge.

I. Procedural History

On 15 November 2005, Justin Wayne Noble and Matthew Allen Noble ("Plaintiffs") filed separate complaints against Jonathan Lee Sugg, the driver of an automobile in which Plaintiffs had been passengers, for severe injuries arising out of an automobile accident that occurred on 30 December 2003. The complaints alleged that Sugg had operated the motor vehicle negligently, although the complaints did not allege that Sugg was intoxicated at the time of the accident, or that his intoxication was a cause of the accident. Plaintiffs' motions to amend their respective complaints to add Hooters of Greenville (NC), L.L.C. ("HOG") as a defendant were allowed on 22 May 2006.

The amended complaints alleged that HOG "by and through the actions and inactions of its employees . . . was negligent" and that "as a direct and proximate result of the actions and inactions of [HOG], Plaintiff[s] sustained severe . . . injuries[.]" Plaintiffs' motions to amend their respective complaints a second time to add Hooters of America, Inc. ("HOA") as a defendant were allowed on 18 December 2006. This second amended complaint included a claim against both HOG and HOA for violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, *et. seq.* ("UDTPA" or "the Act"), and alleged that the violation of the Act "was a proximate cause of the injuries to Plaintiff[s]."

On 29 August 2007, Plaintiffs' separate civil actions against HOG and HOA (collectively, "Defendants") were consolidated for discovery and trial. HOG and HOA moved to dismiss Plaintiffs' Chapter 75 claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. After a hearing, the trial court allowed Defendants' motions and entered an order on 3 June 2008 dismissing Plaintiffs' Chapter 75 claims.[1] The trial court certified the case for immediate appellate review under N.C. Gen. Stat. § 1A-1, Rule 54(b) (2007). From the order dismissing Plaintiffs' Chapter 75 claims, Plaintiffs appeal.

II. Factual Allegations

Plaintiffs allege the following: On 30 December 2003, Justin Wayne Noble, Matthew Allen Noble, Jonathan Lee Sugg, and Joseph Shaun Thomas (collectively, "the patrons") sat together at the Hooters restaurant in Greenville, North Carolina, operated by HOG. HOG is solely owned and managed by HOA. Martha Barrera, a waitress at the Greenville Hooters, served the patrons from approximately 11:45 a.m. to 2:00 p.m. Before Barrera's shift was over, Barrera printed the patrons' bill so she could " 'cash[] out' " and allow a new waitress to take over serving the patrons. The bill indicated that the patrons had been served the equivalent of 35 beers. At or around the time Barrera printed the bill, some of the patrons inquired about ordering more beer. Barrera asked the manager on duty about the appropriateness of serving the patrons additional alcohol. The manager approved the service of additional alcohol to the patrons.

After Barrera " 'cashed out' " with the patrons, Liza Davis, also a waitress at the Greenville Hooters, was assigned to serve the patrons.

1. The order does not disclose the basis or rationale for the trial court's ruling.

Barrera notified Davis of the patrons' food and alcohol consumption. Between approximately 2:00 and 5:00 p.m., Davis served the patrons the equivalent of 23 beers.

At approximately 5:00 p.m, the patrons left the Greenville Hooters in a vehicle owned by Thomas but driven by Sugg. No employee of Hooters attempted to stop the patrons from leaving or driving. At approximately 5:35 p.m., Sugg lost control of the vehicle on Rural Paved Road 1408 in Greene County, North Carolina, causing the vehicle to run off the road and flip four times. Plaintiff Justin Wayne Noble was thrown from the vehicle and sustained serious injuries including paraplegia, multiple vertebral fractures, pneumothorax, and multiple rib fractures. Plaintiff Matthew Allen Noble was also thrown from the vehicle and sustained serious injuries including a closed head injury resulting in brain injury and cerebral edema, respiratory failure, multiple rib fractures, and a fracture of the L2 vertebra.

III. Discussion

Plaintiffs contend the trial court erred in granting Defendants' motions to dismiss Plaintiffs' claims for unfair or deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1. We disagree with Plaintiffs and affirm the trial court's order.

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the pleading against which the motion is directed. *Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 647, 599 S.E.2d 410, 415 (2004), *aff'd per curiam*, 360 N.C. 167, 622 S.E.2d 495 (2005). "Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Meadows v. Iredell Cty.*, 187 N.C. App. 785, 787, 653 S.E.2d 925, 927 (2007) (internal quotation marks and citations omitted), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008). The complaint is to be liberally construed in ruling upon a Rule 12(b)(6) motion, and it should not be dismissed unless it appears to a certainty that the plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim. *Jenkins v. Wheeler*, 69 N.C. App. 140, 142, 316 S.E.2d 354, 356, *disc. review denied*, 311 N.C. 758, 321 S.E.2d 136 (1984). A motion to dismiss is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged. *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 123, 401 S.E.2d 133, 135 (1991).

One insurmountable bar to recovery which may be disclosed on the face of a complaint is a lack of standing. Such a bar to recovery is properly challenged by a Rule 12(b)(6) motion. *Meadows*, 187 N.C. App. at 787, 653 S.E.2d at 927. Chapter 75 of our General Statutes prohibits unfair acts which undermine ethical standards and good faith between persons engaged in business dealings. *McDonald v. Scarboro*, 91 N.C. App. 13, 18, 370 S.E.2d 680, 683, *disc. review denied*, 323 N.C. 476, 373 S.E.2d 864 (1988). N.C. Gen. Stat. § 75-16 governs the determination of standing for redress of Chapter 75 violations:

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done . . . .

N.C. Gen. Stat. § 75-16 (2007). Thus, N.C. Gen. Stat. § 75-16 confers standing to bring a UDTPA claim on "any person" who is "injured" as a result of a "violation" of the provisions of Chapter 75. Accordingly, in order to determine whether Plaintiffs had standing to bring their UDTPA claim in this case, we must determine whether Plaintiffs' complaint alleged facts sufficient to establish that their injuries were the result of a "violation" of Chapter 75.

Pursuant to N.C. Gen. Stat. § 75-1.1, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2007). The elements of a claim for unfair or deceptive trade practices are: " '(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business.' " *Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App. 541, 551, 503 S.E.2d 401, 408 (1998) (quoting *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991)), *disc. review improvidently allowed*, 351 N.C. 41, 519 S.E.2d 314 (1999).

"The Act does not . . . define an unfair or deceptive act, nor is any precise definition of the term possible." *Bernard v. Cent. Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 229-30, 314 S.E.2d 582, 584 (quotation marks and citation omitted), *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984). The North Carolina Supreme Court has stated that "[a] party is guilty of an unfair act or practice when it engages in

conduct which amounts to an inequitable assertion of its power or position." *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 264, 266 S.E.2d 610, 622 (1980), *overruled in part on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). Furthermore, this Court has explained that "[a] deceptive [trade] practice is one that possesses the tendency or capacity to mislead, or creates the likelihood of deception." *Miller v. Rose*, 138 N.C. App. 582, 592, 532 S.E.2d 228, 235 (2000) (internal brackets, quotation marks, and citations omitted). The facts surrounding the transaction and the impact on the marketplace determine whether a particular act is unfair or deceptive, and this determination is a question of law for the court. *Bernard*, 68 N.C. App. at 230, 314 S.E.2d at 584.

In Plaintiffs' second amended complaint, Plaintiffs incorporated the factual allegations constituting their negligence claim, and alleged that such allegations also constituted a violation of the UDTPA. In essence, Plaintiffs alleged that Defendants' sale and service of the equivalent of 58 beers during a five-hour period to the patrons, and Defendants' subsequent failure to undertake reasonable measures to prevent the patrons from leaving the restaurant, constitute unfair or deceptive acts within the meaning of Chapter 75. In their brief to this Court, Plaintiffs argue that the following "summary" of allegations "show the nature of the Chapter 75 violations" by Defendants:

> (1) The Hooters Restaurant in Greenville, North Carolina is a licensed permittee and provider of alcohol for on-premises consumption under North Carolina law []; (2) Hooters employees were trained in safe and responsible alcohol service and Hooters had company policies in place concerning safe alcohol practices, including a one-pitcher rule that limited the consumption of alcohol to any one patron to one pitcher no matter how long the patron was there []; (3) As a Licensee, Hooters was subject to numerous North Carolina statutes, rules, and regulations concerning the sale and service of alcohol []; (4) The public policy of North Carolina is to protect citizens and patrons of Hooters by regulating the sale of alcohol []; (5) Patrons of Hooters are entitled to rely upon Hooters complying with North Carolina statutes and regulations governing the sale and service of alcohol []; (6) Hooters markets and promotes its services and goods by the Hooters concept, including the "Hooters Girls" []; (7) That Hooters violated North Carolina statutes, rules, and regulations, as well as Hooters' company policies in dealing with Plaintiffs[]

and their companions []; (8) That the actions of Hooters were unfair, deceptive, immoral, unethical, unscrupulous, and substantially injurious to consumers, so that Hooters violated N.C. Gen. Stat. § 75-1.1.

We hold that these allegations do not demonstrate conduct which amounts to an inequitable assertion of Defendants' power or position over Plaintiffs, nor do these allegations demonstrate that Defendants' actions had the capacity or tendency to deceive.

Plaintiffs rely on *Shepard v. Bonita Vista Properties, L.P.*, 191 N.C. App. 614, 664 S.E.2d 388 (2008), *aff'd per curiam*, 363 N.C. 252, 675 S.E.2d 332 (2009), and *Sampson-Bladen Oil Co. v. Walters*, 86 N.C. App. 173, 356 S.E.2d 805, *disc. review denied*, 321 N.C. 121, 361 S.E.2d 597 (1987), to support their contention that "obviously the violation of numerous statutory, regulatory, and public policy considerations of this State, arising out of the over-service of alcohol . . . violates Chapter 75." We find these cases distinguishable from the case at bar and are not persuaded by Plaintiffs' strained comparisons.

In *Shepard*, defendant was the owner and operator of the campground at which plaintiffs lived in their recreational vehicles. Plaintiffs paid defendant monthly rent for the lots their vehicles occupied, plugged their vehicles into one of the campground's power sources, and paid defendant for electricity. After having lived at the campground for more than a year, Plaintiff Tamitha Shepard noticed that the campground's bath house was deteriorating and notified the local health department. Defendant became upset when she learned that the health department had been contacted, and told Shepard that defendant would " 'fix' her[.]" *Shepard*, 191 N.C. App. at 618, 664 S.E.2d at 392. Shortly thereafter, defendant's husband placed a zip-tie on the power box supplying power to plaintiff Debra Rosseter's vehicle, and defendant turned off Rosseter's electricity " 'at the main power box,' and placed a padlock on the 'pedestal.' " *Id.* When Rosseter " 'plugged into an old 30 amp power source[,]' " *id.*, near Rosseter's vehicle, defendant had Rosseter's power unplugged and the old power source destroyed. Defendant and one of her employees then " 'began flipping breakers at the [campground], resulting in the electric power being turned on and off ' " at each of plaintiffs' vehicles. *Id.* Plaintiffs' vehicles were damaged as a result of the electrical service interruptions, and plaintiffs moved out of the campground that day. This Court held that defendant's interfering with and disconnecting plaintiffs' utilities was, "at a minimum, unfair[,]" *id.* at

625, 664 S.E.2d at 395, and upheld the trial court's order trebling the damages awarded plaintiffs pursuant to N.C. Gen. Stat. § 75-16. *Id.*

In *Sampson-Bladen Oil Co.*, plaintiff created false invoices for oil which plaintiff never delivered to defendants and charged defendants for approximately 2,600 gallons more oil than plaintiff delivered to defendants over a two-year period. This Court held that "systematically overcharging a customer for two years, as the jury found was done here in the amount of $2,795.30, is an unfair trade practice squarely within the purview of [N.C. Gen. Stat. § 75-1.1.]" *Sampson-Bladen Oil Co.*, 86 N.C. App. at 177, 356 S.E.2d at 808.

Unlike in *Shepard* where defendant inequitably and injuriously asserted her power over plaintiffs by unilaterally denying plaintiffs electricity for which plaintiffs had paid and were entitled to, in retribution for Shepard's notifying the health department, in this case, Defendants asserted no power over Plaintiffs, inequitably or otherwise, and instead served Plaintiffs solely at Plaintiffs' repeated requests. Furthermore, unlike in *Sampson-Bladen Oil Co.* where plaintiff's fraudulent invoices plainly had the tendency to deceive defendants as to the amount of oil they had received and the amount of money they owed, Defendants' actions in this case neither intentionally nor inadvertently deceived Plaintiffs regarding any aspect of the sale or service of alcohol to the patrons.[2] Accordingly, contrary to Plaintiffs' contentions, neither *Shepard* nor *Sampson-Bladen Oil Co.* controls the outcome of the present case. Indeed, neither case remotely supports Plaintiffs' position.

Plaintiffs further argue that Defendants' actions violated Chapter 18B of the North Carolina General Statutes, which regulates the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages in North Carolina, and Title 4, Subchapter 2 of the North Carolina Administrative Code, promulgated under the statutory authority conferred by N.C. Gen. Stat. § 18B-207, thus constituting unfair or deceptive trade practices. Specifically, Plaintiffs advance the following arguments that Defendants' violation of provisions of Chapter 18B and Title 4 constitutes a violation of the UDTPA: N.C. Gen. Stat. § 18B-305 provides in pertinent part that "[i]t shall be unlawful for a permittee or his employee . . . to knowingly sell or give alcoholic beverages to any person who is intoxicated." N.C. Gen. Stat.

2. Notably, Plaintiffs do not contend that they did not get exactly what they ordered, nor is there any contention that the beer they were served was adulterated in any way.

§ 18B-305(a) (2007). Furthermore, "a permittee shall be responsible for the actions of all employees of the business for which the permit is issued[,]" N.C. Gen. Stat. § 18B-1003(b) (2007), and it is unlawful for a permittee or his employee to knowingly allow any violation of Chapter 18B to occur on his licensed premises. N.C. Gen. Stat. § 18B-1005 (2007). Pursuant to 4 N.C.A.C. § 2S.0206, "[n]o permittee or his employees shall allow an intoxicated person to consume alcoholic beverages on his licensed premises." 4 N.C.A.C. § 2S.0206 (2007). Additionally, 4 N.C.A.C. § 2S.0201 mandates that permittees comply with Chapter 18B of the North Carolina General Statutes.

The violation of a regulatory statute designed to protect the consuming public *may* constitute an unfair or deceptive practice, even where the statute itself does not provide for a private right of action. *Stanley v. Moore*, 339 N.C. 717, 723, 454 S.E.2d 225, 228 (1995). Some regulatory acts specifically designate that a violation of the provisions of the act is also a violation of N.C. Gen. Stat. § 75-1.1. *See*, *e.g.*, N.C. Gen. Stat. § 66-67.5(b) (2007) ("A seller or issuer of a gift card who violates this section commits an unfair trade practice under [N.C. Gen. Stat. §] 75-1.1 . . . ."); N.C. Gen. Stat. § 66-100(e) (2007) ("The violation of any provisions of this Article shall constitute an unfair practice under [N.C. Gen. Stat. §] 75-1.1."). However, neither Chapter 18B nor 4 N.C.A.C. § 2S specifically states that a violation of those provisions is also a violation of N.C. Gen. Stat. § 75-1.1.

Additionally, North Carolina appellate courts have held that violations of certain regulatory statutes are *per se* violations of N.C. Gen. Stat. § 75-1.1. *See*, *e.g.*, *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 71, 529 S.E.2d 676, 683, *reh'g denied*, 352 N.C. 599, 544 S.E.2d 771 (2000) (holding that conduct that violates N.C. Gen. Stat. § 58-63-15(11)(f) constitutes a violation of N.C. Gen. Stat. § 75-1.1 as a matter of law); *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 98-99, 331 S.E.2d 677, 681 (1985) (holding that a violation of N.C. Gen. Stat. §§ 95-47.6(2) or (9) constitutes a violation of N.C. Gen. Stat. § 75-1.1 as a matter of law). However, the courts have so concluded only where the regulatory statute *specifically* defines and proscribes conduct which is unfair or deceptive within the meaning of N.C. Gen. Stat. § 75-1.1.[3]

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3. N.C. Gen. Stat. § 58-63-15 provides:

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(1) Misrepresentations and False Advertising of Policy Contracts.—Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illus-

In this case, unlike the statutes at issue in *Gray* and *Winston Realty Co.*, the provisions cited by Plaintiffs do not specifically define and proscribe unfair or deceptive conduct within the meaning of N.C. Gen. Stat. § 75-1.1. Accordingly, we decline to hold that a violation of the provisions of Chapter 18B or 4 N.C.A.C. § 2S is a *per se* violation of the UDTPA.

Furthermore, the violation of a regulatory scheme may be a violation of the UDTPA where the regulatory violation satisfies the three elements of a UDTPA claim. *Drouillard v. Keister Williams Newspaper Services, Inc.*, 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992) ("If the violation of the Trade Secrets Protection Act satisfies [the] three prong test, it would be a violation of N.C. Gen. Stat. § 75-1.1."), *disc. review denied and cert. dismissed*, 333 N.C. 344, 427 S.E.2d 617 (1993). Here, however, Plaintiffs have failed to allege actions which constitute the first element of a claim under the UDTPA: "an unfair or deceptive act or practice, or an unfair method of competition[.]" *Furr*, 130 N.C. App. at 551, 503 S.E.2d at 408 (quotation marks and citation omitted). Thus, the alleged violation of the statutes and regulations cited by Plaintiffs does not constitute a violation of the UDTPA.

> tration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share or surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

N.C. Gen. Stat. § 58-63-15 (2007). Similarly, N.C. Gen. Stat. § 95-47.6 provides:

> A private personnel service shall not engage in any of the following activities or conduct:
>
> . . . .
>
> (2) Publish or cause to be published any false or fraudulent information, representation, promise, notice or advertisement.
>
> . . . .
>
> (9) Knowingly make any false or misleading promise or representation or give any false or misleading information to any applicant or employer in regard to any employment, work or position, its nature, location, duration, compensation or the circumstances surrounding any employment, work or position including the availability thereof.

N.C. Gen. Stat. § 95-47.6 (2007).

Finally, Plaintiffs argue that Defendants' actions in selling and serving Plaintiffs beer and allowing Plaintiffs to leave the restaurant after consuming the beer were unfair within the meaning of the UDTPA because such actions "offend[] established public policy." We agree with Plaintiffs that it is the public policy of North Carolina to protect the public from injury occasioned by an intoxicated individual. We do not, however, agree with Plaintiffs that *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584, *disc. review denied*, 309 N.C. 191, 305 S.E.2d 734 (1983), the sole case upon which Plaintiffs rely, supports their argument that this public policy of our State creates a cause of action under the UDTPA for the conduct at issue in this case. On the contrary, the *Hutchens* Court specifically held that N.C. Gen. Stat. § 18A-34, now N.C. Gen. Stat. § 18B-305,[4] permitted "persons injured by an intoxicated tavern customer the right to recover from the tavern that provided liquor to the customer upon proof of the tavern owner's *negligence*." *Id.* at 12, 303 S.E.2d at 591 (emphasis added).

Here, Plaintiffs have asserted negligence claims against Defendants, and Defendants' answers include defenses based on contributory negligence. Although those claims are not before us on this appeal, we acknowledge that, in the face of such tragic injuries, Plaintiffs' attempt to pursue a UDTPA claim, to which contributory negligence is not a defense, is understandable. *See Winston Realty Co.*, 314 N.C. at 96, 331 S.E.2d at 681 (holding that contributory negligence is not a defense to an unfair and deceptive trade practices claim). Nonetheless, for the foregoing reasons, Plaintiffs' complaint fails to establish a *prima facie* case under the UDTPA. Plaintiffs' opportunity and capacity to recover for their injuries exists, if at all, in their ability to recover for violations of Chapter 18B based on their negligence theories.

For the reasons stated above, Plaintiffs have failed to allege facts which, if proven, would constitute an unfair or deceptive act under the UDTPA and, thus, have failed to allege a "violation" of the provisions of Chapter 75, as required by N.C. Gen. Stat. § 75-16. Because we hold that Plaintiffs' complaint failed to establish a *prima facie* claim for unfair or deceptive trade practices under the UDTPA, Plaintiffs lacked standing to bring a UDTPA claim. Accordingly, the trial court did not err in dismissing Plaintiffs' UDTPA claim.

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4. Session Laws 1981, c. 412, repealed Chapter 18A, effective January 1, 1982, and enacted Chapter 18B in lieu thereof.

Based on this holding, we need not address Plaintiffs' additional arguments. The order of the trial court is

AFFIRMED.

Judges JACKSON and STROUD concur.

SEAN FARRELL, MINOR BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, WILLIAM FARRELL AND SUZANNE FARRELL; WILLIAM FARRELL, INDIVIDUALLY; AND SUZANNE FARRELL, INDIVIDUALLY, PLAINTIFFS v. TRANSYLVANIA COUNTY BOARD OF EDUCATION; TERRY HOLLIDAY, FORMER SUPERINTENDENT OF TRANSYLVANIA COUNTY SCHOOLS IN HIS OFFICIAL CAPACITY; PATRICIA MORGAN, FORMER PRINCIPAL OF BREVARD ELEMENTARY SCHOOL, IN HER OFFICIAL CAPACITY; RON KIVINIEMI, FORMER ASSISTANT PRINCIPAL OF BREVARD ELEMENTARY SCHOOL AND PRINCIPAL OF PISGAH FOREST ELEMENTARY SCHOOL IN HIS OFFICIAL CAPACITY; KATHY HAEHNEL, DIRECTOR OF FEDERAL PROGRAMS AT TRANSYLVANIA COUNTY SCHOOLS IN HER INDIVIDUAL AND OFFICIAL CAPACITIES; DONNA GARVIN, FORMER SPECIAL EDUCATION TEACHER AT BREVARD ELEMENTARY SCHOOL IN HER INDIVIDUAL AND OFFICIAL CAPACITIES; AND JANE WOHLERS, FORMER TEACHER'S AIDE AT BREVARD ELEMENTARY SCHOOL IN HER INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS

No. COA08-310-2

(Filed 18 August 2009)

1. Appeal and Error— appealability—interlocutory order—substantial right—public official immunity

Public official immunity affects a substantial right and is immediately appealable.

2. Immunity; Tort Claims Act— teacher—public official immunity—abuse of severely disabled child

A *de novo* review revealed the trial court did not err by denying defendant teacher's motion for summary judgment with respect to the State tort claims arising from the alleged abuse of a severely disabled child even though defendant contends she is entitled to public official immunity.

3. Immunity; Tort Claims Act— § 1983—teacher—qualified immunity—abuse of severely disabled child

A *de novo* review revealed the trial court did not err by denying defendant teacher's motion for summary judgment with respect to the federal claims including a section 1983 claim for

supervisory liability arising from the alleged abuse of a severely disabled child even though defendant contends she is entitled to qualified immunity to shield her from suit.

Appeal by Defendant Donna Garvin from an order entered 30 October 2007 by Judge Mark E. Powell in Transylvania County Superior Court. Heard in the Court of Appeals 10 September 2008. Opinion filed 2 December 2008. Petition for rehearing granted 30 January 2009, reconsidering whether federal qualified immunity applies, with the filing of additional briefs and without oral argument. The following opinion supersedes and replaces the opinion filed 3 December 2008.

The Law Office of Stacey B. Bawtinhimer by Stacey B. Bawtinhimer, and The Foster Law Firm by Jeffery B. Foster, for plaintiffs-appellees.

Roberts & Stevens, P.A. by Christopher Z. Campbell and Chad R. Donnahoo, for Donna Garvin, defendant-appellant.

JACKSON, Judge.

Donna Garvin ("defendant") appeals the trial court's denial of her motion for summary judgment in an action brought against her and other defendants by William and Suzanne Farrell ("plaintiffs") related to the physical and emotional abuse of their son, Sean Farrell ("Sean") in defendant's special needs classroom. For the reasons stated below, we affirm.

This case previously has been appealed to this Court. In our 7 February 2006 opinion, we dismissed as interlocutory defendant's appeal of the denial of her motion to dismiss. *See Farrell v. Transylvania Cty. Bd. of Educ.*, 175 N.C. App. 689, 690, 625 S.E.2d 128, 130 (2006) (*Farrell I*).

During the 2001 school year, Sean was a student with severe disabilities in defendant's self-contained, special needs classroom. Sean became the victim of physical and emotional abuse at the hands of one of defendant's teacher's aides, Jane Wohlers ("Wohlers"). According to the complaint, Wohlers (1) force fed Sean on a regular basis, at times to the point of choking; (2) yelled at him and used abusive language; (3) violently jerked back his head and pulled his hair while washing his face; and (4) used a stuffed animal she knew that Sean was terrified of to intimidate him to stay on his mat for naptime.

Defendant received other complaints about Wohlers' abusive behavior towards the students in her classroom. One aide witnessed Wohlers (1) yell at the children; (2) pinch them behind their ears and squeeze them under the arms causing bruises; (3) stuff food into students' mouths, hold their heads in a headlock and continue to stuff food into students' mouths until they gagged during which time one student projectile vomited; (4) verbally intimidate the children by yelling at them until they broke down crying; (5) hold their foreheads roughly and yank their heads back in order to wash their faces in the bathroom; and (6) make inappropriate sexual and lewd comments in front of the children. Another aide reported that Wohlers stated, "I can say whatever I want because these kids can't talk so they can't tell their parents" and that she could "do whatever she wanted to one of the black children in the room because his bruises wouldn't show."

As a result of the alleged abuse, Sean stopped eating. His condition became so severe that he was admitted to Mission Hospital from 16 January through 24 January 2002 for intravenous therapy and a thorough medical work-up to find a cause for his severe anxiety associated with food. The tests indicated that there was no physical reason for Sean's failure to eat and drink. The attending pediatric physician and residents from Mission Hospital, including the gastrointestinal doctor and occupational therapists all agreed that his eating problems were consistent with severe anxiety and depression due to suspected child abuse in the classroom. Ultimately, a feeding tube was inserted for a period of approximately six months.

Plaintiffs brought suit against defendant, Wohlers, several school administrators, and the county school board. The instant appeal involves only defendant Donna Garvin, the classroom teacher.

Among other claims, plaintiffs sued defendant in her individual capacity for negligent infliction of emotional distress on Sean and themselves pursuant to the State Tort Claims Act, and for federal civil rights violations pursuant to section 1983 of Title 42 of the United States Code.

On 8 March 2007, defendant filed a joint motion for summary judgment with other of the defendants seeking, *inter alia*, to have the court dismiss the claims against her in her individual capacity. Defendant alleged she was entitled to public official immunity on the State claims and qualified immunity on the federal claim. By order filed 30 October 2007, defendant's motion was denied as "issues of material fact remain[ed]" as to the claims against her in her individ-

ual capacity, although it was granted with respect to the section 1983 claims against all defendants in their official capacities.

[1] The order in this case did not dispose of the entire case; therefore, it is interlocutory. *See Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005) (per curiam) (order granting partial summary judgment is interlocutory). However, an interlocutory order may be appealed immediately if it affects a substantial right of the parties. N.C. Gen. Stat. § 1-277 (2007). This Court has held that claims of immunity affect a substantial right entitled to immediate appeal. *See e.g.*, *Summey v. Barker*, 142 N.C. App. 688, 689, 544 S.E.2d 262, 264 (2001) (citations omitted) (holding public official immunity affects a substantial right and is immediately appealable).

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). The moving party bears the burden of showing that no triable issue of fact exists. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). One means of doing so is to show that the non-moving party cannot surmount an affirmative defense which would bar the claim. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted).

A trial court's rulings on summary judgment motions are reviewed by this Court *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citing *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006)). In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving party. *See Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004).

[2] We first discuss defendant's second argument, in which she contends that the trial court erred in denying her summary judgment with respect to the State tort claims against her. She argues she is entitled to public official immunity to shield her from suit. We disagree.

"It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of

judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952) (citations omitted). "Our courts have recognized several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999) (citations omitted).

Defendant contends that a teacher's position is created by statute, satisfying the first prong of the public official test. She cites North Carolina General Statutes, sections 115C-307 and 115C-325 for support. However, section 115C-307 does not create the position of teacher; it defines the duties of teachers, student teachers, substitute teachers, and teacher assistants. In contrast, as this Court explained in *Farrell I*, section 115C-287.1(a)(3) creates the position of "school administrator" which includes principals, assistant principals, supervisors, and directors. *See Farrell I*, 175 N.C. App. at 696, 625 S.E.2d at 133-34 (holding that Haehnel, as the director of federal programs for the county school system, was a public official who qualifies for public official immunity as a "school administrator" pursuant to section 115C-287.1(a)(3)). Further, subsection 115C-325(a) merely sets forth the definitions used in section 115C-325 which governs the "system of employment for public school teachers." Subsection (a)(6) defines a "teacher" as used in that section, as opposed to a "career employee," "case manager," or "school administrator;" it does not create the position of public school teacher.

In *Mullis v. Sechrest*, 126 N.C. App. 91, 484 S.E.2d 423 (1997), *rev'd on other grounds*, 347 N.C. 548, 495 S.E.2d 721 (1998), this Court declined to grant a teacher public official status, stating that he was not entitled to public official immunity "because his duties at the time the alleged negligence occurred are not considered in the eyes of the law to involve the exercise of the sovereign power; instead, while we dislike the term applied, defendant's duties as a public employee are historically characterized as 'ministerial.' " *Id.* at 98, 484 S.E.2d at 427 (citing *Daniel v. City of Morganton*, 125 N.C. App. 47, 55, 479 S.E.2d 263, 268 (1997)).

Defendant contends that if animal control officers, prison guards, and social workers are public officials, surely teachers are as well. We disagree because there is a clear statutory basis for the grant of public official immunity in two of the three cases.

In *Kitchin v. Halifax Cty.*, 192 N.C. App. 559, 665 S.E.2d 760 (2008), *disc. rev. denied.*, 363 N.C. 127, 673 S.E.2d 135 (2009), this Court concluded that an animal control officer was a public official because

> [t]he position of animal control officer is created by statute, N.C. Gen. Stat. § 67-30, and is given authority to, *inter alia*, impound and euthanize dogs or cats, N.C. Gen. Stat. § 130A-192 and destroy stray dogs or cats in quarantine districts, N.C. Gen. Stat. § 130A-195. An animal control officer is a position created by statute, exercises a portion of sovereign power, and exercises discretion.

Id. at 568, 665 S.E.2d at 766.

In *Hobbs v. N.C. Dep't of Hum. Res.*, 135 N.C. App. 412, 520 S.E.2d 595 (1999), this Court recognized that statutory language "creates a structure under which department of social services staff members *may* function as public officers." *Id.* at 421, 520 S.E.2d at 602 (emphasis added). It did not hold that *all* social workers were public officials. There, a director of social services, a public official, had statutory authority to " 'delegate to one or more members of his staff the authority to act as his representative.' " *Id.* (quoting N.C. Gen. Stat. § 108A-14(b)). The issue before the Court was whether his staff members also were entitled to public official immunity. The Court held that the staff members were acting as public officials because they were acting for and representing the director of social services. *Id.* at 422, 510 S.E.2d at 602.

In the third case, *Price v. Davis*, 132 N.C. App. 556, 512 S.E.2d 783 (1999), this Court held that a correctional sergeant and an assistant superintendent at a correctional facility were "protected by public official immunity from individual liability for alleged violations of State statutes and prison regulations." *Id.* at 562, 512 S.E.2d at 787. This case did not discuss the *Isenhour* criteria. However, we note that North Carolina General Statutes, section 143B-260 creates the Department of Correction and section 143B-261 governs its duties, among them the duty to provide supervision of criminal offenders. This duty is delegated to prison guards, who exercise discretion in carrying it out.

Further, the Supreme Court of the United States has recognized that "the exercise of police authority calls for a very high degree of judgment and discretion[.]" *Foley v. Connelie*, 435 U.S. 291, 298, 55

L. Ed. 2d 287, 294 (1978). "The Supreme Court clearly and emphatically said that police 'are clothed with authority to exercise an almost infinite variety of discretionary powers' and are vested with 'plenary discretionary powers.' " *State v. Pendleton*, 339 N.C. 379, 386, 451 S.E.2d 274, 278-79 (1994), *cert. denied*, 515 U.S. 1121, 132 L. Ed. 2d 280 (1995) (quoting *Foley*, 435 U.S. at 297-98, 55 L. Ed. 2d at 293-94).

In *Kitchin*, *Hobbs*, and *Price*, the party being sued was either employed in a position created by statute, or delegated a statutory duty by a person or organization created by statute. Each defendant exercised discretion in carrying out the sovereign's power. Although teachers serve a vital role in the public education of the children of this state, they do not meet the test for public official immunity. *See Mullis*, 126 N.C. App. at 98, 484 S.E.2d at 427. Therefore, defendant is not entitled to such protection and her argument is without merit.

[3] Defendant also argues that the trial court erred in denying her summary judgment with respect to the federal claim against her. Defendant contends that as to the federal claim, she is entitled to qualified immunity to shield her from suit. In addition, she contends that plaintiffs failed to forecast evidence to support their section 1983 claim for supervisory liability. We disagree.

In *Farrell I*, Kathy Haehnel, the director of federal programs for the school board, successfully argued that she was entitled to qualified immunity in her individual capacity. *Farrell I*, 175 N.C. App. at 696, 625 S.E.2d at 133-34. As this Court stated, " '[q]ualified immunity protects public officials from personal liability for performing official, discretionary functions if the conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Id.* at 697, 625 S.E.2d at 134 (quoting *Vest v. Easley*, 145 N.C. App. 70, 75, 549 S.E.2d 568, 573 (2001)).

In determining whether defendant may benefit from qualified immunity, many courts have adhered to the analysis set forth in *Saucier v. Katz*, 533 U.S. 194, 150 L. Ed. 2d 272 (2001), *overruled in part*, *Pearson v. Callahan*, 555 U.S. 223, 172 L. Ed. 2d 565 (2009). Although that analysis is no longer mandatory, *Pearson*, 555 U.S. at ——, 172 L. Ed. 2d at 576, *Pearson* "does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases." *Id.* at ——, 172 L. Ed. 2d at 580. In following *Saucier*, we first determine "whether a constitutional right would have been violated on the facts alleged." *Saucier*, 533 U.S. at

200, 150 L. Ed. 2d at 281. "Next, assuming that the violation of the right is established, [we] consider whether the right was clearly established at the time such that it would be clear to an objectively reasonable [public] officer that his conduct violated that right." *Brown v. Gilmore*, 278 F.3d 362, 367 (4th Cir. 2002) (citations omitted).

Under both the Fourteenth Amendment to the federal constitution and the "Law of the Land" clause of the state constitution, there is a liberty interest in the integrity of the human body. "Among the historic liberties so protected [by the Fifth and Fourteenth Amendments] was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673, 51 L. Ed. 2d 711, 731 (1977). The Fourth Circuit has recognized a student's substantive due process right to be free from excessive force "inspired by malice or sadism," that is disproportionate to the need presented and inflicts severe injury. *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980). *Hall* recognized

> the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court. The existence of this right to ultimate bodily security—the most fundamental aspect of personal privacy—is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process.

Id. at 613.

Here, the complaint alleged that Wohler's abusive actions toward Sean "constitute[] restraint and infliction of pain in violation of Plaintiff's liberty interest." Although " '[*d*]*e minimis* or trivial deprivations of liberty in the course of the disciplining of a student' " may not violate a student's constitutional rights, *Harris by Tucker v. County of Forsyth*, 921 F. Supp. 325, 331 (M.D.N.C. 1996) (quoting *Hassan v. Lubbock Independent School Dist.*, 55 F.3d 1075, 1081 (5th Cir.), *cert. denied*, 516 U.S. 995, 133 L. Ed. 2d 438 (1995), we do not believe that the conduct alleged in the instant case falls anywhere close to the "*de minimis*" or "trivial" range cited in *Hall*.

W.E.T. v. Mitchell, No. 1:06CV487, 2008 U.S. Dist. LEXIS 2036 (M.D.N.C. Jan. 10, 2008), involved a disabled student with severe asthma. *Id.*, 2008 U.S. Dist. LEXIS 2036, at *3, slip op. at 2. His special needs therapist "forcefully and maliciously" placed tape over his mouth when he would not stop talking, later forcefully removing it.

Id., 2008 U.S. Dist. LEXIS 2036, at *3, *10, slip op. at 2, 7. The court determined that the complaint sufficiently alleged a violation of a constitutional right. *Id.*, 2008 U.S. Dist. LEXIS 2036, at *8-9, slip op. at 6. It further determined that this right was clearly established at the time of the violation such that the teacher should have known that her conduct was violative of the student's rights. *Id.*, 2008 U.S. Dist. LEXIS 2036, at *16, slip op. at 10. In contrast to *W.E.T.*, this case involves a *severely* disabled child whom it is alleged was *repeatedly* subjected to *abusive* behavior.

As to whether plaintiffs forecast evidence of supervisory liability, there are

> three elements necessary to establish supervisory liability under § 1983: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices,"; and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir.), *cert. denied*, 513 U.S. 813, 130 L. Ed. 2d 24 (1994) (citations omitted).

The first element has three components:

> (1) the supervisor's knowledge of (2) conduct engaged in by a subordinate (3) where the conduct poses a pervasive and unreasonable risk of constitutional injury to the plaintiff. Establishing a "pervasive" and "unreasonable" risk of harm requires evidence that the conduct is widespread, or at least has been used on several different occasions and that the conduct engaged in by the subordinate poses an unreasonable risk of harm of constitutional injury.

Id. (citations omitted). Although defendant asserts that she was not aware of Wohler's conduct toward Sean, plaintiffs have presented deposition testimony by several individuals that they told defendant about the conduct or that the conduct occurred in her "plain view."

As to the second element, "[a] supervisor's continued inaction in the face of documented widespread abuses, . . . provides an inde-

pendent basis for finding he either was deliberately indifferent or acquiesced in the constitutionally offensive conduct of his subordinates." *Id.* (citations omitted). Here, notwithstanding defendant's knowledge of Wohler's conduct, defendant did nothing.

As to the third element, plaintiffs provided expert testimony that as a result of being force-fed, Sean suffered post-traumatic stress disorder, resulting in his requiring a feeding tube for several months. Accordingly, defendant's arguments to the contrary are without merit.

Because defendant's position is not considered to be one of a public official, she is not entitled to the benefits of public official immunity. Because Wohler's alleged conduct violates a clearly established constitutional right to bodily integrity, of which defendant would have known, she is not entitled to the benefits of federal qualified immunity. Therefore, the trial court did not err in denying defendant's motion for summary judgment based upon these immunities.

Affirmed.

Judges BRYANT and ELMORE concur.

IN THE MATTER OF: J.D.L.

No. COA09-25

(Filed 18 August 2009)

1. Termination of Parental Rights— subject matter jurisdiction—failure to issue summons—general appearance

The trial court had subject matter jurisdiction to terminate respondent's parental rights even though the summons in the underlying neglect and dependency petition was never served on her because lack of a summons in any juvenile action creates a defect only as to personal jurisdiction and respondent made a general appearance in the action before the trial court, thus waiving any defense as to personal jurisdiction.

2. Appeal and Error— preservation of issues—failure to plainly, concisely and without argumentation raise question

Although respondent contends the trial court erred in a termination of parental rights case by failing to appoint a guardian *ad litem* for respondent, the merits of this argument are not considered and petitioner's motion to strike is allowed because neither of the assignments of error cited in support of this argument by respondent plainly, concisely, and without argumentation raise the question as required by N.C. R. App. P. 10 (c)(1).

3. Termination of Parental Rights— sufficiency of evidence of dependency and abandonment—clear, cogent, and convincing evidence—best interests of child

The trial court did not abuse its discretion in a termination of parental rights case by finding dependency and abandonment as grounds to terminate respondent mother's parental rights, and by concluding that termination is in the minor child's best interests.

Appeal by respondent from order entered 26 September 2008 by Judge Karen Alexander in Craven County District Court. Heard in the Court of Appeals 11 May 2009.

Laura M. Watts-Whitley for petitioner-appellee.

Deana K. Fleming for guardian ad litem.

Windy H. Rose for respondent-appellant.

STROUD, Judge.

Respondent's parental rights to her minor child were terminated by order entered 26 September 2008 in Craven County District Court. Respondent challenges the order on procedural and on substantive grounds. We affirm.

I. Background

J.D.L. (hereinafter "Joey")[1] was born 26 February 2005. On 24 May 2006, the Craven County Department of Social Services (hereinafter "Petitioner" or "DSS") filed a petition alleging Joey was a neglected and dependent juvenile. The whereabouts of Joey's father were unknown at the time and no summons was issued to the father.

1. We will refer to J.D.L. by a pseudonym, Joey, to protect the child's identity and for ease of reading.

A summons was issued to Joey's mother (hereinafter "Respondent") on 24 May 2006 but was returned unserved. The record contains no indication that Petitioner ever obtained an endorsement, extension, or alias/pluries summons or that a summons was ever served on any party. However, Respondent was present at the hearing on the neglect and dependency petition on 29 September 2006.

DSS subsequently deleted the allegations of neglect from the petition. On 15 November 2006, the trial court adjudicated Joey as dependent based upon Respondent's admissions in open court to the allegations of dependency. Custody of Joey was placed with DSS. Joey's father relinquished his parental rights.[2]

On 10 March 2008, Petitioner filed a petition to terminate Respondent's parental rights to Joey. The petition alleged, *inter alia*, dependency and abandonment. Summons was issued and served upon Joey by and through the guardian ad litem on 12 March 2008 and upon Respondent on 13 March 2008. After conducting adjudicatory and disposition hearings on 22 August 2008, the trial court entered an order terminating Respondent's parental rights on 26 September 2008. Respondent appeals.[3]

II. Procedural Issues

A. Subject Matter Jurisdiction

[1] Respondent first contends that the order terminating her parental rights must be vacated because the trial court lacked subject matter jurisdiction to hear and rule on the termination petition. We disagree.

Respondent relies on *In re Miller*, 162 N.C. App. 355, 590 S.E.2d 864 (2004). In *Miller*, this Court vacated an order terminating parental rights for want of subject matter jurisdiction because the petitioner, DSS, did not have legal custody of the child as required by N.C. Gen. Stat. § 7B-1103(a). 162 N.C. App. at 358, 590 S.E.2d at 866.

2. The trial court found as fact that Joey's father relinquished his rights to Joey, but it is not clear from the record how or when this happened. Joey's father is not a party to this appeal.

3. Respondent's counsel filed a notice of appeal, without Respondent's signature showing her consent, on 27 October 2008. Respondent's counsel filed an amended notice of appeal, which contained Respondent's signature indicating her consent to an appeal, on 30 October 2008. Petitioner has filed in this Court a motion to dismiss the appeal. As notice of appeal in compliance with Appellate Rule 3A(a) and N.C. Gen. Stat. § 7B-1001(c) was not given within 30 days after entry of judgment as required by N.C. Gen. Stat. § 7B-1001(b), we grant the motion and consider Respondent's petition for writ of certiorari filed in response to the motion to dismiss. In our discretion we allow the petition for writ of certiorari.

Respondent argues that because the summons in the underlying neglect and dependency petition was never served on her, the trial court's order placing custody with DSS in that proceeding was void. Respondent further contends that if the custody order was void, DSS never had legal custody of Joey and accordingly lacked standing to file the termination petition. Respondent concludes that absent standing by DSS, the trial court lacked subject matter jurisdiction to terminate her parental rights.

In re J.T. (I), J.T. (II), A.J. recently addressed the issue of subject matter jurisdiction over an action terminating parental rights pursuant to Article 11 of the Juvenile Code.[4] 189 N.C. App. 206, 657 S.E.2d 692 (2008), *rev'd*, 363 N.C. 1, 672 S.E.2d 17 (2009). In *J.T.*, summonses were issued to the juveniles' parents, but no summonses were issued to the juveniles, as required by N.C. Gen. Stat. § 7B-1106(a). 363 N.C. at 2-3, 672 S.E.2d at 17-18. On appeal, this Court vacated the termination order, holding that " 'failure to issue a summons to the juvenile deprives the trial court of subject matter jurisdiction.' " 189 N.C. App. at 208, 657 S.E.2d at 692 (quoting *In re K.A.D.*, 187 N.C. App. 502, 504, 653 S.E.2d 427, 428-29 (2007), which cited *In re C.T. & R.S.*, 182 N.C. App. 472, 475, 643 S.E.2d 23, 25 (2007)).

However, the North Carolina Supreme Court granted discretionary review and reversed, holding that the trial court had subject matter jurisdiction despite the failure to issue summonses to the juveniles. 363 N.C. at 4-5, 672 S.E.2d at 19. Specifically, the Supreme Court held:

> In any given case under the Juvenile Code, the issuance and service of process is the means by which the court obtains jurisdiction . . . .
>
> . . . .
>
> *It is inconsequential to the trial court's subject matter jurisdiction that* no summons named any of the three juveniles as respondent and that *no summons was ever served* on the juveniles or their GAL. These errors are examples of insufficiency of process and insufficiency of service of process, respectively, both of which are defenses that implicate personal jurisdiction and thus can be waived by the parties. . . .

4. The Juvenile Code is found in Chapter 7B of the General Statutes of North Carolina.

> In summary, [when] the requirements of N.C.G.S. § 7B-1101 [are] satisfied, the trial court's subject matter jurisdiction attache[s] upon issuance of a summons. It is therefore unnecessary to make inquiry into the summons beyond a determination of whether a summons was issued.

363 N.C. at 4-5, 672 S.E.2d at 18-19 (citations, quotation marks, brackets and emphasis in original omitted; emphasis added).

Approximately four months after deciding *J.T.*, *see id.*, the Supreme Court filed *In re K.J.L.*, which held that even "failure to legally *issue* a summons" implicated only personal jurisdiction. 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009) (emphasis added). *K.J.L.* further held that "*the summons is not the vehicle by which a court obtains subject matter jurisdiction over a case*, and failure to follow the preferred procedures with respect to the summons does not deprive the court of subject matter jurisdiction." 363 N.C. at 346, 677 S.E.2d at 837. *K.J.L.* also stated that "the summons affects jurisdiction over the person rather than the subject matter, [therefore] . . . a general appearance by a civil defendant 'waive[s] any defect in *or nonexistence of a summons*.' " (quoting *Dellinger v. Bollinger*, 242 N.C. 696, 698, 89 S.E.2d 592, 593 (1955), adding emphasis and omitting citations). 363 N.C. at 347, 677 S.E.2d at 837.

K.J.L. also disavowed interpreting the following language in *J.T.*, " 'where *no* summons is issued, the court acquires jurisdiction over neither the parties nor the subject matter of the action[,]' " *J.T.* at 4, 672 S.E.2d at 18 (quoting *In re Poole*, 151 N.C. App. 472, 475, 568 S.E.2d 200, 202 (2002) (Timmons-Goodson, J., dissenting) (citations omitted), *rev'd per curiam for reasons stated in dissenting opinion*, 357 N.C. 151, 579 S.E.2d 248 (2003)), as "mean[ing] the failure to issue a summons defeats subject matter jurisdiction." *K.J.L.*, 363 N.C. at 347, 677 S.E.2d at 838. *K.J.L.* added that "[t]he summons relates to subject matter jurisdiction . . . only insofar as it apprises the necessary parties that the trial court's subject matter jurisdiction has been invoked and that the court intends to exercise jurisdiction over the case." 363 N.C. at 347, 677 S.E.2d at 838.

By their respective holdings, *J.T.*, 363 N.C. 1, 672 S.E.2d 17, and *K.J.L.*, 363 N.C. 343, 677 S.E.2d 835, impliedly abrogated the following language of *In re A.B.D.*:

> [W]here there is neither endorsement nor issuance of alias or pluries summons within 90 days after issuance of the last preceding summons, ***the action is discontinued*** as to any defendant

> not served within the time allowed ***and treated as if it had never been filed***.
>
> . . . .
>
> Because Petitioner failed to obtain an endorsement, extension, or alias/pluries summons within ninety days after the issuance of the summons, the termination of parental [rights] action should have been treated as if it had never been filed. And *where an action has not been filed, a trial court necessarily lacks subject matter jurisdiction*.

173 N.C. App. 77, 85-86, 617 S.E.2d 707, 713 (2005) (citations and quotation marks omitted; emphasis in first paragraph supplied by *A.B.D.* and emphasis in second paragraph added). By impliedly abrogating the foregoing language in *A.B.D.*, *J.T.* and *K.J.L.* also appear to have rejected the application of Rule 4(e) of the North Carolina Rules of Civil Procedure in all cases under the Juvenile Code.

Rule 4(e) provides that an "action is discontinued as to any defendant not theretofore served with summons within the time allowed." N.C. Gen. Stat. § 1A-1, Rule 4(e). *J.T.* and *K.J.L.* impliedly add the words "unless the party who is not served makes a general appearance in the action" to the foregoing sentence for purposes of cases under the Juvenile Code.

A.B.D. and Rule 4(e) notwithstanding, *K.J.L.* and *J.T.* hold that lack of a summons in any juvenile action, including both failure to issue a summons to and failure to serve a summons upon a parent in an action for abuse, neglect or dependency, creates a defect only as to personal jurisdiction.

It is well settled that

> [o]bjections to a court's exercise of personal (in personam) jurisdiction . . . must be raised by the parties themselves and can be waived in a number of ways. Broadly stated, any form of general appearance waives all defects and irregularities in the process and gives the court jurisdiction of the answering party even though there may have been no service of summons.

J.T., 363 N.C. at 4, 672 S.E.2d at 18 (citations and quotation marks omitted).

In the case *sub judice*, a summons was issued forthwith after the filing of the neglect and dependency petition. Even though

Respondent was never served with the summons, she made a general appearance in the action before the trial court, thus waiving any defense as to personal jurisdiction. No defect in the trial court's jurisdiction otherwise appearing, we conclude the trial court had jurisdiction over the underlying neglect and dependency action and issued a valid custody order to DSS. The custody order gave DSS standing to file the instant petition for termination of parental rights per N.C. Gen. Stat. § 7B-1103(a). Respondent's argument is without merit.

B. Appointment of Guardian Ad Litem

[2] Respondent next contends that the court erred by failing to appoint a guardian ad litem for her. Petitioner has filed a motion to strike this argument on the ground it is not raised by an assignment of error. Our review is limited to the assignments of error set out in the record on appeal. N.C.R. App. P. 10(a). "Each assignment of error shall . . . state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C.R. App. P. 10(c)(1).

Here, Respondent cites assignments of error numbers 19 and 26 as the basis for her argument. Assignment of error number 19 states that conclusion of law number 3 is not supported by the evidence. Conclusion of law number 3 consists of the court's determination of the existence of grounds to terminate Respondent's parental rights. Assignment of error number 26 states that the court erred by concluding that Respondent's parental rights should be terminated on the ground of dependency. Neither of the assignments of error cited in support of this argument by Respondent "plainly, concisely and without argumentation" raise the question of whether the court erred by failing to appoint a guardian ad litem for Respondent. N.C.R. App. P. 10 (c)(1). We therefore allow the motion to strike and we do not consider the merits of this argument.

III. Substantive Issues

[3] Respondent contends that the court committed reversible error in finding dependency and abandonment as grounds to terminate her parental rights. Respondent further contends that even if grounds for termination exist, the trial court erroneously concluded that termination is in Joey's best interests.

"A finding of any one of the grounds enumerated [in N.C. Gen. Stat. § 7B-1111], if supported by competent evidence, is sufficient to support a termination" of parental rights. *In re J.L.K.*, 165 N.C. App. 311, 317, 598 S.E.2d 387, 391, *disc. review denied*, 359 N.C. 68, 604

S.E.2d 314 (2004). "On appeal, this Court considers whether the trial court's findings of fact are based on clear, cogent, and convincing evidence and whether those findings support the trial court's conclusion that grounds for termination exist pursuant to N.C. Gen. Stat. § 7B-1111." *In re C.W.*, 182 N.C. App. 214, 219, 641 S.E.2d 725, 729 (2007) (citations omitted).

If no reversible error is found in the trial court's conclusion that grounds for termination exist, this Court then "considers whether the trial court abused its discretion in determining that it was in the child's best interests to terminate the respondent's parental rights." *Id.* "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Greene v. Hoekstra*, 189 N.C. App. 179, 180, 657 S.E.2d 415, 417 (2008) (citation and quotation marks omitted).

A. Grounds for Termination

Parental rights may be terminated if it is shown "[t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future." N.C. Gen. Stat. § 7B-1111(a)(6) (2007). A dependent child is one who is "in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2007). A conclusion that a juvenile is dependent may be supported by evidence that the parent is unable to care for the child or to suggest an appropriate alternative placement for the child. *In re D.J.D.*, 171 N.C. App. 230, 239, 615 S.E.2d 26, 32 (2005).

Parental rights may also be terminated upon a finding that "[t]he parent has willfully abandoned the juvenile for at least six months immediately preceding the filing of the petition." N.C. Gen. Stat. § 7B-1111(a)(7) (2007). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). "It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes

all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citation omitted).

In the order of termination, the trial court adopted findings of fact made in previous orders in this case and made additional findings based upon evidence received at the termination hearing. The trial court's findings of fact show Respondent stipulated the child was dependent at the time of the original adjudication order. At that time Respondent was homeless and unable to secure and maintain a stable residence for herself and the minor child. Joey was born with low birth rate and was not making appropriate weight gains. Respondent failed to appear for medical appointments so physicians could monitor Joey's condition. Respondent had not fed Joey on the day a social worker made a home visit at 2:15 p.m.

At the time of a review hearing on 29 September 2006, Respondent was residing with her parents, who have legal custody of Respondent's two older children, also subjects of juvenile petitions. The maternal grandfather was a paraplegic, and the maternal grandmother was caring for him in addition to Respondent's two elder children. The guardian ad litem believed that respondent lacked the ability to care for herself alone, much less a child. The guardian ad litem advocated that the next move of the child should be to a permanent home, given that Respondent failed to make satisfactory progress in her parenting skills after the older two children were taken from her. The court warned Respondent that she needed to show dramatic improvement in her ability to live independently and to care for Joey.

Respondent failed to appear for a review hearing on 18 January 2008. At that time she was still unemployed. She had recently delivered another child. Respondent told a social worker that her living arrangements are of no concern to the DSS and that she wanted the DSS out of her business. Respondent failed to maintain contact with her attorney. Respondent's attorney stated that "he could not, in good conscience, oppose" the court's permanent plan of adoption by the paternal grandparents, "given the Respondent/Mother's current situation, and lack of an appropriate alternative plan."

The trial court further found that while Respondent had made some progress during the previous twelve months, "conditions have not sufficiently changed so that the minor child is no longer dependent, as defined by N.C.G.S. § 7B-101." The court's findings indicate that Respondent "still fails to show the Court the ability to properly

parent the minor child and attend to his special needs." Respondent "denied that the juvenile was ever dependent in her care, despite prior adjudications and stipulations." Having been in foster care for more than two thirds of his life, Joey has several special needs, including speech and hearing issues. Respondent had not seen Joey since January 2007, she had "given no gifts, support or shown any love or affection for the child since she last saw him," and she had not attempted to do so.

Clear, cogent, and convincing evidence in the record supports these findings. The findings in turn support the trial court's conclusions that Joey was dependent and abandoned, both of which are statutory grounds for termination. N.C. Gen. Stat. § 7B-1111 (2007).

B. Best Interests of Child

N.C. Gen. Stat. § 7B-1110(a) provides trial judges with criteria to consider in making the best interests determination:

> (1) [t]he age of the juvenile[;] (2) [t]he likelihood of adoption of the juvenile[;] (3) [w]hether termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile[;] (4) [t]he bond between the juvenile and the parent[;] (5) [t]he quality of the relationship between the juvenile and the proposed adoptive parent . . . [;] and (6) [a]ny relevant consideration.

N.C. Gen. Stat. § 7B-1110(a)(2007).

The findings of fact show that Joey was three years old at the time of the order terminating Respondent's parental rights. He had been residing with his paternal grandparents for more than one year. The permanent plan for Joey was adoption and the paternal grandparents desired to adopt him as soon as all obstacles to adoption were removed. Joey had not seen Respondent for more than one year when the petition was heard. Respondent had given no gifts, support, love or affection to Joey since the last time she saw him. Respondent also failed to attend hearings concerning Joey. All of these factors call into question the strength of Respondent's bond with Joey. The trial court also found that Joey had formed a bond with his paternal grandparents. They have given him the love and affection that they would have given their own biological child. They have taken care of his special needs by taking him to appointments with various specialists. Joey will also be eligible to receive certain VA benefits as an adopted child if something happened to the paternal grandfather.

The foregoing findings reflect a reasoned decision by the trial court. We find no abuse of discretion in the trial court's determination that termination of Respondent's parental rights is in Joey's best interest. Accordingly, the order is affirmed.

AFFIRMED.

Judges JACKSON and STEPHENS concur.

RITA LAVONNE PETTY, PLAINTIFF v. STEVEN L. PETTY AND GEORGE L. PETTY, DEFENDANTS

No. COA08-1447

(Filed 18 August 2009)

1. Divorce— equitable distribution—findings—valuation of property—supported by evidence

Findings of fact in an equitable distribution action are conclusive if supported by evidence. The trial court here did not err in the valuation and distribution of jewelry and income tax refunds, or by not assigning value to the alleged conversion of funds that were not deposited into a joint account.

2. Divorce— equitable distribution—unequal distribution—statutory factors—findings

The trial court in an equitable distribution action may consider all of the statutory factors and find that an equal division of property would not be equitable, but must make findings setting out its reasons. The decision will not be reversed absent an abuse of discretion.

3. Divorce— equitable distribution—distributional factors—future inheritance

North Carolina equitable distribution law does not permit the trial court to consider as a distributional factor a future inheritance through the will of someone not yet deceased, and the trial court here abused its discretion by basing a portion of its award on the possibility that defendant would inherit a house.

4. Divorce— equitable distribution—unequal distribution—considerations—supported by evidence

The trial court did not err in an equitable distribution action by considering plaintiff's age, health, contribution to the marital estate, and contribution to defendant's education where the findings were supported by the evidence. The trial court did not abuse its discretion in determining that these factors justified an unequal distribution of marital property.

Appeal by defendant from order entered 27 May 2008 by Judge Martin B. McGee in Cabarrus County District Court. Heard in the Court of Appeals 23 April 2009.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for plaintiff-appellee.

Steven L. Petty pro se.

BRYANT, Judge.

Steven L. Petty (defendant)[1] appeals from an equitable distribution order entered 27 May 2008. We affirm in part, and reverse and remand in part.

Facts

Defendant was married to Rita Lavonne Petty (plaintiff) on 22 August 1970 and separated on 24 July 2006. The only child born of the marriage was an adult at the time of the parties' separation.

On 28 December 2006, plaintiff filed a complaint for equitable distribution of the parties' marital assets and for attorney's fees. In addition to an interest in personal property, automobiles, and other assets, plaintiff also claimed an equitable interest in the home in which the parties resided with defendant's father, George Petty (Mr. Petty).

Testimony presented at the equitable distribution hearing indicated Mr. Petty began to live with the parties after the death of his wife. While living with defendant and plaintiff, Mr. Petty contributed to the monthly household expenses. At some point, defendant and

1. Defendant's father, George L. Petty, was made a part of this action solely because of plaintiff's claim for equitable interest to property titled in his name. The trial court determined that plaintiff was not entitled to an equitable interest in George L. Petty's property. Neither plaintiff nor George L. Petty filed notice of appeal to this particular determination.

plaintiff made plans to move to another residence due to problems with their apartment. As a solution, Mr. Petty purchased a home located at 1200 Daybrook Drive, Kannapolis, North Carolina in August of 2003 with a down payment of approximately $32,000 and signed a mortgage for $102,000. Defendant and plaintiff moved into the home along with Mr. Petty, and the parties resumed their living arrangements. Defendant and plaintiff paid the mortgage and other household expenses, and Mr. Petty contributed to the monthly expenses on occasion when needed. No evidence was presented as to the exact amount of Mr. Petty's contributions or the frequency with which Mr. Petty made the contributions to household expenses.

Plaintiff testified that prior to purchasing the home, Mr. Petty's will divided his estate evenly among his seven children and that defendant "took his [inheritance] early" to make the down payment on the house. Plaintiff testified that her understanding of the arrangement with Mr. Petty was that she and defendant would make mortgage payments on the home and, after Mr. Petty died, she and defendant would own the home. Plaintiff also testified that Mr. Petty's will was to be changed to reflect this arrangement.

Mr. Petty testified that the down payment for the house was made with money taken from his account and that he alone signed for the mortgage. Mr. Petty also testified that defendant and plaintiff paid the mortgage sometimes, but that he paid the mortgage whenever they were unable to do so. According to Mr. Petty, if defendant and plaintiff made the payments and continued to do so after his death, the house "would have been theirs." Finally, defendant testified that after Mr. Petty purchased the house, Mr. Petty changed his will to reflect that defendant would inherit the house instead of 1/7th of Mr. Petty's estate at his death.

From August of 2003, until defendant and plaintiff separated, only plaintiff received income. Plaintiff's paycheck was directly deposited into a joint account shared by defendant and plaintiff, and defendant used money from the joint account to pay the parties' bills. During the same time period, Mr. Petty received retirement income and would contribute to the household monthly expenses. Defendant was unemployed and did not make any financial contributions to the household expenses from the time the parties moved into the 1200 Daybrook Drive residence until the parties separated in June of 2006.

On 27 May 2008, the trial court entered an equitable distribution order determining that the parties' marital assets totaled $23,560.64.

The trial court concluded an uneven distribution of the marital property would be equitable and just given the circumstances and awarded plaintiff $17,787.14, approximately 75.5% of the marital assets; defendant was awarded $5,773.50, approximately 24.5% of the assets.

In its order, the trial court made the following relevant findings:

> 10. In considering whether an equal distribution would be equitable, the Court has considered all of the evidence relating to the statutory factors set out in [N.C. Gen. Stat. §] 50-20(c), and specifically including the following:
>
> **A. Plaintiff's equitable interest in 1200 Daybrook Drive, Kannapolis, N.C. Residence.**
>
> The Plaintiff and Defendant resided in an apartment when [Mr.] Petty came to live with them. After a period of time, all three parties moved into the Daybrook Drive home. [Mr.] Petty provided the down payment funds to purchase the property and took a mortgage of $102,000.00. The monthly payments ranged from $730.00 to $770.00. The defendant was not working during this time, and the money that the Plaintiff earned paid for the mortgage—except [Mr.] Petty occasionally contributed to the payment. . . . There was no evidence presented regarding how much of the mortgage debt remains outstanding. . . . [Mr.] Petty testified he originally intended to leave his interest in the property to the Defendant if the Defendant and Plaintiff made the mortgage payments. His will currently leaves the property to the Defendant subject to the mortgage on the property. Thus, it is more likely than not that the Defendant will receive the benefit of the equity accumulated in the home as a result of mortgage payments made with money earned by the Plaintiff—a marital asset—from August 2003 to June 2006.
>
> **B. Direct and indirect contributions made by the Plaintiff to help educate the Defendant (JD degree) and develop his career potential.**
>
> During the parties' marriage, the Defendant earned his undergraduate degree, [an] M.B.A. degree from George Washington University, and a J.D. degree from Capital University. The plaintiff worked for most of the time the Defendant was in school. The Defendant, however, also worked during this period.
>
> . . .

D. During the marriage of the parties, the Plaintiff alleged that she was often the only spouse working and paying the marital debts, despite the Defendant's graduate degree.

The Plaintiff's employment was more stable than the Defendant's during the parties' marriage. This is especially true since they relocated to North Carolina. In recent years, the Plaintiff has, at times, been employed with two jobs while the Defendant has worked sporadically. The Defendant has provided child care for the parties' grandchildren. The Defendant pointed out that in the last few years he earned more in a three month consulting job than the Plaintiff earned all year with steady employment.

E. Any other factor which the court finds to be just and proper.

The Plaintiff is 57 years old and not in good health. She has a limited education and has considerably less earning potential than the Defendant.

The parties spent the retirement funds earned by the Defendant during the parties' marriage.

. . .

14. The Court has determined the following items from Schedule E of the pretrial order are non-marital property and belong to the identified party below:

. . .

C. Owned by [Mr.] Petty:
E1 1200 Daybrook Drive, Kannapolis[2]

. . .

16. The total marital estate of the parties totals $23,560.64. The Plaintiff should receive $17,787.14 (75.5%) of the marital assets and the Defendant should receive $5,773.50 (24.5%) of the marital assets.

Defendant appeals.

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2. With this finding, the trial court included the following footnote: "Plaintiff asserts that she has an equitable interest in this real property titled in the name of [Mr.] Petty. The plaintiff has failed to meet her burden of showing, by clear, strong and convincing evidence, the creation of an express, resulting or constructive trust. The facts, as explained above, have been considered as a distributional factor."

On appeal, defendant argues the trial court erred by: (I) determining certain jewelry was marital property in defendant's possession; (II) determining $3,500 held in a bank account was marital property in defendant's possession; (III) determining the cash conversion listed on Schedule D was valued at $0.00 and assigned to defendant; (IV) making an uneven distribution in favor of plaintiff.

Standard of Review

"The division of property in an equitable distribution is a matter within the sound discretion of the trial court." *Cunningham v. Cunningham*, 171 N.C. App. 550, 555, 615 S.E.2d 675, 680 (2005). When reviewing an equitable distribution order, the standard of review "is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Id.*

Pursuant to N.C. Gen. Stat. § 50-20 (2007), equitable distribution is a three-step process requiring the trial court to "(1) determine what is marital [and divisible] property; (2) find the net value of the property; and (3) make an equitable distribution of that property." *Cunningham*, 171 N.C. App. at 555, 615 S.E.2d at 680 (quotation omitted) (alteration in original).

I, II, & III

[1] Defendant contends the trial court erred in the valuation and distribution of several items of marital property. We disagree.

Defendant specifically contends the trial court erred by determining the value of a cameo ring and a ruby and diamond ring was $500 and assigning the items to defendant. "In appellate review of a bench equitable distribution trial, the findings of fact regarding value are conclusive if there is evidence to support them . . . ." *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 197, 511 S.E.2d 31, 34 (1999). "This Court is not here to second-guess values of marital and separate property where there is evidence to support the trial court's figures." *Id.* (quoting *Mishler v. Mishler*, 90 N.C. App. 72, 74, 367 S.E.2d 385, 386, rev. denied, 323 N.C. 174, 373 S.E.2d 111 (1988)). Here, plaintiff presented evidence that the diamond and ruby earrings were appraised at $400.00 and the cameo ring's value was approximately $100.00. Also, there was evidence presented that plaintiff possessed the jewelry a few months before the parties separated, but did not take the

jewelry with her after they separated. The trial court's findings of value regarding the jewelry and assigning that value to defendant during distribution of the property was supported by the evidence.

Defendant also contends the trial court erred by distributing two income tax refunds totaling $3,500 and deposited in the First Charter Bank account to plaintiff because the tax refund checks were not included in the pre-trial order. Defendant's contention is without merit. The First Charter Bank account was listed in Schedule D of the Equitable Distribution Pre-Trial Order and valued at $3,500, an amount equal to the value of the tax refund checks. Both plaintiff and defendant testified that plaintiff endorsed the income tax refund checks prior to their separation, and the funds were deposited into the First Charter Bank account. The trial court's finding was supported by the evidence and the trial court did not abuse its discretion by distributing the funds held in the First Charter Bank account to defendant.

Finally, defendant contends that the trial court erred by not assigning value to defendant's allegation that plaintiff committed two acts of conversion—borrowing approximately $1,200 against her 401K account and preventing her payroll check from being deposited in the parties' joint bank account. Plaintiff testified that prior to separation, she stopped direct deposit of her paycheck into the parties' joint account. However, plaintiff also testified that she continued to deposit a portion of her paycheck into the joint account to help pay household bills. Therefore, the trial court did not err by not assigning value to defendant's allegation that plaintiff converted marital funds. *See generally*, *Lawrence v. Lawrence*, 100 N.C. App. 1, 16, 394 S.E.2d 267, 275 (1990) (determining trial court erred in concluding plaintiff converted marital funds to her own use during the marriage because defendant failed to prove the money was used to purchase assets that were owned on the date of separation). These assignments of error are overruled.

IV

[2] Defendant finally contends the trial court erred by making an unequal distribution of the marital property. Specifically, defendant contends the trial court erred by considering evidence of defendant's possible inheritance under the will of his father who was still living. Defendant also contends the trial court erred by considering direct and indirect contributions plaintiff made towards defendant's education, plaintiff's contribution to the marital estate, and plaintiff's age and health.

Pursuant to N.C. Gen. Stat. § 50-20(c), an equal division of marital property is equitable. However, a trial court may consider all the factors listed in § 50-20(c) and find that an equal division of marital property would not be equitable under the circumstances. *White*, 312 N.C. at 776, 324 S.E.2d at 832. The court is required to make specific findings of fact setting forth the reasons for an unequal division. *Albritton v. Albritton*, 109 N.C. App. 36, 42, 426 S.E.2d 80, 84 (1993). If the trial court determines that an unequal division of the property would be equitable, the decision will not be reversed unless an abuse of discretion is shown. *White*, 312 N.C. at 777, 324 S.E.2d at 833.

In the present case, the trial court determined that an equal division of the marital property would not be equitable. The trial court considered each of the factors listed in N.C.G.S. § 50-20(c) and placed great emphasis on factors 7 and 12.[3]

Defendant's Future Inheritance

[3] The trial court considered plaintiff's claim for an equitable interest in 1200 Daybrook Drive, but determined that plaintiff had failed to establish an equitable interest in the property. *See Upchurch v. Upchurch*, 122 N.C. App. 172, 176, 468 S.E.2d 61, 64 (1996) (burden on party claiming equitable interest in property to establish trust by clear, strong, and convincing evidence).

However, under factor 12, the trial court found that because the evidence showed the payments on the mortgage were made primarily with funds plaintiff earned from her employment, and that defendant was to inherit the property under Mr. Petty's will, that "it is more likely than not that the Defendant will receive the benefit of the equity accumulated in the home as a result of the mortgage payments made with money earned by the Plaintiff—a marital asset[.]" Defendant contends the trial court erred by considering as a distributional factor property he may "possibly" inherit. We agree.

Whether a trial court may consider a party's expectancy under the will of a living parent as a factor in making an equitable distribution is a matter of first impression for North Carolina courts. There is a split in authority among courts of other jurisdictions that have considered this issue. *See*, *e.g.*, *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa Ct. App. 1984) ("We do not make property divisions

3. Pursuant to N.C.G.S. § 50-20(c), "[t]he court shall consider . . . (7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse. . . . (12) Any other factor which the court finds to be just and proper."

based on speculation of future inheritances."); *Parker v. Parker*, 929 So.2d 940, 946 (Miss. Ct. App. 2005) (holding an expectancy of inheritance is not an asset for equitable distribution purposes); *Hacker v. Hacker*, 659 N.E.2d 1104, 1112-13 (Ind. Ct. App. 1995) (lower court abused its discretion by considering husband's potential inheritance in dividing marital assets); *Johnston v. Johnston*, 815 P.2d 1145, 1148 (Mont. 1991) (district court properly disregarded wife's speculative future inheritance from her father in apportioning marital estate); *Cich v. Cich*, 428 N.W.2d 446, 449 (Minn. Ct. App. 1988) (holding that trial court committed clear error in dividing marital property based on the possibility of husband's future inheritance); *Rubin v. Rubin*, 204 Conn. 224, 237, 527 A.2d 1184, 1190-91 (1987) (approving "the view of those courts that have held evidence of a possible future inheritance to be inadmissible for the purpose of a property assignment or alimony award"); and *In re Marriage of Stephenson*, 460 N.E.2d 1, 2 (Ill. App. Ct. 1983) (trial court properly refused to consider evidence concerning wife's potential inheritance from her mother when dividing marital property). *But see, e.g.*, *In re Marriage of Benz*, 165 Ill. App. 3d 273, 287, 518 N.E.2d 1316, 1324 (1988) (holding that "there is generally no error where a court considers a future or anticipated inheritance when distributing property"); *E.H. v. S.H.*, 59 Mass. App. Ct. 593, 597 n. 7, 797 N.E.2d 411, 414 n. 7 (2003) ("a future inheritance is a mere expectancy and so is not included in a property division" on divorce, but may be considered as a dispositional factor when dividing marital property); and *In re Marriage of Dalley*, 232 Mont. 235, 239-40, 756 P.2d 1131, 1133 (1988) (holding that the lower court did not abuse its discretion by considering that wife would shortly receive a substantial inheritance from her deceased father's estate when dividing the parties' assets).

In the context of an equitable distribution case, property to be considered during the division of assets is defined as property that is "presently owned." *See* Suzanne Reynolds, § 12.18 *Lee's North Carolina Family Law*, *5th ed.*, (2002) ("except for a narrow class of property [divisible property], the equitable distribution statute gives the trial court authority over property only if it is owned by the parties at the date of separation."); *see also*, N.C. Gen. Stat. § 50-20(b)(1) (2007) (defining marital property as property acquired by either spouse during the marriage before separation and *presently owned*) (emphasis added); and N.C.G.S. § 50-20(b)(2) (defining separate property as property acquired by a spouse before marriage or acquired during marriage by, *inter alia*, a bequest or devise); 27B C.J.S., Divorce, § 852 ("In order to be 'property' divisible on divorce

or dissolution of marriage, the interest asserted to be property must be in the nature of a present property interest, *rather than a mere expectancy interest*.") (emphasis added); 24 Am.Jur.2d, Divorce and Separation, § 516 ("A court cannot divide property which the parties do not own at the time of its decree although they may acquire it later on.").

An expectancy in an inheritance is not property presently owned. Here, defendant's actual inheritance of the property at 1200 Daybrook Drive is contingent on several factors including whether he survives his father, whether his father discards the property or takes some action that reduces the value of the property, and whether his father changes his will. Defendant's inheritance of the property at issue here is too speculative to be used as a distributional factor. *See Cobb v. Cobb*, 107 N.C. App. 382, 420 S.E.2d 212 (1992) (holding future value of timber that would not mature for a number of years should not be considered as marital property or a *distributional factor*). As this Court stated in *Cobb*, to allow otherwise "the equitable distribution trial would become overwhelmingly complicated". *Id.* at 387, 420 S.E.2d at 215.

Therefore, we hold that North Carolina law does not permit a trial court to consider a party's future inheritance under the will of a person not yet deceased as a distributional factor for purposes of equitable distribution. As such, the trial court abused its discretion by basing a portion of its award on evidence that defendant would possibly inherit the 1200 Daybrook Drive property as set out in Mr. Petty's will.

[4] As to defendant's remaining arguments that the trial court erred by considering plaintiff's age and health, plaintiff's contribution to the marital estate, and plaintiff's contribution to defendant's education, we find no error. The trial court's findings were supported by the evidence and the trial court did not abuse its discretion in determining that these factors justified an unequal distribution of the marital property.

Because we are unable to ascertain the extent to which the trial court based its award on defendant's future inheritance, we must reverse and remand the order for entry of a new order in accordance with this opinion. For the reasons stated herein, the order of the trial court is affirmed in part and reversed and remanded in part for entry of an order consistent with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA ON BEHALF OF: CHARLOTTE J. MIDGETT, PLAINTIFF
v. GARY W. MIDGETT, DEFENDANT

No. COA08-1198

(Filed 18 August 2009)

Child Support, Custody, and Visitation— child support—defendant's capacity to earn—findings not sufficient

The trial court erred in a child support action by considering defendant's capacity to earn in calculating his gross monthly income without the requisite findings of fact. The trial court appeared to rely solely on plaintiff's testimony as to what defendant purportedly earned on average from commercial fishing and towing and crushing cars over the entire course of the marriage rather than in one or two prior years, and made no findings or conclusions about its decision to halve the figures provided by plaintiff.

Appeal by defendant from order entered 3 June 2008 by Judge J. Carlton Cole in Dare County District Court. Heard in the Court of Appeals 11 March 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins, for plaintiff-appellee.

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

HUNTER, Robert C., Judge.

Gary W. Midgett ("defendant") appeals from an "Order to Establish Child Support" entered 3 June 2008 by Judge J. Carlton Cole in Dare County District Court, which required him to, *inter alia*, pay $1164.00 per month in ongoing child support for his three minor children. After careful review, we reverse and remand.

I. Background

Defendant and Charlotte J. Midgett ("plaintiff") married on 14 October 1995, separated on 17 November 2007, and have three minor children (the "children").

On 14 March 2008, the Dare County Child Support Enforcement Agency filed a complaint seeking child support from defendant on behalf of plaintiff. On 25 April 2008, defendant filed an answer in which he, *inter alia*, admitted that he was the father of the children and asked the court "to establish a reasonable amount of child support . . . ."

On 30 May 2008, a hearing was conducted to establish the amount of child support. At the hearing, Allison Creef ("Ms. Creef"), a Dare County child support enforcement agent assigned to plaintiff's case, testified that plaintiff told her that "on average[, defendant's] normal yearly income" from commercial fishing was "about" $12,000.00, or $1,000.00 per month. Ms. Creef further testified that plaintiff told her that defendant earned about $15,000.00 per year, or $1,125.00 per month, from towing and crushing cars. Ms. Creef stated that these figures were based solely on plaintiff's statements and were not corroborated by any financial records.

Plaintiff testified that defendant had been engaging in commercial fishing for "[h]is whole life, since he was a small child with his uncle." She further testified that she told Ms. Creef that $12,000.00 per year was "[a]bout the average" amount that defendant earned yearly from commercial fishing and that she arrived at this figure based on deposits that defendant had made to their joint checking account over the course of their marriage. The only financial documentation produced at the hearing regarding defendant's commercial fishing income was: (1) a 2005 Form 1099 from O'Neal's Sea Harvest for $5,667.38; (2) a 2005 Form 1099 from Austin Fish Company for $3,829.40; and (3) a 2005 tax return, which listed defendant's gross receipts from commercial fishing as $9,496.00 and an actual profit of $3,296.00 after subtracting out various expenses.[1] Plaintiff agreed that the expenses that were subtracted to arrive at the $3,296.00 profit listed in the 2005 tax return were "reasonable expenses of the business as far as [she] underst[ood.]" Plaintiff admitted that she had no knowledge of whether defendant earned any money from commercial fishing in 2008.

1. None of these documents are contained in the record on appeal.

Plaintiff testified that defendant had been earning income from towing and crushing cars for over twenty years as part of a family business and that defendant was compensated for this work via cash or a check apart from his regular paycheck. She stated that she arrived at the $15,000.00 average figure based on some checks she had seen and bank deposits that defendant had made to their joint checking account over the course of their marriage. Plaintiff testified that she believed that defendant had been earning money towing and crushing cars in 2008 based on "pictures [the] children took when they went for a visit in March." She also stated that she had deposit records from 2007; however, neither the pictures nor the 2007 deposit records were offered into evidence. In fact, no financial documentation pertaining to defendant's income from towing and crushing cars from 2008 or any other year was produced at the hearing.

Defendant testified that he earned a $1,200.00 biweekly salary from his regular employment at Island Convenience, Inc., which is a business owned by defendant's aunt and cousins. He stated that he typically works there from 8 a.m. until 6 p.m. or 7 p.m.

Defendant admitted that, in past years, he had engaged in commercial fishing with his family to earn income, but stated that he had not engaged in any commercial fishing in 2008, that commercial fishing had become "a thing of the past[,]" and that it was no longer an activity one could "rely on an income out of." He further testified that he maybe earned a couple thousand dollars from commercial fishing in 2006 and 2007 and that he did plan to fish in 2008 "[i]f [he] ha[d] nothing else to do and ha[d] the time . . . ."

Defendant testified that he tows and crushes cars for the family business and that he is paid via cash or a check, which is separate from his regular paycheck. He stated that the income he derives from this activity decreased significantly in recent years following his uncle's death and due to increased competition. Defendant testified that prior to his uncle's death and the increased competition, he earned $7,000.00 or $8,000.00 a year from towing and crushing cars, but in recent years, he maybe earned $500.00 to $1,000.00 per year. Defendant admitted that, one or two months prior to the 30 May 2008 hearing, he had received approximately $500.00 from towing and crushing cars, but he stated that this was all he had earned in 2008 and that it was not a monthly source of income for him.

At the end of the hearing, the trial court stated that it found plaintiff's testimony regarding defendant's income from commercial

fishing and from towing and crushing cars to be "credible," but halved the $12,000.00 and $15,000.00 yearly figures to $6,000.00 and $7,500.00 and included these amounts in calculating defendant's gross monthly income in order to determine defendant's overall child support obligation.

Following the 30 May 2008 hearing, the trial court entered an "Order to Establish Child Support" on 3 June 2008, stating that "[t]he child support in [the] action" was based upon the North Carolina Child Support Guidelines, 2009 Ann. R. N.C. 41 (Rev. Oct. 2006) ("the Guidelines"). In this order, the trial court calculated defendant's "gross monthly income" to be "approximately" $3,725.00, based on: (1) a $1,200.00 biweekly salary from his regular employment with Island Convenience, Inc.; (2) $500.00 per month from commercial fishing; and (3) $625.00 per month for towing and crushing cars. The trial court ordered defendant to, *inter alia*, pay $1,164.00 per month in ongoing child support beginning on 1 June 2008. Defendant appeals.

II. Analysis

On appeal, defendant asserts the trial court erred in its calculations as to: (1) the income he receives from commercial fishing; (2) the income he receives from towing and crushing cars; (3) his total gross monthly income; and (4) his overall child support obligation, as it was based on, *inter alia*, the purportedly erroneous gross monthly income calculation. Specifically, defendant argues that there was no competent evidence to support the trial court's finding of fact that, at the time the child support order was entered, his monthly income from commercial fishing was $500.00 and his monthly income from towing and crushing cars was $625.00. As such, defendant contends that the only way that the trial court could attribute this income to him was by utilizing his earning capacity, which the trial court could not do absent the requisite findings of bad faith or deliberate depression of income. Because the trial court did not make such findings, defendant contends his case must be reversed and remanded for further proceedings. As discussed *infra*, we agree.

A. Standard of Review

The standard of review of a trial court's determination of child support is abuse of discretion. *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005). "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions

that underlie it, represent a correct application of the law." *Id.* "Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated." *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

> Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Id. This Court's review of a trial court's findings of fact is limited to "whether there is competent evidence to support the findings of fact, despite the fact that different inferences may be drawn from the evidence." *Hodges v. Hodges*, 147 N.C. App. 478, 482-83, 556 S.E.2d 7, 10 (2001).

> To support the conclusions of law, the judge also must make specific findings of fact to enable this Court to determine whether the trial court's conclusions of law are supported by the evidence. "Such findings are necessary to an appellate court's determination of whether the judge's order is sufficiently supported by competent evidence."

State ex rel. Williams v. Williams, 179 N.C. App. 838, 839, 635 S.E.2d 495, 497 (2006) (citation omitted) (quoting *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 867 (1985)). "Because the determination of gross income requires the application of fixed rules of law, it is properly denominated a conclusion of law rather than a finding of fact." *Lawrence v. Tise*, 107 N.C. App. 140, 145, n.1 419 S.E.2d 176, 179, n.1 (1992) (internal quotation marks omitted) (quoting *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982)).

B. "Income" Calculations

The Child Support Guidelines define " '[i]ncome' " as:

> a parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.), ownership or operation of a business, partnership, or corporation, rental of property, retirement or pensions, interest, trusts,

> annuities, capital gains, social security benefits, workers compensation benefits, unemployment insurance benefits, disability pay and insurance benefits, gifts, prizes and alimony or maintenance received from persons other than the parties to the instant action. When income is received on an irregular, non-recurring, or one-time basis, the court may average or pro-rate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.

Guidelines, 2009 Ann. R. N.C. 43. "It is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997). "Under the Child Support Guidelines, [c]hild support calculations . . . are based on the parents' *current incomes at the time the order is entered*." *Holland v. Holland*, 169 N.C. App. 564, 567, 610 S.E.2d 231, 234 (2005) (alterations in original) (citation and internal quotation marks omitted). "[T]he [c]ourt must determine [the parent's] gross income as of the time the child support order was originally entered, not as of the time of remand nor on the basis of [the parent's] average monthly gross income over the years preceding the original trial." *Tise*, 107 N.C. App. at 149, 419 S.E.2d at 182.

However, "a party's capacity to earn income may become the basis of an award if it is found that the party deliberately depressed its income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child." *Askew v. Askew*, 119 N.C. App. 242, 244-45, 458 S.E.2d 217, 219 (1995). "It is clear, however, that '[b]efore the earnings capacity rule is imposed, it must be shown that [the party's] actions which reduced his income were not taken in good faith.' " *Ellis*, 126 N.C. App. at 364, 485 S.E.2d at 83 (alterations in original) (quoting *Askew*, 119 N.C. App. at 245, 458 S.E.2d at 219).

As stated *supra*, here, the trial court stated that it found plaintiff's testimony regarding the income defendant respectively receives from commercial fishing and towing and crushing cars to be "credible[.]" However, the court made no additional findings of fact regarding defendant's income from these activities. Plaintiff's testimony did not address defendant's income from these activities at the time the order was entered on 3 June 2008. In fact, after carefully examining the record on appeal, we can find no evidence before the

trial court that defendant had earned any income from commercial fishing in 2008, and the only evidence before the trial court as to the income defendant earned from towing and crushing cars in 2008 was defendant's testimony that he had earned $500.00 one or two months prior to the 30 May 2008 hearing.

Recent decisions by this Court, however, suggest that a trial court may permissibly utilize a parent's income from prior years to calculate the parent's gross monthly income for child support purposes. In *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006), this Court determined that the plaintiff had failed to preserve his challenge to "the trial court's use of an average of [the plaintiff's] monthly gross incomes in 2001 and 2002 as a basis for finding [the plaintiff's] monthly gross income for 2003 . . . ." *Id.* at 649-50, 630 S.E.2d at 30. However, this Court went on to state that assuming, *arguendo*, that the plaintiff had preserved this argument, competent evidence existed to support the trial court's findings that the plaintiff's documentation as to his 2003 income was inadequate and " 'highly unreliable[.]' " *Id.* at 650, 630 S.E.2d at 30. "Given the unreliability of [the plaintiff's] documentation," this Court stated that it could not conclude "that the trial court abused its discretion by averaging [the plaintiff's] income from his two prior tax returns to arrive at his 2003 income." *Id.*

Later, in *Hartsell v. Hartsell*, 189 N.C. App. 65, 657 S.E.2d 724 (2008), this Court determined that the trial court did not err in determining that the plaintiff "could continue to earn at least $2,500 a month from [his] grading business [because it] was reasonably based on [the] findings of fact regarding [the p]laintiff's actual earnings during the year prior to the hearing." *Id.* at 79, 657 S.E.2d at 732. In *Hartsell*, the trial court made extensive findings of fact to support its conclusions, and said findings were unchallenged and binding on appeal. *Id.* at 77-78, 657 S.E.2d at 731-32. In addition, as in the instant case, the plaintiff asserted that the income he earned in prior years was greater than the income he could currently earn. *Id.* at 79, 657 S.E.2d at 732. This Court disagreed and concluded that the trial court's findings of fact demonstrated that the court took into account " 'the fact that [the] plaintiff's full-time job responsibilities had changed, that [the] plaintiff's previous income was based upon his having a crew of full-time workers in addition to himself, and that there [might] be periods when work was unavailable to [the plaintiff].' " *Id.* Finally, this Court noted that the trial court had specifically found that the plaintiff had not provided income tax returns for 2004

or 2005, and citing *Diehl* in support, concluded that the trial court had not utilized the plaintiff's earning capacity to reach its income determination. *Id.* at 78-79, 657 S.E.2d at 732.

However, in the instant case: (1) though it appears from the transcript that defendant did not produce his 2006 or 2007 tax returns at the 30 May 2008 hearing, there are no findings that defendant failed to produce these documents or that the financial documentation that defendant produced was inadequate and unreliable; (2) there are no findings that the court was utilizing financial documentation, such as tax returns from prior years, to arrive at its findings/conclusions as to defendant's income; (3) the court did not make extensive findings of fact to support its conclusion as to defendant's gross monthly income, nor did it make any findings regarding defendant's current ability to continue to generate the income he earned in prior years; and (4) the financial documentation from prior years, which was produced, i.e., the 2005 tax return and the two 2005 Form 1099's, does not support the trial court's findings/conclusions that defendant earned $500.00 per month from commercial fishing and $625.00 per month from towing and crushing cars. Rather, the trial court appeared to rely solely on plaintiff's testimony as to what defendant purportedly earned on average from commercial fishing and towing and crushing cars over the entire course of the marriage, not over one or two prior years as in *Diehl* and *Hartsell*. Finally, the trial court made absolutely no findings or conclusions regarding its decision to halve the figures provided by plaintiff.

In *Williams*, this Court noted that the trial court had "concluded as a matter of law [that the] defendant's monthly gross income [was] $3,200.00 . . . based on the . . . finding of fact that 'the most believable statement of income for the [d]efendant [was] the one submitted under oath to the Bankruptcy Court . . . .' " *Williams*, 179 N.C. App. at 841, 635 S.E.2d at 497. Because this statement of income had been filed eighteen months prior to the date "when the trial court's child support order was entered[,]" this Court concluded that "[in] calculating [the] defendant's monthly gross income[,] the trial court used [the defendant's] capacity to earn as the basis for its calculation." *Id.* (internal quotation marks omitted). Furthermore, because the trial court's order lacked the necessary findings of bad faith or deliberate suppression of income, this Court determined that "the trial court erred by considering [the] defendant's capacity to earn, in computing [the defendant's] gross monthly income . . . ." *Id.* at 841, 635 S.E.2d at 498 (internal quotation marks omitted).

Similarly, here, we conclude that the trial court erred by considering defendant's capacity to earn in calculating his gross monthly income without the requisite findings of fact. In addition, the trial court's order lacks sufficient findings to support its legal conclusions, which further frustrates this Court's review. Consequently, we reverse the trial court's order and remand this case to the trial court for an appropriate determination of defendant's monthly gross income, at which time either party may offer additional evidence on this issue. In this regard, we note that as to "[i]ncome [v]erification[,]" the Child Support Guidelines provide, in pertinent part:

> Income statements of the parents should be verified through documentation of both current and past income. Suitable documentation of current earnings (at least one full month) includes pay stubs, employer statements, or business receipts and expenses, if self-employed. Documentation of current income must be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period.

Guidelines, 2009 Ann. R. N.C. 43. We further note that if defendant fails to comply with this provision, "[s]anctions may be imposed . . . on the motion of [plaintiff] or by the court on its own motion." *Id.*

Reversed and remanded.

Judges CALABRIA and HUNTER, Robert N., Jr. concur.

ELIZABETH ELAINE PARDUE, PLAINTIFF v. MICHAEL BRINEGAR AND WIFE, APRIL B. BRINEGAR; FRANCES BRINEGAR, DEFENDANTS

No. COA08-1367

(Filed 18 August 2009)

1. Real Property— quiet title action—location of boundaries on ground—jury question

The trial court did not err in an action to quiet title by denying plaintiff's motion for directed verdict and submitting the issue of the boundary location to the jury because the location of a boundary on the ground is a factual question for the jury.

2. Civil Procedure— motion for judgment notwithstanding verdict—prior directed verdict motion

The trial court did not err in an action to quiet title by denying plaintiff's motion for judgment notwithstanding the verdict because there was more than a scintilla of evidence supporting defendants' claimed location of the boundary line.

Judge STEELMAN dissenting.

Appeal by plaintiff from judgment entered 16 May 2008 by Judge Michael D. Duncan in Wilkes County District Court. Heard in the Court of Appeals 25 March 2009.

McElwee Firm, PLLC, by John M. Logsdon, for plaintiff.

Stone & Christy, P.A., by Bryant D. Webster for defendants.

ELMORE, Judge.

BACKGROUND

Plaintiff Elizabeth Elaine Pardue owns a tract of land in Wilkes County that adjoins and lies southwest of a tract owned by defendants Michael Brinegar, April Brinegar, and Frances Brinegar (the Brinegars). Pardue commenced a quiet title action on 31 May 2007 in order to determine the true boundary line between Pardue's and the Brinegars' tracts. Both parties claimed ownership of a 0.79 acre disputed zone.

Pardue's chain of title described the boundary with the Brinegars' tract as:

> BEGINNING on a white oak in the old S.P. Smith line and runs *up the branch*, South 11 ½ degrees West 32 poles to a maple, at the forks of said branch; then South 62 degrees East up the east prong of said branch 56 poles to a post oak on the east side of the public road.

(Emphasis added.)

The Brinegars' chain of title described the same boundary as:

> [From two white oaks in the S.P. Smith line on the west bank of a branch] then South 20 deg. West *up said branch* 32 poles to a maple at the fork of the branch; thence South 60 deg. East up the

> left prong 56 poles to a white oak (now down) on the South side of the public road.

(Emphasis added.)

At trial, the parties agreed that the disputed zone should be bound by the white oak in the S.P. Smith line, the maple at the forks of the branch, and the oak on the public road. However, Pardue contended that "up the branch" meant that the boundary between these three markers was following the meandering path of a stream, while the Brinegars contended that the phrase merely indicated the general direction of the boundary and that the boundary therefore followed straight line segments. The nature of the boundary line—a branch or straight line segments—was the primary issue at trial. At the close of all evidence, Pardue moved for a directed verdict, which was denied by the trial court. The trial court then instructed the jury as follows:

> Members of the jury, in cases such as this it is a function of the court to determine from the evidence presented a description of the boundary. After I give you the description of the boundary, it is your duty to use this description to locate the true boundary between the lands of the plaintiff and the defendant. I now instruct you that the description of the boundary is as follows:
>
> Beginning on a white oak in the old S.P. Smith line and runs up the branch South 11 ½ degrees West 32 poles to a maple at the forks of said branch; then South 62 degrees East up the east prong of said branch 56 poles to a post oak on the east side of the public road leading from Wilkesboro to Winston-Salem.

The jury determined that the true boundary was as the Brinegars had contended—that is, the boundary consisted of a straight line segment between the white oak and the forks of the branch, and then continued in another straight line segment from the forks of the branch to the post oak. After the jury was dismissed, Pardue moved for judgment notwithstanding the verdict; the motion was denied by the trial court, which then proceeded to enter a judgment in favor of the Brinegars based on the jury's verdict.

Pardue now appeals. For the reasons stated below, we affirm the trial court's judgment.

ARGUMENTS

I.

[1] Pardue's first argument is that the trial court erred by denying her motion for directed verdict and submitting the issue of the boundary location to the jury. We disagree.

Of primary importance here is the question of whether the shape of the boundary was one to be decided by the trial court or by the jury. North Carolina courts have consistently distinguished the role of the jury from the role of the court in matters of boundary location. "The determination of what the boundaries are is a question of law for the court. The *location* of the boundaries *on the ground* is a factual question for the jury." *Cutts v. Casey*, 271 N.C. 165, 167-68, 155 S.E.2d 519, 521 (1967) (emphases added); *see also Brown v. Hodges*, 232 N.C. 537, 541, 61 S.E.2d 603, 606 (1950) ("[W]hat constitutes the dividing line is a question of law for the court, but a controversy as to where the line is must be settled by the jury . . . ."); *Sherrod v. Battle*, 154 N.C. 345, 70 S.E. 834, 837 (1911) ("What are the termini or boundaries of a tract of land, a grant[,] or deed . . . is a matter of law; where these termini are, is a matter of fact.").

In the present case, both parties agreed on the description and location of three markers that outlined the boundary; however, they disagreed on whether the boundary that connected those markers consisted of straight line segments or the meandering path of a creek. Pardue contends that the path of the boundary line goes to *what* constitutes the boundary, and, therefore, is a question of law that should have been determined by the trial court, not the jury. The Brinegars contend that the path of the boundary is a question of fact because the jury's role is to decide where on the ground a boundary line is, and, therefore, the issue was properly submitted to the jury.

In this case, both parties had agreed upon the ground location of only three points on the boundary; the ground locations of all remaining points on the boundary were still in dispute. Using the chains of title, the trial court gave instructions describing what the disputed boundary should be: "Beginning on a white oak in the old S.P. Smith line and runs up the branch." It was the jury's job to use this description to determine where the remaining boundary points were located on the ground. The fact that three singular points out of the entire boundary had been agreed upon does not necessarily mean that the entire boundary's ground location flows therefrom. The trial court

could have properly allowed Pardue's motion for directed verdict only if "the location of th[e] boundary is admitted," or "the location of the declared boundary is uncontroverted by evidence." *Brown*, 232 N.C. at 541, 61 S.E.2d at 606. That is, a directed verdict is appropriate in boundary disputes only when there is no real factual dispute as to the boundary's ground location, meaning that the issue resolves itself into a question of law. In the present case, however, the full ground location of the boundary had not been admitted, and the evidence of its location was precisely what was in dispute. If the trial court had decided the issue of whether the boundary followed a straight line or a meandering line, then the trial court would necessarily have been determining the controverted factual question of the location on the ground of the boundary, which is a duty specifically in the province of the jury. *Cutts*, 271 N.C. at 168-69, 155 S.E.2d at 521. Therefore, the location on the ground of the remaining points of the boundary line was properly for the jury's determination.

The question then becomes whether there was enough evidence for the trial court to deny Pardue's motion for a directed verdict and actually submit it to the jury.

> The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict . . . the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury. Generally, when there is more than a scintilla of evidence to support the non-movant's claim or defense, a motion for directed verdict . . . should be denied.

N.C. Indus. Capital, LLC v. Clayton, 185 N.C. App. 356, 362, 649 S.E.2d 14, 19-20 (2007) (citations omitted). As such, this Court will affirm the trial court's denial of Pardue's motion for a directed verdict and subsequent submission of the issue to the jury so long as there is at least a scintilla of evidence to support the Brinegars' claim that the true boundary location followed a straight line rather than the meanderings of a stream.

Pardue had no objection to the Brinegars presenting John Steven Steele as an expert in the field of land surveying. Steele testified as to two primary reasons why he believed that the boundary was comprised of straight line segments rather than a meandering line follow-

ing the stream. First, Steele testified that straight line segments would have matched the distances stated on both parties' chains of title to within forty feet; however, if the boundary were meandering, then the distances in the chains of title would have been off by 140 feet. As such, the measurements from the original deeds more closely matched a straight line boundary than a meandering boundary. Second, he testified that the language "up the branch" was not typically used to indicate following the meanderings of a stream. "Normally it would say something like: Thence with the meanders of the stream or branch." In fact, the chains of title did use the term "meanders" in describing the boundary's course along a road, further implying to Steele that, if the original deed had meant for another portion of the boundary to follow a stream, then the deed would have used the term "meanders" in that instance as well. Steele testified that "up the branch" was a term indicating "a general direction" that the boundary followed along a given bearing.

Based upon these reasons, Steele concluded that "rather than going exactly with the branch" of the stream, the boundary "went on the straight line, from corner to corner. The branch was not the boundary line." This expert witness, along with the deeds and maps that he referenced, constitute more than a scintilla of evidence supporting the Brinegars' claimed location of the boundary line.

Pardue cites numerous cases from as far back as 1795 that address the issue of deed construction and how straight lines—as opposed to meanderings—were indicated on deeds. Pardue cites *Board of Transportation v. Pelletier*, 38 N.C. App. 533, 248 S.E.2d 413 (1978), which states: "In construing a deed description it is the function of the court to determine the true intent of the parties as embodied in the entire instrument. The intention of the parties as apparent in a deed should generally control in determining the property conveyed thereby." *Id.* at 536-37, 248 S.E.2d at 415. Pardue claims that *Pelletier* requires the trial court to determine whether the parties in the deed intended the boundary to run as a straight line or as a meandering line. However, the trial court in the present case fulfilled its job by determining that both parties meant the boundary to run "up the branch" of the stream. There was no dispute about whether this language was describing the parties' intent; the dispute was about where this language would dictate the boundary to fall on the ground—which is a question for the jury. If Pardue's literal construction of *Pelletier* is correct, then there would rarely be an issue to submit to the jury because the parties' intent as to the location of the

boundary would be decided by the trial court, and, therefore, there would no longer be any factual dispute for the jury.

Pardue heavily relies on *Tallahassee Power Co. v. Savage*, 170 N.C. 625, 87 S.E. 629 (1916), in support of her argument that "up the branch" should be read as "meandering with the branch." However, *Tallahassee* states that "[i]t is a leading rule in the construction of all instruments that effect should be given to every part thereof; and, in expounding the descriptions in a deed or grant . . . they ought all to be reconciled if possible, and as far as possible." *Id.* at 711, 87 S.E. at 631. In the present case, the original deeds listed distances between the agreed-upon points that fit considerably closer if the boundary consists of straight line segments rather than a meandering path; also, the deeds used the word "meanderings" in the context of a road but not in the context of this stream. If we follow *Tallahassee*'s language that effect should be given to every part of an instrument if at all possible, then the uncontroverted distances on the original deed instruments and the selective usage of the word "meanderings" only add to the Brinegars' argument that the original instruments called for a straight line boundary when they used the phrases "up the branch" and "up said branch." As Pardue herself concedes, "if the intent is not apparent from the deed[,] resort may be had to the general rules of construction." *Pelletier*, 38 N.C. App. at 536, 248 S.E.2d at 415. Since there is evidence from the original deeds that the boundary was intended to consist of straight line segments, then there is no need to resort to general rules of construction that Pardue also cites at length.

If the trial court had followed Pardue's argument and allowed a directed verdict on this topic, the trial court would have committed error by usurping the jury's role of settling a disputed factual question that determined the ground location of the boundary. Therefore, the proper question before this Court is whether there was more than a scintilla of evidence to support a finding by a jury on a topic that was properly before it. We hold that there was more than a scintilla of evidence supporting the Brinegars' contended boundary location, and, therefore, the trial court properly denied Pardue's motion for directed verdict. Accordingly, Pardue's argument fails.

II.

[2] Pardue next argues that the trial court also erred by denying her motion for judgment notwithstanding the verdict. Again, we disagree.

"Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, this Court has required the use of the same standard of sufficiency of evidence in reviewing both motions." *N.C. Indus. Capital, LLC*, 185 N.C. App. at 362, 649 S.E.2d at 20 (2007) (citation omitted).

Therefore, the same arguments in Section II, *supra*, that affirmed that the trial court did not err by denying Pardue's motion for a directed verdict and then submitting the issue to the jury are the same arguments that will affirm the trial court's denial of Pardue's motion for judgment notwithstanding the verdict. There was more than a scintilla of evidence supporting the Brinegars' claimed location of the boundary line, and, therefore, it would have been improper for the trial court to have taken this issue out of the jury's hands by directing a verdict or a judgment notwithstanding the verdict in favor of Pardue. As such, Pardue's argument fails.

Accordingly, we affirm the judgment of the trial court.

Affirmed.

Judge BRYANT concurs.

Judge STEELMAN dissents by separate opinion.

STEELMAN, Judge, dissenting

I respectfully dissent from the majority's analysis affirming the trial court's denial of plaintiff's motion for directed verdict at the close of all of the evidence, and the denial of plaintiff's motion for judgment notwithstanding the verdict after the trial.

A deed is to be construed by the court and not by the jury. *Wal-Mart Stores, Inc. v. Ingles Mkts., Inc.*, 158 N.C. App. 414, 417, 581 S.E.2d 111, 114 (2003) (quoting *Elliott v. Cox*, 100 N.C. 536, 538, 397 S.E.2d 319, 320 (1990)). " 'The language of the deed being clear and unequivocal, it must be given effect according to its terms, and we may not speculate that the grantor intended otherwise.' " *County of Moore v. Humane Soc'y of Moore Cty., Inc.*, 157 N.C. App. 293, 298, 578 S.E.2d 682, 685 (2003) (quoting *Southern Furniture Co. v. Dep't of Transp.*, 133 N.C. App. 400, 403, 516 S.E.2d 383, 386 (1999)). Ordinary terms contained in a deed must be given their plain meaning. *Id.*

The language of the deeds in the chain of title for both the property of plaintiff and defendants states the boundary line runs "up the branch," and not in two straight lines between the three undisputed markers.[1] The terms must be given effect according to their plain meaning, and the grantors intended for the branch or stream to be the dividing line between the two properties. " 'The Court considers it settled upon authority that up the river is the same as along the river, unless there be something else beside course and distance to control it.' " *Tallassee Power Company v. C.W. Savage et al.*, 170 N.C. 625, 630, 87 S.E. 629, 631 (1916) (citation omitted). According to the express language contained in the deed, the grantors intended for the boundary line to run along the branch.

The grantors' description of the branch as the boundary controls over the distances mentioned in the deed. In the cases cited by the majority, the call for a permanent natural monument controls the boundary, rather than any distance contained in the deed. *Cutts v. Casey*, 271 N.C. 165, 170, 155 S.E.2d 519, 522 (1967); *Brown v. Hodges*, 232 N.C. 537, 541, 61 S.E.2d 603, 606 (1950). The boundary begins at "a white oak . . . and runs up the branch . . . to a maple, at the forks of said branch." Then, from the maple "up the east prong of said branch . . . to a post oak." The branch is a permanent natural monument, which the grantors described in the deeds. This description unequivocally established the branch as the natural boundary between the two properties.

The majority holds that a factual dispute as to the location of the boundary lines existed for the jury to decide. However, there is no latent ambiguity that required the jury to determine which branch on the property the grantor intended to describe in the deed. *See Sherrod v. Battle*, 154 N.C. 345, 349-50, 70 S.E. 834, 836 (1911). The only issue in this case is what constituted the boundary lines described as running "up the branch." The determination was a matter of law for the court, not the jury.

I would hold the boundary line in dispute followed the path of the stream according to the express language contained in the deeds of both parties. The trial court should have granted plaintiff's motion for directed verdict at the close of all the evidence, and should not have submitted the case to the jury. The judgment of the trial court should be reversed, and the case remanded to the District Court of Wilkes County for entry of judgment in favor of plaintiff.

1. A copy of a plat showing the location of the branch and the disputed properties is attached to this dissent.

CHARLIE L. RICHARDSON, PETITIONER v. N.C. DEPT OF PUBLIC INSTRUCTION LICENSURE SECTION, RESPONDENT

No. COA09-83

(Filed 18 August 2009)

1. Administrative Law; Schools and Education— judicial review of final agency decision—unethical conduct—loss of teacher's license

A whole record review revealed the trial court did not err by affirming the final agency decision of the State Board of Education denying petitioner teacher's request for reinstatement of his teaching license because a reasonable public school teacher of ordinary intelligence, utilizing common understanding, would know that sending threatening and obscene letters to his supervisor would place the teacher's professional position in jeopardy.

2. Administrative Law; Schools and Education— judicial review of final agency decision—dismissal of career employee—teacher

The superior court did not err by failing to make findings of fact addressing petitioner teacher's argument that there was an error of law based on a failure to follow the administrative statutory procedures for dismissal of a career employee under N.C.G.S. § 115C-325(h)(2).

3. Administrative Law— judicial review of final agency decision—whole record test—abuse of discretion standard—arbitrary and capricious standard

The trial court did not err by applying the whole record test and finding that defendant's adoption of the decision of the ALJ was not arbitrary, capricious, or an abuse of discretion because: (1) there was no evidence in the record that anything presented to or considered by the Ethics Committee panel or the superintendent was improper, irrelevant, or tainted by the decision-making process; and (2) petitioner did not carry his burden to show that the trial court erred in finding that the denial of the request for reinstatement was not arbitrary, capricious, or an abuse of discretion.

4. Administrative Law— judicial review of final agency decision—burden of proof

The trial court did not err by finding that the adoption of the ALJ's decision was not error based on petitioner teacher's failure to show that the conduct underlying revocation did not involve moral turpitude or immorality.

Appeal by petitioner from order entered 1 August 2008 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 June 2009.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for the State.

Gray, Johnson & Lawson, LLP, by Sharon M. Lawson-Davis, for plaintiff-appellant.

BRYANT, Judge.

Petitioner Charlie L. Richardson appeals from an order entered in Mecklenburg County Superior Court affirming the decision of the State Board of Education[1] to deny reinstatement of his teaching license. We affirm the order of the Superior Court.

Facts

Richardson was a teacher for twenty-two years and held a teaching license (license) issued by the North Carolina State Board of Education (SBOE). In 1994, Richardson brought suit in the United States District Court for the Western District of North Carolina against his employer, the Cabarrus County Board of Education (the Board), alleging that the Board had unlawfully denied him promotion because of his race and had given him low evaluations and not promoted him because he had filed discrimination charges with the Equal Employment Opportunity Commission (EEOC).

A federal magistrate dismissed all of the claims except that which alleged discrimination by the Board in failing to promote Richardson to Assistant Principal. At trial, a jury was unable to render a verdict, and the federal magistrate declared a mistrial. A retrial was scheduled, but before it was held, the parties reached a settlement.

1. The North Carolina Department of Public Instruction, the named respondent, is comprised of such divisions and departments as the State Board of Education considers necessary for supervision and administration of the public school system. N.C. Gen. Stat. § 115C-21(a) (2007).

A few weeks after the mistrial, Jessie Blackwelder, Assistant Superintendent for the Cabarrus County Schools and a designated witness for respondent, received an anonymous letter. The letter referred to Blackwelder's "lies," noted that it was time "to get [her] back," and referred to "incriminating evidences" which would be revealed "to Mr. Richardson's attorney . . . [and] to Judge Horn, too" unless Richardson received an administrative position "immediately." The letter also "promise[d]" Blackwelder jail, fines, and "sudden retirement" if she did not cooperate with the demands made by the anonymous author.

Four months later, on 8 April 1997, Blackwelder received a second anonymous letter referring to the settlement agreement as a "cheap ass deal" that Richardson was too smart to sign. The tone and content of the letter was angrier and more threatening than the first and referred to Blackwelder by derogatory names. Blackwelder intercepted a third anonymous letter addressed to her husband that said among other things that she would learn not to mess with the writer.

The Federal District Court granted the Board a hearing on its motion to dismiss and Richardson's motion to enforce the settlement agreement. An evidentiary hearing was held on 12 April 1997 to determine if Richardson was engaged in witness tampering or intimidation. Two additional hearings were conducted on 12 May 1997 and 2 July 1997. Richardson denied typing or sending any of the anonymous letters. However, there was evidence presented that the first letter was typed on the same typewriter used to type employment inquiries submitted and signed by Richardson. A federal magistrate concluded that Richardson typed and mailed the three anonymous letters or caused them to be typed and mailed. The magistrate further concluded that Richardson's conduct was intentional, egregious, and in bad faith and that the letters threatened Blackwelder; Richardson attempted to intimidate Blackwelder; and Richardson's actions "likely" violated federal laws dealing with perjury and intimidating witnesses.

On 29 August 1997, having concluded that Richardson was the author of the anonymous letters, the magistrate granted the Board's motion to dismiss and released the Board from the settlement agreement. Richardson was also barred from filing any claim based on the pending EEOC "right to sue" notice which had been incorporated in the aborted settlement agreement. The magistrate's decision was affirmed by the Fourth Circuit Court of Appeals. *See Richardson v.*

Cabarrus County Bd. of Educ., 151 F.3d 1030 (table), 1998 U.S. App. LEXIS 24380 (4th Cir. 1998).

Richardson filed a Petition for Contested Case Hearing in the North Carolina Office of Administrative Hearings (OAH), and a hearing was held on 5 November 1999 before Administrative Law Judge (ALJ) Robert C. Reilly. ALJ Reilly, in an order dated 11 April 2000, concluded that Richardson had engaged in conduct that was unethical. ALJ Reilly also found that Richardson's conduct in sending the threatening and obscene letters had a "reasonable and adverse" relationship to his continuing ability to perform any of his professional functions in an effective manner and recommended to the SBOE that Richardson's license be revoked. On 3 August 2000, the SBOE revoked Richardson's license. Thereafter, Richardson pursued appeals of the final agency decision by the SBOE to the North Carolina Superior Court, the North Carolina Court of Appeals, and the North Carolina Supreme Court; all courts upheld the license revocation.

On 17 February 2006, a panel of the Superintendent's Ethics Advisory Committee—an informal committee appointed by the Superintendent to review various matters related to the licensing of teachers—considered an application by Richardson for reinstatement of his license.[2] On 12 June 2006, the Office of the State Superintendent issued a letter notifying Richardson that the panel concluded that his license had been revoked due to moral turpitude and grounds listed in G.S. 115C-325(e)(1)b (immorality) and that the panel's recommendation was that his license not be reinstated. State Superintendent, June Atkinson, concurred with the panel's recommendation, and Richardson's request for reinstatement was denied. Richardson petitioned the OAH to compel the Department of Public Instruction to act in his favor.

After a hearing on 6 October 2006, Administrative Law Judge (ALJ) Beecher R. Gray on 3 November 2006 entered a decision holding that the denial of Richardson's request for reinstatement by the Department of Public Instruction Licensure Section was supported by the evidence. ALJ Gray recommended that the SBOE issue a final agency decision upholding the decision to deny reinstatement of Richardson's license. On 5 April 2007, the SBOE adopted ALJ Gray's decision, without modification, as its final agency decision and denied Richardson's request for reinstatement of his license.

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2. Richardson sought reinstatement of his license on at least three prior occasions.

Richardson filed a Complaint for Judicial Review of the final agency decision in Mecklenburg County Superior Court. Superior Court Judge Beverly T. Beal held a hearing on 20 March 2008 and entered an order on 1 August 2008 affirming the final agency decision of the SBOE denying reinstatement of Richardson's license. Richardson appeals.

On appeal, Richardson presents the following questions: whether the trial court erred in (I) concluding that Richardson's original revocation based on "unethical" conduct does not preclude a subsequent finding of "immoral" conduct for purposes of reinstatement; (II) failing to make findings of fact as to whether defendant failed to follow the administrative statutory procedures for dismissal of a career employee; (III) finding that defendant's adoption of the decision of the ALJ was not arbitrary, capricious, or an abuse of discretion; and (IV) finding that defendant's adoption of ALJ Gray's decision was not error.

Standard of Review

Under North Carolina General Statutes section 150B-51, a court may reverse or modify an agency's decision if the substantial rights of the petitioner have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. 150B-51(b) (2007).

Judicial review of whether an agency decision was based upon an unlawful procedure or an error of law requires *de novo* review. *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990). The agency's decision is presumed to be made in good faith and in accordance with governing

law. Therefore, the burden is on the party asserting otherwise to overcome such presumptions by competent evidence to the contrary when making a claim that the decision was affected by error of law or procedure. *Albemarle Electric Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E.2d 811 (1972).

When a petitioner claims that an agency action is unsupported by substantial evidence in view of the entire record or that the decision is arbitrary, capricious, or an abuse of discretion, the standard of review for the reviewing court is the "whole record" test. *Rector v. North Carolina Sheriffs' Educ. & Training Standards Comm'n*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991). The North Carolina Supreme Court has described the "whole record" test as follows:

> The whole record test requires the reviewing court to examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Therefore, if we conclude there is substantial evidence in the record to support the Board's decision, we must uphold it. We note that while the whole-record test does require the court to take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached, the test does not allow the reviewing court to replace the [] Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.

Meads v. North Carolina Dep't of Agric., Food & Drug Protection Div., Pesticide Sec., 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998) (internal citations and quotations omitted).

This Court has held that under the whole record test, "[a]dministrative agency decisions may be reversed as arbitrary or capricious if they are 'patently in bad faith,' or 'whimsical' in the sense that 'they indicate a lack of fair and careful consideration' or 'fail to indicate "any course of reasoning and the exercise of judgment." ' " *Rector*, 103 N.C. App. at 532, 406 S.E.2d at 617 (quoting *Lewis v. North Carolina Dep't of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989)). However, "[t]here is a rebuttable presumption that an administrative agency has properly performed its official duties[,]" *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution*, 92 N.C. App. 1, 6, 373 S.E.2d 572, 575

(1988), *rev'd on other grounds*, 324 N.C. 373, 379 S.E.2d 30 (1989), and a petitioner has the burden to prove that the agency acted erroneously. *Id.*

I

[1] Richardson argues that the trial court erred when it affirmed the final agency decision of the SBOE denying his request for reinstatement of his license. Richardson contends that because the revocation of his license was based on "unethical" conduct and the denial of his request for reinstatement of his license was based on "immoral" conduct, that such inconsistent bases constituted error. We disagree.

Under North Carolina Administrative Code, Title 16, Chapter 6, Subchapter 6C, Section 0312(a), the SBOE may revoke a teaching license based upon several grounds, including "any . . . unethical . . . conduct by a person, if there is a reasonable and adverse relationship between the underlying conduct and the continuing ability of the person to perform any of his/her professional functions in an effective manner[.]" 16 N.C.A.C. 6C.0312(a) (2007). Under 16 N.C.A.C. 6C.0312(f)(1), the SBOE may not reinstate the license if the action that resulted in revocation involved abuse of minors, moral turpitude, or grounds listed in N.C. Gen. Stat. 115C-325(e)(1)(b). 16 N.C.A.C. 6C.0312(f)(1) (2007). Under N.C.G.S. § 115C-325(e)(1)(b), "immorality" is listed as a ground for dismissal.

Richardson's license was initially revoked because he had engaged in unethical conduct by sending threatening and obscene letters to his supervisor which had a "reasonable and adverse" relationship to his continuing ability to perform any of his professional functions in an effective manner. Richardson then applied for reinstatement of his license and such application was rejected. Richardson now argues that there is a difference between immoral and unethical conduct. We disagree.

We do however agree with the reasoning of ALJ Gray that the original revocation based on "unethical" conduct can be fairly characterized as constituting "immorality," which has been defined as "such conduct that by common judgment reflects upon a teacher's fitness to teach[.]" *Barringer v. Caldwell County Bd. of Educ.*, 123 N.C. App. 373, 381, 473 S.E.2d 435, 440 (1996). ALJ Gray also found that the conduct underlying Richardson's license revocation was "immoral" under the definition enumerated by the court in *Barringer*. Richardson's original revocation was based upon unethical behavior

that negatively impacted his fitness to teach. As the State Superintendent stated in her 12 June 2006 letter to Richardson:

> The panel concluded that your license . . . was revoked due to moral turpitude and grounds listed in G.S. 115C-325(e)(1)b. (immorality). . . . As a result, the panel concluded that it could not recommend that your license be reinstated on the grounds that the action that resulted in revocation was based on moral turpitude and grounds listed in G.S. 115C-325(e)(1)b (immorality).

The conduct giving rise to the revocation of Richardson's license is the same conduct upon which the agency based its refusal to reinstate his license, which conduct can be classified as both unethical and immoral. "Accordingly, a reasonable public school teacher of 'ordinary intelligence,' and utilizing 'common understanding,' would know that [sending threatening and obscene letters to his supervisor would] . . . consequently plac[e] the teacher's professional position in jeopardy." *Id.* at 382, 473 S.E.2d at 441.

Upon review of the whole record, there is substantial evidence to support the superior court's decision to uphold the SBOE's final agency decision adopting ALJ Gray's ruling that Richardson's conduct constituted "immorality." Therefore, this assignment of error is overruled.

II

[2] Richardson argues that the superior court erred by failing to make findings of fact addressing his argument that there was an error of law because defendant failed to follow the administrative statutory procedures for dismissal of a career employee under N.C. Gen. Stat. § 115C-325(h)(2). We disagree.

Richardson contends that the ALJ and superior court could not use N.C. Gen. Stat. 115C-325(e)(1)(b) to uphold the denial of his reinstatement because this statute only applies when a career employee is dismissed or demoted, and therefore because he resigned, the statute is inapplicable to him. Richardson argues that 16 N.C.A.C. 6C.0312(a)(8) should be used instead. However, Richardson fails to refer this Court to any assignments of error and fails to cite to any authority for these arguments. Therefore, pursuant to N.C. R. App. P. 28(b)(6), these arguments are deemed abandoned.

We do note that the procedures for reinstatement of teaching licenses after revocation as set forth in the SBOE Rules at 16 N.C.A.C.

6C.0312(f) and in Chapter 150B of the North Carolina General Statutes, were properly followed. Richardson also argues that the decision to deny the license reinstatement was made upon unlawful procedure because the grounds justifying license revocation, 16 N.C.A.C. 6C.0312(a)(8), were not the same grounds used to deny his reinstatement, N.C. Gen. Stat. 115C-325(e)(1). Much of Richardson's argument is based on his requests for and denial of reinstatement in May, November, and December 2003. These actions are not a part of this appeal and will not be addressed. Richardson's other contention regarding use of the same conduct to uphold his 2006 denial of reinstatement has been addressed in Issue *I*, *supra*. This assignment of error is overruled.

III

[3] Richardson argues that the trial court committed error by applying the "whole record" test and finding that defendant's adoption of the decision of ALJ Gray was not arbitrary, capricious, or an abuse of discretion. We disagree.

Richardson points to the minutes of the Ethics Advisory Committee panel to support his argument that the adoption of the ALJ's decision was arbitrary, capricious, or an abuse of discretion. According to Richardson, there was nothing in the minutes that reflected any discussion about the statutory requirements for reinstating his license and whether he met those requirements. He also alleges that some of the information discussed by the Ethics Committee panel was not relevant to the determination of whether he met statutory grounds for reinstatement.

The minutes reveal that Richardson's request was presented to the Ethics Committee panel and that Counsel for the Ethics Committee panel explained the background of his case, including the conduct that gave rise to the revocation of his license Additionally, as ALJ Gray found, the Ethics Committee is advisory only. "The Superintendent is not bound by any recommendation and is free to base her licensure decisions on information presented to her different from or in addition to that which came before the committee."

There is no evidence in the record that anything presented to or considered by the Ethics Committee panel or the Superintendent was improper, irrelevant, or tainted by the decision-making process. We hold that Richardson did not carry his burden to show that the trial

court erred in finding that the denial of the request for reinstatement was not arbitrary, capricious, or an abuse of discretion. Accordingly, this assignment of error is overruled.

IV

[4] Richardson argues that the trial court committed error by finding that defendant's adoption of ALJ Gray's decision was not error because Richardson failed to show that the conduct underlying revocation did not involve moral turpitude or immorality. We disagree.

It is well-settled that a petitioner has the burden of proof at an administrative hearing to prove that he is entitled to relief from the action of the administrative agency. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 635 S.E.2d 442 (2006). This burden is on the petitioner even if he must prove a negative. *Id.*

Because Richardson has failed to show any error in the trial court's decision, this assignment of error is overruled.

AFFIRMED.

Judges CALABRIA and ELMORE concur.

BARLOWORLD FLEET LEASING, LLC, PLAINTIFF v. PALMETTO FOREST PRODUCTS, INC. AND CHRISTOPHER B. RILEY, DEFENDANTS

No. COA08-1391

(Filed 18 August 2009)

1. Jurisdiction— personal—findings—supported by affidavit

Findings about personal jurisdiction over a South Carolina business were supported by an affidavit about two equipment leases that was based on personal knowledge. The affidavit stated that defendants executed the leases and forwarded them to plaintiffs in North Carolina for acceptance; the leases were accepted by the affiant, which formed the contract; copies of the agreements showed plaintiff's physical address as being in North Carolina; and payments under the contracts were collected in North Carolina.

2. Jurisdiction— personal—minimum contacts—satisfied

The minimum contacts requirement for personal jurisdiction in North Carolina over a South Carolina business was satisfied where equipment lease contracts were made in North Carolina and were to be performed in North Carolina, and the contracts and attendant regular payments were continuing obligations between defendants and a resident of North Carolina. Moreover, the lease contracts included a North Carolina choice of law provision.

3. Jurisdiction— personal—South Carolina business

North Carolina's exercise of personal jurisdiction over a South Carolina business did not offend due process where defendants purposefully directed their activities toward the state of North Carolina and defendants did not present a compelling case that other considerations would render jurisdiction unreasonable.

4. Appeal and Error— assignment of error—not supported by authority—abandoned

An assignment of error to the exercise of subject matter jurisdiction for which no authority was cited was deemed abandoned.

Appeal by defendants from order entered on or about 23 June 2008 by Judge David S. Cayer in Superior Court, Mecklenburg County. Heard in the Court of Appeals 22 April 2009.

Reginald L. Yates, for plaintiff-appellee.

Law Offices of Dale S. Morrison, by Dale S. Morrison, for defendants-appellants.

STROUD, Judge.

This case presents the sole question of whether the exercise of personal jurisdiction over defendants by the courts of the State of North Carolina comports with due process. Because we conclude that it does, we affirm.

I. Background

On 6 February 2003, plaintiff executed an equipment lease with defendant Palmetto Forest Products, Inc. ("Palmetto"). Plaintiff's address appears on the front of the lease document as 11301-C Granite Street, Charlotte, North Carolina. Palmetto's address is 667

Whitesville Road, Moncks Corner, South Carolina. Defendant Christopher Riley ("Riley"), signed the lease on behalf of Palmetto as president of the corporation. The lease provided that "THIS AGREEMENT SHALL BE GOVERNED BY AND SUBJECT TO THE INTERNAL LAWS OF THE STATE OF NORTH CAROLINA, NOTWITHSTANDING CHOICE OF LAW RULES." On 30 April 2004, the parties entered into a second equipment lease containing an identical choice of law provision. All payments pursuant to the lease were made to plaintiff's agent Barloworld Handling LP, also located in Charlotte, North Carolina.

On or about 8 April 2008, plaintiff filed a complaint in Superior Court, Mecklenburg County, alleging defendants had failed to pay sums due under the lease agreements. On or about 24 April 2008, defendants moved to dismiss the complaint for want of personal and subject matter jurisdiction. The motion alleged that defendants had never "done business in North Carolina[,]" and that "[a]ll events, transactions, negotiations, circumstances and performance of the two (2) lease contracts . . . occurred in or near Charleston, South Carolina."

The trial court heard the motion to dismiss on 3 June 2008. The trial court found that (1) the lease agreements contained North Carolina choice of law provisions, (2) "[t]he two lease agreements were consummated by Daniel Vincini's [sic] signature in Charlotte, North Carolina[,] and [(3)] the contracts between the parties were made in North Carolina and were to be performed in North Carolina." Accordingly, the trial court denied defendants' motion. Defendants appeal.

II. Standard of Review

On review of the denial of a motion to dismiss for want of personal jurisdiction, this Court first considers "whether the trial court's findings of fact are supported by competent record evidence." *Deer Corp. v. Carter*, 177 N.C. App. 314, 324, 629 S.E.2d 159, 167 (2006). If "the trial court's findings of fact are supported by competent evidence, we must conduct a *de novo* review of the trial court's conclusions of law and determine whether, given the facts found by the trial court," *id.* at 326, 629 S.E.2d at 168, "North Carolina statutes permit our courts to entertain this action against defendants, and, if so, whether this exercise of jurisdiction violates due process[,]" *Saxon v. Smith*, 125 N.C. App. 163, 168, 479 S.E.2d 788, 791 (1997) (citation, brackets and quotation marks omitted).

III. Findings of Fact

[1] Defendants contend that there is insufficient evidence to support any findings that the contracts entered into by plaintiff and defendants have a connection with the State of North Carolina.

Defendants specifically argue that any of the trial court's findings based on an affidavit submitted by Daniel Vicini ("the Vicini affidavit") were erroneous because the Vicini affidavit was not competent evidence. They argue that the trial court should have stricken the Vicini affidavit because it is "based on hearsay" and "does not . . . set forth any facts that might have been known to Vicini as the result of his own personal knowledge."

Affidavits which support a motion to dismiss for want of personal jurisdiction " '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[.]' " *Hankins v. Somers*, 39 N.C. App. 617, 620, 251 S.E.2d 640, 642 (quoting N.C.R. App. P. 56(e), and applying the competence standard for affidavits pursuant to a summary judgment motion to a motion to dismiss for want of personal jurisdiction), *disc. review denied*, 297 N.C. 300, 254 S.E.2d 920 (1979). The Vicini affidavit states on its face that the affiant "has personal knowledge" of "the matters and things that transpired with regard to the two lease agreements involved in this lawsuit[.]" Furthermore, Vicini's signature appears on both of the lease contracts. Accordingly, we conclude that Vicini's affidavit, based on his personal knowledge, was competent evidence on which the trial court could base its findings.

The Vicini affidavit states that "the defendants executed the lease[s] and forwarded [them] to the plaintiff in North Carolina for acceptance. [I, Daniel Vicini] accepted the lease[s] . . . which formed the contract[s] between the plaintiff and defendants." The record further contains copies of the lease agreements, in which plaintiff's physical address is clearly stated as Charlotte, North Carolina. Payments pursuant to the contracts were collected by plaintiff's agent in Charlotte, North Carolina. Taken together, this competent evidence supports the trial court's finding that the contracts between the parties were made in North Carolina and were to be performed in North Carolina. This argument is overruled.

IV. Due Process

Defendants argue that even if all the trial court's findings are based on competent evidence, exercise of personal jurisdiction in the

courts of North Carolina offends due process because defendants are South Carolina residents who never solicited business in North Carolina. The United States Supreme Court addressed a similar argument in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 85 L. Ed. 2d 528 (1985), and determined that Florida's exercise of personal jurisdiction over a Michigan resident "did not offend due process[,]" *id.* at 487, 85 L. Ed. 2d at 550, even though (1) the defendant had never even visited the state of Florida, and (2) the only contact defendant had with the plaintiff during contract negotiations was with representatives of the plaintiff's Michigan office, *id.* at 488, 85 L. Ed. 2d at 551 (Stevens, J., dissenting) (citing the findings of the lower court). For the reasons that follow, we conclude that *Burger King* controls and that the trial court's exercise of personal jurisdiction *sub judice* did not offend due process.

A. Minimum Contacts

[2] Defendants contend that they did not establish "minimum contacts" in North Carolina. The first step in the due process inquiry for personal jurisdiction is "whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King*, 471 U.S. at 474, 85 L. Ed. 2d at 542. *Burger King* stated that

> [t]he application of [the minimum contacts] rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Id. at 474-75, 85 L. Ed. 2d at 542 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253[, 2 L. Ed. 2d 1283, 1298] (1958)).

In applying the minimum contacts rule, *Burger King* held that "where the defendant deliberately has . . . created *continuing* obligations between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there[.]" *Burger King*, 471 U.S. at 475-76, 85 L. Ed. 2d at 543 (internal citation and quotation marks omitted; emphasis added). A contract standing alone does not "automatically establish sufficient minimum contacts." *Burger King*, 471 U.S. at 478, 85 L. Ed. 2d at 545. However, where "[t]he contract was delivered in [the forum state], the [payments] were mailed from [the forum state] and the [plaintiff] was a resident of [the forum state] when [his benefits vested,]" the contrac-

tual relationship is sufficient to establish minimum contacts. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 2 L. Ed. 2d 223, 226 (1957). Furthermore, in a close case, a contract choice of law provision designating the law of the forum State as governing the agreement weighs in favor of finding that a defendant has purposefully established minimum contacts within the forum State. *Burger King*, 471 U.S. at 482, 85 L. Ed. 2d at 547.

In *Burger King*, one basis for the Court's finding that sufficient minimum contacts existed was that the contract contained a Florida choice of law provision. *Id.* at 482, 85 L. Ed. 2d at 547. Furthermore, the evidence showed that

> [t]he contract documents themselves emphasize[d] that [plaintiff's] operations [would be] conducted and supervised from the [Florida] headquarters, that all relevant notices and payments must be sent there, and that the agreements were made in and enforced from [Florida]. Moreover, the parties' actual course of dealing repeatedly confirmed that decisionmaking authority was vested in the [Florida] headquarters . . . .

471 U.S. at 480-81, 85 L. Ed. 2d at 546 (internal citation omitted).

In the case *sub judice*, the trial court found that the lease contracts between the parties were made in North Carolina and were to be performed in North Carolina. The contracts and attendant regular payments represented "continuing obligations" between defendants and a resident of North Carolina, which means that defendants "availed [themselves] of the privilege of conducting business" in North Carolina. *Burger King*, 471 U.S. at 476, 85 L. Ed. 2d at 543; *see also McGee*, 355 U.S. at 223, 2 L. Ed. 2d at 226. In addition, an undisputed finding of fact states that the lease contracts included a North Carolina choice of law provision. These findings of the trial court were sufficient to support the trial court's implicit conclusion that defendants had "purposefully established minimum contacts within" North Carolina. *Burger King*, 471 U.S. at 476, 85 L. Ed. 2d at 543.

B. Fair Play and Substantial Justice

[3] Defendants also contend that the exercise of personal jurisdiction offends due process because the trial court's conclusion[1] that

1. This legal conclusion is incorrectly labeled as a finding of fact. *See Estate of Gainey v. Southern Flooring & Acoustical Co.*, 184 N.C. App. 497, 503, 646 S.E.2d 604, 608 (2007) (a legal conclusion mislabeled as a finding of fact is reviewed according to its substance not its label).

"[d]efendants have failed to present compelling evidence that the presence of other considerations . . . would render jurisdiction of this matter in North Carolina unreasonable[,]" incorrectly placed the burden of proof on them rather than plaintiff. Defendants further argue that "there is no unfairness or inconvenience to [plaintiff] if it is required to proceed in the State of South Carolina, rather than North, [sic] Carolina."

"Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Burger King*, 471 U.S. at 476, 85 L. Ed. 2d at 543 (citation and quotation marks omitted). The "fair play" factors listed in *Burger King*, including "the forum State's interest in adjudicating the dispute [and] the plaintiff's interest in obtaining convenient and effective relief . . . . sometimes serve to establish the reasonableness of jurisdiction upon a *lesser showing* of minimum contacts than would otherwise be required." *Id.* at 477, 85 L. Ed. 2d at 543-44 (citation and quotation marks omitted; emphasis added). Furthermore, "[a]lthough the Court has suggested that inconvenience [to the defendant] may at some point become so substantial as to achieve *constitutional* magnitude," *id.* at 484, 85 L. Ed. 2d at 548 (citing *McGee*, 355 U.S. at 223, [2 L. Ed. 2d at 226], emphasis in original), "*where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable*[,]" *id.* at 477, 85 L. Ed. 2d at 544 (emphasis added).

In *Burger King* the defendant, who had established minimum contacts in Florida, "failed to demonstrate how jurisdiction in that forum would otherwise be fundamentally unfair," 471 U.S. at 487, 85 L. Ed. 2d at 550, even though prosecution of the suit in Florida arguably impeded the defendant's ability to obtain witnesses in his favor, 471 U.S. at 490, 85 L. Ed. 2d at 552 (Stevens, J., dissenting) (citing the findings of the lower court). *But see* 471 U.S. at 483, 85 L. Ed. 2d at 548 ("[T]he Court of Appeals' assertion that the Florida litigation severely impaired [defendant's] ability to call Michigan witnesses who might be essential to his defense and counterclaim is wholly without support in the record." (Citation, quotation marks and footnote omitted.)) Accordingly, *Burger King* held that the forum

State, Florida, had personal jurisdiction over the Michigan resident defendant. 471 U.S. at 487, 85 L. Ed. 2d at 552.

In the case *sub judice*, we have already concluded that defendants purposefully directed activities at the State of North Carolina. *See supra* Part IV.A. Therefore, despite their contention that the trial court improperly assigned the burden of proof to them, defendants did indeed need to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King* at 477, 85 L. Ed. 2d at 544.

Defendants contend that jurisdiction is unreasonable because the trial court failed to give proper consideration to evidence that defendants are residents of South Carolina who "did not initiate any contact with North Carolina, and, in fact, had no knowledge of the involvement of any resident or citizen of this State." However, this is merely an argument that defendants did not have minimum contacts in North Carolina; it does not present a compelling case for why, given the presence of minimum contacts, exercise of personal jurisdiction over defendants offends "fair play and substantial justice." *Burger King*, 471 U.S. at 476, 85 L. Ed. 2d at 543 (citations and quotation marks omitted).

Defendants also argue that "there is no unfairness or inconvenience to [plaintiff] if it is required to proceed in the State of South Carolina, rather than North, [sic] Carolina." While "the plaintiff's interest in obtaining convenient and effective relief . . . . sometimes serve[s] to establish the reasonableness of jurisdiction upon a *lesser showing of minimum contacts than would otherwise be required*, *id.* at 477, 85 L. Ed. 2d at 543-44 (citation and quotation marks omitted; emphasis added), defendants cite no case, and we find none, for the proposition that a convenient location for the plaintiff other than the forum State shows that the exercise of jurisdiction over the defendant offends fair play and substantial justice. In fact, the plaintiff in *Burger King* made a similar argument, "contend[ing] that Florida's interest in providing a convenient forum is negligible given the company's size and ability to conduct litigation anywhere in the country." *Id.* at 483, 85 L. Ed. 2d at 547 n.25. That argument was summarily dismissed in a footnote. *Id.*

We conclude that the trial court did not err when it concluded "[d]efendants have failed to present compelling evidence that the presence of other considerations . . . would render jurisdiction of this

matter in North Carolina unreasonable." Accordingly, this argument is overruled.

V. Subject Matter Jurisdiction

[4] Defendants assign as error the trial court's exercise of subject matter jurisdiction over this case. However, defendants cite no authority in support of this assignment of error in their brief. Accordingly, this assignment of error is deemed abandoned. N.C.R. App. P. 28(b)(6) ("Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

VI. Conclusion

The trial court found that the lease contracts *sub judice* were made in North Carolina, were to be performed in North Carolina, and the parties agreed that North Carolina law would apply. These findings of minimum contacts were sufficient, when defendant presented no compelling reason why the trial court should not exercise personal jurisdiction, to support the trial court's conclusion that North Carolina's exercise of personal jurisdiction over defendants comports with due process. Accordingly, the order of the trial court is affirmed.

AFFIRMED.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA v. CURTIS ALLEN JACKSON

No. COA08-1517

(Filed 18 August 2009)

1. Search and Seizure— traffic stop—extended—seizure continued

A passenger in a car that has been stopped by a law enforcement officer is still seized when the stop is extended; a passenger would not feel any freer to leave when the stop is lawfully or unlawfully extended, especially under circumstances such as those in this case where the officer was questioning the driver away from the vehicle while the passenger waited in the vehicle.

A passenger subject to detention beyond the scope of the initial seizure is still seized under the Fourth Amendment and has standing to challenge the constitutionality of the extended detention.

2. Constitutional Law— traffic stop—extended seizure and search—not consensual

The search of a vehicle was unconstitutional where the initial stop rose from a suspicion that the driver was without a valid license; the officer extended the stop beyond what was necessary to confirm or dispel that suspicion, asking if there was anything illegal in the vehicle and whether she could search the vehicle; there was no evidence which could have provided the officer with reasonable and articulable suspicion to justify the extension of the detention; and there was no evidence that the encounter became consensual after the officer's initial suspicion was dispelled because there was no evidence that the driver's documentation was returned. A reasonable person would not have believed he was free to leave without his driver's license and registration.

3. Constitutional Law— fruit of poisonous tree—traffic stop extended without reasonable and articulable suspicion

A weapon and cocaine seized from a vehicle were discovered as a direct result of an illegal search and should have been suppressed as fruit of the poisonous tree. The cocaine found in defendant's sock at the jail was also the direct result of the illegal vehicle search and should also have been suppressed.

Appeal by Defendant from judgment entered 17 July 2008 by Judge James U. Downs in Rutherford County Superior Court. Heard in the Court of Appeals 23 April 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe and Special Deputy Attorney General Robert T. Hargett, for the State.

Michele Goldman for Defendant.

STEPHENS, Judge.

I. Procedural History and Factual Background

On 31 March 2008, Defendant was indicted on charges of possession with intent to sell and deliver cocaine and carrying a concealed weapon. On 23 May 2008, Defendant filed a motion to suppress the

cocaine and weapon found during searches of Defendant and the vehicle in which Defendant was a passenger. Defendant's motion was heard on 16 July 2008 in Rutherford County Superior Court.

The evidence presented by the State at the hearing tended to show the following: On 29 January 2008, Deputy Lori Bradley ("Bradley") of the Rutherford County Sheriff's Department was on duty in her patrol car on the side of a highway in Rutherford County. At approximately 4:00 p.m., an Explorer with three male occupants, one of whom was Defendant, passed Bradley's patrol car. Because the occupants "appeared to tense up when they went by," Bradley pulled out behind the Explorer and followed it for several miles. Bradley observed the vehicle brake and saw Defendant in the front passenger seat "put on a hood as if—if somebody might be trying to hide their identity." Bradley "ran the tag" of the Explorer and found it registered to John Roth ("Roth") of North Carolina. As she followed the vehicle, Bradley observed no problems with the manner in which the vehicle was driven, although she testified that it appeared to her "that [the occupants] were acting a little suspicious[.]" Bradley followed the vehicle until she was informed by Communications that Roth's license was inactive. Because the registered owner of the vehicle had an inactive license, and because the driver of the vehicle matched the description of the registered owner, Bradley pulled the vehicle over on suspicion that the driver was operating the vehicle without a license.

Bradley had the driver step out of the vehicle and patted him down because "[n]ormally, that is what we do." Bradley confirmed that the driver was John Roth and asked him about his expired North Carolina driver's license. Roth explained that he had moved back to North Carolina from Kentucky three weeks earlier, and had a valid Kentucky driver's license. Roth gave Bradley his Kentucky license and she went back to her vehicle to speak with Communications. Within a few minutes, Sergeant Allen Green ("Green") and Deputy Brian Atkins ("Atkins") arrived as backup. While Bradley checked Roth's driver's license, Atkins obtained the registration card from the vehicle. Atkins also obtained the identity of Defendant and the other passenger. A search on the names of the three occupants revealed no outstanding warrants.

After checking Roth's license, Bradley advised Roth that there were no problems with his license and explained to him that he needed to update his information with the North Carolina

Department of Motor Vehicles. "Because there was confusion with Mr. Roth finding out what the problem was with his license and all that and explaining everything to him[,]" the process took about 20 minutes.

Bradley testified that "[r]ight after the traffic stop was pretty much over," she asked Roth

> if there was anything illegal in the vehicle. He advised no. I asked if there was, specific, like, weapons, marijuana, any kind of drugs. He said no. I asked him if I could search the vehicle. Mr. Roth replied—first he said "the vehicle?" as in a question. And then he replied, "You can search the vehicle if you want to."

The three men then exited the vehicle and stood with Green while Bradley and Atkins searched the Explorer. In the back passenger door panel, Atkins discovered a bag of white powder which was later determined to be cocaine. When none of the men claimed the bag, the three men were placed in handcuffs "for officer safety reasons."

When Atkins resumed the search, a gun fell out of the bottom of the door panel where the cocaine had been discovered. As with the cocaine, none of the men claimed ownership of the gun. The officers then arrested Roth, Defendant, and the other passenger and transported them to the Rutherford County jail. At the jail, Defendant was searched and a bag of cocaine was discovered in Defendant's sock.

Based on the foregoing evidence, Judge Downs denied Defendant's motion to suppress, concluding, *inter alia*, that both the search of Roth's vehicle and the post-arrest search of Defendant were constitutional. Defendant reserved his right to appeal the denial of his motion and, after the State dismissed the charge of carrying a concealed weapon, Defendant entered a guilty plea to the reduced charge of simple possession of cocaine. Defendant was sentenced to six to eight months imprisonment. The trial court suspended the sentence and placed Defendant on 36 months supervised probation. **[R p 22]** Defendant appeals.

II. Discussion

A. Standing

[1] On appeal, Defendant argues that the trial court erred in denying Defendant's motion to suppress because the cocaine and the weapon were the fruits of an unlawfully extended and, thus, unconstitutional seizure. Before we address the merits of Defendant's appeal, we must

first determine whether Defendant has standing to challenge the constitutionality of the allegedly unconstitutional seizure.

This Court has held that when a traffic stop is illegally extended, the seizure becomes unlawful and the *driver* may challenge the constitutionality of the extended seizure. *See State v. Falana*, 129 N.C. App. 813, 816-17, 501 S.E.2d 358, 360 (1998) (unjustified delay after the initial purpose for the stop has been addressed is an unreasonable seizure in violation of the Fourth Amendment). The question before us is whether a *passenger* in the detained vehicle may also challenge the constitutionality of the extension of the seizure. We hold that a passenger may.

In *Brendlin v. California*, 551 U.S. 249, 168 L. Ed. 2d 132 (2007), the United States Supreme Court concluded that when a police officer makes a traffic stop, a passenger in the stopped vehicle, like the driver, is seized within the meaning of the Fourth Amendment because a reasonable person under such circumstances would not feel free to leave. Accordingly, the Court held that a passenger may challenge the constitutionality of the initial stop. *Id.* at 251, 168 L. Ed. 2d at 136.

Applying this same reasoning to the present issue, we must conclude that a passenger in a car that has been stopped by a law enforcement officer is still seized when the stop is extended. A passenger would not feel any freer to leave when the stop is lawfully or unlawfully extended, especially under circumstances such as those extant in this case where the officer was questioning the driver away from the vehicle while the passengers waited in the vehicle. This conclusion is further supported by the following reasoning of the *Brendlin* Court regarding the effect of its decision:

> Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal. The fact that evidence uncovered as a result of an [unconstitutional] stop would still be admissible against any passengers would be a powerful incentive to run the kind of "roving patrols" that would still violate the driver's Fourth Amendment right.

Id. at 263, 168 L. Ed. 2d at 143 (footnote and citation omitted).

Similarly, denying a passenger the right to challenge the constitutionality of an allegedly suspicionless search or detention subsequent

to a traffic stop would provide the same dangerous incentive for an officer to search a stopped vehicle after a lawful traffic stop ends, without suspicion or consent, and to then use any evidence of wrongdoing found in the vehicle to arrest and prosecute any of the vehicle's passengers. The Fourth Amendment cannot be interpreted to allow such an unjust result to the passenger and such a bold conflagration of the driver's constitutional rights. *Cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 555, 49 L. Ed. 2d 1116, 1126 (1976) ("The Fourth Amendment imposes limits on search and seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.").

Accordingly, we hold that a passenger subject to detention beyond the scope of the initial seizure is still seized under the Fourth Amendment and, therefore, has standing to challenge the constitutionality of the extended detention. *See Brendlin*, 551 U.S. at 251, 168 L. Ed. 2d at 136 (a person seized by the police is entitled to challenge the government's action under the Fourth Amendment).

B. Motion to Suppress

[2] We now turn to Defendant's contention that the trial court erred in denying Defendant's motion to suppress because the cocaine and the weapon were the fruits of an unlawfully extended and, thus, unconstitutional seizure. The applicable standard of review for a motion to suppress is explicated in *State v. Hernandez*, 170 N.C. App. 299, 612 S.E.2d 420 (2005), as follows:

> Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether [its] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion. However, the trial court's conclusions of law are reviewed *de novo* and must be legally correct.

Id. at 304, 612 S.E.2d at 423 (internal quotation marks and citations omitted).

A law enforcement officer may stop and briefly detain a vehicle and its occupants if the officer has reasonable, articulable suspicion that criminal activity may be afoot. *State v. Morocco*, 99 N.C. App. 421, 427, 393 S.E.2d 545, 548 (1990). "Generally, the scope of the detention must be carefully tailored to its underlying justification." *Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360 (internal quotation marks and citation omitted). Once the original purpose of the stop

has been addressed, in order to justify further delay, there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion or the encounter must have become consensual. *State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 755, *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008). Where no grounds for a reasonable and articulable suspicion exist and where the encounter has not become consensual, a detainee's extended seizure is unconstitutional. *See id.*

The scope of the detention in this case was necessarily limited to confirming or dispelling Bradley's suspicion that Roth was operating his vehicle without a license. *See State v. Fisher*, 141 N.C. App. 448, 458, 539 S.E.2d 677, 684 (2000) (officer may ask limited number of questions to try to obtain information confirming or dispelling officer's suspicions), *disc. review denied*, 353 N.C. 387, 547 S.E.2d 420 (2001). Once Bradley determined that Roth had a valid license and explained "the things [Roth] needed to do with DMV," the original purpose of the stop had been addressed.

The State contends that "[D]efendant's argument that the deputy unlawfully extended the detention is unfounded" as "[t]here is no 'extension' as claimed by [D]efendant." However, Bradley testified that "[r]ight after the traffic stop was pretty much over," Bradley continued her interrogation of Roth, asking

> if there was anything illegal in the vehicle. He advised no. I asked if there was, specific, like, weapons, marijuana, any kind of drugs. He said no. I asked him if I could search the vehicle. Mr. Roth replied—first he said "the vehicle?" as in a question. And then he replied, "You can search the vehicle if you want to."

Such interrogation was indeed an extension of the detention beyond the scope of the original traffic stop as the interrogation was not necessary to confirm or dispel Bradley's suspicion that Roth was operating without a valid driver's license and it occurred after Bradley's suspicion that Roth was operating without a license had already been dispelled. Accordingly, for this extended detention to have been constitutional, Bradley must have had grounds which provided a reasonable and articulable suspicion or the encounter must have become consensual. *See Myles*, 188 N.C. App. at 45, 654 S.E.2d at 755.

The State does not argue that Bradley had reasonable and articulable suspicion to extend the stop. Furthermore, the occupants of the vehicle had been cooperative with the officers throughout the stop, and Atkins confirmed "there were no problems with any of these

folks" while the driver's license issue was being resolved. In addition, there were no pending warrants for any of the vehicle's occupants. Accordingly, there was no evidence which could have provided Bradley with reasonable and articulable suspicion to justify the extension of the detention.

Furthermore, there is no evidence that the encounter became consensual after Bradley's suspicion that Roth was operating without a license was dispelled. Generally, an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration. *See State v. Kincaid*, 147 N.C. App. 94, 100, 555 S.E.2d 294, 299 (2001) (holding that because a reasonable person would have felt free to leave when his documents were returned, the initial seizure concluded when the officer returned the documents to defendant); *see also Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991) ("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." (internal quotation marks and citation omitted)). "Furthermore, the return of documentation would render a subsequent encounter consensual *only if* a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information." *Kincaid*, 147 N.C. App. at 99, 555 S.E.2d at 299 (internal quotation marks and citation omitted) (emphasis added).

Here, the evidence establishes that Bradley took Roth's driver's license to her patrol car and that Atkins brought the vehicle registration card to the patrol car. However, there is no evidence in the record that Roth's documentation was ever returned. As a reasonable person under the circumstances would certainly not believe he was free to leave without his driver's license and registration, Bradley's continued detention and questioning of Roth after determining that Roth had a valid driver's license was not a consensual encounter. Accordingly, the extended detention of Defendant was unconstitutional and Roth's eventual consent to search the vehicle was tainted by the illegality of the extended detention, thus rendering Roth's consent ineffective to justify the search. *See Florida v. Royer*, 460 U.S. 491, 507-08, 75 L. Ed. 2d 229, 243 (1983) (holding that because defendant was illegally detained when he consented to the search, that consent "was tainted by the illegality and was ineffective to justify the search"). Consequently, the search of the vehicle was unconstitutional. *See Myles*, 188 N.C. App. at 51, 654 S.E.2d at 758.

[3] We must now determine whether the weapon and the cocaine were the fruits of the illegal detention and search such that the evidence should have been suppressed.

Evidence that is discovered as a direct result of an illegal search or seizure is generally excluded at trial as fruit of the poisonous tree unless it would have been discovered regardless of the unconstitutional search. *See Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 455 (1963). This Court must ascertain

> "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

State v. Barnard, 184 N.C. App. 25, 40, 645 S.E.2d 780, 790 (2007) (quoting *Wong Sun*, 371 U.S. at 487-88, 9 L. Ed. 2d at 455 (quotation marks and citation omitted)), *aff'd*, 362 N.C. 244, 658 S.E.2d 643, *cert. denied*, —— U.S. ——, 172 L. Ed. 2d 198 (2008).

In this case, the cocaine and weapon found in the car were discovered as a direct result of the illegal search and, therefore, should have been suppressed as fruit of the poisonous tree. *Wong Sun*, 371 U.S. at 485, 9 L. Ed. 2d at 455. Furthermore, because Defendant was arrested as a consequence of the discovery of cocaine and a weapon in the vehicle, the cocaine found in Defendant's sock at the jail was the direct result of the officers' exploitation of the illegal search of the vehicle and could not have been discovered "by means sufficiently distinguishable to be purged of the primary taint." *Barnard*, 184 N.C. App. at 40, 645 S.E.2d at 790. Therefore, the evidence of the cocaine found in Defendant's sock should have been suppressed. *See id.* Accordingly, we hold that the trial court erred in denying Defendant's motion to suppress.

In light of this holding, we need not address Defendant's remaining argument. The trial court's order denying Defendant's motion to suppress is REVERSED and its judgment is VACATED.

REVERSED and VACATED.

Judges BRYANT and GEER concur.

MERLIN HAWKINS, EMPLOYEE, PLAINTIFF-APPELLEE v. GENERAL ELECTRIC COMPANY, EMPLOYER, ELECTRIC INSURANCE CO., CARRIER, DEFENDANTS-APPELLANTS

No. COA08-1436

(Filed 18 August 2009)

1. Workers' Compensation— medical expenses—asthma—sufficiency of findings of fact

The Industrial Commission erred in a workers' compensation case in its findings of fact about plaintiff employee's asthma condition, and the award requiring defendants to pay medical expenses for plaintiff's asthma is reversed, because the testimony and evidence regarding plaintiff's asthma only established a causal link between plaintiff's employment and his development of asthma, without specifically addressing the possibility of an increased risk to plaintiff.

2. Workers' Compensation— occupational disease—contact dermatitis

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's contact dermatitis was a compensable occupational disease, and the case is remanded to the Industrial Commission for the purpose of entering an order stating the amount to be paid for plaintiff's treatment and any resulting disability because the chemicals that plaintiff was exposed to list the ailment he has now acquired as a possible side-effect of exposure and a doctor testified that plaintiff developed this hypersensitivity as a direct result of his prolonged exposure to the chemicals at the GE facility.

3. Workers' Compensation— total disability—continuing disability

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee is totally disabled even though defendants contend his condition subsided after he terminated his employment with GE because: (1) plaintiff in the instant case has presented competent evidence of continuing disability; and (2) plaintiff was 63 years old in 2005 when his employment with GE was terminated due to his occupational disease, he lacked a college education and his spelling and mathematical skills were below high school level, his work experience had been exclusively in the aircraft assembly and maintenance

industries, and plaintiff would need significant training to find employment in another industry which was highly problematic given his age.

Appeal by defendants from Opinion and Award filed 15 July 2008 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 20 April 2009.

Younce & Vtipil, P.A., by Robert C. Younce, Jr., for plaintiff-appellee.

Young Moore and Henderson P.A., by Jeffrey T. Linder and Martin R. Jernigan, for defendants-appellants.

CALABRIA, Judge.

General Electric Company ("GE") and Electric Insurance Co. ("insurer"), the workers' compensation carrier (collectively, "defendants"), appeal from the North Carolina Industrial Commission's ("the Commission") Opinion and Award, which granted Merlin Hawkins ("plaintiff") temporary total disability benefits. We affirm in part and reverse in part.

Plaintiff was hired by the GE Aircraft Engine Manufacturing facility in Durham as an assembly and test technician on 28 September 1998. Plaintiff had previously worked in airline maintenance for the United States Navy and various airlines. When he began his employment with GE, plaintiff did not suffer from any skin or breathing problems.

Beginning in the spring of 2003, plaintiff began to experience skin and breathing problems. Plaintiff sought the advice of various doctors, including several dermatologists. Eventually, Dr. Beth Goldstein ("Dr. Goldstein") of the Central Dermatology Center suspected plaintiff's condition was the result of occupational exposures. On 20 April 2005, Dr. Goldstein removed plaintiff from his workplace and referred him to Dr. Elizabeth Sherertz, ("Dr. Sherertz") a board certified occupational dermatologist with significant experience with contact dermatitis. Dr. Sherertz conducted allergic test patching on plaintiff for some of the compounds that plaintiff may have encountered in his work environment. Based on her observations, Dr. Sherertz concluded that plaintiff had developed a delayed hypersensitivity allergy to chemicals in his workplace. As a result of Dr. Sherertz's recommendations, Dr. Goldstein removed plaintiff from the workplace for a period of three months.

During the three-month leave of absence, plaintiff showed signs of improvement, and Dr. Goldstein permitted him to return to work with restrictions on his exposure to chemicals in July 2005. Once plaintiff returned to work, his symptoms reappeared. On 8 September 2005, plaintiff took the advice of Dr. Goldstein and Dr. Sherertz and ceased working at GE. In the opinion of his doctors, plaintiff was unable to work in any job where he would be exposed to the chemicals that cause his allergic reaction. Within two months of leaving GE, Dr. Goldstein found plaintiff's skin problems to be ninety-eight percent improved.

Plaintiff filed a request for hearing on 8 May 2006, alleging that he suffered from the compensable occupational diseases of allergic contact dermatitis and occupational asthma due to his exposure to chemicals while working at GE. On 4 October 2007, an Opinion and Award was filed, which concluded that the plaintiff developed compensable occupational diseases due to his employment with GE. This decision was appealed to the Full Industrial Commission, which affirmed the Opinion and Award with modifications on 15 July 2008. Defendants appeal.

Our review of an Industrial Commission decision is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000) (internal citation omitted). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Barbour v. Regis Corp.*, 167 N.C. App. 449, 454-55, 606 S.E.2d 119, 124 (2004). The Commission's conclusions of law are reviewable *de novo*. *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003) (citation omitted).

A claim for an occupational disease not otherwise recognized in N.C. Gen. Stat. § 97-53 of our workers' compensation statutes may be established under the provision of § 97-53(13). *See James v. Perdue Farms, Inc.*, 160 N.C. App. 560, 561-62, 586 S.E.2d 557, 559 (2003). A plaintiff bears the burden of proof in showing he meets the require-

ments of the statute. *Id.* Our Supreme Court has held, in *Rutledge v. Tultex Corp.*, that:

> For a disease to be occupational under G.S. 97-53(13) it must be (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment."

308 N.C. 85, 93, 301 S.E.2d 359, 364 (1983) (internal citations omitted). The Court further explained that in order to satisfy the first and second elements, it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. *Id.* The statute does not exclude all ordinary diseases of life from coverage. *Id.* Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded. *Id.* Thus, the first two elements are satisfied if the employment exposed the worker to a greater risk of contracting the disease than the public generally. *Id.* "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation." *Id.* at 93-94, 301 S.E.2d at 365 (quoting *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979)).

I. Plaintiff's Asthma

[1] Defendants first argue that there is no competent evidence to support the Commission's findings of fact in regards to the plaintiff's asthma condition. According to defendants, without these findings, the remaining evidence is insufficient to support the Commission's conclusions of law that employment with GE placed the employee at a greater risk than the general public of contracting asthma and that the employee's work with GE was a significant factor in causing his asthma. We do not agree there is no competent evidence to support the Commission's finding of fact that plaintiff's asthma condition was caused by his employment, but we do agree that there is no competent evidence that plaintiff was placed at a greater risk of contracting asthma than the general public.

Defendants assert the following findings of fact concerning the plaintiff's asthma are not supported by competent evidence:

45. Based on the greater weight of the evidence, the Full Commission finds that plaintiff's work for defendant-employer placed him at greater risk than the general public of contracting systemic allergic contact dermatitis and asthma.

46. The Full Commission further finds that plaintiff's work for defendant-employer was a significant factor in causing his systemic allergic contact dermatitis and asthma.

"[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Moreover, "[w]here a layman can . . . do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony." *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965) (internal citation and quotations omitted). Thus, "findings regarding the nature of a disease—its characteristics, symptoms, and manifestations—must ordinarily be based upon expert medical testimony." *Norris v. Drexel Heritage Furnishings, Inc.*, 139 N.C. App. 620, 623, 534 S.E.2d 259, 262 (2000).

Finding of fact forty-six is clearly supported by competent evidence. The evidence indicates that Dr. Peter Bressler, an allergist at the University of North Carolina, diagnosed the employee with "probable occupational asthma." Additionally, Dr. Dennis Darcey, an occupational medicine specialist at Duke University, diagnosed a "possible occupational contact/allergic dermatitis with occupational allergic/irritant asthma component." Finally, according to the testimony of Dr. Sherertz, it was "likely" that there was a connection between plaintiff's asthma and his dermatitis. Based upon our standard of review, there is no error in this finding of the Commission.

However, finding of fact forty-five, that the plaintiff was at a greater risk than the general public of contracting asthma, is not supported by any competent evidence in the record and therefore cannot stand. None of the doctors testified that in their individual medical opinions plaintiff was at an increased risk of contracting asthma because of his employment with GE, as required by *Rutledge*, 308 N.C. 85, 301 S.E.2d 359 (1983). The testimony and evidence regarding asthma only establishes a causal link between the plaintiff's employment and the development of asthma, without specifically addressing

the possibility of an increased risk to the plaintiff. Without this evidence, plaintiff has failed to carry his burden that he suffers from the compensable occupational disease of asthma. Because finding of fact forty-five is unsupported by any competent evidence, the Commission's conclusion of law that plaintiff was at a greater risk than the general public of contracting asthma fails. Further, because defendants are obligated to pay only for treatments "required to effect a cure or give relief" for conditions related to a compensable injury, the Commission's conclusion of law that plaintiff is entitled to medical expenses for plaintiff's asthma also fails. N.C. Gen. Stat. § 97-2(19) (2007). The award requiring defendants to pay medical expenses for plaintiff's asthma is reversed.

II. Plaintiff's Contact Dermatitis

[2] Defendants next argue that plaintiff's contact dermatitis is the result of personal sensitivities that are not compensable under the Workers' Compensation Act. While we agree that personal sensitivities are not compensable under our Workers' Compensation Act, we do not agree that such rule has application in this case. *Hayes v. Tractor Supply Co.*, 170 N.C. App. 405, 408, 612 S.E.2d 399, 402 (2005).

Defendants have conceded that plaintiff's contact dermatitis is unquestionably a result of his employment with GE. However, defendants contend that plaintiff's contact dermatitis resulted entirely from his personal sensitivities, and, as a matter of law, plaintiff was not placed at an increased risk of contracting this disease when compared to the general public. We disagree.

The cases cited by the defendants to support their proposition are distinguishable from the instant case. In both *Hayes v. Tractor Supply Co.*, 170 N.C. App. 405, 612 S.E.2d 399 (2005), and *Nix v. Collins & Aikman Co.*, 151 N.C. App. 438, 566 S.E.2d 176 (2002), the plaintiffs were denied benefits because there was evidence that the plaintiffs suffered from a pre-existing condition that was aggravated by their employment. In the instant case, there is no evidence that the plaintiff presented any symptoms consistent with his contact dermatitis condition until he worked at GE for several years.

In *Sebastian v. Mona Watkins Hair Styling*, the plaintiff developed a skin condition due to her sensitivities to chemicals used at her employer's hair salon after working for a few years. 40 N.C. App. 30, 251 S.E.2d 872, *disc. review denied*, 297 N.C. 301, 254 S.E.2d 921

(1979). Within one month of plaintiff's termination of employment, this condition cleared up and she suffered no continuing disability. *Id.* at 33, 251 S.E.2d at 874. The plaintiff was awarded medical expenses and temporary total disability benefits for the period during which she suffered the skin condition. *Id.* at 31, 251 S.E.2d at 874. Contrary to defendants' assertions, the plaintiff in *Sebastian* was not denied workers' compensation benefits due to her "personal sensitivities." *Id.* at 33, 251 S.E.2d at 875.

The plaintiff in the instant case shares many similarities with the compensated plaintiff in *Sebastian*, 40 N.C. App. 30, 251 S.E.2d 872 (1979). After years of working for GE, plaintiff developed an allergic contact dermatitis that made it impossible for him to return to work. The condition subsided on both occasions that plaintiff spent significant time away from GE. It is undisputed that plaintiff can no longer work at GE because there are no jobs available that could guarantee he would not have exposure to the chemicals at issue.

While no other employee has reported a similar issue in the fifteen years the plant has operated, the chemicals that plaintiff was exposed to list the ailment he has now acquired as a possible side-effect of exposure. Dr. Sherertz testified that plaintiff developed this hypersensitivity as a direct result of his prolonged exposure to the chemicals at the GE facility, and the Commission decided to give weight to her testimony. The evidence, including the expert medical testimony, was sufficient for the Commission to conclude that plaintiff's contact dermatitis was a compensable occupational disease and we find no error in this conclusion.

III. Plaintiff's Total Disability

[3] Defendants next argue that plaintiff is not totally disabled because his condition subsided after he terminated his employment with GE. We disagree.

Under the Workers' Compensation Act, "[a]n employee injured in the course of his employment is disabled . . . if the injury results in an 'incapacity . . . to earn the wages which the employee was receiving at the time of the injury in the same or any other employment.' " *Russell v. Lowe's Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (second alteration in original) (quoting N.C. Gen. Stat. § 97-2(9)(1991)). Therefore, "disability" as defined in the Workers' Compensation Act is the impairment of the injured employee's earning capacity and not physical disablement. *Peoples v.*

Cone Mills Corp., 316 N.C. 426, 434-35, 342 S.E.2d 798, 804 (1986) (quoting *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 84, 155 S.E.2d 755, 761 (1967)). It is the burden of the employee to make this showing. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982).

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

Defendants' contention relies heavily on *Sebastian*, 40 N.C. App. 30, 251 S.E.2d 872 (1979), which was decided many years prior to *Russell*. In *Sebastian*, the Court upheld the Commission's determination that additional benefit payments were unnecessary after the employee's skin condition cleared, since there was no evidence of a continuing disability. *Sebastian*, 40 N.C. App. at 33, 251 S.E.2d at 875. This case is distinguishable. The plaintiff in the instant case has presented competent evidence of continuing disability under the last three prongs of *Russell*.

Plaintiff was 63 years old in 2005 when his employment with GE was terminated due to his occupational disease. The evidence showed that he lacks a college education and that his spelling and mathematical skills were below high school level. His work experience has been exclusively in the aircraft assembly and maintenance industries. Plaintiff would need significant training to find employment in another industry, which is highly problematic given his age. Given these facts, it was not error for the Commission to determine that the plaintiff is disabled pursuant to N.C. Gen. Stat. § 97-29 for as long as his occupational disease exists.

The award is affirmed with the exception of the portion of the award ordering payment for plaintiff's asthma treatment, which is

reversed. We remand to the Industrial Commission for the purpose of entering an order stating the amount to be paid for plaintiff's contact dermatitis treatment and any resulting disability.

Affirmed in part, reversed in part, and remanded.

Chief Judge MARTIN and Judge STEELMAN concur.

STATE OF NORTH CAROLINA v. HENRY LUTHER BROWN, III

No. COA08-1214

(Filed 18 August 2009)

1. Arrest— probable cause—informant's corroborated information—surveillance information

Officers had probable cause to arrest defendant prior to an illegal entry into his apartment, and the trial court did not err by denying defendant's motion to suppress his statements to deputies and the fruits thereof.

2. Appeal and Error— record—index—required

Sanctions were imposed upon appellate counsel for failure to include an index in the record on appeal.

Appeal by defendant from judgment entered 23 January 2008 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 20 April 2009.

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

Attorney General Roy Cooper, by Assistant Attorney General K. D. Sturgis, for the State.

STEELMAN, Judge.

Defendant's motion to suppress evidence was properly denied when an informant's anonymous tip was sufficiently corroborated by reliable and credible evidence, which established probable cause to arrest defendant.

I. Factual and Procedural Background

On 14 December 2002, Sergeant Charlie Disponzio (Disponzio) of the Cumberland County Sheriff's Department was dispatched to the scene of a reported shooting at the Coliseum Motel on Highway 301 in Fayetteville, North Carolina. At approximately 7:10 p.m., Disponzio arrived at the scene and received a briefing from the first responding deputy. The victim was found dead lying on the floor of room 171, and witnesses reported to deputies that they saw two African-American males and an African-American female fleeing the area. Witnesses also noticed a white Pontiac Grand Am with factory rims and spoiler on the back, and a burgundy Nissan with tinted windows leaving the scene.

After the briefing, Disponzio examined the scene of the shooting. The victim appeared to have suffered multiple gunshot wounds, and shell casings littered the area. Victim's left pants pocket was partially turned inside out, and coins were on the floor below the pocket. Deputies found the victim's identification card in his pocket, but no money on his person. Otherwise, the room appeared to be clean and neat, and there were no signs of forced entry.

Eleven fired 9 mm caliber shell casings, five fired 9 mm caliber projectiles, and one unfired 9 mm caliber round were found in the room. All the casings in the room were 9 mm caliber, but appeared to be two different brands. Further investigation revealed the victim arrived in his black Jeep Cherokee, and a witness reported seeing an African-American female driving the Cherokee away from the motel.

On 15 December 2002 at approximately 1:30 a.m., the Cumberland County Sheriff's Office forwarded a call to Disponzio from an anonymous caller indicating he had information about a shooting. The caller asked if there had been a murder on Highway 301, and Disponzio answered "Yes." The caller said he knew who killed the man and then identified the persons involved in the murder as Chris Scott and his roommate Henry Brown (defendant). The caller further stated that the killing was over defendant's girlfriend, and the girlfriend set the whole thing up.

The caller identified the location of the shooting as the motel next to the "old Pavilion" club, which Disponzio recognized as the Coliseum Motel. Disponzio was told that the guns were thrown in a river, and the victim's Cherokee was parked behind a church on the east side of Fayetteville. The caller stated that the victim had been

shot numerous times, and the girlfriend had gone through the victim's pockets and taken some money. The caller told Disponzio that Scott and defendant lived in an apartment complex off of Highway 210 in Spring Lake, and their apartment was in building 911, apartment 102. The caller then agreed to meet with deputies at the Sheriff's Office, and upon arrival, the caller identified himself as Michael Williams (Williams).

At the Sheriff's Office, Disponzio learned from the victim's brother that he went to meet a female identified as "Khateefa" at a motel. At approximately 2:05 a.m., Disponzio left to reconnoiter the apartment while other deputies completed the interview of Williams. Upon entering the parking lot of the apartment building, Disponzio saw a white Pontiac Grand Am with a spoiler on the trunk, tinted windows, and factory rims located immediately in front of apartment 102. Minutes later, a burgundy Nissan with tinted windows pulled into the parking space next to the white Grand Am, and an African-American male exited the car and entered apartment 102. Other deputies then relayed to Disponzio that Williams said that the gun had jammed during the shooting at the motel. Disponzio reported the description of the two cars back to the other deputies. Williams said the Nissan should have Alabama plates on it, which Disponzio confirmed.

At approximately 2:40 a.m., Disponzio and other deputies knocked on the door of apartment 102, and Chris Scott answered the door. After opening the door, deputies led Scott out of the apartment and into custody. Deputies entered the apartment and arrested Khateefa Daniel and defendant without a warrant. Defendant and Scott both verbally consented to a search of the apartment, where deputies found a box for a 9 mm caliber handgun, two magazines for a handgun, and an empty 9 mm caliber ammunition box. Deputies transported defendant to the Sheriff's Office at approximately 3:47 a.m.

At the Sheriff's Office, defendant waived his *Miranda* rights in writing, and deputies began an interview at approximately 5:43 a.m. Defendant admitted his participation in the events at the motel. Defendant told deputies the guns used had been thrown into a river from a bridge in Spring Lake, and agreed to show deputies the location of the bridge. At approximately 6:40 a.m., a magistrate issued arrest warrants.

On 15 December 2002 at approximately 6:55 a.m., Disponzio and another deputy transported defendant to the bridge in Spring Lake,

but they did not recover the weapons. That afternoon, a man found a 9 mm caliber handgun in the river while fishing. On 16 December 2002, deputies discovered two 9 mm caliber magazines, and subsequently the Cumberland County Sheriff's dive team found a second 9 mm caliber handgun in the river.

On 22 April 2003, defendant was indicted for the offenses of first-degree murder, robbery with a dangerous weapon, and conspiracy to commit first-degree murder and robbery with a dangerous weapon. On 6 August 2003, defendant filed a motion to suppress defendant's statements made at the Sheriff's Office and evidence obtained from the search of defendant's apartment.

On 22 January 2008, the trial judge entered an order suppressing all evidence seized pursuant to the entry and search of defendant's apartment. The trial judge denied the motion to suppress defendant's statements and any evidence resulting from those statements.

On 23 January 2008, the jury found defendant guilty of second-degree murder under a theory of acting in concert. Jury found defendant not guilty of robbery with a firearm, conspiracy to commit first-degree murder and robbery with a dangerous weapon. Defendant received an active sentence from the presumptive range of 150-189 months. Defendant appeals.

II. Denial of Motion to Suppress

In his only argument, defendant contends that the trial court erred in denying his motion to suppress evidence. We disagree.

A. Standard of Review

A trial court's findings of fact in a motion to suppress are conclusive and binding on appeal if supported by competent evidence. *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001) (quoting *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)). The conclusions of law made from the findings of fact are reviewable *de novo*. *State v. Wilson*, 155 N.C. App. 89, 93-94, 574 S.E.2d 93, 97 (2002) (quoting *State v. Young*, 148 N.C. App. 462, 466, 559 S.E.2d 814, 818 (2002)), *disc. review denied*, 356 N.C. 693, 579 S.E.2d 98 (2003).

B. Probable Cause

[1] Defendant fails to assign as error any of the findings of fact made by the trial court. As a result, the findings of fact are binding on appeal, and our review is limited to whether the findings of fact sup-

port the trial court's conclusions of law. *State v. Allison*, 148 N.C. App. 702, 704, 559 S.E.2d 828, 829-30 (2002) (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). The trial court concluded the deputies had probable cause to arrest defendant.

If deputies have probable cause to arrest an individual, then the exclusionary rule does not bar the use of the individual's statements made after an illegal entry into the individual's home. *New York v. Harris*, 495 U.S. 14, 21, 109 L. Ed. 2d 13, 22 (1990).

Defendant argues the deputies did not have sufficient information to establish probable cause supporting his arrest, and his state and federal constitutional rights were violated by the trial court's denial of his motion to suppress.

The United States Constitution and the North Carolina Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20; *see State v. Sanchez*, 147 N.C. App. 619, 623, 556 S.E.2d 602, 606 (2001) (citations omitted), *disc. review denied*, 355 N.C. 220, 560 S.E.2d 358 (2002). "An arrest is *constitutionally* valid whenever there exists probable cause to make it." *State v. Chadwick*, 149 N.C. App. 200, 202, 560 S.E.2d 207, 209 (2002), *disc. review denied*, 355 N.C. 752, 565 S.E.2d 672 (2002) (quoting *State v. Wooten*, 34 N.C. App. 85, 88, 237 S.E.2d 301, 304 (1977)).

> Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty . . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith.

State v. Crawford, 125 N.C. App. 279, 281-82, 480 S.E.2d 422, 423-24 (1997) (quoting *State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971)). Probable cause can be established through the use of information provided by informants, and the applicable test is a totality of circumstances. *Illinois v. Gates*, 462 U.S. 213, 230-31, 76 L. Ed. 2d 527, 543-44 (1983), *reh'g denied*, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983); *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 261 (1984).

This test " 'permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an

informant's tip.' " *Chadwick*, 149 N.C. App. at 203, 560 S.E.2d at 209 (quoting *State v. Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 22 (2001), *cert. denied*, 353 N.C. 731, 551 S.E.2d 116 (2001)). "The indicia of reliability of an informant's tip 'may include (1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be independently corroborated by the police.' " *State v. Rodgers*, 161 N.C. App. 311, 314, 588 S.E.2d 481, 483 (2003) (quoting *State v. Collins*, 160 N.C. App. 310, 315, 585 S.E.2d 481, 485 (2003), *aff'd*, 358 N.C. 135, 591 S.E.2d 518 (2004)).

Defendant argues that Williams' information must be given the same weight as information from an anonymous tipster because deputies knew nothing about his history of reliability. Williams did not merely make an anonymous phone call, but rather revealed his identity and met with deputies for an interview at the police station. Williams' direct involvement with deputies during the investigation is an indication of reliability beyond a single anonymous tip. Thus, Williams reliability as an informant is given substantial weight in a totality of circumstances analysis.

In *State v. Bone*, the court held that an anonymous tip corroborated by other matters within the detective's knowledge established probable cause for the warrantless arrest of defendant. *State v. Bone*, 354 N.C. 1, 10-11, 550 S.E.2d 482, 488 (2001). The tip claimed defendant was the murderer in a homicide, and the information included specific facts about defendant and details about the crime. *Bone*, 354 N.C. at 6, 550 S.E.2d at 485. The arresting detective corroborated the information contained in the tip with the particular facts about the crime uncovered during the investigation. This corroboration was an indication of reliability, which gave credibility to the anonymous tipster and the information. *Bone*, 354 N.C. at 11, 550 S.E.2d at 488. Based on the reliable information indicating defendant committed the homicide, the detective established the probable cause necessary to arrest defendant.

In the instant case, Disponzio corroborated the substantial amount of information Williams provided with facts gathered throughout the investigation prior to defendant's arrest. The independent corroboration gave credibility to the information and Williams as an informant. The corroboration as well as the substantial level of detail provided Disponzio with an additional indication that the information was reliable. *See Gates*, 462 U.S. at 234, 76 L. Ed. 2d at 545. Williams individually named defendant, how he com-

mitted the murder, why he committed the murder, and exactly where he lived.

The facts Williams revealed in the initial phone call confirmed details Disponzio previously acquired from the crime scene. The facts included the location of the motel, that a male victim was shot numerous times, that money was taken from his pockets, and that two males and one female were involved in the shooting. This information corresponded with forensic evidence found in the motel room and statements from unrelated witnesses at the motel.

Prior to leaving the Sheriff's Office, Disponzio learned the victim went to the motel to meet a female. This detail corresponded with Williams' statement that defendant's girlfriend set up the incident with the victim. This correlates with the scene of the crime because deputies found no signs of forced entry to the room.

While Disponzio conducted surveillance outside defendant's apartment, he saw a white Grand Am similar to the vehicle witnesses described leaving the scene. Moments later, the second vehicle witnesses described, a burgundy Nissan, pulled into the parking spot next to the Grand Am. Disponzio's investigation outside defendant's apartment corroborated eyewitness accounts of the individuals and vehicles fleeing the motel at the time of the shooting. This development constituted a separate basis to establish the probable cause necessary for the warrantless arrest of defendant, and further indicated the reliability of Williams and the details he provided to deputies.

Prior to the arrest, information obtained from Williams and relayed to Disponzio corroborated two more facts. Williams stated the burgundy Nissan had Alabama plates, and the gun jammed during the shooting, which explained the unfired bullet found on the floor in the motel room.

Williams named defendant as one of two individuals who shot the victim at the Coliseum Motel. The substantial level of detail and the independent corroboration indicated the reliability of the information Williams provided to Disponzio under a totality of circumstances analysis. *See Gates*, 462 U.S. at 234, 76 L. Ed. 2d at 545; *See also Collins*, 160 N.C. App. at 315, 585 S.E.2d at 485. Upon investigating the apartment, Disponzio discovered both vehicles reported at the scene, which provided a separate basis for probable cause to arrest defendant. The reliable information Williams provided combined with the investigation at the apartment established a reasonable ground of suspicion for Disponzio to believe defendant to be guilty.

The record establishes that Disponzio had probable cause to arrest defendant prior to entering the apartment. Thus, the trial court properly denied defendant's motion to suppress his statements to deputies and the fruits garnered therefrom.

III. Sanctions

[2] Rule 9(a)(3)a of the North Carolina Rules of Appellate Procedure provides that the record on appeal in a criminal action *shall contain* "an index of the contents of the record, which shall appear as the first page thereof." N.C.R. App. P. 9(a)(3) (emphasis added). The record in this matter contains no index. Appellate counsel for defendant is not a novice in bringing criminal appeals before this Court. A record without an index is a gross violation of the rules of appellate procedure. In its discretion, this Court imposes sanctions upon counsel for defendant in the amount of double the costs of the appeal. This sanction is imposed upon counsel personally, and she may not seek reimbursement of this amount from the Office of the Appellate Defender.

AFFIRMED.

Chief Judge MARTIN and Judge CALABRIA concur.

IN THE MATTER OF: M.S.

No. COA08-1016

(Filed 18 August 2009)

Juveniles— subject matter jurisdiction—sexual offenses—fatally defective petition—failure to name victims

The trial court lacked subject matter jurisdiction in a first-degree sexual offense case based on fatally defective petitions, and the trial court's order is vacated because: (1) the State was required by N.C.G.S. § 15-144.2(b) to name the alleged victims in the juvenile petitions; (2) the State did not name the victim at all, and the petitions did not include the victim's initials or any other means of identifying the victim; and (3) the State's bare reference to "a child" violates N.C.G.S. § 15-144.2(b) and renders the petitions facially defective. Further, a challenge to the facial validity of a juvenile petition may be raised at any time.

IN RE M.S.

[199 N.C. App. 260 (2009)]

Appeal by juvenile from orders entered 11 March 2008 by Judge Margaret L. Sharpe and 15 April 2008 by Judge Susan E. Bray in Guilford County District Court. Heard in the Court of Appeals 10 March 2009.

Attorney General Roy Cooper, by Assistant Attorney General LaToya B. Powell, for the State.

Ryan McKaig for juvenile-appellant.

GEER, Judge.

The juvenile M.S. appeals from the trial court's orders adjudicating him delinquent and placing him on probation for 12 months. On appeal, the juvenile contends the trial court lacked subject matter jurisdiction because the juvenile petitions, which failed to name the alleged victims of the charged offenses, were fatally defective. We agree that the State was required by N.C. Gen. Stat. § 15-144.2(b) (2007) to name the alleged victims in the juvenile petitions and, therefore, vacate the trial court's orders.

Facts

On 25 and 30 January 2008, the State filed four juvenile petitions alleging that the juvenile was delinquent for committing four counts of first degree sexual offense. On 4 February 2008, the juvenile filed a transcript of admission in which the juvenile admitted committing two counts of first degree sexual offense in exchange for the State's promise to dismiss the two remaining counts. The trial court accepted the admission on 4 February 2008.

At the adjudication hearing, the State provided the following factual basis for the juvenile's admission. On 12 November 2007, a mother contacted police officers to report that her five-year-old son, A.H. ("Andrew"),[1] had been sexually assaulted. Andrew's mother reported that when she gave Andrew a bath, he indicated that his "behind" was sore, and when she asked him what had happened, he said the juvenile's name. Upon being interviewed by police officers, Andrew said that the juvenile had "put his weiner [sic] in [Andrew's] behind" when Andrew spent the night at the juvenile's house. Andrew said that the juvenile had done the same thing to his cousin who was also five years old. In his statement to the police, the juvenile said that he and the two boys had been playing a game and that he "took

1. The minor victim's name has been changed to protect his privacy.

his hand and put it on their private part, and that he tried to put his penis in their behind but did not. . . ." The juvenile was 14 years old at the time.

The trial court adjudicated the juvenile delinquent in an order filed 11 March 2008. Following a dispositional hearing on 31 March 2008, an order was entered on 15 April 2008 placing the juvenile on Level 2 probation for 12 months. The juvenile timely appealed to this Court.

Discussion

The juvenile's sole contention on appeal is that the juvenile petitions were fatally defective because they failed to name the alleged victims of the charged offenses. As an initial matter, the State contends that any defect in the petitions was a constitutional error, review of which the juvenile waived by failing to object below. Because the juvenile argues that the State's failure to name the victims in the juvenile petitions deprived the trial court of subject matter jurisdiction, the juvenile's challenge is jurisdictional and unable to be waived.

Challenges to a court's subject matter jurisdiction may be raised at any time. *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) ("Because litigants cannot consent to jurisdiction not authorized by law, they may challenge 'jurisdiction over the subject matter . . . at any stage of the proceedings, even after judgment.' ") (quoting *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961), *appeal dismissed and cert. denied*, 371 U.S. 22, 9 L. Ed. 2d 96, 83 S. Ct. 120 (1962)). "Arguments regarding subject matter jurisdiction may even be raised for the first time before [an appellate] [c]ourt." *Id.*

Further, our courts have repeatedly held that a defective petition "is inoperative and fails to evoke the jurisdiction of the court." *In re J.F.M. & T.J.B.*, 168 N.C. App. 143, 150, 607 S.E.2d 304, 309, *appeal dismissed and disc. review denied*, 359 N.C. 411, 612 S.E.2d 320 (2005).[2] Therefore, a challenge to the facial validity of a juvenile peti-

2. In criminal cases, a valid indictment gives the trial court its subject matter jurisdiction over the case. *In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004). Thus, " '[a] facially invalid indictment deprives the trial court of jurisdiction to enter judgment in a criminal case.' " *State v. McKoy*, 196 N.C. App. 650, 654, 675 S.E.2d 406, 410 (2009) (quoting *State v. Haddock*, 191 N.C. App. 474, 476, 664 S.E.2d 339, 342 (2008)). Since "[i]n a juvenile delinquency action, the juvenile petition 'serves essentially the same function as an indictment in a felony prosecution,' " *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006) (quoting *Griffin*, 162 N.C. App. at 493, 592 S.E.2d at 16), this same principle applies in juvenile proceedings.

tion "may be raised at any time." *S.R.S.*, 180 N.C. App. at 153, 636 S.E.2d at 279. This rule applies even when a juvenile has filed a transcript of admission. *See State v. McGee*, 175 N.C. App. 586, 587-88, 623 S.E.2d 782, 784 ("By knowingly and voluntarily pleading guilty, an accused waives all defenses other than the sufficiency of the indictment. Nevertheless, when an indictment is alleged to be facially invalid, thereby depriving the trial court of jurisdiction, the indictment may be challenged at any time." (internal citations omitted)), *disc. review denied*, 360 N.C. 489, 632 S.E.2d 768, *appeal dismissed and disc. review denied*, 360 N.C. 542, 634 S.E.2d 891 (2006).

The juvenile contends on appeal that the petitions in this case were facially defective under N.C. Gen. Stat. § 15-144.2(b). Accordingly, the juvenile is challenging the trial court's subject matter jurisdiction, an issue that may be raised for the first time on appeal. We note that the State has cited no authority suggesting that arguments such as those made by the juvenile in this case do not implicate the trial court's subject matter jurisdiction and may be waived. We, therefore, conclude that the juvenile's challenge to the petitions is properly before us.

" 'Because juvenile petitions are generally held to the standards of a criminal indictment, we consider the requirements of the indictments of the offenses at issue.' " *S.R.S.*, 180 N.C. App. at 153, 636 S.E.2d at 280 (quoting *In re B.D.W.*, 175 N.C. App. 760, 761, 625 S.E.2d 558, 560 (2006)). The petitions in this case charged the juvenile with first degree sexual offense. The General Assembly has authorized the State to use short-form indictments when charging first degree sexual offense. *State v. Miller*, 159 N.C. App. 608, 613, 583 S.E.2d 620, 623 (2003), *aff'd per curiam*, 358 N.C. 133, 591 S.E.2d 520 (2004). With respect to short-form indictments for sexual offense, N.C. Gen. Stat. § 15-144.2(a) provides:

> In indictments for sex offense it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the sex offense was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, *naming the victim*, by force and against the will of such victim and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in

> law as an indictment for a first degree sex offense and will support a verdict of guilty of a sex offense in the first degree, a sex offense in the second degree, an attempt to commit a sex offense or an assault.

(Emphasis added.)

Similarly, N.C. Gen. Stat. § 15-144.2(b) provides that

> [i]f the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, *naming the child*, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a sex offense against a child under the age of 13 years and all lesser included offenses.

(Emphasis added.)

The juvenile argues on appeal that the petitions were fatally defective because they fail to allege the name of the child victims. The petitions filed in this case alleged:

> The juvenile is a delinquent juvenile as defined by G.S. 7B-1501(7) in that on or about the date of the alleged offense shown above and in the county named above the juvenile did unlawfully, willfully, and feloniously, did [sic] . . . ENGAGE IN A SEXUAL ACT OTHER THAN VAGINAL INTERCOURSE WITH A CHILD UNDER THE AGE OF 13 YEARS, WHO IS AT LEAST FOUR YEARS YOUNGER THAN THE DEFENDANT, AND THE DEFENDANT IS AT LEAST 12 YEARS OLD. G.S. 14-27.4(a)(1) FIRST DEGREE STATUTORY SEXUAL OFFENSE.

Thus, the petitions merely reference "a child" without alleging the victims' names.

The State argues that the name of the victim is simply an evidentiary detail that need not always be included in the indictment. In support of this argument, the State relies on *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982), in which the Supreme Court held that while the State was required to prove a "sexual act" was committed, the State was not required to specify which sexual act was committed in the indictment. In *Edwards*, however, the Court explicitly stated that N.C. Gen. Stat. § 15-144.2(b) "provides the approved 'short form' *essentials* of a bill for sex offense. . . ." *Edwards*, 305

N.C. at 380, 289 S.E.2d at 362 (emphasis added). As naming the victim is included in the statute, it is one of those " 'short form' essentials" that must be contained in the indictment. *Id.*

This conclusion was also reached in *State v. Dillard*, 90 N.C. App. 318, 320, 368 S.E.2d 442, 444 (1988) (internal citations omitted), in which this Court explained that N.C. Gen. Stat. § 15-144.2(a)

> sets forth the *requirements* for sexual offense indictments. *For an indictment to be legally valid under the statute*, it must contain only the following: the name of the accused, the date of the offense, the county in which the offense was allegedly committed, the averment "with force and arms," the allegation that the accused unlawfully, willfully and feloniously engaged in a sex offense with the victim by force and against the victim's will, *and the victim's name*. An indictment including such information is sufficient to charge first-degree sexual offense, second-degree sexual offense, attempt to commit a sexual offense or assault.

(Emphasis added.)[3] *Dillard* thus holds that for a sexual offense indictment "to be legally valid" under N.C. Gen. Stat. § 15-144.2(a), "it must contain," among other items, "the victim's name." *Dillard*, 90 N.C. App. at 320, 368 S.E.2d at 444.

This Court has recently addressed in further detail what is required when naming the victim in order to comply with N.C. Gen. Stat. § 15-144.2(a). In *McKoy*, 196 N.C. App. at 652-53, 675 S.E.2d at 409, the defendant argued that indictments for second degree rape and second degree sexual offense were fatally defective because they did not include the full name of the victim, but rather referred to the victim by initials. The Court noted that the statutes permitting short-form indictments for both rape and sexual offense "include the language 'naming her' or 'naming the victim' as part of the allegations to be set forth in the indictment." *Id.* at 655, 675 S.E.2d at 410-11. The Court pointed out that it had "found no decision by our North Carolina Courts directly interpreting whether 'naming' the victim can only be satisfied by using the victim's full name, or whether a nickname, initials or other identification method would be sufficient." *Id.* at 657, 675 S.E.2d at 411. Federal courts have, however, supported the

3. N.C. Gen. Stat. § 15-144.2(b) requires the indictment to "nam[e] the child" as opposed to the victim and also requires the additional allegation that the victim was under the age of 13 to sufficiently charge first-degree sexual offense and all lesser included offenses. Given the phrasing of N.C. Gen. Stat. § 15-144.2, the reasoning of *Dillard* applies equally to § 15-144.2(a) and § 15-144.2(b).

use of initials in indictments. *Id.* at 657 n.1, 675 S.E.2d at 411 n.1. The Court then "conclude[d] that the use of initials to identify a victim will require the trial court to employ the *Coker* and *Lowe* tests to determine if an indictment is sufficient to impart subject matter jurisdiction." *Id.* at 658, 675 S.E.2d at 412.[4] *McKoy*, however, implicitly acknowledges that the indictment must name the victim in some fashion.

In this case the State did not name the victim at all—the petitions did not include the victim's initials or any other means of identifying the victim. As *Dillard* holds and *McKoy* acknowledges, there must be some attempt to name the victim. The State's bare reference to "a child" violates N.C. Gen. Stat. § 15-144.2(b) and renders the petitions facially defective.

Finally, we note that the State's argument that the victim's name is merely evidentiary is not only unsupported by the case law, but also is contrary to longstanding principles in North Carolina law regarding indictments. Our Supreme Court explained more than 50 years ago that "[a]t common law it is of vital importance that the name of the person against whom the offense was directed be stated with exactitude." *State v. Scott*, 237 N.C. 432, 433, 75 S.E.2d 154, 155 (1953). The Supreme Court explained:

> "The purpose of setting forth the name of the person who is the subject on which an offense is committed is to identify the particular fact or transaction on which the indictment is founded, so that the accused may have the benefit of one acquittal or conviction if accused a second time."

Id. at 433-34, 75 S.E.2d at 155 (quoting *State v. Angel*, 29 N.C. (7 Ired.) 27, 29 (1846)).

Although our courts have become more flexible regarding typographical errors as to names and misnomers in indictments, this Court's recent decision in *McKoy* confirms that the identity of the victim is still of critical importance in avoiding double jeopardy issues. *See McKoy*, 196 N.C. App. at 657, 675 S.E.2d at 412 (holding that the Court was required to determine "whether Defendant's constitutional rights to notice and *freedom from double jeopardy* were adequately protected by the use of the victim's initials" (emphasis added)). The identity of the victim cannot, therefore, be merely an evidentiary matter.

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4. *See State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984); *State v. Lowe*, 295 N.C. 596, 603, 247 S.E.2d 878, 883 (1978).

" 'When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.' " *In re R.P.M.*, 172 N.C. App. 782, 787, 616 S.E.2d 627, 631 (2005) (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)). Because the petitions in this case were fatally defective in failing to name the alleged victims, we are compelled to vacate the trial court's orders.

Vacated.

Judges McGEE and BEASLEY concur.

RAYMOND J. MILESKI, PLAINTIFF v. ROBERT H. McCONVILLE, JR., INDIVIDUALLY AND AS EXECUTOR AND TRUSTEE OF THE WILL AND TRUST OF MAGDALEN P. MILESKI, EDWARD W. NAJAM, JR., INDIVIDUALLY AND AS EXECUTOR AND TRUSTEE OF THE WILL AND TRUST OF MAGDALEN P. MILESKI, ANNE F. McCONVILLE, DOROTHY F. FINDLEN, MARY HELEN PARKER ADAMS, AND WACHOVIA BANK, N.A., AS TRUSTEE OF THE MAGDALEN P. MILESKI TRUST, DEFENDANTS

No. COA08-1216

(Filed 18 August 2009)

1. Civil Procedure— Rule 12(b)(6) motion to dismiss—matters outside pleadings—summary judgment

A Rule 12(6) motion to dismiss was converted to a motion for summary judgment where the court's order stated that the court reviewed the pleadings and considered the arguments and submissions of counsel, and took notice of portions of an estate file and a pending caveat.

2. Estates— claim against estate—not timely—personal notice not required

There was no issue of fact that plaintiff failed to present his claim against an estate within the time specified by the general newspaper notice to creditors and the claim was barred by N.C.G.S. § 28A-19-3(a). Plaintiff did not set forth specific facts showing that a genuine issue of material fact existed as to whether his claim against the estate was reasonably ascertainable, and he was not entitled to personal notice.

3. Estates— claim against estate—properly determined by caveat

The trial court did not err by granting summary judgment in favor of defendants in their individual capacities in an estate claim where plaintiff's essential claim could properly be determined through a caveat proceeding.

Appeal by plaintiff from order dated 10 June 2008 by Judge John O. Craig in Guilford County Superior Court. Heard in the Court of Appeals 25 March 2009.

Wyatt Early Harris Wheeler, LLP, by William E. Wheeler, for plaintiff-appellant.

Smith Moore Leatherwood LLP, by Manning A. Connors, and Roberson, Haworth & Reese, P.L.L.C., by Robert A. Brinson, for defendant-appellees.

BRYANT, Judge.

Raymond J. Mileski (plaintiff) appeals from an order dated 10 June 2008 granting a motion filed by Robert H. McConville, Jr., Edward W. Najam, Jr., Anne F. McConville, Dorothy F. Findlen, and Mary Helen Parker Adams (collectively defendants) to dismiss plaintiff's complaint pursuant to Rule 12(b)(6).

Facts

On 11 May 2007, Magdalen P. Mileski (Mrs. Mileski) died in Moore County, North Carolina. She was survived by plaintiff, her husband. On 22 June 2007, Mrs. Mileski's Last Will and Testament was admitted to probate by the Clerk of Court of Moore County. Letters Testamentary were issued to Robert H. McConville, Jr., Mrs. Mileski's nephew by marriage, and to Edward W. Najam, Jr., her nephew.

As required by N.C. Gen. Stat. § 28A-14-1, the executors of Mrs. Mileski's estate published a statutory general notice to creditors once per week for four consecutive weeks on the 1st, 8th, 15th, and 22nd of July 2007. The notice required anyone having a claim against the estate to notify the executors by 1 October 2007 of their claim.

On 5 November 2007, plaintiff presented a claim against the estate through a letter addressed to the executors of the estate. In the

letter, plaintiff claimed assets had been transferred from his name by his wife into her accounts. Plaintiff subsequently filed a complaint in Guilford County Superior Court on 25 January 2008 alleging among other things, actual fraud, constructive fraud, breach of contract and conversion, and requested a preliminary injunction. On 25 January 2008, plaintiff also filed a caveat in Moore County.

The complaint stated plaintiff had executed an affidavit on 25 July 2007 concerning matters related to Mrs. Mileski's estate. According to plaintiff's affidavit, plaintiff was aware that Mrs. Mileski had executed a new will prior to her death, that she had transferred assets from his name to her estate, and that Mrs. Mileski resided in Moore County, North Carolina at the time of her death.

On 26 March 2008, defendants filed a motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure alleging all claims were barred by N.C. Gen. Stat. § 28A-19-3(a). On 10 June 2008, the trial court granted defendants' motion and dismissed plaintiff's action with prejudice. Plaintiff appeals.

On appeal, plaintiff's arguments may be summarized as follows: whether the trial court erred by (I) considering matters outside the pleadings; (II) dismissing plaintiff's complaint as barred by N.C. Gen. Stat. § 28A-19-3; and (III) whether plaintiff's due process rights were violated.

I

[1] On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted." *Allred v. Capital Area Soccer League, Inc.*, 194 N.C. App. 280, 282, 669 S.E.2d 777, 778 (2008). A complaint is properly dismissed under Rule 12(b)(6) when one or more of the following conditions are met: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim. *Oates v. Jag, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985). N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) states:

> If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be

> granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C.G.S. § 1A-1, Rule 12(b)(6) (2007). "Where matters outside the pleadings are presented to and not excluded by the court on a motion to dismiss for failure to state a claim, the motion shall be treated as one for summary judgment under Rule 56." *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 758, 325 S.E.2d 223, 229 (1985) (citations omitted).

In the present case, the trial court's order states the court "reviewed the pleadings and considered the arguments and submissions of counsel, and the Court [takes] judicial notice of portions of Estate file for the Estate of Magdalen P. Mileski and the pending caveat of the Will of Magdalen P. Mileski in Moore County[.]" It is evident from the order that the trial court considered matters outside the pleadings. Thus, defendants' Rule 12(b)(6) motion was converted to a motion for summary judgment. In reviewing plaintiff's arguments, we will apply the standard of review from an order granting summary judgment.

II

Plaintiff argues his claims against the estate were not barred by N.C. Gen. Stat. § 28A-19-3(a) because he was a reasonably ascertainable creditor as contemplated by N.C. Gen. Stat. § 28A-14-1 and defendants failed to give plaintiff personal notice. Plaintiff also argues his claims against defendants in their individual capacities were not barred by § 28A-19-3(a).

"[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted). "[T]he evidence presented by the parties must be viewed in the light most favorable to the nonmovant." *Id.* Summary judgment is proper 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).

Claims Against the Estate

[2] Any claim against an estate is, under N.C. Gen. Stat. § 28A-19-3(a), forever barred if the claim is not presented to the personal representative of the estate "by the date specified in the general notice to creditors as provided for in G.S. 28A-14-1(a)." N.C.G.S. § 28A-19-3(a) (2007). However, the personal representative of the estate is required under N.C.G.S. § 28A-14-1 to publish a notice to creditors once per week for four consecutive weeks in a newspaper qualified to publish legal advertisements, notifying all persons having claims against the decedent to present them to the personal representative on or before "a day to be named in such notice, which day must be three months from the date of the first publication . . . of such notice." N.C.G.S. § 28A-14-1(a).

In the present case, defendants complied with N.C.G.S. § 28A-14-1(a) by publishing a notice to creditors on the 1st, 8th, 15th, and 22nd of July 2007 in *The Pilot*, a newspaper published in Moore County. Therefore, we must now determine whether defendants were required to give plaintiff personal notice.

In addition to publishing a notice to creditors in a qualified newspaper, the personal representative is also required to:

> personally deliver or send by first class mail to the last known address a copy of the notice required by subsection (a) of this section to all persons, firms, and corporations having unsatisfied claims against the decedent *who are actually known or can be reasonably ascertained by the personal representative* or collector within 75 days after the granting of letters. Provided, however, no notice shall be required to be delivered or mailed with respect to any claim that is recognized as a valid claim by the personal representative or collector.

N.C.G.S. § 28A-14-1(b) (2007) (emphasis added). This Court recently established in *Azalea Garden Bd. & Care, Inc. v. Vanhoy*, 196 N.C. App. 376, 675 S.E.2d 122 (2009), that once a defendant-personal representative shows that she properly published a general notice pursuant to § 28A-14-1(b), the plaintiff then bears the initial burden of showing that he was entitled to *personal* notice pursuant to N.C.G.S. § 28A-14-1(b). The plaintiff must "produce a forecast of evidence demonstrating that a material issue of fact exists as to whether its identity and its claim were reasonably ascertainable . . . ." *Id.* at 390, 675 S.E.2d at 131.

Plaintiff contends he was a reasonably ascertainable claimant, and therefore entitled to personal notice. However, plaintiff's forecast of evidence, even when viewed in the light most favorable to him, fails to set forth specific facts showing that a genuine issue of material fact existed as to whether his claim against the estate was reasonably ascertainable. Plaintiff contends the executors of Ms. Mileski's estate had knowledge of his claims against the estate because they knew or should have known that the transfer of his assets to Ms. Mileski's name was unauthorized and that Ms. Mileski breached the joint estate planning agreement.

There is no evidence in the record that defendants were aware of plaintiff's claim. Plaintiff did not file a complaint against the estate until well after the time limitation had expired. Nothing in the record indicates that defendants were on notice that plaintiff had claims against the estate regarding the transfers Ms. Mileski conducted via her power of attorney. Given the lack of forecasted evidence to support his claim, plaintiff was not entitled to personal notice under N.C.G.S. 28A-14-1(b). *See In re Estate of Mullins*, 182 N.C. App. 667, 643 S.E.2d 599 (2007) (holding petitioner was not entitled to personal notice where no evidence in the record indicated respondent was "on notice" of any claims petitioner had against the estate). Therefore, viewing the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact and plaintiff's claim is barred by N.C. Gen. Stat. § 28A-19-3(a)[1] due to plaintiff's failure to present his claim within the time specified by the general newspaper notice to creditors.

Claims Against Individual Defendants

[3] Plaintiff also argues the trial court erred by granting summary judgment in favor of the defendants in their individual capacities. Plaintiff contends his claims against the individual defendants were not barred by N.C. Gen. Stat. § 28A-19-3(a) because the statute acts to bar actions only against personal representatives and heirs or devisees for derivative claims arising out of claims against the estate, but does not act to bar claims against such individuals for their individual torts.

1. (a) All claims against a decedent's estate which arose before the death of the decedent . . . whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis, which are not presented to the personal representative or collector pursuant to G.S. 28A-19-1 by the date specified in the general notice to creditors as provided for in G.S. 28A-14-1(a) . . . are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.

Plaintiff is able to, and in fact did present his claims against the estate in a caveat proceeding. North Carolina General Statutes, section 31-32 states:

> At the time of application for probate of any will, and the probate thereof in common form, or at any time within three years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will . . . .

N.C. Gen. Stat. § 31-32 (2007).

"In general, '[t]he purpose of a caveat is to determine whether the paperwriting purporting to be a will is in fact the last will and testament of the person for whom it is propounded.' " *Baars v. Campbell University, Inc.*, 148 N.C. App. 408, 419, 558 S.E.2d 871, 878 (2002) (quoting *In re Spinks*, 7 N.C. App. 417, 423, 173 S.E.2d 1, 5 (1970)). "The filing of a caveat is the customary and statutory procedure for an attack upon the testamentary value of a paperwriting which has been admitted by the clerk of superior court to probate in common form." *Id.* "Additionally, a direct attack by caveat has been held a complete and adequate remedy at law, such that a plaintiff is not entitled to equitable relief." *Id.*

In the present case, plaintiff is challenging the validity of Ms. Mileski's will that was submitted to the Moore County Clerk of Court as well as the unauthorized transfer of assets from his name to Ms. Mileski's name. Plaintiff's essential claim—that defendants' undue influence procured the will submitted to the Clerk of Court and procured the transfer of assets—can properly be determined through a caveat proceeding. Thus, the trial court did not err by dismissing plaintiff's complaint.

Because we have determined defendants were not required to deliver to plaintiff a copy of the general notice to creditors, we need not address plaintiff's final argument that his due process rights were violated. This assignment of error is overruled.

For the forgoing reasons, the order of the trial court is affirmed.

AFFIRMED

Judges ELMORE and STEELMAN concur.

NORTH CAROLINA DEPARTMENT OF REVENUE, PETITIONER-APPELLEE v. BERNHARD VON NICOLAI, RESPONDENT-APPELLANT

N0. COA08-1356

(Filed 18 August 2009)

1. Taxation— gift taxes—transfer of real property—reserved special power of appointment

The Secretary of Revenue had the power to impose gift taxes on the property transfers in this case, at the Secretary's discretion, where respondent transferred real property to his daughter, the reservation of a special power of appointment served as a condition or contingency, and the reserved power gave respondent the ability to defeat or abridge his daughter's interests in the real property. The conditions of N.C.G.S. § 105-195 were satisfied.

2. Taxation— gift tax—statute of limitations

Even if respondent had preserved the issue for appeal, the superior court did not err by finding that the Department of Revenue did not violate the statute of limitations when it imposed a gift tax. The original return was filed on 15 April 2003 and any assessment issued by petitioner on or before 15 April 2006 would fall within the three-year statute of limitations. The original assessment was issued on 2 February 2005, and any amendment was timely because the original assessment was within the statute of limitations.

3. Taxation— gift taxes—contingent real estate transfer—highest appropriate amount

The trial court did not err by confirming the Department of Revenue's valuation of gift taxes due. The Secretary of Revenue did not abuse the statutory discretion to consider the facts and select the highest appropriate tax rate where respondent transferred land to his daughter with an option to defeat his daughter's interests in the land and convey it to charity or to his siblings. The Class B rate under N.C.G.S. § 105-188.1(f)(2) would apply if respondent conveyed the property to any of his siblings and would be the highest rate that could arise, as determined by the Secretary.

Appeal by Respondent from order entered 21 July 2008 by Judge James E. Hardin, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 22 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Michael D. Youth, for Petitioner-Appellee.

Craige Brawley Liipfert & Walker LLP, by Brent W. Stephens, for Respondent-Appellant.

McGEE, Judge.

The North Carolina Department of Revenue (Petitioner) filed a petition on 9 November 2007 for judicial review of a Tax Review Board (TRB) decision that stated Bernhard von Nicolai (Respondent) was not required to pay gift taxes on real property he transferred to his daughter. In an order entered 21 July 2008, Superior Court Judge James E. Hardin, Jr. reversed the administrative decision of the TRB, finding that Respondent was required to pay gift taxes on the real property transfer. Respondent appeals.

Respondent owned six separate parcels of land located throughout Winston-Salem and Lewisville, North Carolina. Respondent gifted to his daughter, Maria von Nicolai (daughter), an unconditional one percent interest in parcels one through five on 31 May 2002. Respondent signed a deed transferring the remaining ninety-nine percent interest in parcels one through five to his daughter on 14 August 2002. Respondent made the transfer subject to what he termed a "reserved special power of appointment." This power gave Respondent the ability to transfer the real property, in part or in whole, from his daughter to any charity or to any of his siblings if he chose to do so in the future. Respondent then conveyed a one percent interest in the sixth parcel to his daughter on 14 November 2002. Respondent released the reserved special power of appointment for parcel number five on 22 November 2002. Respondent signed a deed transferring the remaining ninety-nine percent interest in the sixth parcel to his daughter on 26 November 2002, again reserving the same special power of appointment.

Respondent filed federal and North Carolina gift tax returns on 15 April 2003. The North Carolina gift tax return reported parcel number five as a completed gift, and reported the ninety-nine percent interest in parcels one through four and parcel six as incomplete gifts. The ninety-nine percent interest in the five parcels reported as incomplete gifts are the subject of this suit. Pursuant to N.C. Gen. Stat. § 105-188.1(c), Petitioner issued a tax assessment stating that the five parcels reported as incomplete gifts were, in fact, completed gifts. This assessment further stated the real property transfer was a Class

A gift and that gift taxes of $12,912.00, plus interest, were due. The lowest gift tax rate applies to a Class A beneficiary. Class A gifts are between a donor and "lineal issue, lineal ancestor, adopted child, or stepchild[.]" N.C. Gen Stat. § 105-188(f)(1) (2007). Respondent requested more information regarding the assessment, and received a letter on 8 April 2005 that stated it was Petitioner's opinion that the transaction was a completed gift.

A second assessment was issued to Respondent on 1 June 2005. This assessment stated that, when applying the $100,000.00 Class A gift exemption under N.C. Gen. Stat. § 105-188(g), a gift tax of $7,118.25, plus interest, was due on the transaction. A third and final assessment was issued on 27 January 2006. This assessment stated that, pursuant to N.C. Gen. Stat. § 105-195, a gift tax of $21,819.20, plus interest, was due on the transaction, as Petitioner had determined that the gift was actually a Class B gift, which did not qualify for the $100,000.00 Class A exemption. A Class B beneficiary is subject to a higher tax rate than a Class A beneficiary. Class B status exists when the "donee is the brother or sister, or descendant of the brother or sister, or is the uncle or aunt by blood of the donor." N.C. Gen. Stat. § 105-188(f)(2) (2007).

An administrative hearing was held before the Assistant Secretary of the Department of Revenue (Secretary) on 14 June 2006. The Secretary issued a final decision on 9 October 2006, affirming the third and final assessment of gift taxes in the amount of $21,819.20, plus interest. Respondent petitioned for a review by the TRB pursuant to N.C. Gen. Stat. § 105-241.2. The TRB issued Administrative Decision Number 507, which reversed the Secretary's final decision and found that no gift tax was due as of 21 July 2007. The superior court reversed the TRB decision on 21 July 2008, upholding the Secretary's third assessment that $21,819.20 in gift taxes was due on the transaction.

I.

[1] In his first two arguments, Respondent contends the superior court erred when it affirmed the Secretary's final decision that Respondent was required to pay gift taxes on the disputed land transfers based on N.C. Gen. Stat. § 105-195. We disagree.

"The standard of review for an appellate court upon an appeal from an order of the superior court affirming or reversing an administrative agency decision is the same standard of review as that employed by the superior court." *Dorsey v. UNC-Wilmington*, 122

N.C. App. 58, 62-63, 468 S.E.2d 557, 560 (1996). The instant case requires interpretation of the State's gift tax statutes. "Since this is a question of statutory interpretation, we will conduct a *de novo* review of the [superior] court's conclusions of law." *Downs v. State*, 159 N.C. App. 220, 222, 582 S.E.2d 638, 639 (2003).

Although it was repealed effective 1 January 2009, N.C. Gen. Stat. § 105-195 is the controlling gift tax statute for property transfers during the period at issue. According to N.C. Gen. Stat. § 105-195:

> When property is transferred or limited in trust or otherwise, and the rights or interests of the transferees or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate, within the discretion of the Secretary of Revenue, which on the happening of any of the said contingencies or conditions would be possible under the provisions of this section, and such tax so imposed shall be due and payable forthwith by the donor, and the Secretary of Revenue shall assess the tax on such transfers.

N.C. Gen. Stat. § 105-195 (2007). "We believe the wording of the statute is unambiguous in that it gives the Secretary the discretion to assess a tax on the contingent transfer based on the potential happening of any of the possible contingencies." *Downs*, 159 N.C. App. at 223, 582 S.E.2d at 640. Further, "the Secretary must have sufficient discretion to assess a tax that is appropriate under the circumstances." *Id.* While the Secretary does not have absolute discretion, "[a]n interpretation by the Secretary is prima facie correct." N.C. Gen. Stat. § 105-264 (2007).

Respondent transferred a ninety-nine percent interest in each of five parcels of land to his daughter in 2002, reserving a special power of appointment for himself in each parcel. This special power of appointment granted Respondent the power to defeat or abridge his daughter's possession of the parcels and convey all or part of the real property to any charity or to any of Respondent's siblings. Respondent treated the transfer as an incomplete gift on his 2002 gift tax returns, and as a consequence, claimed no gift tax was due. The Secretary, acting on behalf of the North Carolina Department of Revenue, found that a gift tax was due on the transfer, and tax assessments were issued to Respondent.

Under N.C. Gen. Stat. § 105-195, a gift tax must be assessed when the following three requirements have been met: (1) property has

been transferred, (2) the rights or interests of the transferee are dependent upon contingencies or conditions, and (3) the interests of the transferee may be, wholly or in part, defeated or abridged. In the present case, Respondent met these requirements: (1) he transferred real property to his daughter, (2) Respondent's reserved special power of appointment served as a condition or contingency, and (3) the reserved power gave Respondent the ability to defeat or abridge his daughter's interests in the real property. With the conditions of this unambiguous statute met, we hold that the Secretary had the power to impose gift taxes on the property transfers at the Secretary's discretion, as such a tax was "appropriate under the circumstances." *Downs*, 159 N.C. App. at 223, 582 S.E.2d at 640. These arguments are without merit.

II.

[2] In his third argument, Respondent argues the superior court erred when it found that Petitioner had not violated the statute of limitations. We disagree.

Respondent argues that "[t]he third assessment was issued within the three year statute of limitations; however, the Department's assertion that N.C.G.S. § 105-195 was the basis for the tax came after the statute of limitations had passed." "Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure states, in relevant part, '[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.' " *Clay v. Monroe*, 189 N.C. App. 482, 484, 658 S.E.2d 532, 534 (2008) (quoting N.C.R. App. P. 28(b)(6)(2007)); *see also Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008). Respondent's briefing of this issue is devoid of any legal argument, or relevant facts, in support of his contention that Petitioner's "assertion of its basis" for "the tax" is something that must be ultimately established before the statute of limitations ends. Because Respondent fails to state any reason or cite any authority in support of this argument, he has abandoned for appellate review the issue of whether "the Department's assertion that N.C.G.S. § 105-195 was the basis for the tax came after the statute of limitations had passed."

Because there is no factual dispute concerning whether the assessments were issued within the statute of limitations, our review is a question of statutory interpretation, and thus *de novo*. *Downs*, 159 N.C. App. at 222, 582 S.E.2d at 639. Regarding the statute of limita-

tions for tax assessments, N.C. Gen. Stat. § 105-241.1(e) (2006) states that "the Secretary must propose an assessment of any tax due within one year after the return is filed or within three years of when the original return was filed or due to be filed, whichever is later." Further, "[i]f the Secretary proposes an assessment of tax within the time provided in this section, the final assessment of the tax is timely." N.C.G.S. § 105-241.1(e).

Respondent originally filed his gift tax return on 15 April 2003. Petitioner issued the first tax assessment on 2 February 2005, followed by amendments to the assessment on 1 June 2005 and 27 January 2006. According to N.C. Gen. Stat. § 105-241.1(e), because the original return was filed on 15 April 2003, any assessment issued by Petitioner on or before 15 April 2006 would fall within the three-year statute of limitations. The original assessment was issued 2 February 2005 and was well within the statute of limitations, which would have expired 15 April 2006. Further, because the initial assessment was issued within the statute of limitations, any "final assessment of the tax [was] timely." N.C.G.S. § 105-241.1(e). Therefore, any amendment made to the original valid assessment was timely. Even assuming *arguendo* that Respondent had preserved his argument concerning the timeliness of Petitioner's statement of the "basis for the tax," Respondent's argument would still fail. Accordingly, we hold that the superior court did not err in its determination that Petitioner's final assessment did not violate the statute of limitations. This argument is without merit.

III.

[3] In his final argument, Respondent contends that the superior court committed error when it affirmed Petitioner's valuation of the gift tax due. We disagree.

The method for valuation of a gift tax assessment is set forth in N.C. Gen. Stat. § 105-195. Once again, because the valuation was based on statutory interpretation, we review the superior court's determination *de novo*. With regard to tax valuations for gifts of property under N.C. Gen. Stat. § 105-195, our Court stated in *Downs*, 159 N.C. App. at 223, 582 S.E.2d at 640:

> The Secretary is not granted unlimited authority or discretion in assessing a tax, and a decision by the Secretary may be overturned upon an abuse of that discretion. The wording of the statute specifically permits the Secretary to assess a tax at the

highest possible rate that could arise upon the happening of any of the potential contingencies, but this decision is left to the discretion of the Secretary. Since the assessment of taxes on contingent transfers are heavily fact based, the Secretary must have sufficient discretion to assess a tax that is appropriate under the circumstances. The General Assembly declined to fashion a hard and fast rule for the consideration, valuation, and taxation of contingencies and left the assessment of such taxes to the Secretary's discretion.

Respondent's reserved special power of appointment provides him with the option to defeat his daughter's interests in the real property and to convey the parcels to charity or to any of his siblings. Under N.C. Gen. Stat. § 105-188.1(f)(2), if the donee is a sibling of the donor, the higher Class B tax rate may be assessed. Here, Respondent's daughter is the donee, and the lower Class A rate would apply only if Respondent was unable to defeat her interests. However, because Respondent has the option to defeat his daughter's interests and convey the real property to any of Respondent's siblings, Class A is not the highest rate available. Should Respondent act on his reserved power and convey the real property to any of his siblings, it would constitute a Class B gift. Therefore, the Class B tax rate is the "highest possible rate that could arise upon . . . any of the potential contingencies[.]" *Downs*, 159 N.C. App. at 223, 582 S.E.2s at 640. It was within the Secretary's discretion to consider all the facts and assess the highest possible tax rate "appropriate under the circumstances." *Id.* We hold that the Secretary has not abused the discretion granted by the statute, and therefore Petitioner's determination of the gift tax due is valid. This argument is without merit.

Affirmed.

Judges ERVIN and BEASLEY concur.

WILLIAM WHITEHEART D/B/A WHITEHEART ADVERTISING COMPANY, PLAINTIFF-APPELLANT v. BETTY STROTHER WALLER AND WALLER & STEWART, LLP (FORMERLY KNOWN AS WALLER, STROUD, STEWART, & ARANEDA, LLP), DEFENDANTS-APPELLEES

No. COA08-1261

(Filed 18 August 2009)

1. Collateral Estoppel and Res Judicata— legal malpractice—verdict—indicated plaintiffs' intentional wrongdoing

A *de novo* review revealed the trial court did not err in a legal malpractice action by concluding that the verdicts against plaintiff in the Forsyth County cases established as a matter of law plaintiff's intentional wrongdoing.

2. Attorneys— legal malpractice—intentional wrongdoing—*in pari delicto*

The trial court did not err in a legal malpractice action by concluding that plaintiff's intentional wrongdoing barred any recovery from defendants for losses that may have resulted from defendants' misconduct under a theory of *in pari delicto*.

Appeal by plaintiff from order entered 13 August 2008 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 6 April 2009.

Randolph M. James, P.C., by Randolph M. James, for plaintiff-appellant.

Poyner & Spruill, LLP, by E. Fitzgerald Parnell, III and Cynthia L. Van Horne, for defendants-appellees.

CALABRIA, Judge.

William Whiteheart d/b/a Whiteheart Advertising Company ("plaintiff") appeals an order dismissing his complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We affirm the trial court.

Plaintiff is in the business of billboard advertising on the highways of North Carolina. Beginning in 1983, the predecessor to plaintiff's company maintained a billboard on Interstate 77, near Statesville, North Carolina, located on land owned by a predecessor of the Beroth Oil Company ("Beroth"). The original lease for this billboard expired on 30 June 1998. The lease could have been renewed

by agreement of the parties for additional terms; however, plaintiff failed to pay rent from July 1998 until 25 July 2000. Despite notices from Beroth for past due rent, plaintiff continued to use the billboard on Beroth's property ("the Beroth property") during this time.

Sometime before July 2000, a competitor of plaintiff, Darlene Payne ("Ms. Payne"), through her company Skyad, LLC ("Skyad"), offered to lease the billboard location from Beroth. On or about 13 July 2000, Ms. Payne's attorney, pursuant to instructions received from Beroth, sent plaintiff a letter requesting the removal of his billboard from the Beroth property. Plaintiff responded by sending Beroth a check in the amount of $2,000 for past due rent for the period from 1 July 1999 to 30 June 2000. In addition to the check, plaintiff enclosed a proposed lease for the period from 1 July 2000 to 30 June 2001. Beroth rejected the lease offer on 5 February 2001 and returned plaintiff's unnegotiated check with the unsigned lease. At that time, Beroth gave plaintiff thirty days notice to remove his billboard from the property. Plaintiff failed to comply with this demand, as well as several others from Beroth in the ensuing months.

On 26 March 2001, plaintiff sent a letter to his various competitors "alerting" them about Ms. Payne. In this letter, plaintiff asserted that Ms. Payne was a "lease jumper" and that she and her business practices were unprofessional, unethical, and despicable. Plaintiff also referred to Ms. Payne personally in additional derogatory terms. Although plaintiff's attorney, Betty Waller ("defendant"), reviewed the letter before it was sent, she failed to advise plaintiff of the potential liability that could result from sending such a *per se* defamatory document.

On 4 May 2001, plaintiff, through the services of defendant, obtained a Temporary Restraining Order that permitted plaintiff to continue to maintain his sign on the Beroth property, while at the same time preventing Ms. Payne from either leasing the property or obtaining a North Carolina Department of Transportation ("NCDOT") outdoor advertising permit for the property. Plaintiff also filed a verified complaint against, *inter alios*, Ms. Payne and Beroth in Iredell County Superior Court requesting a declaratory judgment.

On 7 May 2001, plaintiff submitted a check to NCDOT to pay the renewal fee for his permit on the Beroth property. Plaintiff falsely asserted in his renewal certification that he had Beroth's permission and consent to continue to maintain his billboard. Ms. Payne subsequently applied for an NCDOT permit on the Beroth property, but

her application was denied because plaintiff already held a permit for the property.

On 14 May 2001, the trial court denied plaintiff's motion to convert the Temporary Restraining Order into a preliminary injunction. Plaintiff then removed his billboard from the Beroth property on 4 June 2001. Beroth and Ms. Payne subsequently moved for summary judgment against plaintiff, at which time plaintiff filed a voluntary dismissal of his claims in the Iredell County action.

After plaintiff voluntarily dismissed his claims, both Beroth and Ms. Payne filed actions against plaintiff in the Superior Court of Forsyth County ("Forsyth County cases") for, *inter alia*, malicious prosecution, abuse of process, libel *per se*, slander of title, unfair and deceptive trade practices, unjust enrichment, and *quantum meruit*. Defendant served as plaintiff's counsel in the Forsyth County cases. The jury returned a verdict against plaintiff. Beroth and Ms. Payne were awarded combined damages in excess of $700,000. On appeal, these judgments were affirmed by this Court in *Beroth Oil Co. v. Whiteheart; Am. Adver. Consultants, Inc. v. Whiteheart*, 173 N.C. App. 89, 618 S.E.2d 739 (2005).

After satisfying the judgments against him, plaintiff filed an action in Forsyth County Superior Court against defendant and her law firm Waller & Stewart, LLP (formerly known as Waller, Stroud, Stewart, & Araneda, LLP) (collectively "defendants") for legal malpractice, seeking to recover damages sufficient to cover the judgments noted above. Defendants moved to dismiss the action pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and on 7 August 2008, the court granted defendants' motion. Plaintiff appeals.

I. Standard of Review

Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review for a motion to dismiss 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." *Harris v. Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citation omitted). The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief. *See Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d

757, 758 (1987). Dismissal under Rule 12(b)(6) is proper when one or more of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985). A superior court's decision to dismiss a complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is reviewed *de novo* by this Court. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003), *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

II. Collateral Estoppel

[1] Plaintiff contends that the trial judge erred when she concluded that the verdicts against the plaintiff in the Forsyth County cases "establish as a matter of law [plaintiff's] intentional wrongdoing." The doctrine of collateral estoppel, also referred to as "issue preclusion" or "estoppel by judgment", precludes relitigation of a fact, question or right in issue:

> when there has been a final judgment or decree, necessarily determining [the] fact, question or right in issue, rendered by a court of record and of competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit.

King v. Grindstaff, 284 N.C. 348, 355, 200 S.E.2d 799, 805 (1973) (quoting *Masters v. Dunstan*, 256 N.C. 520, 524, 124 S.E.2d 574, 576 (1962)). The requirements for the identity of issues to which collateral estoppel may be applied have been established by the Supreme Court as follows: (1) the issues must be the same as those involved in the prior action; (2) the issues must have been raised and actually litigated in the prior action; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment. *Id.* at 358, 200 S.E.2d at 806.

The judgments against the plaintiff in Forsyth County necessarily decided his liability for his actions. The issue regarding whether plaintiff engaged in intentional acts giving rise to legal liability was litigated and was necessary for the jury's verdicts and the superior court's judgments against plaintiff. Plaintiff is not permitted to re-

litigate the issue in the hope of obtaining a better result. *See*, *e.g.*, *Summer v. Allran*, 100 N.C. App. 182, 184, 394 S.E.2d 689, 690-91 (1990) (malpractice plaintiff could not sue her attorney for loss of alimony and increased child support as she previously litigated those issues and lost). The trial court correctly applied collateral estoppel in determining that the jury verdicts in the Forsyth County cases, finding the plaintiff liable for malicious prosecution, abuse of process, libel *per se*, unfair and deceptive trade practices, slander of title, unjust enrichment, and *quantum meruit*, established as a matter of law plaintiff's intentional wrongdoing. Such a determination is fatal to plaintiff's claims under the doctrine of *in pari delicto*.

III. *In Pari Delicto*

[2] Plaintiff argues that his claim should not be barred because he was not *in pari delicto* ("in equal fault") with defendants. Our courts have long recognized the *in pari delicto* doctrine, which prevents the courts from redistributing losses among wrongdoers. "The law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same matter whereof he complains." *Byers v. Byers*, 223 N.C. 85, 90, 25 S.E.2d 466, 469-70 (1943). The courts of North Carolina have yet to apply the *in pari delicto* doctrine to a legal malpractice case, but it has been used in this context in several other jurisdictions. *See*, *e.g.*, *Gen. Car & Truck Leasing Sys., Inc. v. Lane & Waterman*, 557 N.W.2d 274 (Iowa 1996) (plaintiffs' malpractice claim dismissed because they acted *in pari delicto* with defendant law firm in knowingly making false statements in affidavits submitted to Patent and Trademark Office); *Evans v. Cameron*, 121 Wis. 2d 421, 360 N.W.2d 25 (1985) (plaintiff's malpractice action barred by defense of *in pari delicto* where the client lied under oath in a bankruptcy proceeding about transferring money to her mother, even though she claimed her testimony was based upon the advice of her attorney); *Robins v. Lasky*, 123 Ill.App.3d 194, 201-02, 462 N.E.2d 774, 779 (1984) (plaintiff's malpractice action barred by defense of *in pari delicto* when he followed defendant attorneys' advice to relocate and establish his permanent residence in another state in order to avoid service of process in Illinois). When applying *in pari delicto* in legal malpractice actions, some courts have distinguished between wrongdoing that would be obvious to the plaintiff and "legal matters so complex . . . that a client could follow an attorney's advice, do wrong and still maintain suit on the basis of not being equally at fault." *Pantely v. Garris, Garris & Garris, P.C.*, 180 Mich.App. 768, 776, 447 N.W.2d 864, 868 (1989). Such a distinction

is proper for circumstances in which advice given by an attorney is sufficiently complex that a client would be unable to ascertain the illegality of following the advice. *Id.*

The instant case presents no such complexity. Plaintiff was well aware that he did not possess either a valid lease or permission from the owner of the Beroth property to maintain his billboard. Yet he continued to assert his non-existent interests, giving rise to his liability. His verified complaint, in Iredell County, asserted that he had a valid lease for the Beroth property and his application to the NCDOT asserted he had the permission of the property owner to maintain his billboard. Plaintiff knew that neither of these facts were true. The defamatory letter plaintiff wrote implied that Ms. Payne was intentionally interfering with his contractual relationship with Beroth, while at the same time plaintiff continued to assure Beroth that he understood no such relationship existed and that he intended to vacate their property. Plaintiff is liable since he was well aware these actions were unethical. Regardless of the nature of the advice from defendant, plaintiff knew that the information was incorrect. The information he presented to the courts, NCDOT, his fellow billboard industry members, and Beroth was also incorrect. It would not serve justice to relieve plaintiff from liability in these circumstances.

IV. Conclusion

Plaintiff persuasively argues that defendant violated several North Carolina State Bar Rules of Professional Conduct in her handling of plaintiff's matters. However, in a case such as this, where the plaintiff has himself engaged in significant misconduct, it is not appropriate to address the attorney's misconduct through an action for malpractice. We agree with the holding of the Supreme Court of Wisconsin:

> A court should not encourage others to commit illegal acts upon their lawyer's advice by allowing the perpetrators to believe that a suit against the attorney will allow them to obtain relief from any damage they might suffer if caught. The attorney's misconduct of advising clients to perform illegal acts should be discouraged by the threat of attorney disciplinary action.

Evans v. Cameron, 121 Wis.2d 421, 428, 360 N.W.2d 25, 29 (1985).

The trial judge correctly decided that plaintiff's intentional wrongdoing barred any recovery from defendants for the losses that may have resulted from defendants' misconduct, under a theory

of *in pari delicto*. Because this decision acts as a full bar to any recovery by the plaintiff, it is unnecessary to consider plaintiff's additional claims.

Affirmed.

Chief Judge MARTIN and Judge STEELMAN concur.

UNITED STATES TRUST COMPANY, N.A., PLAINTIFF v. STANFORD GROUP COMPANY, JOHN R. RICH, D. KENNETH DIMOCK, GLENDA R. BURKETT, ANTHONY P. MONFORTON, MARTHA JO BROOKS, WILLIAM W. WATSON,VIRGINIA B. SASLOW, SANDRA G. BOES, SUZANNE C. WILCOX, KIM M. VAN ZEE, AND KIMBERLY LEMONS, DEFENDANTS

No. COA08-179

(Filed 18 August 2009)

1. **Appeal and Error— denial of motion to compel arbitration—interlocutory—substantial right affected**

   The trial court's denial of a motion to compel arbitration is an interlocutory order but is immediately appealable because a substantial right would otherwise be lost.

2. **Arbitration and Mediation— denial of motion to compel—remanded—findings insufficient**

   An order denying a motion to dismiss or to compel arbitration was remanded where the trial court did not specifically decide whether the parties had a valid agreement to arbitrate, did not set out the rationale underlying the denial, and there were several possible bases for the trial court's decision. Furthermore, the trial court should also determine on remand whether the Federal Arbitration Act or North Carolina law is applicable.

Appeal by defendants from order entered 20 September 2007 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 September 2008.

McGuireWoods LLP, by Irving M. Brenner, John G. McDonald, and Makila Sands Scruggs, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by John R. Buric and Preston O. Odom, III, for defendants-appellants.

PER CURIAM.

Defendants John R. Rich, D. Kenneth Dimock, Glenda R. Burkett, Anthony P. Monforton, Martha Jo Brooks, William W. Watson, Virginia B. Saslow, Sandra G. Boes, Suzanne C. Wilcox, Kim M. Van Zee, and Kimberly Lemons ("defendants") appeal from the trial court's order denying their motion to dismiss or, in the alternative, to compel arbitration. On appeal, defendants primarily contend that the trial court failed to make adequate findings of fact as to whether a valid arbitration agreement existed between the parties. Because this Court has repeatedly held that such findings are required, and we are bound under *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), to follow that authority, we reverse and remand for further findings of fact.

Facts

Plaintiff United States Trust Company, N.A. ("U.S. Trust") is a financial services company that offers a variety of wealth management services to both individual and institutional clients. U.S. Trust is the parent company of UST Securities Corp., a securities broker/dealer.

In 2006, while employed by U.S. Trust, Rich, Dimock, Burkett, Monforton, Brooks, Watson, Saslow, and Wilcox applied for and obtained licenses with the National Association of Securities Dealers, Inc., now called the Financial Industry Regulatory Authority ("NASD/FINRA"). Defendants contend that U.S. Trust required these employees to do so as a condition of their employment.

In order to apply for licensure, the employees were required to complete a Form U-4 and file it with the NASD/FINRA. The Form U-4 contains an arbitration clause that states in part: "I agree to arbitrate any dispute, claim or controversy that may arise between me and *my firm*, or a customer, or any other person, that is required to be arbitrated under the rules[.]" (Emphasis added.) The Form U-4 requires that the applicant identify his or her firm's name. In each case, the employees entered "UST Securities" in the area of the form requesting the firm name.

In July 2007, the individual defendants, all employed in U.S. Trust's Greensboro office, voluntarily terminated their employment with U.S. Trust and formed a new office for Stanford Group Company, a competitor of U.S. Trust. On 19 July 2007, U.S. Trust filed suit against the Stanford Group and the departing employees, alleging

claims for breach of contract, breach of the duty of loyalty, conversion, tortious interference with contractual relations, unfair trade practices, civil conspiracy, and misappropriation of trade secrets and confidential information. The complaint included a request for a temporary restraining order and a motion for a preliminary injunction.[1] In an order entered 3 August 2007, the trial court denied U.S. Trust's motion for a temporary restraining order enforcing certain non-competition agreements.

On 30 August 2007, defendants filed a motion to dismiss or, in the alternative, to compel arbitration. According to defendants, they were dual employees of both U.S. Trust and UST Securities. Defendants contended that U.S. Trust was a third-party beneficiary of the Form U-4 arbitration agreement and, consequently, U.S. Trust was required to arbitrate any claims asserted against defendants. U.S. Trust, on the other hand, contended the arbitration agreement did not apply because U.S. Trust "was, at most, an incidental beneficiary of the agreement between [defendants] and UST Securities." On 20 September 2007, the trial court entered an order denying defendants' motion. Defendants appealed to this Court.

The order denying the motion to dismiss or to compel arbitration was not stayed. On 4 January 2008, U.S. Trust filed a motion for a preliminary injunction enforcing employment agreements allegedly entered into by defendants Rich, Burkett, Dimock, Monforton, Brooks, Watson, Wilcox, and Saslow. U.S. Trust did not seek relief as to defendants Boes, Van Zee, and Lemons and ultimately withdrew its request for relief as to defendant Wilcox. On 28 January 2008, the trial court entered an order denying U.S. Trust's preliminary injunction motion as to defendants Dimock and Rich, but granting it in part as to Burkett, Monforton, Brooks, Watson, and Saslow. U.S. Trust and the five defendants subject to the injunction filed a separate appeal from that order, COA08-472, which is the subject of a separate opinion.

Discussion

[1] As an initial matter, we note that an appeal from the trial court's denial of a motion to compel arbitration is an interlocutory order. *See Boynton v. ESC Med. Sys., Inc.*, 152 N.C. App. 103, 106, 566 S.E.2d 730, 732 (2002). Our appellate courts have, however, repeatedly held that " '[t]he right to arbitrate a claim is a substantial right

1. Although Stanford Group Company was originally named as a defendant, plaintiff voluntarily dismissed the company as a party on 21 November 2007.

which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable.' " *Id.* (quoting *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881, *disc. review denied*, 350 N.C. 832, 539 S.E.2d 288 (1999), *cert. denied*, 528 U.S. 1155, 145 L. Ed. 2d 1072, 120 S. Ct. 1161 (2000)). This appeal is, therefore, properly before us.

[2] Turning to the merits of the appeal, when, as here, a party files a motion to compel arbitration, the trial court must perform " 'a two-step analysis requiring the trial court to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement.' " *Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 633, 610 S.E.2d 293, 296 (2005) (quoting *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004)). This Court has stressed repeatedly that, in making this determination, "the trial court must state the basis for its decision in denying a defendant's motion to stay proceedings [pending arbitration] in order for this Court to properly review whether or not the trial court correctly denied the defendant's motion." *Steffes v. DeLapp*, 177 N.C. App. 802, 804, 629 S.E.2d 892, 894 (2006). *See also Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co.*, 175 N.C. App. 380, 387, 623 S.E.2d 620, 625 (2006) (reversing order denying motion to compel arbitration and remanding for "a new order containing findings which sustain its determination regarding the validity and applicability of the arbitration provisions"); *Ellis-Don Constr.*, 169 N.C. App. at 635, 610 S.E.2d at 297 (reversing and remanding because "[t]he order appealed from contained neither factual findings that allow us to review the trial court's ruling, nor a determination whether an arbitration agreement exists between the parties"); *Barnhouse v. Am. Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 509, 566 S.E.2d 130, 132 (2002) ("In the instant case, there is no indication that the trial court made any determination regarding the existence of an arbitration agreement between the parties before denying defendants' motion to stay proceedings. The order denying defendants' motion to stay proceedings does not state upon what basis the court made its decision, and as such, this Court cannot properly review whether or not the court correctly denied defendants' motion.").

In this case, the trial court's order denying defendants' motion to compel arbitration stated in its entirety:

> THIS MATTER came on for hearing before the undersigned Superior Court Judge at the September 18, 2007 Civil Session for

> Mecklenburg County on Defendants' Motion to Dismiss, or, in the Alternative, to Stay Proceedings and Compel Arbitration. Having considered Defendants' Motion, the affidavits submitted by Plaintiff and Defendants, the arguments of counsel for both Plaintiff and Defendants, the applicable law, the pleadings and all other matters of record, this Court is of the opinion that under the facts presented in this case, Plaintiff should not be compelled to arbitrate its dispute with the Defendants and, accordingly, Defendants' Motion should be denied.

This order cannot be meaningfully distinguished from the orders in the above cited cases that were reversed as insufficient.

First, nothing in this order indicates that the trial court specifically decided, as it was required to do, whether the parties had a valid agreement to arbitrate. The order simply states that "Plaintiff should not be compelled to arbitrate," but does not indicate whether the basis for this determination was the lack of a valid arbitration agreement.

U.S. Trust contends that no findings of fact on this issue were necessary because there was no dispute regarding the existence of a valid arbitration agreement. According to U.S. Trust, the dispute is not whether the Form U-4 contained an arbitration agreement, but whether U.S. Trust was a party to that agreement. Far from justifying omission of findings of fact, this contention highlights the need for findings of fact.

U.S. Trust argues on appeal that it was not bound by the arbitration agreement signed by defendants. Thus, the first step of the required analysis was squarely before the trial court, and it was required to make findings of fact "regarding the existence of an arbitration agreement *between the parties* before denying defendants' motion to stay proceedings." *Barnhouse*, 151 N.C. App. at 509, 566 S.E.2d at 132 (emphasis added). *See also Ellis-Don Constr.*, 169 N.C. App. at 635, 610 S.E.2d at 297 (requiring "a determination whether an arbitration agreement exists *between the parties*" (emphasis added)).

In any event, the order does not set out the rationale underlying the trial court's decision to deny defendants' motion. Nothing in the order explains what about "the facts presented" persuaded the trial court that plaintiff "should not be compelled to arbitrate its dispute . . . ." As this Court recognized in *Ellis-Don Constr.*, "[w]hile denial of defendant's motion might have resulted from: (1) a lack of

privity between the parties; (2) a lack of a binding arbitration agreement; (3) this specific dispute does not fall within the scope of any arbitration agreement; or, (4) any other reason, we are unable to determine the basis for the trial court's judgment." 169 N.C. App. at 635, 610 S.E.2d at 296.

This case presents an even greater number of possible bases for the trial court's decision. U.S. Trust itself has presented a number of arguments—both based on the facts and the law—in support of the trial court's order, but this Court has no way of knowing which, if any, of those arguments were persuasive to the trial court, or whether it relied upon some other basis that might or might not be sustainable on appeal. *See also Steffes*, 177 N.C. App. at 805, 629 S.E.2d at 894 (reversing and remanding because "[t]he trial court's denial may have resulted from a number of reasons"); *Barnhouse*, 151 N.C. App. at 509, 566 S.E.2d at 132 (noting that although it was possible to infer from order that trial court found no arbitration agreement existed, "other possibilities [were] equally likely" for denial of motion, including equitable estoppel and procedural grounds).

Under these circumstances, we are required to remand for entry of a new order performing the two-step analysis required by *Ellis-Don* and including the findings of fact necessary to resolve defendants' motion. As this Court stated in *Pineville Forest Homeowners Ass'n*, 175 N.C. App. at 387, 623 S.E.2d at 625, because this case cannot be distinguished from *Ellis-Don* and "because that decision as well as *Barnhouse* are binding upon us, *see In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ('Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.')," we must reverse the order and remand to the trial court for "findings which sustain its determination regarding the validity and applicability of the arbitration provisions."

On remand, the trial court should also determine first whether the Federal Arbitration Act or North Carolina law is applicable. This Court explained in *Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 226, 606 S.E.2d 708, 711 (2005), that the question whether the Federal Arbitration Act or the North Carolina Uniform Arbitration Act applies "is a question of fact, which an appellate court should not initially decide." Therefore, as in *Hobbs*, "[t]his question should be determined by the trial court upon remand." *Id.* at

227, 606 S.E.2d at 711. Because of our resolution of this appeal, we do not address defendants' remaining arguments.

Reversed and remanded.

Panel Consisting of:

Judges ROBERT C. HUNTER, ELMORE and GEER.

WARREN B. MOSLER, THROUGH HIS ATTORNEY IN FACT, ALAN SIMON, PETITIONER v. DRUID HILLS LAND CO., INC., ALLAN J. GREENE, AS TRUSTEE FOR DRUID HILLS LAND TRUST 2000; MICHAEL MARTIN, INDIVIDUALLY AND AS OFFICER AND TRUSTEE, RESPONDENTS

No. COA08-1146

(Filed 18 August 2009)

Mortgages and Deeds of Trust—foreclosure—subject matter jurisdiction—merger—equitable relief exceeds permissible scope of review

The trial court lacked subject matter jurisdiction in an action for foreclosure under power of sale under N.C.G.S. § 45-21.16 to consider the equitable defense of merger.

Appeal by respondents from order entered 10 March 2008 by Judge J. Marlene Hyatt in Henderson County Superior Court. Heard in the Court of Appeals 26 February 2009.

Law Office of Frank B. Jackson by James L. Palmer and Frank B. Jackson, for petitioner-appellee.

John E. Tate, Jr., for respondents-appellants.

STROUD, Judge.

This case presents the sole question of whether a mortgagor can raise the equitable defense of merger to prevent foreclosure in an action for foreclosure under power of sale pursuant to N.C. Gen. Stat. § 45-21.16 when the existence of all the conditions required under the statute is undisputed. Because we conclude that he cannot, we affirm.

I. Background

On or about 30 May 1997, petitioner Warren B. Mosler ("Mosler") sold a tract of land, including a building, on Ashwood Road in Henderson County ("the property") to Druid Hills Land Co. ("Druid Hills"). Michael L. Martin ("Martin"), both individually and as president of Druid Hills, executed a promissory note in the amount of one-hundred seventy-five thousand dollars ($175,000) in favor of Mosler as consideration for the property. Martin, in his capacity as president of Druid Hills, executed a deed of trust on the property to secure the debt.

Martin and Druid Hills defaulted on the note in 2006 by failing to make payments to Mosler and by failing to pay property taxes. In January and February 2007, Mosler's attorney initiated discussions requesting Martin to execute a deed in lieu of foreclosure to be held in escrow as a sign of Martin's good faith intention to pay the note. On 21 February 2007, Mosler through his attorney e-mailed Martin that a foreclosure action would be filed on 26 February 2007 unless the note was paid in full or a deed in lieu of foreclosure was received.

On 26 February 2006, Martin filed a quitclaim deed with the Henderson County Register of Deeds purporting to convey the property to Mosler. On 27 April 2007, Mosler through an attorney sent a letter to Martin demanding payment of the note within 15 days and informing Martin that he "has never accepted and does not accept the purported 'deed in lieu of foreclosure' filed in February 2007."

On 10 August 2007, Mosler filed a Notice of Hearing on Foreclosure of Deed of Trust in Superior Court, Henderson County. Martin filed a verified answer on 22 August 2007. The answer sought to prevent foreclosure by asserting that Martin and Druid Hills had "provided all it's [sic] right, title and interest, exactly and promptly, per Petitioner's demand(s) by [the quitclaim deed filed on] February 26, 2007." On 1 October 2007, the Clerk of Superior Court dismissed the action without prejudice on the grounds "that there are title issues and therefore [I] can not issue an Order of Foreclosure." Petitioner appealed to Superior Court pursuant to N.C. Gen. Stat. § 1-301.1 on 15 October 2007.

In a Pre-Trial Order signed 3 March 2008, the parties stipulated to the following facts and exhibits: (1) a promissory note dated May 1997 evidencing a debt of $175,000 owed to Mosler by Martin and Druid Hills, (2) proper notice, (3) authorization of "the Substitute

Trustee to proceed with foreclosure (if the Court [determined the doctrine of merger did not apply and therefore] allow[ed] the Foreclosure to proceed)[,]" and (4) the note was in default. The Pre-Trial Order also purported to stipulate to the issues before the court:

> (1) Whether or not the "Quit Claim [sic] Deed" [recorded by Martin in favor of Mosler on 26 February 2007] was accepted by the Petitioner[;]
>
> (2) If [the "Quit Claim [sic] Deed" was accepted] does the doctrine of merger apply[; and]
>
> (3) May Petitioner proceed with foreclosure pursuant to his Deed of Trust[.]"

The trial court held a hearing on the action on 3 March 2008. The trial court entered an Order Allowing Foreclosure of Deed of Trust on 10 March 2008, specifically decreeing "[t]hat the Quitclaim Deed was not delivered to or accepted by the Petitioner and the document is ineffective as either a quitclaim deed or a deed in lieu of foreclosure" and "[t]hat the doctrine of merger does not apply to the facts of this case." Respondents appeal.

II. Subject Matter Jurisdiction for Equitable Defenses

Neither party raised the issue of subject matter jurisdiction. However, "[a] challenge to subject matter jurisdiction may be made at any time. The issue may be raised by the appellate court on its own motion, even when not raised by the parties." *Whittaker v. Furniture Factory Outlet Shops*, 145 N.C. App. 169, 172, 550 S.E.2d 822, 824 (2001) (citations, quotation marks, and ellipses in original omitted).

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question [and] is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citations omitted). Subject matter "[j]urisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (citation and quotation marks omitted). Specifically, subject matter jurisdiction cannot be conferred by waiver or consent of the parties. *Id.*

At a foreclosure hearing pursuant to N.C. Gen. Stat. § 45-21.16, "[t]he Clerk of Superior Court is limited to making the four findings

of fact specified in the statute, and it follows that the Superior Court Judge is similarly limited in the hearing *de novo*." *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978) (citing N.C. Gen. Stat. § 1-276). "The proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in the Superior Court pursuant to G.S. 45-21.34." *Id.* at 94, 247 S.E.2d at 430. On a *de novo* appeal to the Superior Court in a section 45-21.16 foreclosure proceeding, the trial court must "declin[e] to address [any party's] argument for equitable relief, as such an action would [] exceed[] the superior court's permissible scope of review[.]" *Espinosa v. Martin*, 135 N.C. App. 305, 311, 520 S.E.2d 108, 112 (1999) (citing N.C. Gen. Stat. § 1-276), *disc. review denied*, 351 N.C. 353, 543 S.E.2d 126 (2000). This is true even when, as here, the parties stipulate that additional issues are properly before the trial court in a section 45-21.16 proceeding, because subject matter jurisdiction "is never dependent upon the conduct of the parties." *T.R.P.*, 360 N.C. at 595, 636 S.E.2d at 793.

Because *Espinosa* and *Watts* both cited N.C. Gen. Stat. § 1-276, we find it necessary to consider whether the holding of those cases was superseded when the General Assembly repealed N.C. Gen. Stat. § 1-276 and several other related statutes, replacing them with N.C. Gen. Stat. § 1-301.1, effective 1 January 2000. N.C. Sess. Law 1999-216 part 1 § 2. Comparing the old and new statutes below, we conclude that those holdings were not superseded and that *Espinosa* and *Watts* remain good law.

The old statute, N.C. Gen. Stat. § 1-276, provided that:

> Whenever a civil action or special proceeding begun before a clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so.

N.C. Gen. Stat. § 1-276 (1996).

The new statute, N.C. Gen. Stat. § 1-301.1, provides that:

> Upon appeal [of a clerk's decision in civil actions], the judge may hear and determine all matters in controversy in the civil action, unless it appears to the judge that any of the following apply:

(1) The matter is one that involves an action that can be taken only by a clerk.

(2) Justice would be more efficiently administered by the judge's disposing of only the matter appealed.

N.C. Gen. Stat. § 1-301.1(c) (2007).

The language of subsubsection (c)(2), "[j]ustice would be more efficiently administered by the judge's disposing of only the matter appealed[,]" seems to suggest that the trial court's subject matter jurisdiction is broader than the clerk's subject matter jurisdiction in the same action. However, N.C. Gen. Stat. § 1-301.1(a) specifically states: "If this section conflicts with a specific provision of the General Statutes, that specific provision of the General Statutes controls." Accordingly, we conclude that if the enactment of N.C. Gen. Stat. § 1-301.1(c) created any conflict between it and the jurisdictional provisions in Chapter 45, section 45-21.16 and section 45-21.34, the latter control in foreclosure actions.

In fact, *Espinosa* and *Watts* more specifically rested their holdings on section 45-21.16 and section 45-21.34 and the legislative intent in enacting those statutes. Accordingly, we conclude that the enactment of N.C. Gen. Stat. § 1-301.1 did not supersede *Espinosa* and *Watts*, and the subject matter jurisdiction of the trial court *sub judice* is controlled by those two cases.

Common law merger of title, the doctrine relied on by respondents in the instant case, is an equitable doctrine. *Blades v. Norfolk Southern R.R. Co.*, 224 N.C. 32, 40-41, 29 S.E.2d 148, 153 (1944) ("It is believed that the doctrine of merger is an elastic doctrine in equity, not one to be applied with rigidity. Equity will not use merger if serious injustice would arise or intent be obviously frustrated." (Citation and quotation marks omitted.)); *Washington Furniture Co. v. Potter*, 188 N.C. 145, 147, 124 S.E. 122, 123 (1924) ("[I]n equity, there will be no merger of estates when a mortgagee receives a conveyance of the equity of redemption, when such a result would be contrary to his real intention in the transaction, or to the bargain made by the parties at the time."). Therefore, because respondents failed to invoke the equitable jurisdiction of the court to enjoin the foreclosure "by bringing an action in the Superior Court pursuant to G.S. 45-21.34[,]" *Watts* at 94, 247 S.E.2d at 429, we hold that any findings and conclusions of the trial court regarding merger were outside of its jurisdiction and therefore have no legal effect in the proceeding *sub judice*. *See Laurel Valley Watch, Inc. v. Mountain Enters. of Wolfe Ridge, LLC*,

192 N.C. App. 391, 404, 665 S.E.2d 561, 570 (2008) (vacating a judgment in part when the trial court had subject matter jurisdiction as to only part of the claims).

III. Section 45-21.16 Foreclosure

A. Standard of Review

"It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Willen v. Hewson*, 174 N.C. App. 714, 718, 622 S.E.2d 187, 190 (2005) (citation and quotation marks omitted), *disc. review denied*, 360 N.C. 491, 631 S.E.2d 520 (2006). The propriety of the trial court's conclusions of law is subject to *de novo* review. 174 N.C. App. at 718, 622 S.E.2d at 190.

B. Analysis

In an action for foreclosure under a deed of trust pursuant to N.C. Gen. Stat. § 45-21.16,[1] the trial court should authorize the trustee to exercise the power of sale under the deed of trust if it "find[s] the existence of a (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled." *Espinosa*, 135 N.C. App. at 308, 520 S.E.2d at 111 (quoting *Watts* at 38 N.C. App. 90, 247 S.E.2d at 429, and citing N.C. Gen. Stat. § 45-21.16(d)).

In the case *sub judice*, the parties stipulated to (1) the validity of the note evidencing the debt owed to petitioner, (2) default on that note, and (3) proper notice. The only remaining factual issue, the substitute trustee's right to foreclose, was stipulated to exist unless the trial court granted equitable relief pursuant to the doctrine of merger. As we noted above, the trial court had no jurisdiction to consider the doctrine of merger in this proceeding, and therefore did not err in failing to grant relief to respondents on that basis. Accordingly, the trial court's order allowing foreclosure is affirmed.

AFFIRMED.

Judges JACKSON and STEPHENS concur.

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1. N.C. Gen. Stat. § 45-21.16 was amended with effect from 1 April 2008, N.C. Sess. Law 2007-351 § 4 and with effect from 1 November 2008, N.C. Sess. Law 2008-226 §§ 2,3. Those amendments do not affect this case, which was filed on 10 August 2007 and decided by the trial court on 10 March 2008.

STATE OF NORTH CAROLINA v. JOHN DOUGLAS SAVAGE

No. COA08-1217

(Filed 18 August 2009)

Probation and Parole— revocation—expiration of term before order—State unable to locate defendant—findings

A probation revocation was remanded for further findings (although defendant should not profit from his decision to abscond from his term of probation) where the probationary period had expired before the entry of the revocation order, and the unchallenged findings were that the probation officer was unable to locate defendant and unable to serve the warrant for the defendant's arrest. The record, transcript, lack of objection, and absence of subsequent ruling or explanation impeded review.

Appeal by defendant from an order entered 13 June 2008 by Judge Edwin G. Wilson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 5 May 2009.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Donald R. Teeter, Sr., for the State.

Lucas & Ellis, PLLC, by Anna S. Lucas, for defendant-appellant.

JACKSON, Judge.

John Douglas Savage ("defendant") appeals from judgment entered upon revocation of probation. For the following reasons, we remand.

On 23 September 2003, defendant pled no contest to one count of felonious possession of stolen goods. The trial court entered judgment suspending defendant's eleven to fourteen months term of imprisonment and placed him on supervised probation for twenty-four months.

On 3 January 2005, with more than eight months remaining on defendant's period of probation, defendant's probation officer filed a violation report alleging various violations of both the monetary and regular conditions of probation. The report further alleged that defendant had been charged with misdemeanor harassing phone calls and violating a domestic protective order in September 2004 and that

defendant was convicted of the crimes in October 2004. The probation officer filed another probation violation report that day further alleging that defendant (1) had left his residence on or about 16 November 2004 and failed to make his whereabouts known to his probation officer, and (2) had been charged with violating a domestic violence protective order in file number 04 CR 063092 and failed to appear for a 22 November 2004 court date. An order for defendant's arrest was issued based upon defendant's probation violations, and defendant eventually was arrested in March 2008.

On 13 June 2008, the trial court held a probation violation hearing. Defendant moved to dismiss for lack of subject matter jurisdiction. After hearing arguments from defendant and the State, the trial court denied the motion. On 16 July 2008, the trial court entered a written order denying the motion and finding that the probation officer's attempts to locate defendant constituted reasonable effort on the part of the State pursuant to North Carolina General Statutes, section 15A-1344(f). Defendant elected to serve the suspended sentence and the trial court ordered that defendant's probation be revoked. The trial court subsequently entered a judgment revoking defendant's probation and activating his suspended sentence. Defendant appeals.

Defendant contends that the trial court lacked subject matter jurisdiction to revoke his probation because the probationary period had expired prior to the trial court's entry of the probation revocation order. Defendant also asserts that the trial court erred in finding as fact that the State made reasonable efforts to notify defendant and conduct the probation revocation hearing pursuant to section 15A-1344(f) because the trial court's findings were not supported by sufficient evidence. We disagree.

A trial court's jurisdiction to review a defendant's compliance with the terms and conditions of probation is limited by statute. *State v. Hicks*, 148 N.C. App. 203, 204, 557 S.E.2d 594, 595 (2001). North Carolina General Statutes, section 15A-1344(f) allows revocation of probation after the probationary term has expired if:

> (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
>
> (2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.

N.C. Gen. Stat. § 15A-1344(f) (2007).[1] We previously have instructed that "the probationer must have committed a violation during his probation, the State must file a motion indicating its intent to conduct a revocation hearing, and the State must have made a reasonable effort to notify the probationer and conduct the hearing sooner." *State v. Cannady*, 59 N.C. App. 212, 214, 296 S.E.2d 327, 328 (1982) (citing N.C. Gen. Stat. § 15A-1344(f)).

We review the trial court's judgment to determine " 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)), *disc. rev. denied*, 361 N.C. 702, 653 S.E.2d 158 (2007).

In the case *sub judice*, the trial court made the following findings of fact:

> 1. On September 23, 2003, the Defendant was convicted in Nash County of Possession of Stolen Goods and was placed on probation.
>
> 2. On January 3, 2005 the Probation Officer filed a violation report with the Forsyth County Clerk of Superior Court alleging the Defendant failed to make his whereabouts known to his probation officer, failed to notify his probation officer of his current residence, and failed to appear for a November 22, 2004 Forsyth County court date.
>
> 3. An order of arrest was issued based on the Defendant's probation violations.
>
> 4. The Probation Officer made several efforts to locate the Defendant including checking the homeless shelters, leaving messages on the Defendant's door, checking the jail lists, and checking the hospitals.
>
> 5. The Probation Officer was unable to locate the Defendant and unable to serve the warrant for the Defendant's arrest.

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1. The General Assembly has amended section 15A-1344(f)(2) so as to eliminate the "reasonable effort" requirement existing at the time this matter was considered below. *See* 2008 N.C. Sess. Laws 129. However, this amendment to section 15A-1344(f) is of no import in the case *sub judice* because it became effective on 1 December 2008. *See id.* The trial court conducted the hearing on 13 June 2008.

6. The Probation Officer then took the warrant to the police department.

7. The Defendant's probation expired on September 23, 2005.

8. The Order for Arrest was served on May 20, 2008[,] and the District Attorney was notified.

9. The probation hearing was held on June 13, 2008.

10. The Probation Officer's attempts to locate the Defendant constitute reasonable efforts on the part of the State.

Upon these findings, the court concluded that it retained jurisdiction pursuant to section 15A-1344(f) and denied defendant's motion to dismiss.

At the 13 June 2008 hearing, the following colloquy took place between the trial court and defendant's counsel:

THE COURT: So the probation violation [report] was filed January 3rd of 2005?

[DEFENSE COUNSEL]: Yes, Your Honor.

THE COURT: Looks like, what, an order for arrest was issued April the 18th?

[DEFENSE COUNSEL]: Yes, sir, Your Honor.

THE COURT: Well, I imagine they couldn't find him for four years, is that probably what happened?

[DEFENSE COUNSEL]: Probably true, Your Honor[.]

Counsel for the State subsequently explained:

Your Honor, the State will contend that the efforts were made in this case at first. The violation report first goes out January 3rd, 2005, then the order for arrest isn't issued until April 18th of 2005, and this period of time there are certain things that the State goes through in trying to locate individuals.

As to what happened in this particular case[,] the probation officer would have to inform the Court. I can instruct the Court as to the usual practices and procedures, but not as to what happened in this particular case.

In relevant part, the probation officer explained the efforts to notify defendant as follows:

> Now the violations are, if you will notice, the first violation was issued November 19th of '04. Judge, this is before Mr. John Savage was considered [to be] an absconder.
>
> The addendum violation was issued, it's dated December the 9th of '04 in which it is alleged that he did abscond. There's no need for me to make any effort to leave a copy of the violation report or OFA alleging absconding at his last known residence, I knew he wasn't there. I knew he had moved out.
>
> THE COURT: All right. Well, [I] find that the State has made a reasonable effort[] to have the probation violation hearing, and I will deny the motion[.]

After the court made its finding, defendant failed to object, but immediately gave notice of appeal in open court.

Thus, the transcript reflects (1) the court's concern that the State was unable to locate defendant for four years, (2) defense counsel's subsequent acknowledgment of the State's inability to locate defendant, (3) the State's position that efforts were made at the beginning of defendant's probation violations, and (4) the probation officer's explanation that further efforts were frustrated by defendant's absconding. Furthermore, in unchallenged findings of fact, the trial court found that between 2005 and 2008, the "[t]he Probation Officer was unable to locate the Defendant and unable to serve the warrant for the Defendant's arrest." *See State v. Pickard*, 178 N.C. App. 330, 334, 631 S.E.2d 203, 206 (Unchallenged findings of fact are presumed to be correct.) (citation omitted), *disc. rev. denied and appeal dismissed*, 361 N.C. 177, 640 S.E.2d 59 (2006).

Upon review, and pursuant to the presumption of correctness afforded to unchallenged findings of fact, it is clear that defendant absconded. We acknowledge the relative informality of probation violation proceedings permitted by North Carolina Rules of Evidence, Rule 1101(b)(3), but the record, transcript, lack of objection, and absence of subsequent ruling or explanation in the case *sub judice* impede our review. *See* N.C. Gen. Stat. § 8C-1, Rule 1101(b)(3) (2007) ("The rules [of evidence] other than those with respect to privileges do not apply in . . . [p]roceedings for . . . granting or revoking probation[.]").

We question the sufficiency of the evidence underlying the trial court's finding of fact number 4, but, notwithstanding the probation officer's testimony, we are satisfied that the record contains some

evidence of efforts to locate defendant prior to the expiration of his probation. "[W]here record evidence supports a finding that the State made reasonable efforts to conduct a hearing prior to the expiration of the defendant's probation, the matter is remanded to the trial court to enter sufficient material findings." *State v. Jackson*, 190 N.C. App. 437, 442, 660 S.E.2d 165, 168 (2008) (citing *State v. Daniels*, 185 N.C. App. 535, 537-38, 649 S.E.2d 400, 401 (2007)).

Accordingly, we remand the matter to the trial court for entry of proper findings of fact which are supported the evidence. It is an axiomatic and resolute principle that one may not profit from his own wrongdoing, and defendant, therefore, should not be the beneficiary of his decision to abscond from his lawful term of probation. To hold otherwise "obviously rewards the defaulting probationer for his skill in eluding the officers[.]" *State v. Best*, 10 N.C. App. 62, 64, 177 S.E.2d 772, 774 (1970).

Remanded.

Judges WYNN and HUNTER, Jr., Robert N. concur.

DAVID LAWYER & SHEILA LAWYER, PLAINTIFFS v. CITY OF ELIZABETH CITY NORTH CAROLINA AND BRENT THORNTON, DEFENDANTS

No. COA08-765

(Filed 18 August 2009)

Eminent Domain—condemnation—notice—sufficiency of steps

The trial court erred in a condemnation case by granting summary judgment as a matter of law in favor of defendants because although there was no genuine issue of material fact as to what steps defendants took in attempting to ascertain to whom they should send notice, reasonable minds could differ as to whether the steps taken by defendants were sufficient.

Appeal by plaintiffs from an order entered 1 April 2008 by Judge J. Richard Parker and 14 May 2008 by Judge W. Russell Duke, Jr. in Pasquotank County Superior Court. Heard in the Court of Appeals 14 January 2008.

Sharp, Michael, Graham & Evans L.L.P., by David R. Tanis and Laura F. Meads, for plaintiffs-appellants.

Hornthal, Riley, Ellis & Maland, L.L.P., by L. Phillip Hornthal, III, for defendants-appellees.

JACKSON, Judge.

David and Sheila Lawyer ("plaintiffs") appeal the allowing of summary judgment in favor of the City of Elizabeth City, North Carolina ("the City") and Brent Thornton ("Thornton") (collectively "defendants"). For the reasons stated below, we reverse.

On or about 24 September 1999, Buena Ballance, Myrtle Ballance, Rosalie Hardy, Alvin Ballance, David Ballance, and Royce Ballance ("the Ballances") acquired real property located at 405 East Broad Street in Elizabeth City ("the property") as tenants in common by a deed of gift filed with the Pasquotank County Register of Deeds on 7 October 1999. Plaintiffs acquired the property by being the highest bidder at a sheriff's sale of the property on or about 7 October 2003. Although a Sheriff's Deed was prepared on 23 October 2003, it was not recorded until on or about 2 November 2005, more than nine months after the incident giving rise to this case.

Prior to 10 October 2003, plaintiffs requested that the Pasquotank County Tax Department forward tax notices/bills for the property to them. Thereafter, tax bills were addressed to "Ballance, Buena et al c/o David & Sheila Lawyer." Plaintiffs filed an Affidavit of Consideration or Value Excise Tax on Conveyance of Real Property with the Pasquotank County Tax Department on or about 27 October 2007.

The property had not had electric service since May 1999. Upon inspection at some time prior to 16 September 2004, the property was found to be unfit for human habitation. Defendants sent notices with respect to the property to the Ballances because upon inquiry with the Tax Department and Register of Deeds, the Ballances were listed as the owners of the property. On 9 September 2004, Royce Ballance mailed to defendants a letter indicating that the Ballances no longer owned the property because it was sold at auction. Thornton sought the assistance of the Tax Department and Register of Deeds and was informed that the Ballances were the owners of the property.

On 22 November 2004, the City Council of the City of Elizabeth City condemned the property as unfit for human habitation. In addi-

tion to mailing notices to the Ballances, a notice of condemnation was posted on the property on 2 December 2004. On 28 January 2005, the property was demolished by defendants.

On 14 July 2006, plaintiffs filed a complaint against defendants alleging claims of 1) unconstitutional taking without just compensation, 2) destruction of property, 3) violation of due process, 4) trespass, and 5) denial of equal protection. Defendants filed a claim of lien against the property on 25 September 2006 for costs associated with its demolition. Also on that date, defendants filed their answer alleging nine defenses—and counterclaim seeking to recover on their claim of lien. Plaintiffs filed their reply to defendants' counterclaim on 30 October 2006.

On 4 January 2008, defendants filed a motion for summary judgment. Plaintiffs filed a motion for partial summary judgment on 8 January 2008. The trial court heard the competing motions for summary judgment on 3 March 2008. By order filed 1 April 2008, the trial court allowed defendants' motion and denied plaintiffs' motion. Defendants subsequently filed a motion for summary judgment as to the counterclaim on 14 April 2008. That motion was heard on 12 May 2008, and allowed in defendants' favor by order filed 14 May 2008. From both orders, plaintiffs appeal.

Plaintiffs argue that the trial court erred in granting the motions for summary judgment because genuine issues of material fact existed. We agree.

A grant of 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). This Court reviews an order allowing summary judgment *de novo*. *See Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). In doing so, we must consider the evidence in the light most favorable to the nonmoving party. *See id.* "[A]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citing *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972)). If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004).

The moving party bears the burden of showing that no triable issue of fact exists. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citing *Texaco v. Creel*, 310 N.C. 695, 699, 314 S.E.2d 506, 508 (1984)). This burden can be met by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that the non-moving party cannot surmount an affirmative defense which would bar the claim. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted). Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case. *Id.* (citation omitted).

As a preliminary matter, we note that plaintiffs brought their own motion for partial summary judgment before the trial court. In doing so, they agreed with defendants that there were no genuine issues of material fact as to liability. Accordingly, we limit our review to whether defendants were entitled to judgment as a matter of law.

Pursuant to North Carolina General Statutes, section 160A-441 concerning minimum housing standards,

> Whenever any city . . . of this State finds that there exists in the city . . . dwellings that are unfit for human habitation due to dilapidation, defects increasing the hazards of fire, accidents or other calamities, lack of ventilation, light or sanitary facilities, or due to other conditions rendering the dwellings unsafe or unsanitary, or dangerous or detrimental to the health, safety, morals, or otherwise inimical to the welfare of the residents of the city . . . , power is hereby conferred upon the city . . . to exercise its police powers to repair, close or demolish the dwellings in the manner herein provided.

N.C. Gen. Stat. § 160A-441 (2007). A city ordinance adopted to regulate buildings which are determined to be unfit for human habitation "must contain certain procedures that the city must follow prior to demolition of a dwelling including providing the owner with notice, a hearing, and a reasonable opportunity to bring his or her dwelling into conformity with the housing code." *Monroe v. City of New Bern*, 158 N.C. App. 275, 279, 580 S.E.2d 372, 375, *appeal dismissed, disc. rev. denied*, 357 N.C. 461, 586 S.E.2d 93 (2003) (citing N.C. Gen. Stat. § 160A-443).

Section 160A-443 sets forth the provisions a city must include in any ordinances adopted pursuant to its power to enact minimum housing standards. This section refers to serving notices upon the "owner" and "parties of interest" in a property subject to minimum housing standards. " 'Owner' means the holder of the title in fee simple and every mortgagee *of record*." N.C. Gen. Stat. § 160A-442(4) (2007) (emphasis added). " 'Parties in interest' means all individuals, associations and corporations who have interests *of record* in a dwelling and any who are in possession thereof." N.C. Gen. Stat. § 160A-442(5) (2007) (emphasis added).

All notices concerning the property at issue were mailed to Royce Ballance, whose address appeared on the most recent deed filed with the Register of Deeds. The Ballances appeared as the owners *of record* in both the Register of Deeds and Tax Department offices. Although plaintiffs' address was listed on the tax bill, the Ballances continued to appear as the owners *of record*.

Plaintiffs contend that the 9 September 2004 letter should have put defendants on notice that they were interested parties requiring notice; had defendants inquired about a sheriff's auction of the property, they would have discovered that plaintiffs were the owners of the property. After receiving the letter, Thornton again asked the Register of Deeds and Tax Department offices who owned the property. Thereafter, he was assured by the "tax office" and the "deeds office" several times that the Ballances were the owners. Although plaintiffs' names were listed on the tax bill, the tax office routinely mails tax bills to people other than the record owner if requested to do so. Plaintiffs requested the tax bills be mailed to them. The Tax Department followed this request, but continued to consider the Ballances the record owners until plaintiffs recorded their deed on or about 2 November 2005.

No party presented evidence as to what the appropriate standard of care under the circumstances would be. Had the City engaged an attorney to conduct a title search, including all "out" conveyances, the attorney should have discovered the unrecorded sheriff's deed. However, it is not clear that the City was required to do so in this circumstance. The extent of its duty may have been for Thornton to do exactly as he did.

> [W]here one of the questions raised by a motion for summary judgment is one concerning the reasonableness of the actions of the movant, summary judgment is normally inappro-

> priate, since the resolution of the question "necessarily involves conflicting interpretations of the perceived events, and even where all the surrounding facts and circumstances are known, reasonable minds may still differ over their application to the legal principles involved."

Farmers Bank v. City of Elizabeth City, 54 N.C. App. 110, 115, 282 S.E.2d 580, 584 (1981) (quoting *Smith v. Currie*, 40 N.C. App. 739, 743, 253 S.E.2d 645, 647, *disc. rev. denied*, 297 N.C. 612, 257 S.E.2d 219 (1979)).

There is no genuine issue of material fact as to what steps defendants took in attempting to ascertain to whom they should send notice. However, reasonable minds could differ as to whether the steps taken by defendants were sufficient. Therefore, defendants were not entitled to a judgment as a matter of law. Accordingly, the trial court's order allowing summary judgment to defendant must be reversed.

Reversed.

Judges McGEE and HUNTER, Jr, Robert N. concur.

STATE OF NORTH CAROLINA v. JAMES CHARLES WILLIS

No. COA08-1259

(Filed 18 August 2009)

Probation and Parole— probation modification—substantial change—notice of hearing

A probation modification was remanded where there was no evidence that defendant was notified of a hearing or that a hearing took place, and the modification was substantial.

Appeal by defendant from judgment entered 19 March 2008 by Judge Gary E. Trawick in Pender County Superior Court. Heard in the Court of Appeals 21 May 2009.

Attorney General Roy Cooper, by Assistant Attorney General Vanessa N. Totten, for the State.

Mary McCullers Reece, for defendant-appellant.

ELMORE, Judge.

On 19 March 2008, James Charles Willis (defendant) was convicted in Pender County Superior Court of larceny of a dog and sentenced to a term of four to five months' imprisonment. The trial court suspended the sentence and placed defendant on supervised probation for twenty-four months. In open court, the judge ordered as a special condition of probation that defendant "is not to have in his possession more than one dog at any time. Let him have a pet."

However, when the judge issued his written sentence later that day, the special condition had been modified to: "Defendant is not to have in his possession more than one animal." On 25 March 2009, without notifying defendant, the clerk initialed a second modification to the special condition, which then read: "Defendant is not to have his in his possession or on his premises more than one animal." Defendant appeals to this Court. For the reasons stated below, we vacate the order filed by the clerk and remand to the trial court for entry of defendant's special condition of probation.

Defendant argues that the trial court erred by amending defendant's sentence without notice and out of his presence after the conclusion of the court session. We agree.

N.C. Gen. Stat. § 15A-1344(d) states:

> At any time prior to the expiration or termination of the probation period or in accordance with subsection (f) of this section, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. . . . The hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him.

N.C. Gen. Stat. § 15A-1344(d) (2007). As such, the trial court in this case has the authority to modify defendant's conditions of probation, but the clear language of the statute requires that (1) defendant be notified that a hearing will take place, (2) a hearing actually take place at which defendant is present or has failed to appear after a reasonable effort to notify him, and (3) good cause be shown for the modification. *See State v. Coltrane*, 307 N.C. 511, 512, 299 S.E.2d 199, 200 (1983) ("Under this statute a defendant is entitled to receive notice that a hearing is to take place."); *State v. Hanner*, 188 N.C. App. 137, 141, 654 S.E.2d 820, 823 (2008) ("The defendant had a right

to be present at the time that sentence was imposed."); *State v. Coltrane*, 58 N.C. App. 210, 212, 292 S.E.2d 736, 737 (1982), *rev'd on other grounds*, 307 N.C. 511, 299 S.E.2d 199 (1983) ("[A] grant of probation is a privilege afforded by the court and not a right to which a felon is entitled. In view of this fact, the court is given considerable discretion in determining whether good cause exists for modifying the terms of probation.").

There is no evidence in the record that defendant or his attorney were notified that the trial court intended to hold a hearing on defendant's probation conditions, nor that a hearing actually took place.

The State argues that the modifications in defendant's probation conditions were simply clerical corrections that the trial court could correct without notifying defendant:

> It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth. It has the power to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record, and no lapse of time will debar the court of the power to discharge this duty.

State v. Cannon, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956). "Clerical error has been defined recently as: An error resulting from a minor mistake or inadvertence, esp[ecially] 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) (quotations omitted).

The first modification, which changed the trial court's order from prohibiting defendant from possessing more than one dog to prohibiting him from possessing more than one animal, merely reflected the judge's comments in open court that defendant was allowed only "a pet." As such, the first modification is properly classified as a clerical change that brought the written statement in line with the judge's statements in open court.

However, the second modification, which changed defendant's sentence from allowing only one animal in his possession to allowing only one animal on his premises, is not properly classified as a clerical correction. First, such a condition was never discussed in open court, and there is no evidence in the record that the court was

merely making its records "speak the truth." Second, given that a neighbor testified that defendant and his wife were keeping approximately seventeen animals on their property, the second modification in the trial court's order substantively impacted defendant's life in a way that was very different than the court's first modification. The first modification would have allowed defendant's roommate, friend, or spouse to keep animals, including strays, on defendant's property; however, under the second modification, any such behavior would violate defendant's probation conditions. Third, where "there has been uncertainty in whether an error was 'clerical,' the appellate courts have opted to err on the side of caution and resolve [the discrepancy] in the defendant's favor." *Jarman* at 203, 535 S.E.2d at 879 (quotations omitted) (modification in original).

> [I]n the exercise of power to amend the record of a court, the court is only authorized to make the record correspond to the actual facts and cannot, under the guise of an amendment of its records, correct a judicial error or incorporate anything in the minutes except a recital of what actually occurred.

Cannon, 244 N.C. at 404, 94 S.E.2d at 342. As such, the second modification in defendant's probation conditions was a substantive change in defendant's probation condition, and such a change "could only be made in the Defendant's presence, where [the defendant or] his attorney would have an opportunity to be heard." *Hanner* at 141, 654 S.E.2d at 823 (modification in original); *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999) ("Because there is no indication in this record that Defendant was present at the time the written judgment was entered, the sentence must be vacated and this matter remanded for the entry of a new sentencing judgment."). Since defendant was not given notice of a hearing and a hearing never actually took place, the second modification made to defendant's probation condition is invalid. *Crumbley* at 67, 519 S.E.2d at 99; *Hanner* at 142, 654 S.E.2d at 823.

The State correctly points out that a "defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released. If any modification of the terms of that probation is subsequently made, he must be given a written statement setting forth the modifications." N.C. Gen. Stat. § 15A-1343(c) (2007). The State argues that the language of N.C. Gen. Stat. § 15A-1343(c) does not require defendant to be pres-

ent when his probation is modified. However, this section does not stand alone; rather, it adds another *sine qua non* for modifying a defendant's probation conditions. N.C. Gen. Stat. § 15A-1344(d), discussed *supra*, requires, *inter alia*, that defendant be given notice of a hearing, and N.C. Gen. Stat. § 15A-1343(c) requires that, if defendant's probation is subsequently modified as a result of the hearing, defendant must then be provided a written statement of the modifications. This additional requirement of providing defendant with a written copy of modifications ensures that defendants do not unknowingly violate the modified terms of their probation, an especially pertinent requirement given that the probation's terms may be modified outside of a defendant's presence so long as reasonable effort was made to notify him of the hearing. N.C. Gen. Stat. § 15A-1344(d) (2007); *State v. Henderson*, 179 N.C. App. 191, 197, 632 S.E.2d 818, 822 (2006) ("If the record does not explicitly demonstrate that a defendant received written notification of the terms and conditions of probation, the condition prescribed by the trial court is invalid.").

However, the State's emphasis on the requirement that defendant be given written notice of any probation modification is misplaced because defendant does not argue that he never received a written copy of the modifications after the trial court made them. Rather, defendant argues, as discussed *supra*, that he never received notification that a probation hearing was going to be held in the first place, which is a prerequisite for any substantive modification to be made to defendant's probation condition. N.C. Gen. Stat. § 15A-1344(d) (2007).

For the reasons stated above, we hold that the trial court could not substantively modify defendant's probation condition without notifying defendant that a hearing was going to take place. Absent this notification, the substantive modification made by the trial judge is invalid, and we must vacate that portion of the trial court's order and remand the matter to the trial court for entry of defendant's special condition of probation.

Vacated in part and remanded.

Judges BRYANT and CALABRIA concur.

CHANDA A. GRIESSEL, M.D., PLAINTIFF v. TEMAS EYE CENTER, P.C. AND GREGORY P. TEMAS, M.D., DEFENDANTS

No. COA08-1139

(Filed 18 August 2009)

1. **Appeal and Error— denial of motion to dismiss—interlocutory**

   The trial court's denial of a Rule 12(b)(6) motion to dismiss did not affect a substantial right and the appeal was dismissed.

2. **Appeal and Error— denial of motion to return records—interlocutory**

   The denial of a motion to compel plaintiff to return records and confidential material was an interlocutory order, defendants did not argue that the denial affected a substantial right, and no substantial right was apparent to the appellate court.

3. **Appeal and Error— denial of motion to compel arbitration—substantial right affected—immediately appealable**

   The denial of a motion to compel arbitration under an employment contract without findings affected a substantial right and was immediately appealable.

4. **Arbitration and Mediation— denial of motion to compel arbitration—no findings—remanded**

   The denial of a motion to compel arbitration under an employment contract was remanded where there was no finding as to the existence of a valid agreement to arbitrate.

Appeal by defendants from order entered 3 June 2008 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 25 February 2009.

Nelson Mullins Riley & Scarborough LLP, by Mark A. Stafford and Candace S. Friel, for plaintiff.

Douglas S. Harris for defendants.

ELMORE, Judge.

Chanda A. Griessel, M.D. (plaintiff), sued Temas Eye Center, P.C. (TEC), and Gregory P. Temas, M.D. (together, defendants), for fraud, breach of contract, *quantum meruit*, violation of the North Carolina

Wage and Hour Act, and declaratory judgment. Defendants filed motions to dismiss pursuant to Rule 12(b)(6), to stay the action and refer to arbitration, and "to return records and confidential material." The trial court denied all three motions by order filed 3 June 2008. Defendants now appeal.

Plaintiff is a licensed ophthalmologist who was recruited by defendants to work at TEC during the summer of 2006. According to plaintiff's complaint, defendants made numerous oral and written representations to her in their attempt to obtain her services. These representations included a $125,000.00 annual base salary, a $30,000.00 signing bonus, and bonuses based upon "a percentage of her actual production and collections exceeding her annual base salary[.]" On 24 July 2006, plaintiff entered into an employment contract with defendants. According to the complaint,

> During 2007, Dr. Griessel became aware that, in her professional opinion, Defendant TEC, as described more particularly herein, was improperly billing and submitting claims to patients and third-party payors for services provided by Dr. Griessel, Dr. Temas, and TEC; that Defendant TEC was billing third-party payors including Medicare under Dr. Temas' own provider number for services provided by Dr. Griessel; that Defendant TEC was collecting and retaining amounts in excess of that to which it was entitled for services rendered; and that Defendants were using improper accounting methods for their wrongful benefit and unjust enrichment, including without limitation, crediting Dr. Temas for procedures performed by Dr. Griessel in a manner that reduced the apparent amount of actual collections credited by Dr. Griessel under her "incentive salary" bonus agreement with Defendant TEC.

Defendant tendered a notice of resignation on 1 October 2007 and ceased providing services to TEC on 1 December 2007. According to the complaint, after 1 December 2007, defendants told inquiring patients and referral sources that plaintiff had simply "failed to show up to work" and that they did not have her contact information.

[1] We first consider defendants' arguments that the trial court erred by denying their motions to dismiss and their motion to compel plaintiff to return documents to defendants. We do not reach the merits of these appeals because they are interlocutory and not properly before us. "Typically, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *Reid v.*

Cole, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007) (quotations and citation omitted). In the absence of any final judgment, we may hear an interlocutory appeal if the order affects a substantial right. *Id.* at 263, 652 S.E.2d at 719-20. However, "the party seeking review of the interlocutory order still must show that it affects a substantial right[.]" *Id.* at 263, 652 S.E.2d at 719. "It is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]" *Slaughter v. Swicegood*, 162 N.C. App. 457, 463, 591 S.E.2d 577, 581 (2004) (quotations and citations omitted). Although defendants admit that the order is interlocutory, they do not argue that it affects a substantial right. Though we need not extend ourselves this far, it is not apparent to us that the trial court's denial of defendants' 12(b)(6) motion affects a substantial right. Accordingly, we dismiss that portion of defendants' appeal as interlocutory.

[2] For similar reasons, we dismiss defendants' appeal from the trial court's denial of the motion to compel plaintiff to return records and confidential material. Defendants have not argued that the order denying this motion affects a substantial right and none is apparent to us.

[3] We next reach defendants' contention that the trial court improperly denied their motion to compel arbitration. The employment contract between plaintiff and defendants contains an arbitration clause. The clause states, in relevant part:

> Upon written demand of either party, any controversy or claim arising out of, in connection with, or related to this Agreement or breach thereof . . . shall be settled by arbitration . . . . The North Carolina Uniform Arbitration Act, as contained in Chapter 1, Article 45A, as amended of [*sic*] the North Carolina General Statutes, shall apply to this agreement to arbitrate.

Defendants argue that the trial court should have stayed the court proceedings and compelled arbitration based upon this clause.

We note first that "[a]lthough an order denying a motion to stay pending arbitration is interlocutory, it is immediately appealable under N.C. Gen. Stat. § 1-277(a) because it affects a substantial right." *Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co.*, 192 N.C. App. 376, 381, 665 S.E.2d 505, 508 (2008) (citations omitted). Accordingly, we reach the merits of defendants' argument: that it was reversible

error for the trial court to deny their motion to compel arbitration without making findings of fact.

[4] We recently reiterated that an order denying a motion to compel arbitration must include findings of fact as to "whether the parties had a valid agreement to arbitrate" and, if so, "whether the specific dispute falls within the substantive scope of that agreement." *U.S. Tr. Co. v. Stanford Gr. Co.*, 199 N.C. App. ——, —— , S.E.2d ——, —— (2009) (quoting *Ellis-Don Constr. v. HNTB Corp.*, 169 N.C. App. 630, 633, 610 S.E.2d 293, 296 (2005)). Here, the trial court made no finding of fact as to the existence of a valid agreement to arbitrate. Accordingly, we must reverse the trial court's order and remand for entry of findings of fact consistent with our opinion in *United States Trust Company*.

Dismissed in part, reversed and remanded in part.

Judges BRYANT and STEELMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 AUGUST 2009)

ANTHONY v. CONTINENTAL TIRE No. 09-99	Indus. Comm. (IC392600)	Affirmed
AUGUSTA HOMES, INC. v. FEUERSTEIN No. 08-1456	Iredell (05CVS2929)	Affirmed
GRANVILLE v. YEDDO No. 08-1539	Brunswick (08CVS1471)	Affirmed
HARLEYSVILLE MUT. v. BUZZ OFF INSECT No. 08-1393	Guilford (06CVS6714)	Vacated
IN RE: J.T., J.T., A.J. No. 07-1372-2	Cumberland (04JT653) (04JT654) (04JT652)	Affirmed
IN RE C.G.H. No. 09-410	Randolph (07JT149)	Remanded
IN RE C.N.P. No. 09-208	Lee (05J8-10)	Affirmed
IN RE D.M.S. AND D.L.H. No. 09-437	Wake (07JT188) (07JT187)	Affirmed
IN RE J.M. No. 09-345	Rockingham (07JA32) (07JA35) (07JA33) (04JA39) (07JA31) (07JA34)	Affirmed
IN RE J.R., I.R., D.R. No. 09-449	Alamance (06JT0200) (06JT202) (06JT0199)	Affirmed
JMW CONCRETE v. JOHN W. DANIEL & CO. No. 08-643	Alamance (06CVS2542)	Affirmed
LUPO v. SHARE OF N.C., INC. No. 08-899	Guilford (07CVS2432)	Reversed and remanded in part; affirmed in part; dismissed in part

MSC INDUSTRIAL DIRECT CO. v. STEELE No. 08-418	Union (07CVS2847)	Affirmed
OVERCASH v. N.C. DEP'T OF ENV'T No. 08-1205	Cabarrus (06CVS745)	Affirmed
RAEF v. UNION CNTY. PUBLIC SCH. No. 08-1196	Union (06CVS1169)	Reversed and Remanded
STATE v. ADAMS No. 09-40	Gaston (05CRS64259)	No Error
STATE v. LOUIS No. 08-1502	Wake (07CRS11849) (07CRS11848)	Affirmed
STATE v. MARENGO No. 08-1104	Onslow (05CRS57976)	No Error
STATE v. McNAIR No. 09-152	Cumberland (06CRS53627)	No Error
STATE v. RANDOLPH No. 08-1138	Beaufort (06CRS3927) (06CRS51847)	Vacated and remanded
STATE v. ROBINSON No. 08-1495	Cumberland (07CRS63287)	No prejudicial error
STATE v. STRICKLAND No. 08-1186	Person (06CRS53124)	No prejudicial error
STATE v. THOMAS No. 08-1449	Guilford (03CRS95113) (03CRS950103) (03CRS95109) (03CRS950104) (03CRS95110) (03CRS950102) (03CRS950105)	No prejudicial error
STATE v. TUCKER No. 08-1189	Forsyth (06CRS54799)	No Error
STATE v. UMANZOR AND CARRANZA No. 08-1476	Mecklenburg (06CRS238917) (06CRS238939) (06CRS238918) (06CRS238940) (06CRS238916) (06CRS238938)	No error in part and vacated in part

STATE v. WEBB No. 08-904	Union (04CRS50463) (04CRS50462)	No Error
STATE v. WHITLEY No. 08-1246	Martin (06CRS51512)	No Error
U.S. TRUST CO., N.A. v. BURKETT No. 08-472	Mecklenburg (07CVS14445)	Affirmed in part, dismissed in part

STATE OF NORTH CAROLINA v. EDWARD JUNIOR WAGONER, DEFENDANT

No. COA08-982

(Filed 1 September 2009)

1. Constitutional Law— ex post facto—satellite monitoring—not criminal punishment

The enrollment of an indecent liberties defendant in the satellite-based monitoring (SBM) system did not violate the constitutional *ex post facto* prohibition because the legislature did not intend SBM to be criminal punishment.

2. Constitutional Law— double jeopardy—satellite monitoring—not criminal punishment

The failure of the attorney of an indecent liberties defendant to advance a double jeopardy argument against the imposition of satellite-based monitoring was not ineffective assistance of counsel. That claim is available only in criminal matters, and this was not a criminal mater. The claim of double jeopardy fails for the same reason.

3. Criminal Law— plea bargain—subsequent satellite monitoring requirement

The imposition of a satellite-based monitoring system on an indecent liberties defendant did not violate his plea agreement.

Judge ELMORE dissents in a separate opinion.

Appeal by defendant from order entered on or about 19 February 2008 by Judge Henry E. Frye, Jr. in Superior Court, Wilkes County. Heard in the Court of Appeals 28 January 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Yvonne B. Ricci, for the State.

Richard E. Jester, for defendant-appellant.

STROUD, Judge.

Defendant was ordered to enroll in satellite-based monitoring pursuant to N.C. Gen. Stat. § 14-208.40B. Defendant appeals, arguing the trial court erred in (1) violating defendant's "constitutional rights in violation of the prohibition against *ex post facto* punishments[,]" (2) violating "his right to be free from double jeopardy[,]" and (3) "imposing any condition or restriction upon the defendant which was

not specifically agreed to in his plea bargain with the State of North Carolina in violation of the specific agreements." For the following reasons, we affirm.

I. Background

On or about 27 February 1996, defendant pled no contest to attempted first degree sex offense and one count of indecent liberties; defendant was sentenced to five years imprisonment. Also on or about 27 February 1996, defendant pled guilty to committing a crime against nature and one count of indecent liberties; defendant was sentenced to two years imprisonment. On or about 18 January 2005, defendant pled no contest to the charge of indecent liberties with a child and was sentenced to 20 to 24 months, but received a suspended sentence. On or about 14 November 2005, defendant's suspended sentence was activated because he violated the conditions of his probation.

On 7 January 2008, the Department of Correction ("DOC") notified defendant of a scheduled hearing regarding satellite-based monitoring ("SBM"). On 12 February 2008, counsel was appointed to represent defendant regarding his SBM hearing. On or about 19 February 2008, the SBM hearing was held. Defendant and his counsel attended the hearing but did not present any documentary evidence or testimony. Defendant was ordered to enroll in SBM for the remainder of his life because he was found to be a recidivist. Defendant appeals from the order requiring him to enroll in SBM, arguing the trial court erred in (1) violating defendant's "constitutional rights in violation of the prohibition against *ex post facto* punishments[,]" (2) violating "his right to be free from double jeopardy[,]" and (3) "imposing any condition or restriction upon the defendant which was not specifically agreed to in his plea bargain with the State of North Carolina in violation of the specific agreements." For the following reasons, we affirm.

II. *Ex Post Facto* Law

[1] Defendant first contends that

> [s]atellite-based monitoring of sex offenders was first enacted two years after [defendant] admitted he had taken indecent liberties with a minor. The Statute by which he was returned to Court became law more than three years after his offense. Ordering him to enroll in satellite-based monitoring for the remainder of his life constituted an *ex post facto* punishment in violation of our law.

A. Standard of Review

The standard of review for determining whether SBM violates the Constitutional prohibition on *ex post facto* law is *de novo*. *State v. Bare* 197 N.C. App. 461, 464, —— S.E.2d ——, —— (2009) (citation omitted). Furthermore, "[b]ecause both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition, we analyze defendant's state and federal constitutional contentions jointly." *Id.* at 464, —— S.E.2d at —— (quotation marks omitted) (*quoting State v. White*, 162 N.C. App. 183, 191, 590 S.E.2d 448, 454 (2004)).

B. Analytical Framework for *Ex Post Facto* Challenges to SBM

The prohibition against *ex post facto* laws applies to:

> . . . Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. . . .
>
> . . . .
>
> In determining whether a law inflicts a greater punishment than was established for a crime at the time of its commission, we first examine whether the legislature intended SBM to impose a punishment or to enact a regulatory scheme that is civil and nonpunitive.
>
> If the intent of the legislature was to impose punishment, that ends the inquiry. If however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the legislature's intention to deem it civil.
>
> Because we ordinarily defer to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.
>
> Whether a statutory scheme is civil or criminal is first of all a question of statutory construction. We consider the statute's text and its structure to determine the legislative objective. A conclusion that the legislature intended to punish would satisfy an *ex post facto* challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the leg-

islature has stated it. Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. However, if the language of the statute is ambiguous or lacks precision, or is fairly susceptible of two or more meanings, the intended sense of it may be sought by the aid of all pertinent and admissible considerations. Proper considerations include the law as it existed at the time of its enactment, the public policy of the State as declared in judicial opinions and legislative acts, the public interest, and the purpose of the act.

In discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible. The courts must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. It is well settled that statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law.

The SBM provisions were enacted by N.C. Sess. Laws 2006-247, § 1(a) which states: This act shall be known as An Act To Protect North Carolina's Children/Sex Offender Law Changes. The SBM provisions are located in part 5 of Article 27A of Chapter 14 of the General Statutes. Art. 27A of Chapter 14 of the General Statutes is entitled Sex Offender and Public Protection Registration Programs. The SBM system is required to provide time-correlated and continuous tracking of the geographic location of the subject using a global-positioning system based on satellite and other location tracking technology and reporting of subject's violations of prescriptive and proscriptive schedule or location requirements. Frequency of reporting may range from once a day (passive) to near real-time (active).

The sex offender monitoring program monitors two categories of offenders. The first category is any offender who is convicted of a reportable conviction defined by N.C. Gen. Stat. § 14-208.6(4) and required to register as a sex offender under Part 3 of Article 27A because he . . . is classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense as defined in G.S. § 14-208.6. The second category is any offender who satisfies four criteria: (1) is convicted of a reportable conviction defined by § 14-208.6(4), (2) is required to

register under Part 2 of Article 27A, (3) has committed an offense involving the physical, mental, or sexual abuse of a minor, and (4) based on a risk assessment program, requires the highest possible level of supervision and monitoring.

In construing the statute as a whole, we conclude the legislature intended SBM to be a civil and regulatory scheme. This Court has interpreted the legislative intent of Article 27A as establishing a civil regulatory scheme to protect the public. By placing the SBM provisions under the umbrella of Article 27A, the legislature intended SBM to be considered part of the same regulatory scheme as the registration provisions under the same article.

Id. at 464, —— S.E.2d at —— (citations, quotation marks, brackets, heading, and footnote omitted).

1. Legislative Intent

Defendant claims that the legislative intent to make SBM a criminal sanction, and thus subject to the *ex post facto* prohibition, is demonstrated through: (1) use of the term "intermediate sanction" to describe SBM in Section 16 of House Bill 1896, (2) imposing SBM "as [a] condition[] of probation, parole, and post-release supervision," (3) selecting the DOC "as the governmental entity to develop and supervise" SBM, (4) not specifying "that enrollment orders would enter in any forum other than a sentencing hearing in criminal court[,]" (5) replacing the word "probation" with "cooperation" in House Bill 29 in "a clumsy cosmetic effort to disguise the penal nature of" SBM, (6) requiring "that determinations of eligibility for [SBM] be made while offenders awaited sentencing . . . or, as in the present case, had registered as sex offenders after their release from prison[,]" (7) placing "the responsibility for initiating eligibility determinations on the District Attorney for offenders awaiting sentencing . . . and on the Department of Corrections for offenders already released[,] (8) not creating "administrative proceedings for eligibility determinations, but mandat[ing] that the determinations be made in courts of law[,]" and (9) not authorizing "non-judicial officers to make the final eligibility determination[, but] [i]nstead . . . direct[ing] superior court judges to issue eligibility orders." In *Bare*, this Court fully addressed defendant's arguments above regarding issues 1, 2, 3, and 7; accordingly, these arguments are overruled. *See id.* at 461, —— S.E.2d at ——. We will now address defendant's remaining contentions that the legislature intended that SBM be criminal punishment.

a. Involvement of the Criminal Justice System

Defendant contends that

> [(Defendant's argument number 4 above:)] [the] Legislature did not specify that enrollment orders would enter in any forum other than a sentencing hearing in criminal court[,]
>
> . . . .
>
> [and, (Defendant's argument number 6 above:)] House Bill 29 . . . filled a void in the enacting legislation by specifying how offenders would be placed on satellite-based monitoring, and did so in a manner which again evidenced the penal nature of the scheme. The Legislature required that determinations of eligibility for satellite-based monitoring be made while offenders awaited sentencing . . . or, as in the present case, had registered as sex offenders after their release from prison[.]

In considering Alaska's sex offender registration statutes on a different issue the United States Supreme Court noted, "Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive." *Smith v. Doe*, 538 U.S. 84, 96, 155 L. Ed. 2d 164, 179 (2003). Furthermore, North Carolina's registration of sex offenders is maintained by the offender's local sheriff's department, but our courts have found that registration was not intended as punitive. *See* N.C. Gen. Stat. § 14-208.7 (2007); *State v. Sakobie*, 165 N.C. App. 447, 452, 598 S.E.2d 615, 618 (2004); *State v. White*, 162 N.C. App. 183, 198, 590 S.E.2d 448, 458 (2004). We agree with *Smith*, in that mere involvement of "the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive." *Smith* at 96, 155 L. Ed. 2d at 179.

b. "Probation" Replaced with "Cooperation"

Defendant next points to the language of the 2007 revision to N.C. Gen. Stat. § 14-208.42 and argues that the revision was an attempt by the General Assembly to cover up its punitive intent. The 2006 version of N.C. Gen. Stat. § 14-208.42 provided that

> [n]otwithstanding any other provision of law, when the court sentences an offender who is in the category described by G.S. 14-208.40(a)(1) for a reportable conviction as defined by G.S. 14-208.6(4), and orders the offender to enroll in a satellite-based monitoring program, the court shall also order that the offender,

> upon completion of the offender's sentence and any term of parole, post-release supervision, intermediate punishment, or supervised probation that follows the sentence, continue to be enrolled in the satellite-based monitoring program for the offender's life and be placed on unsupervised *probation* unless the requirement that the person enroll in a satellite-based monitoring program is terminated pursuant to G.S. 14-208.43.

N.C. Gen. Stat. § 14-208.42 (2006). (emphasis added). The 2007 version of N.C. Gen. Stat. § 14-208.42, which is applicable to defendant provides that

> [n]otwithstanding any other provision of law, when an offender is required to enroll in satellite-based monitoring pursuant to G.S. 14-208.40A or G.S. 14-208.40B, upon completion of the offender's sentence and any term of parole, post-release supervision, intermediate punishment, or supervised probation that follows the sentence, the offender shall continue to be enrolled in the satellite-based monitoring program for the period required by G.S. 14-208.40A or G.S. 14-208.40B unless the requirement that the person enroll in a satellite-based monitoring program is terminated pursuant to G.S. 14-208.43.
>
> The Department shall have the authority to have contact with the offender at the offender's residence or to require the offender to appear at a specific location as needed for the purpose of enrollment, to receive monitoring equipment, to have equipment examined or maintained, and for any other purpose necessary to complete the requirements of the satellite-based monitoring program. The offender shall *cooperate* with the Department and the requirements of the satellite-based monitoring program until the offender's requirement to enroll is terminated and the offender has returned all monitoring equipment to the Department.

N.C. Gen. Stat. § 14-208.42 (2007) (emphasis added).

Defendant contends that the 2007 amendment "manifested a clumsy cosmetic effort to disguise the penal nature of satellite-based monitoring" by replacing the requirement of "unsupervised probation" with "cooperat[ion] with the Department[.]" *Id.* (2006)-(2007). Defendant directs our attention to *State v. Hearst*, where the term "residential treatment" was substituted in a statute for "confinement." 356 N.C. 132, 137, 567 S.E.2d 124, 128 (2002). In *Hearst*, the North Carolina Supreme Court determined that

> the 1998 amendments did not make any substantive changes to the program itself. While we acknowledge that the wording used in the title of an act can provide useful guidance, we hold that this change in terminology is merely cosmetic and does not clearly demonstrate a legislative intent that the IMPACT program should not qualify for credit under N.C.G.S. § 15-196.1.

Id. at 137, 567 S.E.2d at 128.

We must therefore consider whether the 2007 amendment made a substantive change to the statute. *See id.* The 2006 version of N.C. Gen. Stat. § 14-208.42 required that offenders be placed on unsupervised probation. *See* N.C. Gen. Stat. § 14-208.42 (2006). The 2007 version of N.C. Gen. Stat. § 14-208.42 removes the requirement of unsupervised probation and instead enables the DOC to contact defendant "to receive monitoring equipment, to have equipment examined or maintained, and for any other purpose necessary to complete the requirements of the satellite-based monitoring program." *Id.* (2007).

N.C. Gen. Stat. § 15A-1343(b) sets forth the regular conditions of unsupervised probation as follows:

> (1) Commit no criminal offense in any jurisdiction.
>
> . . . .
>
> (4) Satisfy child support and other family obligations as required by the court. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c).
>
> (5) Possess no firearm, explosive device or other deadly weapon listed in G.S. 14-269 without the written permission of the court.
>
> . . . .
>
> (7) Remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip him for suitable employment. A defendant pursuing a course of study or of vocational training shall abide by all of the rules of the institution providing the education or training, and the probation officer shall forward a copy of the probation judgment to that institution and request to be notified of any violations of institutional rules by the defendant.
>
> . . . .

(9) Pay the costs of court, any fine ordered by the court, and make restitution or reparation as provided in subsection (d).

(10) Pay the State of North Carolina for the costs of appointed counsel, public defender, or appellate defender to represent him in the case(s) for which he was placed on probation.

. . . .

(12) Attend and complete an abuser treatment program if (i) the court finds the defendant is responsible for acts of domestic violence and (ii) there is a program, approved by the Domestic Violence Commission, reasonably available to the defendant, unless the court finds that such would not be in the best interests of justice.

N.C. Gen. Stat. § 15A-1343(b) (2007). If an offender were placed on unsupervised probation, all of the conditions in N.C. Gen. Stat. § 15A-1343(b) could apply. However, none of the conditions of probation enumerated above are now required by N.C. Gen. Stat. § 14-208.42. *Compare* N.C. Gen. Stat. §§ 14-208.42 (2007); 15A-1343(b). Unlike in *Hearst*, the legislature did "make . . . substantive changes to the program itself." *Hearst* at 137, 567 S.E.2d at 128. The requirements of SBM under the 2007 revision are quite different from the conditions of unsupervised probation as required by the 2006 statute. *Compare* N.C. Gen. Stat. § 14-208.42 (2006)-(2007). The amendment establishes a different way of maintaining SBM which is not merely a "cosmetic" change. *Compare* N.C. Gen. Stat. § 14-208.42 (2006)-(2007); *but see Hearst* at 137, 567 S.E.2d at 128. Furthermore, the 2007 amendment does not indicate a legislative intent that SBM be a criminal punishment, as the "cooperation" required by the revised statute is less restrictive than the "unsupervised probation" required by the 2006 statute. N.C. Gen. Stat. § 14-208.42 (2006)-(2007).

c. Determinations of Enrollment in SBM Made in Courts of Law by Superior Court Judges

Defendant also argues SBM was intended to be punitive because

[(Defendants argument number 8 above:)] [t]he Legislature did not create administrative proceedings for eligibility determinations, but mandated that the determinations be made in courts of law[,] . . . [and (Defendant's argument number 9 above:)] [t]he Legislature did not authorize non-judicial officers to make the

final eligibility determination. Instead, the Legislature directed superior court judges to issue eligibility orders.

However, our courts of law and superior court judges serve numerous non-punitive purposes and their involvement is certainly not determinative of a civil or criminal scheme. Indeed, North Carolina's Superior Courts have jurisdiction regarding many different types of civil matters. *See*, *e.g.*, N.C. Gen. Stat. §§ 7A-241 (2007) ("Exclusive original jurisdiction for the probate of wills and the administration of decedents' estates is vested in the superior court division[.]"); -245 (2007) ("The superior court division is the proper division . . . for the trial of civil actions where the principal relief is" certain types of injunctive and declaratory relief.); -246 (2007) ("The superior court division is the proper division . . . for the hearing and trial of all special proceedings . . . ."); -247 (2007) ("The superior court division is the proper division . . . for the trial of all civil actions seeking as principal relief the remedy of quo warranto . . . ."); -248 (2007) ("The superior court division is the proper division . . . for the trial of all actions and proceedings wherein property is being taken by condemnation . . . ."); -249 (2007) ("The superior court division is the proper division . . . for actions for corporate receiverships[.]"). Therefore, the involvement of "courts of law" and "superior court judges" does not indicate a punitive legislative intent.

d. Conclusion Regarding Legislative Intent

We thus agree with *Bare* that

> [d]efendant has failed to direct us to any considerations which would support his contention that the General Assembly intended that SBM . . . be a criminal punishment. Therefore, in accord with our prior cases regarding sex offender registration, we again conclude that Article 27A of Chapter 14 of the North Carolina General Statutes, entitled "Sex Offender and Public Protection Registration Programs," which now includes "Part 5. Sex Offender Monitoring," was intended as "a civil and not a criminal remedy."

Bare at 466, ––– S.E.2d at ––– (citation and brackets omitted). Defendant's contentions that the legislature intended SBM to be a criminal punishment are without merit.

2. Punitive in Purpose or Effect

We now must consider "whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to

deem it civil." *Id.* at 465, —— S.E.2d at —— (citation and quotation marks omitted). However, all of defendant's contentions regarding the punitive effect of SBM have been fully addressed in *Bare*. *See id.* at 465, —— S.E.2d at ——. Defendant presented no evidence before the trial court as to the punitive effects upon him nor any argument which would permit us to distinguish defendant's situation from that of the defendant in *Bare*.[1] We are controlled by *Bare*'s conclusion that

> the restrictions imposed by the SBM provisions do not negate the legislature's expressed civil intent. Defendant has failed to show that the effects of SBM are sufficiently punitive to transform the civil remedy into criminal punishment. Based on the record before us, retroactive application of the SBM provisions do not violate the *ex post facto* clause.

Id. at 478, —— S.E.2d at ——.

We recognize, as noted by the dissent, that there may be serious legal issues raised by the DOC's manner of execution of SBM under some provisions of the DOC's Sex Offender Management Interim Policy ("Interim Policy"). However, just as in *Bare*, 197 N.C. App. 461, —— S.E.2d ——, those issues regarding the execution of SBM have not been raised by either party in this case and our record contains no evidence, and certainly no findings by the trial court, as to the Interim Policy or details of SBM as applied to defendant. Defendant has challenged the constitutionality of the *statute* under which he was ordered to enroll in SBM, N.C. Gen. Stat. § 14-208.40B; defendant has not challenged the Interim Policy. Pursuant to our record, neither defendant nor the State mentioned the Interim Policy before the trial court or in their briefs. Although this Court may have the ability to take judicial notice of the Interim Policy, we have not had the benefit of briefing and arguments regarding the Interim Policy. For these reasons, we have addressed only the issues presented to us in this case, based upon the arguments and record presented in this case.

III. Ineffective Assistance of Counsel and Double Jeopardy

[2] Defendant argues that he had ineffective assistance of counsel due to his counsel's failure to "advance a legally sound double jeopardy argument." Defendant contends that his right to be free from

1. This Court can consider only the information in the record before us, and the record reveals almost nothing about how SBM is performed or its effects upon defendant. Indeed, the record does not even reveal the size of the SBM monitoring unit or how it is operated and maintained.

double jeopardy has been violated because he has been subjected to an additional punishment for his prior convictions of sexual offenses. "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).

We first note that a claim for ineffective assistance of counsel is available only in criminal matters, and we have already concluded that SBM is not a criminal punishment. *See* U.S. Const. amend. VI. (emphasis added) ("In all *criminal prosecutions*, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); *see generally Alford v. Lowery*, 154 N.C. App. 486, 491, 573 S.E.2d 543, 546 (2002) ("Plaintiff cites no authority and we have found no precedent for setting aside a jury verdict in a civil case based on ineffective assistance of counsel.").

However, even if we assume that defendant could raise an ineffective assistance of counsel argument in this context, an argument that SBM violates double jeopardy would fail because SBM is a civil regulatory scheme. Defendant has not been prosecuted a second time for any previously committed offenses, but contends he has been subjected to additional punishments. As we have already held that SBM is a civil regulatory scheme, and not a punishment, double jeopardy does not apply. *See Kansas v. Hendricks*, 521 U.S. 346, 369, 138 L. Ed. 2d 501, 519 (1997) ("Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for . . . double jeopardy . . . claims."). This argument is without merit.

IV. Violation of Plea Bargain

[3] Lastly, defendant contends that "[t]he trial court erred in imposing any condition or restriction upon the defendant which was not specifically agreed to in his plea bargain with the State of North Carolina in violation of the specific agreements." Again, *Bare* has fully addressed this issue and we are bound by its precedent which has determined that SBM does not violate defendant's plea agreement. *See Bare* at 478, S.E.2d at ——. This argument is overruled.

V. Conclusion

We conclude that defendant's enrollment in SBM does not violate prohibitions against *ex post facto* law or double jeopardy. Furthermore, defendant's plea bargain has not been violated. We

therefore affirm the trial court's order requiring defendant to enroll in SBM.

AFFIRMED.

Judge CALABRIA concurs.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

I respectfully dissent from the majority opinion affirming the trial court's order requiring defendant to enroll in satellite-based monitoring. Although I recognize that most of defendant's arguments were addressed by this Court several months ago in *State v. Bare*, I believe that we have the benefit of an expanded record in this case, which makes defendant's case distinguishable from Mr. Bare's. In *Bare*, we explained repeatedly that our conclusions were based upon the record before us and that the record could not support a contrary finding. 197 N.C. App. 461, 473-75, 677 S.E.2d 518, 528 (2009). I believe that the record before us now can and should support a contrary finding.

Here, we may augment the record on appeal by taking judicial notice of the DOC's "Sex Offender Management Interim Policy" (Interim Policy). "The device of judicial notice is available to an appellate court as well as a trial court[.] This Court has recognized in the past that important public documents will be judicially noticed." *State ex rel. Utilities Com. v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 286, 288, 221 S.E.2d 322, 323 (1976) (quotations and citations omitted). Although the DOC has not yet drafted final regulations governing the SBM program that are available in our state register, its interim policy is the sort of public document of which this Court may take judicial notice. *See, e.g.*, *W. R. Co. v. North Carolina Property Tax Com.*, 48 N.C. App. 245, 261, 269 S.E.2d 636, 645 (1980) (stating that we may take judicial notice of a corporate charter on file with the Secretary of State but not included by either party in the record on appeal). Our opinion in *Bare* makes no mention of the DOC's Interim Policy and thus, in my opinion, the contents of the Interim Policy are new facts and circumstances unique to defendant's appeal.

A. Ex Post Facto Punishment

I respectfully disagree with the majority's conclusion that SBM has no punitive purpose or effect and thus does not violate the *ex*

post facto clause. To determine whether a statute is penal or regulatory in character, a court examines the following seven factors, known as the *Mendoza-Martinez* factors:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned[.]

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 661 (1963) (footnotes and citations omitted). Although these factors "may often point in different directions[, a]bsent conclusive evidence of [legislative] intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face." *Id.* at 169, 9 L. Ed. 2d at 661. Because I agree with the majority that there is no conclusive evidence that the legislative intended the SBM statute to be penal, I begin my analysis by examining the seven *Mendoza-Martinez* factors.

1. Affirmative disability or restraint. The first question is "[w]hether the sanction involves an affirmative disability or restraint." *Mendoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 661 (footnote and citations omitted). To echo the Supreme Court of Indiana, "[t]he short answer is that the Act imposes significant affirmative obligations and a severe stigma on every person to whom it applies." *Wallace v. State*, 905 N.E.2d 371, —— (Ind. 2009). Both the SBM statutory provisions and its implementing guidelines require affirmative and intrusive post-discharge conduct under threat of prosecution.

In addition to the regular sex offender registration program requirements, which, though judicially determined to be non-punitive, are nevertheless significant in practice, SBM monitoring participants are subject to the following additional affirmative disabilities or restraints: (1) The DOC has "the authority to have contact with the offender at the offender's residence or to require the offender to appear at a specific location as needed[.]" N.C. Gen. Stat. § 14-208.42 (2007). (2) "The offender *shall* cooperate with the [DOC] and the requirements of the satellite-based monitoring program[.]" *Id.*

(emphasis added). (3) An offender is subject to unannounced warrantless searches of his residence every ninety days. N.C. Dep't of Correction Policies-Procedures, No. VII.F Sex Offender Management Interim Policy 12 (2007). (4) An offender must maintain a daily schedule and curfew as established by his DOC case manager. An offender's schedule and curfew includes spending at least six hours each day at his residence in order to charge his portable tracking device. *Id.* at 15. (5) "If the offender has an active religious affiliation," the offender's case manager must "notify church officials of the offender's criminal history and supervision conditions[.]" *Id.* at 12.

In addition, the DOC has created maintenance agreements that all program participants must sign. Form DCC-44 applies to supervised sex offenders (monitoring) and form DCC-45 applies to unsupervised sex offenders (tracking). DCC-45, which is slightly less burdensome than DCC-44, requires the offender to agree to the following affirmative disabilities or restraints or else face criminal prosecution:

> 4. My location will be monitored by a tamper proof, non-removable ankle transmitter and a receiver. I will be required to wear the transmitter and carry the receiver with me 24 hours a day, 7 days a week.
>
> 5. I understand that it is my responsibility to charge the receiver for a minimum of four (4) hours each 24-hour period to enable the equipment to work properly. I understand that charging the receiver requires electric service to be available.
>
> 6. I understand a unit in the home will be assigned to me and it will be necessary for a designated representative of DCC to enter my residence or other location(s) where I may temporarily reside to install, retrieve, or periodically inspect the unit in order to maintain tracking as required.
>
> 7. I understand I must place the receiver in an area that is unobstructed with the receiver display screen facing out at all times. The receiver should not be covered by metal containers, lockers, vehicle trunks, etc. or hidden under clothing, car seats, purses, briefcases, tote bags, etc.
>
> * * *
>
> 9. In order to maintain equipment and receive necessary communications, I agree to reside at ____, ____ with contact

phone number ____. Prior to changing my residence, I will contact the appropriate DCC representative and the Sheriff's Office where I am registered with my new address.

10. I understand that messages may be sent to me via my receiver. I will acknowledge these messages and follow the instructions in order to maintain the equipment.

Clearly, the SBM program imposes affirmative and intrusive post-discharge conduct upon offenders long after they have completed their sentences, their parole, their probation, and their regular post-release supervision; these restraints continue forever.

Though some may argue that the remaining restrictions are mere inconveniences, this would be a deceiving understatement. Although offenders are no longer subject to formal probation, the requirements that they are subject to are nearly if not equally intrusive: they cannot spend nights away from their homes, they are subject to schedules and curfews, they must appear on command, and they must submit to all DOC requests and warrantless searches. An offender's freedom is as restricted by the SBM monitoring requirements as by the regular conditions of probation, which include: remaining in the jurisdiction unless the court or a probation officer grants written permission to leave, reporting to a probation officer as directed, permitting the probation officer to visit at reasonable times, answering all reasonable inquiries by the probation officer, and notifying the probation officer of any change in address or employment. In addition, submission to warrantless searches is not a regular condition of probation and is instead a special condition of probation.

Accordingly, I believe that SBM imposes an affirmative disability or restraint upon defendant, which weighs in favor of the SBM statute being punitive rather than regulatory.

2. Sanctions that have historically been considered punishment. The next question is whether SBM "has historically been regarded as a punishment." *Mendoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 661 (footnote and citations omitted). Obviously, satellite monitoring technology is new and thus tracking offenders using the technology is not a historical or traditional punishment. However, the additional restrictions imposed upon offenders are considered punishments, both historical and current. In addition, some courts have suggested that the SBM units, made up of an ankle bracelet and a miniature tracking device (MTD), are analogous to the historical pun-

ishments of shaming. *See, e.g.*, *Doe v. Bredeson*, 507 F.3d 998, 1010 (Keith, J., concurring in part and dissenting in part).

In *Bredeson*, the Sixth Circuit considered whether Tennessee's SBM statute violated the *ex post facto* clause. The *Bredeson* majority first held that the Tennessee legislature's purpose when enacting the SBM statute was to establish a civil, nonpunitive regime. *Id.* at 1004. The majority then examined the *Mendoza-Martinez* factors and concluded, in relevant part, that Tennessee's SBM program was not a sanction historically regarded as punishment. *Id.* at 1005. It explained that the Tennessee "Registration and Monitoring Acts do not increase the length of incarceration for covered sex offenders, nor do they prevent them from changing jobs or residences or traveling to the extent otherwise permitted by their conditions of parole or probation." *Id.* Judge Keith, in his dissent, characterized the GPS monitoring system as a "catalyst for ridicule" because the defendant's monitoring device was "visible to the public when worn" and had to "be worn everywhere" the defendant went. *Id.* at 1010 (Keith, J., dissenting in part and concurring in part). "Public shaming, humiliation, and banishment are well-recognized historical forms of punishments." *Id.* (citations omitted). It is clear from the DOC guidelines and maintenance agreements that the LTD must be worn on the outside of all clothing and cannot be concealed or camouflaged in any way, even though some forms of concealment or camouflage would not interfere with the LTD's function. In addition, an offender's religious institution must be informed of his status and his SBM compliance requirements. I agree with Judge Keith that the SBM scheme is reminiscent of historical shaming punishments, which weighs in favor of finding the scheme punitive, rather than regulatory.

3. Finding of scienter. The next question is whether the statute "comes into play only on a finding of *scienter*." *Mendoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 661 (footnote and citations omitted). I believe that this factor is met because the underlying criminal acts, indecent liberties with a child and third degree sexual exploitation of a minor, require intentional conduct. *State v. Beckham*, 148 N.C. App. 282, 286, 558 S.E.2d 255, 258 (2002) (citation omitted); *see* N.C. Gen. Stat. § 14-202.1(a) (2007) ("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; or (2)

Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years."); N.C. Gen. Stat. § 14-190.17A(a) (2007) ("A person commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity.").

4. Traditional aims of punishment. The next question is "whether the sanction promotes the 'traditional aims of punishment—retribution and deterrence.' " *Beckham*, 148 N.C. App. at 286, 558 S.E.2d at 258 (quoting M*endoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 661). Without question, the sanction promotes deterrence. For example, offenders are restricted in their movements, ostensibly in part to prevent them from venturing into schoolyards or nurseries; when satellite-monitored offenders venture into these restricted zones, their supervisors are notified and the offender may be charged with a felony. Although "the mere presence of a [deterrent quality] is insufficient to render a sanction criminal [because] deterrence may serve civil, as well as criminal goals," *Hudson v. United States*, 522 U.S. 93, 105, 139 L. Ed. 2d 450, 463 (1997) (quotations and citation omitted), the deterrent effect here is substantial and not merely incidental. Accordingly, it weighs in favor of finding the sanction to be punitive.

5. Applicability only to criminal behavior. The next question is "whether the behavior to which [the] statute applies is already a crime." *Mendoza-Martinez*, 372 U.S. at 168, 9 L. Ed. 2d at 567 (footnote and citation omitted). The SBM statute applies only to people who have been convicted of "reportable offenses." Thus, this factor weighs in favor of finding the sanction to be punitive.

6. Advancing non-punitive interest. The next question is "whether an alternative purpose to which [the statute] may rationally be connected is assignable for it[.]" *Id.* at 168-69, 9 L. Ed. 2d at 567 (footnote and citation omitted). The SBM statute does advance a rationally related non-punitive interest, which is to keep law enforcement officers informed of certain offenders' whereabouts in order to protect the public. Preventing further victimization by recidivists is a worthy non-punitive interest and one that weighs in favor of finding the sanction to be regulatory.

7. Excessiveness in relation to State's articulated purpose. The final question is "whether [the statute] appears excessive

in relation to the alternative purpose assigned" to it. *Id.* at 169, 9 L. Ed. 2d at 568 (footnote and citation omitted). "The excessiveness inquiry . . . is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith v. Doe*, 538 U.S. 84, 105, 155 L. Ed. 2d 164, 185 (2003) (emphasis added). Judge Keith, dissenting from the majority opinion in *Bredeson*, explained SBM's excessiveness as follows:

> I fail to see how putting all persons in public places on alert as to the presence of offenders, like Doe, helps law enforcement officers geographically link offenders to new crimes or release them from ongoing investigations. It equally eludes me as to how the satellite-based monitoring program prevents offenders, like Doe, from committing a new crime. Although the device is obvious, it cannot physically prevent an offender from re-offending. Granted, it may help law enforcement officers track the offender (after the crime has already been committed), but it does not serve the intended purpose of public safety because neither the device, nor the monitoring, serve as actual preventative measures. Likewise, it is puzzling how the regulatory means of requiring the wearing of this plainly visible device fosters rehabilitation. To the contrary, and as the reflection above denotes, a public sighting of the modern day "scarlet letter"—the relatively large G.P.S. device—will undoubtedly cause panic, assaults, harassment, and humiliation. Of course, a state may improve the methods it uses to promote public safety and prevent sexual offenses, but requiring Doe to wear a visible device for the purpose of the satellite-based monitoring program is not a regulatory means that is reasonable with respect to its nonpunitive purpose.
>
> Sexual offenses unquestionably rank amongst the most despicable crimes, and the government should take measures to protect the public and stop sexual offenders from re-offending. However, to allow the placement of a large, plainly obvious G.P.S. monitoring device on Doe that monitors his every move, is dangerously close to having a law enforcement officer openly escorting him to every place he chooses to visit for all (the general public) to see, but without the ability to prevent him from re-offending. As this is clearly excessive, this factor weighs in favor of finding the Surveillance Act's satellite-based monitoring program punitive.

Bredesen, 507 F.3d at 1012 (Keith, J., dissenting). I agree with Judge Keith's assessment; the restrictions imposed upon defendant by the SBM statute are dangerously close to supervised probation if not personal accompaniment by a DOC officer. The *Bredeson* majority dismissed Justice Keith's concerns about the device's visibility by stating its "belie[f] that the dimensions of the system, while not presently conspicuous, will only become smaller and less cumbersome as technology progresses." *Id.* at 1005. Smaller, less conspicuous, and less cumbersome technologies already exist, but implementation of new technologies is expensive and time-consuming. Though we may one day be able to tag and release a recidivist sex offender as though he were a migrating songbird, it is not a practical reality for defendant at this time or in the immediate future. The SBM equipment and accompanying restrictions as they *exist now* support a conclusion that SBM is a punishment.

In sum, of the seven factors specifically identified by the U.S. Supreme Court in *Mendoza-Martinez* as relevant to the inquiry of whether a statute has a punitive effect despite legislative intent to the contrary, I believe that six factors point in favor of treating the SBM provisions as punitive. Only one—that the statute advances a non-punitive purpose—points in favor of treating the SBM provisions as non-punitive. Accordingly, I would hold that defendant's enrollment in the SBM program constitutes a punishment.

Accordingly, I would also hold that defendant's enrollment in the SBM program constitutes an unconstitutional *ex post facto* punishment.

B. Ineffective Assistance of Counsel and Double Jeopardy

I also respectfully disagree with the majority's analysis of defendant's ineffective assistance of counsel argument. Because I would hold that SBM is a criminal punishment, not a civil regulatory scheme, I would not dismiss this argument on those bases.

C. Violation of Plea Bargain

Finally, I respectfully disagree with the majority's analysis of defendant's argument that the trial court erred by imposing a condition upon defendant that was not specifically agreed to in his plea bargain. "Although a plea agreement occurs in the context of a criminal proceeding, it remains contractual in nature. A plea agreement will be valid if both sides voluntarily and knowingly fulfill every aspect of the bargain." *State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993) (citations omitted). We explained that, because a defend-

ant surrenders fundamental constitutional rights when he pleads guilty based upon the State's promise, "when a prosecutor fails to fulfill promises made to the defendant in negotiating a plea bargain, the defendant's constitutional rights have been violated and he is entitled to relief." *Id.* at 145, 431 S.E.2d at 790 (quotations and citations omitted). Accordingly, I would hold that defendant received a punishment in excess of what he was promised in exchange for his guilty plea in violation of his constitutional rights.

For the foregoing reasons, I would reverse the order imposing lifetime satellite-based monitoring upon defendant.

ASHEVILLE SPORTS PROPERTIES, LLC, and ASHEVILLE SPORTS, INC., ALSO D/B/A SKI COUNTRY SPORTS, PLAINTIFFS v. THE CITY OF ASHEVILLE, DEFENDANT

No. COA08-1085

(Filed 1 September 2009)

1. Appeal and Error— appealability—improper materials—summary judgment motion

The Court of Appeals disregarded those materials cited by plaintiffs in a negligence case (such as unverified pleadings and unsupported factual allegations) that may not properly be considered on a motion for summary judgment.

2. Cities and Towns— municipal liability for waterway maintenance—storm water drainage pipes—no duty to exercise reasonable care to inspect, maintain, and repair

The trial court did not err in a negligence case by granting the City's motion for summary judgment in an action seeking damages for two sinkholes that developed on plaintiffs' property as a result of the failure of storm water drainage pipes running under plaintiffs' parking lot. Although plaintiffs contend the City had an affirmative duty to exercise reasonable care to inspect, maintain, and repair the storm drain pipes buried under plaintiffs' property, plaintiffs admitted in their brief that no stormwater structures owned by the City were located on plaintiffs' property or on immediately adjoining properties, and it was undisputed that the pipes under plaintiffs' property were put in place by a previous owner of the property and were owned solely by plaintiffs.

3. Utilities— collection of public utility fee—no duty to maintain privately owned pipes

Plaintiffs in a negligence case have not shown that the City's duty to maintain its own pipes by virtue of a public utility fee should create a duty to maintain plaintiffs' privately owned pipes, nor have plaintiffs cited any authority suggesting that the City's collection of storm water utility fees gave rise to an affirmative duty to inspect, maintain, and repair a privately owned drainage pipe on private property.

4. Negligence— causation—directing unreasonable amount of storm water runoff into pipes

Although plaintiffs alternatively contend in a negligence case that the City's liability for plaintiffs' property damage arises from a duty to refrain from directing an unreasonable amount of storm water runoff into pipes that eventually flow into plaintiffs' pipes, there was insufficient evidence of causation to support this theory.

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

Although plaintiffs contend they are entitled to equitable relief even if they failed to prove the elements of negligence, plaintiffs only brought a claim for negligence against the City and asserted no claim based on any equitable principle. The Court of Appeals declined to adopt a new rule imposing a duty on the City to exercise reasonable care.

Appeal by plaintiffs from order entered 30 June 2008 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 12 February 2009.

Roberts & Stevens, P.A., by Mark C. Kurdys and Ann-Patton Nelson Hornthal, for plaintiffs-appellants.

Barbour Law Firm, PLLC, by Frederick S. Barbour; and Assistant City Attorney Martha Walker-McGlohon, for defendant-appellee.

GEER, Judge.

Plaintiffs Asheville Sports Properties, LLC ("ASP") and Asheville Sports, Inc. ("Asheville Sports") appeal the trial court's grant of summary judgment to defendant, the City of Asheville. Two sinkholes developed on plaintiffs' property as a result of the failure of storm

water drainage pipes running under plaintiffs' parking lot. Plaintiffs first contend that the City should be liable for the damage because it failed to maintain and repair the pipes. Plaintiffs have, however, failed to establish that the City had a duty to do so with respect to these privately installed and owned storm water drainage pipes. Although plaintiffs alternatively argue that the City should be held liable for having directed an unreasonable volume of water through the private pipes, plaintiffs have failed to present any evidence as to causation with respect to that theory. Because we also find plaintiffs' remaining arguments unpersuasive, we hold that the trial court properly granted summary judgment to the City, and we affirm.

Facts

ASP owns the real property and building located at 1000 Merrimon Avenue in Asheville, North Carolina. ASP leases a portion of the building to Asheville Sports for the operation of Ski Country Sports, a business that sells specialty outdoor equipment and apparel. A storm water drainage system consisting of a series of corrugated metal pipes, each 54 inches in diameter, is buried under the parking lot of the property. The pipes were installed in approximately 1978 by one of the property's previous owners. At the boundaries of the property, the pipes are connected to other storm water drainage pipes that run along Merrimon Avenue, Osborne Road, Lakeshore Drive, Beaverdam Road, and the surrounding areas in Asheville.

On 30 May 2006, a large sinkhole, caused by the collapse of a portion of the pipes underneath plaintiffs' property, formed on the parking lot of the property. When the City refused to repair the damage, plaintiffs paid $94,000.00 to replace 30 or 40 feet of the pipes and to repair the parking lot. On 27 July 2007, another sinkhole formed on the property when a portion of the pipes further downstream failed. After the City again refused to perform the repairs, plaintiffs paid roughly $124,000.00 to have the pipes and property repaired.

On 22 August 2007, plaintiffs filed a verified complaint against the City, asserting three causes of action: (1) negligence, (2) nuisance, and (3) inverse condemnation. Plaintiffs requested a temporary restraining order, a preliminary injunction, and monetary damages. On 12 September 2007, the trial court denied plaintiffs' motion for a temporary restraining order and preliminary injunction. On 20 November 2007, plaintiffs filed an unverified amended complaint in which they withdrew their claims for nuisance and inverse condemnation, leaving only their negligence claim remaining.

On 22 April 2008, the City moved for summary judgment, and on 12 June 2008, plaintiffs filed a cross-motion for partial summary judgment. On 30 June 2008, the trial court entered an order denying plaintiffs' motion for partial summary judgment and granting the City's motion for summary judgment, finding that "there is no genuine issue of material fact and Defendant City is entitled to judgment in its favor as a matter of law." Plaintiffs timely appealed to this Court.

Discussion

This Court reviews the trial court's grant of summary judgment de novo. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). Summary judgment is appropriate only 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.R. Civ. P. 56(c).

[1] We first make some observations regarding the evidentiary support cited by plaintiffs in their main brief and reply brief. As the Supreme Court explained in *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976), "[t]he purpose of Rule 56 is to prevent unnecessary trials when there are no genuine issues of fact and to identify and separate such issues if they are present." Therefore, Rule 56 "requires the party opposing a motion for summary judgment—notwithstanding a general denial in his pleadings—to show that he has, or will have, evidence sufficient to raise an issue of fact." *Id.* Thus, "the opposing party may not rest on the mere allegations or denials of his pleading." *Gillis v. Whitley's Discount Auto Sales, Inc.*, 70 N.C. App. 270, 274, 319 S.E.2d 661, 664 (1984). Rather, "the opposing party must set forth specific facts showing that there is a genuine issue for trial, either by affidavits or as otherwise provided in G.S. § 1A-1, Rule 56. . . ." *Id.*

On many key points in plaintiffs' briefs, instead of citing to evidence, they rely exclusively on citations to their unverified amended complaint. "[T]he trial court may not consider an unverified pleading when ruling on a motion for summary judgment." *Allen R. Tew, P.A. v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999), *disc. review improvidently allowed*, 352 N.C. 145, 531 S.E.2d 213 (2000). *See also Hill v. Hill*, 11 N.C. App. 1, 10, 180 S.E.2d 424, 430 ("An unverified complaint is not an affidavit or other evidence."), *cert. denied*, 279 N.C. 348, 182 S.E.2d 580 (1971).

We acknowledge that some, but not all, of the amended complaint paragraphs cited in the briefs are repeated in the original verified complaint. "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). Plaintiffs' initial complaint was verified by Craig W. Friedrich, who was identified in the verification as the manager of ASP.

With respect to the allegations relied upon by plaintiffs, the verified complaint does not demonstrate that Mr. Friedrich had personal knowledge of the facts contained in those allegations or that he is competent to testify to those facts. Indeed, some of the paragraphs are asserted "upon information and belief." Our appellate courts have, however, "repeatedly held that statements made 'upon information and belief'—or comparable language—'do not comply with the "personal knowledge" requirement . . . .' " *Currituck Assocs.-Residential P'ship v. Hollowell*, 170 N.C. App. 399, 404, 612 S.E.2d 386, 389 (quoting *Hylton v. Koontz*, 138 N.C. App. 629, 634, 532 S.E.2d 252, 256 (2000), *disc. review denied*, 353 N.C. 373, 546 S.E.2d 603 (2001)).

Plaintiffs have also cited to their own response to a request for production of documents. As that response is unsworn, it does not fall within the scope of materials permitted to be considered under Rule 56. *See Dixon v. Hill*, 174 N.C. App. 252, 262, 620 S.E.2d 715, 721 (2005) (holding defendant's denials in unverified response to plaintiffs' request for admissions could not be considered in summary judgment), *disc. review denied*, 360 N.C. 289, 627 S.E.2d 619, *cert. denied*, 548 U.S. 906, 165 L. Ed. 2d 954, 126 S. Ct. 2972 (2006).

Finally, plaintiffs have, in other instances, simply made factual assertions with no citations to the record at all. Those assertions in an appellate brief, without evidentiary support, cannot support a reversal of summary judgment. *See Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 505, 451 S.E.2d 650, 658 ("An adequately supported motion for summary judgment by the defendant triggers the plaintiff's responsibility to produce facts, as distinguished from allegations, sufficient to show that he will be able to prove his claim at trial. In the present case, plaintiffs rely on mere conjecture and have shown no facts sufficient to support their allegations of a common agreement and objective. Accordingly, the trial court properly entered summary

judgment for defendants." (internal citation omitted)), *appeal dismissed and disc. review denied*, 339 N.C. 739, 454 S.E.2d 654 (1995).

In reviewing the trial court's summary judgment order in this case, we have disregarded those materials cited by plaintiffs that may not properly be considered in connection with a motion for summary judgment. We now address each of plaintiffs' contentions regarding the merits of their claims.

I

[2] Plaintiffs first argue that the trial court erred in granting the City's motion for summary judgment because the City "had an affirmative duty to exercise reasonable care to inspect, maintain, and repair the storm drain pipes buried under plaintiff's [sic] property. . . ." Plaintiffs contend that, even though the pipes were constructed by private parties and are located on their private property, the City adopted the pipes by using them "as integral components of [its] municipal storm water runoff control and drainage system," and the City is, therefore, responsible for their upkeep.

In *Johnson v. City of Winston-Salem*, 239 N.C. 697, 707, 81 S.E.2d 153, 160 (1954), our Supreme Court held that

> a municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care in respect to upkeep, of drains and culverts constructed by third persons when, and only when, they are adopted as a part of its drainage system, or the municipality assumes control and management thereof.

The Court explained that "there is no municipal responsibility for maintenance and upkeep of drains and culverts constructed by third persons for their own convenience and the better enjoyment of their property unless such facilities be accepted or controlled in some legal manner by the municipality." *Id.*

In *Johnson*, 293 N.C. at 699, 81 S.E.2d at 154, the prior owner of the defendant's property extended a storm drain across the property. He then filled in the ditch through which the water had previously flowed and developed the property for residential purposes. *Id.* After the defendant bought the property, a manhole just below the plaintiffs' property became stopped up, during a heavy rainstorm, by a large piece of terra cotta pipe that had washed down from the defendant's property, causing the manhole to overflow and flood the plaintiffs' basement. *Id.* at 702, 81 S.E.2d at 157. The plaintiffs brought suit

against both the defendant and the City, contending the City had wrongfully diverted surface waters into the drain and that both the defendant and the City failed to exercise proper care in keeping the drain in good repair. *Id.* at 703, 81 S.E.2d at 157.

On appeal, the defendant argued that he had no legal duty to maintain the drain on his property, contending that "although this underground drain originally may have been a private drainage project, it had lost its identity as such and had been taken over or appropriated as a part of the city street and park drainage system, and while the burden of maintenance and upkeep may have rested originally upon the property owners along the drain, this burden had passed to the City by operation of law as incident to its use and control of the pipe line." *Id.* at 706, 81 S.E.2d at 160. The Court rejected that argument, noting that "[t]he record discloses no evidence tending to show dedication or legal acceptance by the City of the drain as a part of its drainage system, nor control over it by the City as such, within the purview of the controlling principles of law." *Id.* at 708, 81 S.E.2d at 161.

Since the Supreme Court's explanation of the general rule in *Johnson*, our appellate courts have had several occasions to further define the scope of municipal liability for waterway maintenance. In *Geo. A. Hormel & Co. v. City of Winston-Salem*, 263 N.C. 666, 668, 140 S.E.2d 362, 363 (1965), the plaintiff's building was flooded when the pipes under the property on which the building was located collapsed. The plaintiff sought to hold the City liable for the damage. The Supreme Court held:

> Plaintiff cannot invoke the application of the general rule that a municipality is liable for damages caused by its negligence in the maintenance and repair of its sewers and drains constructed by it, which is the cause of action it has alleged in its complaint, for the simple reason that all its proof is that the drainage pipes which collapsed causing its damage were not only constructed and installed by an individual, Liberty Storage Company, on its own property, but were actually under the control of Liberty Storage Company.

Id. at 674, 140 S.E.2d at 367 (internal citations omitted).

The Court explained that:

> Further, plaintiff cannot invoke the application of the general rule that municipal adoption and control of drainage culverts or pipes

> complained of, constructed or owned by an individual, is sufficient to render the municipality liable for defects or obstructions therein, for the reason that it has neither allegation nor proof to call this rule of law into play. The mere fact, as shown by plaintiff's evidence, that defendant in the Levy building bolted the manhole down of Liberty Storage Company's private drainage line and sealed the holes therein, and that defendant regularly sent an employee through the private drainage system of Liberty Storage Company to see that it was open and waters could leave its streets did not constitute municipal adoption and control of Liberty Storage Company's private drainage system on its premises.

Id., 140 S.E.2d at 367-68 (internal citations omitted). The Court cited in support *City of Irvine v. Smith*, 304 Ky. 868, 202 S.W.2d 733 (1947), in which the Kentucky Court of Appeals "held that where sewers constructed by the city were placed to catch surface water as it drained naturally, the fact that such culverts and sewers crossing streets were connected with private sewers did not constitute a dedication of private sewers to public use." *Hormel*, 263 N.C. at 674, 140 S.E.2d at 368. The Court, therefore, affirmed the grant of nonsuit. *Id.* at 677, 140 S.E.2d at 370.

In *Mitchell v. City of High Point*, 31 N.C. App. 71, 71-72, 228 S.E.2d 634, 634-35 (1976), the plaintiffs alleged the City was liable for the damage sustained when the plaintiffs' land was flooded during a rainstorm because the City had failed to adequately maintain its drainage system. The Court held that the City's control and maintenance of two culverts upstream from the plaintiffs' property did not mean that the City had adopted the entire stream. *Id.* at 75, 228 S.E.2d at 637. The Court explained:

> Except for those portions of the stream bed in the defendant's street right-of-way the plaintiffs have failed to show that the defendant exercised legal control and management of the stream bed or adopted it in any manner. That being so, the court erred in charging the jury that the defendant "adopted" the stream bed.

Id., 228 S.E.2d at 636-37. This Court, therefore, held that the City owed no duty to the plaintiffs and could not be held liable. *Id.*, 228 S.E.2d at 637.

We believe this case is similar to *Mitchell* and *Hormel* and, consequently, requires the same result reached in those cases. Plaintiffs

admit in their brief that "no stormwater structures owned by the City of Asheville are located on Plaintiffs' property or on immediately adjoining properties . . . ." It is undisputed that the pipes under plaintiffs' property were put in place by a previous owner of the property and were owned solely by plaintiffs.

On the issue of maintenance and repair, the City submitted the affidavit of Nick Harvey, an analyst in the City's Transportation and Engineering Department, in which he explained that "[t]he City does not own or maintain the stormwater drain structures located on private property, with the exception of those structures that the City has accepted by deed or dedication and adoption." Mark Combs, the City's Director of Public Works, stated in his affidavit that "[t]he City has not at any time accepted the subject pipe by dedication." Finally, Charlotte Hutchinson, a City research analyst, confirmed in her affidavit that "the city has never accepted dedication of an easement across the subject property."

Moreover, in 1992, the City adopted Resolution 92-20, which states: "All existing storm drainage systems or portions thereof, including but not limited to pipes and pipe culverts, reinforced concrete culverts, catch basins, drop inlets, junction boxes, ditches and natural drainageways, located on private property shall be maintained by the property owner or his agent." Similarly, Subsection (j)(1) of Section 7-12-6 of the City's Unified Development Ordinance states that "[t]he City shall be responsible only for the portions of the drainage system which are in city maintained street rights of way and permanent storm drainage easements conveyed to and accepted by the city."

In response to this evidence, plaintiffs presented no evidence that the City has ever taken any action with respect to plaintiffs' pipes. The record contains no evidence that the City expressly adopted the pipes as part of its storm water management system; there is no evidence that the City ever assumed control or management of the pipes; and there is no evidence that the City engaged in any maintenance, repair, or even inspection or monitoring of the pipes. Plaintiffs rely solely upon a map showing that their pipes connect with other drainage pipes that connect with the City's storm water management facilities. Under *Johnson*, *Hormel*, and *Mitchell*, that evidence is not sufficient.

Plaintiffs cite four cases in which our appellate courts held that a city was liable for the failure of a private drainage system because the city had adopted that system. *See Dize Awning & Tent Co. v. City*

of Winston-Salem, 271 N.C. 715, 157 S.E.2d 577 (1967); *Milner Hotels, Inc. v. City of Raleigh*, 268 N.C. 535, 151 S.E.2d 35 (1966), *modified on reh'g*, 271 N.C. 224, 155 S.E.2d 543 (1967); *Howell v. City of Lumberton*, 144 N.C. App. 695, 548 S.E.2d 835 (2001); and *Hooper v. City of Wilmington*, 42 N.C. App. 548, 257 S.E.2d 142, *disc. review denied*, 298 N.C. 568, 261 S.E.2d 122 (1979). The evidence in each of these cases is distinguishable from that presented in this case. In all of the cases cited by plaintiffs, the municipalities took some affirmative action to signal they had adopted the system in some legal manner.

Plaintiffs rely heavily on this Court's decision in *Hooper*, 42 N.C. App. at 552-53, 257 S.E.2d at 145. In that case, the plaintiffs argued, like plaintiffs here, that the drainage ditch on their property was part of the City's drainage system, and the City was, therefore, liable for diverting more water than natural into the ditch because it caused erosion on the plaintiffs' land. *Id.* at 549, 257 S.E.2d at 143. The plaintiffs presented evidence that the City "controlled all drains and culverts above and below the plaintiffs' property in that drainage basin." *Id.* at 552-53, 257 S.E.2d at 143. The water flowing into the ditch came from and continued on through a system of City-maintained ditches throughout the drainage basin. No other city used the ditch, and the City had regularly repaired and maintained the ditch above and below the plaintiffs' property. *Id.*

Following a bench trial at which the plaintiffs prevailed, the City argued to this Court that there had been no evidence of dedication of the ditch to the City and that the mere fact that the City adopted and controlled the ditch where it intersected with City streets was not sufficient. *Id.* at 552, 257 S.E.2d at 144. This Court concluded, however, that "there [was] considerably more evidence of control over the entire stream than was present in *Mitchell*." *Id.*, 257 S.E.2d at 145. The Court reasoned that "[t]he city controlled all drains and culverts above and below the plaintiffs' property in that drainage basin." *Id.* at 552-53, 257 S.E.2d at 145. Additionally, "[o]ther city owned ditches drained into the [ditch] above plaintiff's property." *Id.* at 553, 257 S.E.2d at 145. There was also testimony by a City official that the City "used" the ditch and that "city work crews had regularly snagged and worked the [ditch] above and below plaintiffs' property." *Id.* The Court held: "After a careful review of the record and plaintiffs' exhibits, we hold that there is ample evidence to support the findings of the trial court that the city had adopted, managed and controlled the entire [ditch]." *Id.*

In this case, there are no similar admissions by the City. In addition, plaintiffs acknowledge that their pipes are not immediately connected with City pipes, but rather are connected to other private property. The only evidence plaintiffs rely upon is the map of the drainage system showing that, at some point, the water in their pipes runs through other pipes owned by the City. This map cannot create an issue of fact as to whether the City adopted plaintiffs' storm drain, especially in light of the evidence that the City owns and maintains only a small percentage of the storm drains in Asheville. In his affidavit, Mark Combs states that "City of Asheville records indicate there are approximately 219 miles of mapped stormwater pipe located within the corporate limits of the City of Asheville. Of this 219 miles, approximately 47 miles, or 22%, are owned by the City of Asheville. Approximately 27 miles, or 12%, are owned by the North Carolina Department of Transportation. Approximately 145 miles, or 66%, are owned by private parties." In the drainage area of approximately 210 acres, "the City owns or has right-of-way for approximately 34 acres or 16 percent of the total acreage."

Additionally, there is no evidence of any maintenance or control immediately along the drainage line, including where plaintiffs' pipes are located. Combs explains in his affidavit that "[t]he City of Asheville maintains the stormwater pipe it owns. The City does not maintain stormwater pipe owned by the North Carolina Department of Transportation or private parties." Combs also states that "[t]he subject pipe is not maintained, and has never been maintained, by the City of Asheville" and that "[t]he subject pipe is not located within any right-of-way of the City of Asheville." Plaintiffs have presented no contrary evidence.

In short, in contrast to *Hooper*, there is no evidence that the City admitted using plaintiffs' storm drains, that the City controls any pipes or drains immediately above or below plaintiffs' property, or that the City has performed any repair or other work on the pipes that ultimately connect with plaintiffs' pipes. Indeed, the undisputed evidence was that the City owned and maintained only a relatively small percentage of the storm drains and pipes within the City. Accordingly, *Hooper* does not warrant overturning the summary judgment order.

Plaintiffs also refer this Court to *Milner Hotels*, 268 N.C. at 535, 151 S.E.2d at 36, in which the City used a stream flowing through the plaintiff's property to drain storm runoff by connecting the City's gutters and street drains with the stream. The City performed periodic maintenance on a culvert to clear debris after rainstorms, but

only after the waters subsided. *Id.* After a particularly heavy rainstorm, water backed up and flooded the plaintiff's property. *Id.* at 536, 151 S.E.2d at 36.

The plaintiff sued the City, which contended that it had no duty to the plaintiff. *Id.* The Court disagreed, holding that because the City had repaired and maintained the culvert at other times, it had assumed control and management of the system and could be held liable. *Id.* at 537, 151 S.E.2d at 37-38. In this case, however, plaintiffs have presented no evidence that the City maintained plaintiffs' pipes at any time.

In *Dize Awning*, 271 N.C. at 717, 157 S.E.2d at 578, the plaintiff sued the City when its property was flooded after a heavy rainstorm. Previously, there had been drainage pipes and culverts underneath the property with covers or grills on them to prevent debris from entering the system and blocking the pipes. *Id.* at 716-17, 157 S.E.2d at 577. They had been installed by someone else, but later were maintained by the City. *Id.* The City removed an old culvert and replaced it with a new one, but failed to install a grill or other protective covering across the opening. *Id.* at 717, 157 S.E.2d at 578. When it rained, large debris flowed through the pipe and blocked the opening, causing the rainwater to back up and overflow onto the plaintiff's property. *Id.*

The Court held that the City could be held liable, explaining:

> To maintain the existing culvert for forty years and then to revise and enlarge the method of controlling the drainage, even from a natural watercourse, would be to assume its control and management and require [the City] to use reasonable diligence to keep the drain in good repair and condition and render it liable to one damaged by its negligence in this respect.

Id. at 721, 157 S.E.2d at 581. Once the City assumed control of the culvert by removing the old culvert and replacing it with a new one, it was responsible for its upkeep. By contrast, here, there is no evidence that the City took any affirmative steps to take responsibility for the pipes' upkeep on plaintiffs' property.

Finally, plaintiffs rely on *Howell*, 144 N.C. App. at 703, 548 S.E.2d at 840, in which the City was held liable for sinkholes caused by the City's maintenance of the pipe underneath the plaintiff's property. That case is readily distinguishable from the facts at hand because, in

Howell, the City actually owned the pipe and the easement on which the pipe was located. *Id.* at 697, 548 S.E.2d at 837.

In sum, in all of the cases cited by plaintiffs, the city took affirmative acts to control or assume management of the pipe at issue. Plaintiffs have pointed to no evidence of any such affirmative acts taken by the City in this case. Accordingly, we hold that *Johnson*, *Hormel*, and *Mitchell* control, and plaintiffs have failed to show that the City undertook a duty to maintain plaintiffs' pipes.

II

[3] Plaintiffs next contend that the City's duty to maintain their pipes arises from the City's collection of storm water utility fees from plaintiffs and other private property owners. We note that plaintiffs did not include this argument in their main brief, but instead asserted it for the first time on appeal in their reply brief. Because, however, the City anticipated this argument in its appellee's brief, we address the argument on the merits.

The City collects a storm water utility fee that it uses to improve, repair, and maintain those portions of the storm water drainage system that are owned by the City. This fee is specifically authorized by the General Assembly. *See* N.C. Gen. Stat. § 160A-314(a) (2007) ("A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise."); N.C. Gen. Stat. § 160A-311(10) (2007) (providing that the term "public enterprise" includes "[s]tormwater management programs designed to protect water quality by controlling the level of pollutants in, and the quantity and flow of, stormwater and structural and natural stormwater and drainage systems of all types").

The City can only charge those fees necessary to provide "a structural and natural stormwater and drainage system to the City's citizens as contemplated by the General Assembly." *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 815, 517 S.E.2d 874, 881 (1999) (holding City of Durham's storm water utility fee scheme invalid because City used fees for more than maintenance of storm water drainage system and charged fees "far exceed[ing] the cost of providing a structural and natural stormwater and drainage system").

Plaintiffs stress that they are not seeking "to invalidate the City of Asheville's storm water utility nor to recover the storm water utility

fees they have paid," as the plaintiffs in *Smith Chapel* were. Rather, in their reply brief, plaintiffs clarify:

> Plaintiffs seek to recover damages resulting from the failure of the City to provide to the Plaintiffs the service for which the City has collected such fees. Having collected such fees from the Plaintiffs, the City is obligated, certainly since 2006, to provide storm drainage management and maintenance, including periodic inspections and necessary repairs, to the Plaintiffs. Hand-in-hand with the duty to provide service is the legal duty to provide such services in a reasonable manner, and those cases cited by both Appellants and Appellee in their primary briefs establish the viability of an action to recover damages incurred by a property owner as the result of a municipality's breach of the duty to provide such services in a reasonable, non-negligent manner.

(Emphasis omitted.) In other words, plaintiffs are contending that the City owes them a duty to inspect, repair, and maintain their pipes because the City has a duty to inspect, repair, and maintain public storm water drainage pipes by virtue of charging a utility fee for the service.

Plaintiffs have not, however, shown that the storm water utility fee was established to maintain privately owned pipes that connect to the City's pipes, as well as the City's storm water drainage system. Nor, in light of the City's Resolution 92-20 and its Unified Development Ordinance, can we make that assumption. Therefore, plaintiffs have not shown that the City's duty to maintain its own pipes by virtue of the public utility fee should extend to create a duty to maintain plaintiffs' privately owned pipes. We further note that plaintiffs have cited no authority suggesting that the City's collection of storm water utility fees gives rise to an affirmative duty to inspect, maintain, and repair a privately owned drainage pipe on private property. We decline to reach such a holding here given the record before us.

III

[4] Plaintiffs alternatively contend that the City's liability for plaintiffs' property damage arises from a duty to refrain from directing an unreasonable amount of storm water runoff into pipes that eventually flow into plaintiffs' pipes. Our courts have, in certain circumstances, recognized such a municipal duty.

In *Eller v. City of Greensboro*, 190 N.C. 715, 720, 130 S.E. 851, 853 (1925), our Supreme Court held that a municipality could be held "liable for negligence in not exercising skill and caution in the construction of its artificial drains and watercourses." The Court explained that "[i]f [the city's drains and watercourses] are so constructed as to collect and concentrate surface water that such an unnatural flow in manner, volume and mass is turned and diverted onto the lower lot, so as to cause substantial injury, the city is liable." *Id. See also Yowmans v. City of Hendersonville*, 175 N.C. 575, 578, 96 S.E. 45, 47 (1918) (holding that municipalities "are not allowed, from this or other cause, to concentrate and gather such waters into artificial drains and throw them on the lands of an individual owner in such manner and volume as to cause substantial injury to the same and without making adequate provision for its proper outflow, unless compensation is made, and for breach of duty in this respect an action will lie").

Even though such a duty exists, a plaintiff must still prove all of the other elements of negligence. In *Hooper*, 42 N.C. App. at 553, 257 S.E.2d at 145, in addition to holding that the City adopted the ditch located on the plaintiffs' property, the Court also held that the City "had a duty to use due care in controlling the water" diverted into the ditch. The Court explained that "[a]ssuming that a municipality has adopted an open drainage ditch as part of its drainage system '*it may become liable for injury caused by its negligence* in the control of the water.' " *Id.* (emphasis added) (quoting *Milner*, 268 N.C. at 536, 151 S.E.2d at 37). Because the plaintiffs in *Hooper* presented evidence that the plaintiffs' land had been eroded due to the increased water flow into the ditch resulting from the City's too small culvert, the Court held that "[t]he plaintiffs presented sufficient evidence to support the court's findings that the City's negligence had proximately caused the erosion damage to plaintiffs' property." *Id.* at 554, 257 S.E.2d at 146.

In *Johnson*, 239 N.C. at 707, 81 S.E.2d at 160, on the other hand, the Court held that the plaintiffs had failed to present sufficient evidence of causation. The defendant property owner argued that the City was at fault for the flooding of the plaintiffs' property, contending that the City had made extensive street improvements that materially increased the flow of street surface waters and diverted these waters into the storm drain. The Court rejected this argument, explaining:

> There is no evidence that the City augmented the flow of water to the point of overloading the drain or causing an overflow, and the plaintiffs' claim here asserted is not, on this record, traceable to any such causal origin. Therefore the appeal as presented does not bring into focus the rules of law applicable where there is an acceleration or increase in the volume of surface waters in or through a drain incident to the improvement of lands. Accordingly, we deem it unnecessary to discuss the refinements of these rules of law.

Id., 81 S.E.2d at 160-61.

Similarly, here, plaintiffs state in their brief that "drains, culverts and ditches on City-owned streets and rights-of-way have been intentionally connected to the drain pipes buried under neighboring properties below and above the Plaintiffs' property and running in a continuous fashion, thus diverting runoff from City streets into those pipes." They further argue in their brief that "[b]y design, the pavement, curbs, gutters and other stormwater control structures on property where the City is the owner of record (primarily city streets and sidewalks) drastically alter the natural runoff of rainwater falling and/or flowing onto the surface of all property within the Catchment Area." According to plaintiffs' brief, "[t]his drastic alteration in the natural runoff has the effect of concentrating and increasing the volume and flow of storm water accumulating in the City's streets and thereafter artificially-diverting [sic] that runoff into surface ditches, culverts and pipes buried under private property, in particular the pipes located under Plaintiffs' property. As a result, an unreasonable amount of storm runoff flows through the pipes buried deep beneath Plaintiffs' property."

Plaintiffs, however, include no citations to any evidence to support these assertions. They similarly omit any citations to the record to support their factual assertion that

> [t]he City has placed an unreasonable burden on [plaintiffs'] structures by artificially diverting the stormwater that falls and flows from other properties onto City-owned and controlled impervious surfaces, directing and concentrating the volume and flow of that stormwater with pavement, curbs, gutters, ditches, catch basins and other structures and then discharging the artificially-increased volume and flow into the stormwater structures under Plaintiffs' property.

We cannot assume that there has been a drastic alteration to the natural runoff of rainwater without supporting testimony or documentary evidence in the record. We also cannot assume without evidence that, because of the City's actions, an unreasonable amount of storm water runoff flows through plaintiffs' pipes. Nor can we assume, without evidence, that the City has artificially diverted and increased the water and placed an unreasonable burden on plaintiffs' storm water pipes. *Compare Hooper*, 42 N.C. App. at 551, 257 S.E.2d at 144 (holding City liable where expert testified natural drainage path had been altered and flow of water increased as result of City's actions), *with Mitchell*, 31 N.C. App. at 74, 228 S.E.2d at 636 (rejecting plaintiff's argument that City could be held liable for diverting unreasonable amounts of water into plaintiff's waterway because "[t]here [was] no evidence that the City augmented the flow of water to the point of overloading the stream or causing an overflow").

The only evidence relating to causation is the testimony of Craig Friedrich, the owner of ASP, who, when asked to identify the cause of the sinkhole, stated, "The rainfall I imagine is what caused it." Mr. Friedrich then stated that he thought "the pipe collapsed because of, I guess, just wear, age or deterioration." His testimony does not support plaintiffs' claim that the sinkhole was caused by the City's redirecting an unreasonable amount of water through plaintiffs' storm water pipes. Because there is insufficient evidence of causation, this theory does not provide a basis for overturning the trial court's summary judgment order.

IV

[5] Finally, plaintiffs argue that even if they failed to prove the elements of negligence, they are entitled to equitable relief. According to plaintiffs, "based on equitable principles, the City should not be allowed to pump as much water as it wants through the pipes under Plaintiffs' property." Plaintiffs contend that it could not have been anticipated when their pipes were installed that "those pipes would be responsible for the flow of the City's water and an integral part of the City's drainage system." Once they were installed, plaintiffs argue, they had no way to block the City's water or make sure the pipes could handle that water.

Plaintiffs, however, only brought a claim for negligence against the City. The Amended Complaint asserts no claim based on any equitable principle. Plaintiffs even withdrew their request for injunctive relief. Since a claim for equitable relief was not before the trial court,

plaintiffs cannot argue that the trial court erred, in light of such a claim, in granting summary judgment.

Moreover, plaintiffs cite only a single case in support of their "equitable principles" theory: *Marriott Fin. Servs., Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 217 S.E.2d 551 (1975). Plaintiffs quote its holding that "[i]t is a well-recognized principle that equity will grant relief from the consequences of mistake, 'some unintentional omission, or error, arising from ignorance, surprise, imposition or misplaced confidence.' " *Id.* at 135, 217 S.E.2d at 560 (quoting 27 Am. Jur. 2d *Equity* § 28). *Marriott Financial Services*, however, addressed whether the remedy of rescission was available as to a contract allegedly entered into based on a mutual mistake of fact. *Id.* at 137, 217 S.E.2d at 561. We fail to see what relevance *Marriott Financial Services* has to the facts of this case. We, therefore, overrule this assignment of error.

Plaintiffs also urge this Court to adopt a new rule imposing a duty on the City to exercise reasonable care "because this result is consistent with the 'realities of modern life and that consistency, fairness and justice are better served through the flexibility afforded by that rule.' " (Quoting *Pendergrast v. Aiken*, 293 N.C. 201, 216, 236 S.E.2d 787, 796 (1977).) Significantly, *Pendergrast* was a decision of our Supreme Court. In order to accept plaintiffs' invitation to adopt a new duty, we would have to disregard the specific holdings of prior decisions of our Supreme Court and of panels of this Court. We are not allowed to do so.

We are bound by the appellate courts' prior decisions. In accordance with that precedent, because plaintiffs have failed to present sufficient evidence that the City had a duty to maintain plaintiffs' pipes or that any actions by the City were the proximate cause of plaintiffs' property damage, we affirm the trial court's grant of summary judgment to the City and its denial of partial summary judgment to plaintiffs.

Affirmed.

Judges STEELMAN and STEPHENS concur.

THOMAS R. PEACH AND WIFE, SUSAN M. PEACH, PLAINTIFFS v. CITY OF HIGH POINT AND BREECE ENTERPRISES, INC., DEFENDANTS

No. COA08-1174

(Filed 1 September 2009)

1. Eminent Domain— inverse condemnation—replacement of sewer outfall—not solely a negligence claim

Homeowners asserting damage from the replacement of a sewer outfall were not limited to bringing a negligence claim and were allowed to bring an inverse condemnation claim. Plaintiffs asserted that the damages to their property were generalized, not repairable, and resulted in loss of value to their property.

2. Statutes of Limitation and Repose— inverse condemnation—replacement of sewer outfall—time of taking—opportunity to discover damage

The trial court erred by granting summary judgment based on the statute of limitations in an action alleging inverse condemnation where sewage backed up into the house and the yard after replacement of a sewer outfall and there were genuine issues of material fact as to when the taking occurred. Although defendant contended that the taking occurred when the old easement was acquired and the outfall installed on plaintiffs' property, there were issues as to when plaintiffs had an adequate opportunity to discover the damage to their property and whether the action was timely filed under N.C.G.S. § 40A-51(a).

3. Statutes of Limitation and Repose— inverse condemnation—replacement of sewer outfall—time of taking—completion of project

Summary judgment based on the statute of limitations should not have been granted in an inverse condemnation action that arose from the replacement of a sewer outfall where there was a genuine issue of material fact as to when the project was completed. The forecast of evidence tends to show that the construction company (with whom plaintiffs settled) had returned to plaintiffs' residence to perform work which it had originally agreed to do but neglected to complete.

Appeal by plaintiffs from order entered 1 November 2007 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 11 March 2009.

Sparrow Wolf & Dennis, P.A., by James A. Gregorio and Donald G. Sparrow, for plaintiff-appellants.

Smith Moore Leatherwood LLP, by James G. Exum, Jr., Bruce P. Ashley, and Travis W. Martin, for defendant-appellee The City of High Point.

HUNTER, Robert C., Judge.

On 1 November 2007, Judge Catherine C. Eagles entered an order, which, *inter alia*, granted summary judgment in favor of the City of High Point (the "City" or "defendant") and dismissed Thomas R. and Susan M. Peach's ("plaintiffs") inverse condemnation claim with prejudice based on the running of the statute of limitations. On 3 March 2008, plaintiffs' appeal was dismissed by the trial court due to their counsel's failure to file their notice of appeal in accordance with N.C.R. App. P. 3. On 21 May 2008, plaintiffs petitioned this Court for writ of certiorari to review the 1 November 2007 order. On 30 May 2008, this Court allowed said petition, but stated: "Review shall be limited to whether plaintiffs's [sic] claim against the City of High Point for inverse condemnation is barred by the applicable statue [sic] of limitations." Accordingly, this is the sole issue before us on appeal. After careful review, we reverse and remand.

I. Standard of Review

> Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." A defendant who moves for summary judgment assumes the burden of positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law.

James v. Clark, 118 N.C. App. 178, 180, 454 S.E.2d 826, 828 (1995) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)(1990)), *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1985). "A defendant may meet this burden by (1) proving that an essential element of the plaintiff's claim is nonexistent, or (2) showing through discovery that plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that plaintiff cannot surmount an affirmative defense which would bar the claim." *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247 (1985), *reversed*

on other grounds, 317 N.C. 321, 345 S.E.2d 201 (1986). "In passing upon a motion for summary judgment, all materials filed in support or opposition to the motion must be viewed in the light most favorable to the party opposing the summary judgment and that party is entitled to the benefit of all inferences in his favor which may be reasonably drawn from that material." *James*, 118 N.C. App. at 181, 454 S.E.2d at 828. "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000). Our standard of review is de novo. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

II. Factual Background

When viewed in the light most favorable to plaintiffs, the forecast of evidence in the record tends to show the following facts and circumstances. Since 1983, plaintiffs have owned a residence located at 1633 North Hamilton Street in High Point, which is served by defendant's sewage system. In the 1990s, defendant decided to upgrade its sewage system, and in August 1999, Breece Enterprises, Inc. ("Breece")[1] was the successful bidder for defendant's upgrade project, titled " 'Water and Sewer Improvements 1999' " (the "Overall Project"). Prior to beginning the Overall Project, defendant provided Breece with "sealed engineering plans" from defendant's Central Engineering Department, which subdivided the Overall Project into geographical regions. The portion of the Overall Project that implicated plaintiffs' property was referred to as the "Dayton Street Outfall Project" (the "DSO Project").

The DSO Project primarily involved the replacement of the old outfall line (the "old outfall"), which was located in plaintiffs' neighborhood, with a new outfall line (the "new outfall"). Outfall lines are sewer lines that carry wastewater and sewage from main sewer lines to wastewater treatment facilities. Defendant's residential sewage system typically works as follows: (1) a residence is connected to a main sewer line, which is located in the street in front of the residence and is the exit point for the residence's wastewater; and (2) the main sewer line is connected to an outfall line, which carries the wastewater to a treatment facility. At some point in 1999, defendant

1. Breece was originally a defendant in this case; however, on 22 October 2007, plaintiffs and Breece entered into an agreement for "settlement and mutual release."

approached plaintiffs and told them that: their residence was located above part of the old outfall in an easement (the "old easement"); the City planned on replacing the old outfall with the new outfall; and the City could condemn their property unless the City was permitted to run the new outfall through plaintiffs' yard. It is undisputed that this is the first time that plaintiffs learned about the presence of the old outfall and the old easement. On 23 May 2000, plaintiffs granted defendant the new easement, which was described as a permanent and temporary construction easement "to construct, repair, maintain, inspect, operate, replace, enlarge and protect the sewer lines and pipes, and for any other purpose useful or necessary for the proper and adequate functioning of the [City's] sewer system," in exchange for $1,000.00.

Plaintiffs' home was built sometime in the late 1920s. The parties agree that the old outfall was placed on plaintiffs' property prior to the home's construction. At some point, plaintiffs' residence was directly connected to the old outfall, which functioned as a main line, i.e., served as the exit point for the wastewater that exited their home. Plaintiffs assert that defendant installed the old outfall and connected their residence to it, a fact which defendant disputes, and at the summary judgment hearing, plaintiffs' counsel conceded that plaintiffs had no evidence as to who installed the old outfall or connected plaintiffs' home to it. However, it is undisputed that neither the presence of the old outfall nor the old easement were platted or recorded and that defendant had been using the old outfall as part of its sewer system for decades until late 2000 or early 2001. In the 1940s or 1950s, defendant installed a main sewer line (the "main line") down North Hamilton Street. The main line has a connection for plaintiffs' house; however, when the main line was installed, plaintiffs' residence was not connected to it and remained connected to the old outfall. Plaintiffs contend that when defendant installed the main line, it decided to leave plaintiffs' home connected to the old outfall and neglected to make note of this fact. Defendant claims that the City had no knowledge that plaintiffs' home was directly connected to the old outfall until early May 2002.

Defendant's plans for the DSO Project, which are dated 4 March 1999, indicate that Breece was to remove the majority of the old outfall and replace it with the new outfall; however, a portion of the old outfall, including approximately 30 feet running beneath plaintiffs' property, was to be abandoned, filled with flowable fill concrete, and capped. In addition, defendant planned to abandon the old easement.

According to Leon Adams ("Mr. Adams"), who was employed with the City's Engineering Services Department at the time the DSO Project was undertaken, the old outfall was abandoned in December 2000 or January 2001, with the new outfall being connected to the City's sewer system in its place. Counsel for Breece admitted that Breece did not fill the abandoned portion of the old outfall with flowable fill and cap it at the time the old outfall was abandoned.

Approximately one month after the new outfall was installed, a pervasive, noxious odor began to emanate from plaintiffs' yard and through their basement, and plaintiffs telephoned defendant's call center to complain about said odor and about their drains backing up. In late April or early May of 2002, plaintiffs learned that their residence was connected to the old outfall instead of the main line. In May 2002, at the City's direction, Breece connected plaintiffs' home to the new outfall and filled and capped the old outfall.

By this time, however, wastewater had been exiting from plaintiffs' home and from at least one other residence into the old outfall for approximately 18 months, and because the old outfall was no longer tied into defendant's sewage system, fecal matter, bacteria, mold, ammonia, nitrogen, and other waste had been emanating from the old line, which saturated and contaminated the soil in plaintiffs' yard and overflowed into plaintiffs' basement and a storm-water runoff creek behind their home. At some point thereafter, plaintiffs' home was appraised as being worth $0.00.

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

III. Statute of Limitation

> Whether a cause of action is barred by a statute of limitation is a mixed question of law and fact, and where the facts are admitted or established, the trial court may sustain the plea to dismiss as a matter of law. Where, however, the evidence is sufficient to support an inference that the cause of action is not barred, the issue is for the jury.

Little v. Rose, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974) (citations omitted). In determining whether a cause of action is barred by the statute of limitations, courts must determine the applicable limitations period and the date of accrual of that action. *See*, *e.g.*, *James*, 118 N.C. App. at 183, 454 S.E.2d at 829. The applicable statute of limitations for an inverse condemnation action is contained in N.C. Gen.

Stat. § 40A-51 (2007), which provides in pertinent part that, such an "action may be initiated within 24 months of the date of the taking of the affected property or the completion of the project involving the taking, *whichever shall occur later*." N.C. Gen. Stat. § 40A-51(a) (emphasis added). "[P]laintiffs have the burden of showing their actions were filed within the statutory period." *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 572, 372 S.E.2d 742, 743 (1988).

Here, the parties agree that in order for plaintiffs' inverse condemnation claim to be timely, the evidentiary forecast must tend to show that said claim began to accrue on or subsequent to 9 December 2001, as plaintiffs filed their initial complaint on 9 December 2003. Plaintiffs assert that the evidentiary forecast before the trial court demonstrated that genuine issues of material fact exist as to: (1) when the "taking" occurred; and (2) when the "project involving the taking," i.e., the DSO Project, was completed. N.C. Gen. § 40A-51(a). Defendant contends that plaintiffs' claim is really a negligence claim based on the overflow of plaintiffs' sewage into the old outfall and that plaintiffs can only recover in negligence.[2] Defendant further contends that even if plaintiffs' claim is an inverse condemnation claim, said claim conclusively began accruing prior to 9 December 2001 and is barred by the statute of limitations as a matter of law. As discussed *infra*, we agree with plaintiffs.

A. Negligence or Inverse Condemnation Claim

[1] In support of defendant's argument that plaintiffs' claim is essentially a negligence claim and that plaintiffs were exclusively limited to bringing a claim for negligence, defendant cites this Court's decision in *Ward v. City of Charlotte*, 48 N.C. App. 463, 469, 269 S.E.2d 663, 667, *disc. review denied*, 301 N.C. 531, 273 S.E.2d 463 (1980), where this Court held, "that the sole basis of municipal liability for damages caused by the overflow of a sewerage system is negligence[.]" As discussed *infra*, we do not believe that *Ward* limits plaintiffs' claim to negligence and conclude that plaintiffs' claim can be properly classified and brought as an inverse condemnation claim.

In *Ward*, the plaintiffs filed claims for: (1) negligence, based on the City of Charlotte's (the "City") purported "failure [to] properly . . . inspect, maintain, repair and keep unobstructed the sewer line serving [the plaintiffs'] home"; (2) breach of a continuing contract under which the City agreed to carry sewage away from the

2. Plaintiffs also brought a negligence claim against defendants. The trial court dismissed this claim with prejudice as well; this claim is not before us on appeal.

plaintiffs' home in exchange for monthly payments; (3) breach of an implied warranty that the City's sewage system was fit for its intended purpose; and (4) trespass on the case. *Id.* 464-65, 269 S.E.2d at 664. In rejecting the latter three causes of action and adopting "the prevailing rule that the sole basis of municipal liability for damages caused by the overflow of a sewerage system is negligence," this Court emphasized that "[t]he application of any one of [these actions] to [the specific case before the Court] would effectively make a municipality an absolute insurer of the condition of its sewerage system[, which the Court] decline[d] to do." *Id.* at 469, 269 S.E.2d at 667. In other words, this Court was concerned about the larger ramifications of affording the plaintiffs a right to relief based on contract or additional tort principles. The plaintiffs in *Ward* did not bring an inverse condemnation claim and that case was decided prior to the enactment of N.C. Gen. Stat. § 40A-51, which provides a statutory "inverse condemnation remedy." *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 108, 338 S.E.2d 794, 798 (1986). As such, whether a plaintiff can recover for inverse condemnation based on an overall, general loss of property value was not before this Court in *Ward*; rather, the damages that the plaintiffs sought were for particularized and repairable damages to their home, purportedly caused by a backup in the sewer line that served their home. *Ward*, 48 N.C. App. at 464-65, 269 S.E.2d at 664.

This Court has stated that: "Inverse condemnation is simply a device to force a governmental body to exercise its power of condemnation, even though it may have no desire to do so." *Smith v. City of Charlotte*, 79 N.C. App. 517, 521, 339 S.E.2d 844, 847 (1986).

> An action in inverse condemnation must show (1) a taking (2) of private property (3) for a public use or purpose. Although an actual occupation of the land, dispossession of the landowner, or physical touching of the land is not necessary, a taking of private property requires "a substantial interference with elemental rights growing out of the ownership of the property." A plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental.

Adams Outdoor Advertising v. N.C. Dept. of Transportation, 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993) (internal citations omitted) (quoting *Long v. City of Charlotte*, 306 N.C. 187, 198-99, 293 S.E.2d 101, 109 (1982)).

In contrast to the plaintiffs in *Ward*, here, plaintiffs assert that the damages to their property are generalized and not repairable, i.e., that a reduction in the market value of their property occurred. Essentially, plaintiffs contend that when defendant updated its sewage system on North Hamilton Street, eliminated the old outfall from said system, and failed to fill and cap the old outfall for approximately 18 months, defendant created a situation in which the continuous flow of wastewater from plaintiffs' residence and from their neighbors' residence: (1) entered into the old outfall; (2) both exited the uncapped ends of and seeped through cracks in the old outfall onto their property; and (3) turned their property into a waste lagoon, rendering it worthless. Plaintiffs assert that this constituted substantial interference with their property rights and resulted in injuries that were not consequential or merely incidental.[3] We agree.

Because an inverse condemnation claim was not before this Court in *Ward*, that case was decided prior to the enactment of N.C. Gen. Stat. § 40A-51, and plaintiffs' claim is for generalized loss of value of their property, we do not believe that *Ward* limits plaintiffs to a cause of action for negligence. *See Howell v. City of Lumberton*, 144 N.C. App. 695, 701-02, 548 S.E.2d 835, 839 (2001) (holding that where a plaintiff "is not seeking to recover for the general loss of value to her property due to the 'continual and ongoing effects of the location of [a storm drain] pipe' " located in an easement on her property, but rather for "specific damage to her house," a "plaintiff has legitimately characterized her claim as an action in negligence" and "N.C. Gen. Stat. § 40A-51[, the inverse condemnation statute,] does not preempt that negligence action."). Also, in accordance with the law of inverse condemnation cited above, we believe that plaintiffs' claim can be properly classified as one for inverse condemnation, and that the earliest point at which it can be fairly argued that a "taking" occurred here, is when defendant eliminated the old outfall from its sewage system, which allowed for the process via which plaintiffs' property was substantially damaged to occur.

B "Taking"

[2] Plaintiffs contend genuine issues of material fact exist as to when the "taking" occurred here, and consequently, that the trial court

3. In addition, we note that plaintiffs assert that even after Breece returned to fill and cap the old outfall and to properly connect their residence to plaintiff's sewage system in May 2002, waste has continued to accumulate on their property because the old outfall has not been adequately filled and their residence was not properly connected to defendant's sewage system due to a dip in the line.

erred in granting summary judgment in defendant's favor based on the statute of limitations. Defendant asserts that no genuine issue of material fact exists, that any taking conclusively occurred prior to 9 December 2001, and that plaintiffs' inverse condemnation claim is barred by the statute of limitations as a mater of law. As discussed *infra*, we agree with plaintiffs.

Defendant contends that if there was a taking here, it occurred when the old easement was acquired and the old outfall was installed on plaintiffs' property, which was prior to 1926. In support, defendant cites *Central Carolina Developers, Inc. v. Moore Water & Sewer Auth.*, 148 N.C. App. 564, 559 S.E.2d 230 (2002). Plaintiffs argue that that case is distinguishable and does not establish that the "taking" here conclusively occurred when the old outfall was installed and the old easement was acquired. We agree.

In *Central Carolina Developers*, the plaintiffs asserted that the mere presence of a sewer pipe, which ran across their lot, was the taking, and the damages that the plaintiff asserted, i.e., being barred from building a residence, were strictly due to the presence of said pipe. *Id.* at 565, 559 S.E.2d at 231. Here, plaintiffs do not allege that the presence of the old outfall was the taking. Rather, they contend that by eliminating the old outfall from its sewage system, defendant created a condition in which wastewater repeatedly exited plaintiffs' home and their neighbors' home and collected on plaintiffs' property, and that the damage from this process is what constitutes the taking. Consequently, we do not think that *Central Carolina Developers* controls the outcome here.

Next, in *Frances L. Austin Family Ltd. P'ship v. City of High Point*, 177 N.C. App. 753, 630 S.E.2d 37 (2006), a case which neither party cites, the plaintiffs argued that the defendant's "act of leaving [the defendant's] buried sewer pipe on [the defendant's] abandoned sewer easement" constituted a compensable taking. *Id.* at 755, 630 S.E.2d at 39. This Court disagreed. Because: (1) the defendant had paid the plaintiff for a new easement to install the new pipe; (2) the defendant had paid the plaintiff's predecessor-in-title for the right to place the old sewer line on the property " 'forever' "; and (3) the defendant agreed and the parties stipulated that the defendant would be "'responsible for any assessment and/or remediation of contamination emanating from abandoned underground sewer lines on the [p]roperty[,]' to the extent required by state or federal statutes or federal, state, or local regulations[,]" this Court concluded that the defendant had already paid the plaintiff for the burden the buried

sewer line posed to its property and that the plaintiff was not entitled to be paid twice for that right. *Id.* at 757-58, 630 S.E.2d at 40.

In the instant case, there is no evidence that defendant or anyone else paid plaintiffs' predecessor-in-interest any compensation for the burden the old outfall posed to the property or for the old easement, nor does there appear to be any prior agreement describing the old easement or its terms. Also, there is no evidence in the record that the parties agreed that defendant would abandon the old outfall and that it would revert back to plaintiffs or that defendant would be responsible for any contamination emanating from it. However, as stated *supra*, it is undisputed that defendant had been utilizing both the old outfall and the old easement as part of its sewer system for decades. Consequently, we do not think the above case controls the outcome here.

Plaintiffs list eight possible dates on which they contend a "taking" could have occurred here. However, they argue that 26 April 2002, which is the date plaintiffs assert they first learned that their residence was connected to the old outfall, is the "*most* logical date" on which to determine the taking occurred because it is the earliest point at which they reasonably could have known of the damage to their property. In response, defendant contends that, under North Carolina law, it does not matter when a plaintiff becomes aware of the act constituting the alleged taking because the statute of limitations for an inverse condemnation claim begins to run at the moment the property first suffers injury, not when a plaintiff did or should have discovered it.

It is true that this Court has stated: "The rule is that a statute of limitations on an inverse condemnation claim begins running when plaintiffs' property first suffers injury." *Robertson v. City of High Point*, 129 N.C. App. 88, 91, 497 S.E.2d 300, 302 (citing *Lea Co. v. N.C. Board of Transportation*, 308 N.C. 603, 629, 304 S.E.2d 164, 181 (1983)), *disc. review denied*, 348 N.C. 500, 510 S.E.2d 654 (1998). However, we disagree with defendant that a property owner's awareness or discovery of the injury is irrelevant to when a claim for inverse condemnation begins to accrue. In fact, as discussed *infra*, decisions by this Court and our Supreme Court suggest the opposite is true. As this Court has stated: "Our courts have recognized there may be excusable delay in filing actions. The legislature, in enacting [N.C. Gen. Stat. §] 40A-51(a), sought to account for such delay and provide plaintiffs adequate opportunity to discover damage." *McAdoo*, 91 N.C. App. at 572, 372 S.E.2d at 743 (citations omitted).

Furthermore, in the three cases cited by defendant in support of its argument, this Court and/or our Supreme Court took the respective property owners' discovery or awareness of the injury to the property into account. In *Robertson*, immediately after stating the rule cited above, this Court proceeded to state:

> In the instant case, plaintiffs had reasonable opportunity to discover that their property was injured well before the running of the statute of limitations. Plaintiffs' complaint states the landfill operation caused damage to their property beginning 9 October 1993. However, the complaint was filed 23 December 1996. Plaintiffs "offer no explanation for their delay in filing this action, nor does it appear legally excusable . . . ." Therefore, plaintiffs have failed to comply with the statute of limitations in N.C. Gen. Stat. § 40A-51.

Robertson, 129 N.C. App. at 91, 497 S.E.2d at 302 (alteration in original) (quoting *Smith*, 79 N.C. App. at 523, 339 S.E.2d at 848). In *Lea Co.*, 308 N.C. at 609, 304 S.E.2d at 170, the plaintiff brought an inverse condemnation action against the defendant, asserting that defendant's highway structures increased the level of flooding on the plaintiff's property and caused substantial flood damage to the plaintiff's apartment buildings. Hence, the damage to the plaintiff's property in that case, substantial flood damage, would have been readily perceivable. Finally, in *Central Carolina Developers*, the plaintiff bought a lot in 1995, purportedly did not discover a sewer pipe running through it until 1997, and brought an inverse condemnation claim against the defendant in 1998 based on the presence of the pipe, which had been installed in or around 1989, because the presence of the pipe barred the plaintiff from constructing a residence. 148 N.C. App. at 565, 559 S.E.2d at 231. This Court determined that "any 'taking' would have occurred when the sewer pipe was installed across [the lot]" and that the plaintiff's claim was barred by the statute of limitations. *Id.* at 567, 559 S.E.2d at 232. However, in that case the "sewer pipe [was] 'clearly visible, and . . . above the water line of the creek,' crossing the creek on [the plaintiff's lot]." *Id.* at 565, 559 S.E.2d at 231. In other words, the plaintiff could have easily noticed the pipe's presence on the lot.

As stated *supra*, we believe that the act of eliminating the old outfall from service, which purportedly occurred in late 2000 or early 2001 and triggered the process via which plaintiffs' property was substantially damaged, is the earliest point in time at which it can be fairly argued that a taking occurred here. Assuming, *arguendo*, that

this is when the taking occurred, viewed in the light most favorable to plaintiffs, the forecast of evidence indicates that plaintiffs had no reason to know of the substantial interference with or damage to their property that eliminating the old outfall from service posed to their property. Admittedly, the noxious odors and poor draining that plaintiffs noticed subsequent to the old outfall being taken out of service and prior to learning that their house was connected to the old outfall might have arguably placed plaintiffs on notice of the injury to their property. However, we believe that a genuine issue of material fact exists as to whether any delay in filing their inverse condemnation action was excusable based on plaintiffs not having an "adequate opportunity to discover [the] damage" to their property, *McAdoo*, 91 N.C. App. at 572, 372 S.E.2d at 743, and thus, whether their action was timely filed in accordance with N.C. Gen. Stat. § 40A-51(a).

In sum, we hold that the earliest possible point at which it can be fairly argued that a taking occurred here is when defendant eliminated the old outfall from service. Assuming, *arguendo*, that this act constituted the taking, a genuine issue of material fact exists as to whether plaintiffs' had an adequate opportunity to discover the damage to their property, and thus, whether their action was timely filed in accordance with N.C. Gen. Stat. § 40A-51(a). Consequently, the trial court erred in granting summary judgment in defendant's favor based on the statute of limitations.

C. Completion of the "Project"

[3] Plaintiffs also contend that a material issue of fact exists as to when the DSO Project was completed within the meaning of N.C. Gen. Stat. § 40A-51(a). Defendant contends that Breece conclusively completed its work on the DSO Project in November 2000, and, as a result, there is no issue of material fact as to whether plaintiffs brought their inverse condemnation claim within two years of the project's completion in accordance with section 40A-51(a). Both parties cite this Court's decision in *McAdoo*, 91 N.C. App. at 570, 372 S.E.2d at 742, in support of their arguments. As discussed *infra*, we agree with plaintiffs that, based on the forecast of evidence, a material issue of fact exists as to when the DSO Project was completed.

In *McAdoo*, this Court determined that where a larger road widening project was done in individual sections, each section met the definition of "'projects' for purposes of [N.C. Gen. Stat. §] 40A-51(a)." *Id.* at 572, 372 S.E.2d at 743. However, this Court further stated that the "completion of the 'project' " in accordance with section 40A-51(a)

does not necessarily equate to the "completion of construction." *Id.* at 573, 372 S.E.2d at 744. In that case, the widening of the particular section of road at issue was finished on 10 May 1984, the defendant-municipality made its final inspection and acceptance of the project on 31 May 1984, the municipality authorized final payment on 5 September 1984, and final payment was made on 7 September 1984. *Id.* at 571, 372 S.E.2d at 742. However, the contract between the municipality and the company that performed the construction required said company to maintain the road for three months after the defendant's acceptance until 31 August 1984. *Id.* This Court concluded:

> The fact that [the] defendant accepted the improvements is not relevant as it did so on [the] condition that the project be completed with necessary maintenance. [The d]efendant's authorization of final payment on 5 September 1984 and subsequent payment on 7 September 1984 show that [the] defendant did not consider the project completed until the maintenance period was over. For these reasons, we hold completion of the project was not until 31 August 1984, and the trial court erred in granting summary judgment to [the] defendant based on the statute of limitations."

Id. at 573, 372 S.E.2d at 744.

Defendant asserts that *McAdoo* is distinguishable because in that case, the maintenance period was part of the contractor's contractual obligations, and in contrast, here, all of the evidence in the record suggests that Breece was not contractually obligated to examine or make residential sewage system connections as part of the DSO Project. Consequently, defendant argues that Breece's return to properly connect plaintiffs' residence to defendant's sewer system in May 2002 was not the date of the "completion of the project involving the taking" pursuant to N.C. Gen. Stat. § 40A-51(a). In his affidavit, Mr. Adams testified that: "Breece performed the work in the area of plaintiffs' house in late 2000"; the old outfall was abandoned in December 2000 or January 2001 "as part of the [DSO] Project, with the new outfall . . . being connected to the sewage system in its place"; "Breece last submitted a billing to [defendant] for work on the [DSO] Project in early 2001"; and this billing covered the period from 15 November 2000 through 12 January 2001. In his affidavit, David N. Breece ("David Breece"), a Vice President of Breece, testified that: defendant did not contract with Breece to make residential connections at the Dayton Street Outfall section; Breece did not encounter any residen-

tial lines during its work there; and Breece completed its construction work in November 2000. Finally, Robert S. Breece ("Robert Breece"), also a Vice President of Breece, stated in his affidavit that: the plans provided to Breece by defendant for the DSO Project did not show a residential connection from plaintiffs' property to the old outfall; Breece did not encounter any residential lines during its work there; Breece was not responsible for the connection of any residential lines at the Dayton Street Outfall; and when Breece removed a section of the old outfall, which ran under plaintiffs' property, to install the new outfall and bypass the old outfall, "there was no noticeable discharge of sewage."

There is no copy of any contract between defendant and Breece regarding the Overall Project or regarding the particular DSO Project present in the record on appeal. While we agree with defendant that there appears to be no evidence in the record that residential connections were part of the agreement between it and Breece, at the summary judgment hearing, Breece conceded that it did not fill the old outfall with flowable fill and cap it as required by defendant's plans for the DSO Project and as required by the contract. In addition, both David Breece and Robert Breece testified that the old outfall was not filled and capped until May 2002, and Robert Breece further testified that, between November 2000 and May 2002, sewage would have "exited the open ends [of the old outfall] much like a very large leech field."

Given the forecast of evidence that Breece did not fill and cap the old outfall as required by the plans and the contract at the time Breece purportedly finished its work on the DSO Project, plaintiffs assert that a material issue of fact exists as to whether the DSO project was completed prior to May 2002. Defendant argues that to the extent Breece's "May 2002 activities" were related to the DSO Project, said activities are more like "'repair' " work, which would not toll the statute of limitations or begin the running of a new statute of limitations period. As discussed *infra*, we agree with plaintiffs.

In support of its argument, defendant cites four cases: *Hodge v. Harkey*, 178 N.C. App. 222, 631 S.E.2d 143 (2006); *Whitehurst v. Hurst Built, Inc.*, 156 N.C. App. 650, 577 S.E.2d 168 (2003); *Bryant v. Don Galloway Homes, Inc.*, 147 N.C. App. 655, 556 S.E.2d 597 (2001); and *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 515 S.E.2d 445 (1999). These cases all address the issue of whether a party's claims for damages, which are based on or arise out of defec-

tive or unsafe conditions of improvements to real property, are barred by North Carolina's statute of repose, which states:

> No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or the substantial completion of the improvement.

N.C. Gen. Stat. § 1-50(a)(5)(a) (2007). Hence, these cases implicate a different statutory provision than the case before us. Furthermore, "[u]nlike a statute of limitations, a statute of repose will begin to run when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted." *Nolan*, 135 N.C. App. at 77, 518 S.E.2d at 792. In other words, "a statute of repose may operate to cut off a defendant's liability even before an injury occurs." *Id.*

This greatly contradicts what this Court has stated about the purpose of the statute of limitation contained in section 40A-51(a): "The legislature, in enacting [N.C. Gen. Stat. §] 40A-51(a), sought to account for [excusable delay in filing inverse condemnation actions] and provide plaintiffs adequate opportunity to discover damage." *McAdoo*, 91 N.C. App. at 572, 372 S.E.2d at 743-44. Furthermore, unlike in *Monson*, 133 N.C. App. at 238, 515 S.E.2d at 448, where this Court emphasized that the plaintiff had presented no evidence that the defendant had a continuing duty to complete repairs under the parties' original improvement contract, the forecast of evidence here tends to show that Breece did not fill and cap the old outfall in accordance with defendant's plans and their original agreement. In other words, the forecast of evidence indicates that Breece returned to plaintiffs' residence in May 2002 to perform work, which it had originally agreed to perform, but neglected to complete. Finally, we note that had Breece filled and capped the old outfall in November 2000, plaintiffs would have been able to discover the fact that their residence was connected to the old outfall instead of the main line without the 18 month delay, as both their wastewater and their neighbors' wastewater would have exited their respective homes into the old outfall, which would have been blocked. Instead, for over 18 months, the wastewater exited the respective homes, entered the old outfall, and poured out onto plaintiffs' property, allowing waste to accumulate, which substantially damaged plaintiffs' property.

> "[A] municipality is solely liable for the damages that *inevitably or necessarily flow* from the construction of an

> improvement . . . ." Thus, "[d]amages to land outside the easements which inevitably or necessarily flow from the construction of the [improvement] result in an appropriation of land for public use [to which] [s]uch damages are embraced within just compensation to which defendant landowners are entitled."

City of Charlotte v. Long, 175 N.C. App. 750, 753, 625 S.E.2d 161, 164 (2006) (alterations in original) (quoting *Ferrell*, 79 N.C. App. at 110, 338 S.E.2d at 799). In *Long*, the defendants asserted that the installation of a new septic system on their property, which included a pump tank, 400 feet of pipe and a new leach field, constituted an additional taking. In that case, the municipality had previously acquired a permanent sanitary sewer easement across the defendants' property to install a gravity sewer line and a pressurized sewer force main for a residential development, which rendered defendants' septic waste system inoperable. *Id.* at 751, 625 S.E.2d at 164. The defendants consented to the installation of the new septic system, and "the plaintiff reciprocated by expending $16,000.00 to cover the cost." *Id.* at 754, 625 S.E.2d at 164. This Court concluded:

> [The p]laintiff's installation of the pump, pipe, and field on [the] defendants' property did not *necessarily flow* from construction of the improvement, here the 8-inch sewer line and 16-inch sewer main force. The installation was not part of the improvement project, but rather the plaintiff's subsequent and separate effort to accommodate defendants' need for a new septic system. . . . [The d]efendants incorrectly assert [that] a separate taking has occurred.

Id. As stated *supra*, when the evidence in the record here is viewed in the light most favorable to plaintiffs, it tends to establish that eliminating the old outfall from service, abandoning the portion of the old outfall that ran beneath plaintiffs' property, and filling and capping the abandoned portion of the old outfall were part of the improvement project, and consequently, that the damages to plaintiffs' property did *necessarily flow* from construction of the improvement.

In sum, we hold that a genuine issue of material fact exists as to when the "project involving the taking" was completed in accordance with N.C. Gen. Stat. § 40A-51(a). Consequently, we hold that the trial court erred in granting summary judgment in defendant's favor based on the statute of limitations.

IV. Conclusion

In sum, even if we assume, *arguendo*, that defendant's act of eliminating the old outfall from service constituted the "taking" here, we hold that a material issue of fact exists as to whether plaintiffs had an adequate opportunity to discover the damage to their property, and thus, whether their delay in filing their inverse condemnation action was legally excusable and timely filed in accordance with N.C. Gen. Stat. § 40A-51(a). Furthermore, we hold that a material issue of fact exists as to when the DSO Project was completed within the meaning of N.C. Gen. Stat. § 40A-51(a). Standing alone, each of these grounds is sufficient to support our conclusion that the trial court erred in granting summary judgment in defendant's favor based on the statute of limitations. Accordingly, we reverse the trial court's order and remand this case to the trial court for further proceedings.

Reversed and remanded.

Judges CALABRIA and HUNTER, Robert N., Jr. concur.

DOUGLAS GORDON BRACKNEY, PLAINTIFF v. ROBIN MASON BRACKNEY, DEFENDANT

No. COA08-1044

(Filed 1 September 2009)

1. Divorce— equitable distribution—marital property—house—source of funds rule

The trial court did not err in an equitable distribution action by classifying a house as marital property where marital funds were used for the down payment and for further equity; the parties had not closed on the house at the time of separation; plaintiff obtained a mortgage and closed on the house; and plaintiff did not present evidence of any amount of mortgage principal that he paid using his separate property after separation.

2. Divorce— equitable distribution—divisible property—appreciation on house—passive

The trial court did not err in an equitable distribution action by classifying appreciation on a house as divisible property

where plaintiff's actions preserved the marital estate's down payment and the right to purchase, but the subsequent appreciation was the result of market forces rather than any action by plaintiff.

3. Divorce— equitable distribution—equal division of property—plaintiff's preservation efforts

The trial court did not err in an equitable distribution action by ordering an equal distribution of property. Plaintiff argued that the trial court ignored plaintiff's preservation efforts, but the findings showed that the court considered and weighed those efforts.

4. Divorce— equitable distribution—illicit drug use—reduction in income—weight given to evidence

The trial court did not abuse its discretion in an equitable distribution case in the weight it gave to defendant's illicit drug use for her reduction in income where there were extensive findings about defendant's drug use and earnings.

5. Divorce— equitable distribution—attorney fees—debt

The trial court did not err in an equitable distribution action in its consideration of defendant's attorney fees under N.C.G.S. § 50-20(c)(1) where the court included her attorney fees in her debt. The evidence indicated that a major liability for defendant is her attorney fees, and plaintiff has not challenged the finding of the amount of debt, including those fees, and plaintiff did not cite authority that a liability based on attorney fees should be treated differently from other liabilities.

Appeal by plaintiff from judgments entered 10 January 2008 and 25 February 2008 by Judge Chester C. Davis in Forsyth County District Court. Heard in the Court of Appeals 24 March 2009.

Tash & Kurtz, PLLC, by Jon B. Kurtz, for plaintiff-appellant.

Robinson & Lawing, LLP, by Kevin L. Miller, for defendant-appellee.

GEER, Judge.

Plaintiff Douglas Gordon Brackney appeals from the trial court's equitable distribution judgment providing for an equal distribution of property between plaintiff and defendant Robin Mason Brackney. Plaintiff's primary contention on appeal is that the trial court erred in

its classification of a home and its appreciation in value that the parties, prior to separation, had only contracted to purchase, but that plaintiff, following the separation, had purchased using marital funds and a mortgage he obtained in his own name. We hold that the trial court properly determined, under the "source of funds" rule, that the house was marital property because plaintiff used only marital funds to purchase the home. The fact that he also obtained a mortgage in his own name to pay for the house does not grant him any separate equity interest in the home and, under controlling authority, does not transform any portion of the house into separate property. Further, as stipulated by plaintiff, the house appreciated in value due solely to passive market forces, and, therefore, the trial court correctly classified the home's appreciation as divisible property rather than plaintiff's separate property. Because we also find plaintiff's remaining arguments unpersuasive, we affirm.

Facts

Plaintiff and defendant were married on 19 June 1999. Their daughter, who was born on 12 November 2002, suffered from a congenital central nervous system disorder. To accommodate their daughter's special needs, the parties entered into a contract ("the Ballincourt contract") with Keith Rogers Homes, Inc. on 8 August 2003 to build a single-level home on Ballincourt Lane in Winston-Salem, North Carolina ("the Ballincourt house"). The total price for the Ballincourt house was $434,000.00, with the contract requiring a 10% down payment of $43,400.00 at the time of execution of the contract followed by payment of the balance of the purchase price—$390,600.00—at closing.

The parties took out an equity line of credit on the house in which they were living at the time, located on Century Oaks Lane, also in Winston-Salem ("the Century Oaks house"). They drew $43,400.00 on that line of credit to use as the down payment on the Ballincourt house. Plaintiff had purchased the Century Oaks house prior to the marriage, but after refinancing the home in February 2002, the property was held as a tenancy by the entirety.

The parties' daughter died on 25 August 2003. The parties sold the Century Oaks house on 23 September 2003, netting approximately $95,000.00. From these funds, they used $43,400.00 to pay off the equity line of credit, with the remaining funds (approximately $51,600.00) being deposited in plaintiff's banking account. After the sale of the Century Oaks house, the parties moved into an apartment.

Plaintiff and defendant separated on 6 February 2004. At the time of their separation, the Ballincourt house was not completed, and they had not closed on the house. Plaintiff filed a complaint on 14 April 2004, requesting equitable distribution of the parties' marital and divisible property. In his complaint, plaintiff also moved for an interim allocation of the Ballincourt "residence and all rights and liabilities under the [Ballincourt contract]." The Ballincourt contract included a provision that the $43,400.00 down payment would be forfeited to Keith Rogers Homes if the parties failed to close on the house by a specified date.

The trial court entered an Order for Interim Allocation on 14 May 2004, in which the court found that "in order to *preserve the marital estate*, it is necessary that the Court make an interim allocation of [the Ballincourt house] and all rights and liabilities under the [Ballincourt contract] . . . ." (Emphasis added.) The trial court then allocated to plaintiff the Ballincourt house and the rights to the Ballincourt contract, providing:

> That said down payment and funds used to acquire equity in the [Ballincourt house] are subject to Defendant's rights to an equitable distribution of property, both as marital and divisible property notwithstanding any documents required by the Defendant in order that the Plaintiff purchase said residence, Defendant's rights and claims to said property are preserved until an equitable distribution of marital and divisible property and this Order shall be taken into consideration at an equitable distribution trial and proper credit given to the parties.

Plaintiff closed on the Ballincourt house on 25 May 2004 for a total purchase price of $434,000.00. Plaintiff obtained a loan from Coastal Mortgage Services, Inc. to cover $345,000.00 of the purchase price. Of the $89,000.00 difference, $43,400.00 had already been paid by the parties as a down payment on the house, and plaintiff used the proceeds of the sale of the Century Oaks house for the remaining $45,600.00. Plaintiff later obtained a second loan on the Ballincourt house in February 2005.

Defendant filed an answer with counterclaims on 22 June 2004. Defendant sought an equitable distribution in her favor and an interim allocation to support herself. She also asserted counterclaims for post-separation support, alimony, and attorneys' fees, as well as a counterclaim alleging assault by plaintiff. On 6 August 2004, plaintiff

filed a reply and motion to dismiss defendant's counterclaims. The parties ultimately divorced on 16 May 2005.

The Ballincourt house was appraised on 10 May 2005 at a fair market value of $480,000.00. In preparation for trial, the house was re-appraised on 11 September 2007 at a fair market value of $615,000.00. The parties stipulated that the house had appreciated in value by $181,000.00.

The trial court held equitable distribution hearings on 23 and 30 October 2007. The trial court indicated in its ultimate order that "[t]he issues for determination at trial were: (1) what is the marital interest in the Ballincourt House, if any; (2) what is Plaintiff's separate interest in the Ballincourt House, if any; (3) what portion of the $181,000.00 appreciation in value of the Ballincourt House is divisible property, if any; and (4) how should the marital and divisible property interests in the Ballincourt House, if any, be distributed."

In a Judgment of Equitable Distribution and Order entered 10 January 2008, the trial court answered these questions by finding, first, that the Ballincourt house was marital property because it had been purchased with funds from the sale of the Century Oaks house, which was wholly marital property. The trial court further found that plaintiff had not acquired any separate property interest in the Ballincourt house as plaintiff's procurement of the $345,000.00 mortgage loan did not "constitute[] a contribution of his separate funds to the Ballincourt House."

As for the post-separation appreciation in the value of the Ballincourt house, the trial court found that the $181,000.00 was entirely divisible property: "While Plaintiff's closing on the Ballincourt House may have preserved the marital estate's down payment of $43,400, the post-separation appreciation was not caused by or the 'result of' the closing within the meaning of N.C.G.S. § 50-20(b)(4)a. Rather, the post-separation appreciation in the value of the Ballincourt House was the result of market forces alone, as stipulated by the Parties."

As for the distribution of the marital and divisible property, the trial court noted, in its order, that

> the Court specifically asked each Party and his or her counsel whether they had any evidence to present or argument to be made concerning each of the distributional factors set forth in N.C.G.S. § 50-20(c). After reviewing each of the distributional fac-

> tors with each of the Parties and his or her counsel, the Parties and their counsel stated to the Court that they only wanted to present evidence concerning distributional factors (c)(1), (3), (5), (6), (7), 11(a) [sic] and (12).

The trial court then made findings of fact as to all the factors in the statute, including identifying those factors on which evidence was presented (even if not argued by the parties) and noting the factors on which no evidence had been presented.

The trial court further stated in its order that in determining how to distribute the parties' marital and divisible property, it "weigh[ed] [the statutory factors] in order of importance from most to least important as follows":

a. Plaintiff's income of $150,000-$200,000 per year;

b. Plaintiff's assets of $143,000.00;

c. Defendant's income of $0;

d. Defendant's negative net worth of—$85,000;

e. Plaintiff's contribution of a substantial amount of separate property to the marital estate;

f. Defendant's age of 38 years and poor mental health, and fair physical health;

g. Plaintiff's age of 49 years and excellent physical and mental health;

h. Plaintiff's expectation of stock options and retirement benefits at Liberty Hardware;

i. Plaintiff's preservation of the marital assets by closing on the Ballincourt House, not withdrawing the equity in the Ballincourt House, and not permitting the foreclosure of the Ballincourt House;

j. The length of the marriage in the amount of 4 and 2/3rds years;

k. Defendant's wasting of marital and separate assets since separation, including the use of some such assets to purchase illicit drugs, and Defendant's use of illicit drugs as recently as ten (10) weeks prior to trial;

l. The fact that the $181,000 of post-separation increase in the value of the Ballincourt House was totally passive[.]

The trial court explained in its order that it had decided to give little or no weight to factors N.C. Gen. Stat. § 50-20(c)(6) and (c)(7), although both factors had been argued by defendant.

As a result of its weighing of the N.C. Gen. Stat. § 50-20(c) factors, the trial court determined that an equal distribution was equitable. Based on the disparity in the amount of marital and divisible property in each party's possession, the trial court ordered plaintiff to pay a distributive award of $126,101.87 to defendant. On 25 February 2008, the trial court entered an amended judgment and order, in which the court found that "there is no just reason to delay appeal" of its prior judgment and order and certified it for immediate appellate review under Rule 54(b) of the Rules of Civil Procedure. Plaintiff timely appealed to this Court.[1]

Discussion

Equitable distribution is governed by N.C. Gen. Stat. § 50-20 (2007), which requires the trial court to conduct a three-step process: (1) classify property as being marital, divisible, or separate property; (2) calculate the net value of the marital and divisible property; and (3) distribute equitably the marital and divisible property. *Cunningham v. Cunningham*, 171 N.C. App. 550, 555, 615 S.E.2d 675, 680 (2005). A trial court's determination that specific property is to be characterized as marital, divisible, or separate property will not be disturbed on appeal "if there is competent evidence to support the determination." *Holterman v. Holterman*, 127 N.C. App. 109, 113, 488 S.E.2d 265, 268, *disc. review denied*, 347 N.C. 267, 493 S.E.2d 455 (1997). Ultimately, the court's equitable distribution award is reviewed for an abuse of discretion and will be reversed "only upon a showing that it [is] 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).

I

[1] Plaintiff first contends that the trial court erred in classifying the Ballincourt house as marital property and the $181,000.00 apprecia-

1. We note that because two of defendant's counterclaims remain pending, this appeal is from an interlocutory order. Nevertheless, the order is final as to the equitable distribution claims, and the trial court included the proper Rule 54(b) certification in the amended order. The appeal is, therefore, properly before this Court. *See Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (holding that when trial court certifies final judgment or order "for immediate appeal under Rule 54(b), appellate review is mandatory").

tion in its value as divisible property. With respect to this issue, the trial court made the following unchallenged finding of fact:

> [I]n August and September, 2003, the Parties contracted to begin building a new house, known as the "Ballincourt House," and sold their existing house, known as the "Century Oaks House." The Century Oaks House had been purchased by Husband prior to the marriage, but had been re-titled tenancy-by-the-entireties during the marriage. Upon the sale of The Century Oaks House in September, 2003, the Parties received at least $95,000 in sales proceeds, which proceeds the Parties have stipulated was marital property. At the time of the Parties' separation on February 6, 2004, $43,400.00 of the Century Oaks House proceeds had been invested by the Parties as a down payment on the Ballincourt House. Following the Parties' separation, Plaintiff closed on the Ballincourt House on May 25, 2004. At the closing of the Ballincourt House, the $434,000.00 purchase price was paid with Eighty-Nine Thousand Dollars ($89,000) of the Century Oaks House proceeds (inclusive of the $43,400.00 down payment) and Three Hundred Forty-Five Thousand Dollars ($345,000.00) of funds Plaintiff borrowed from Coastal Mortgage Services, Inc. The Parties stipulated that, as shown in a September 11, 2007 appraisal, the fair market value of the Ballincourt House as of the time of trial and distribution was and is $615,000.00, such that between May 25, 2004 and the time of trial and distribution, the Ballincourt House appreciated in value by $181,000. . . .

Plaintiff contends that the trial court erred in finding that the Ballincourt house was marital property and should, instead, have found that only the initial down payment and offer to purchase and contract was marital property. With respect to the Ballincourt house's subsequent appreciation in value, plaintiff argues that it should all be considered plaintiff's separate property due to his active efforts in preserving the property by obtaining the mortgage and closing on the property. Plaintiff acknowledges that he has found no case law directly supportive of his specific contentions.

N.C. Gen. Stat. § 50-20(b)(1) (2007) defines "[m]arital property" as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned." In contrast, "[s]eparate property" includes "all real and personal property acquired by a spouse before marriage or acquired by a spouse by

bequest, devise, descent, or gift during the course of the marriage." N.C. Gen. Stat. § 50-20(b)(2). In equitable distribution proceedings, the party claiming a certain classification has the burden of showing, by a preponderance of the evidence, that the property is within the claimed classification. *Joyce v. Joyce*, 180 N.C. App. 647, 650, 637 S.E.2d 908, 911 (2006).

Plaintiff's argument that the Ballincourt house itself can be deemed "appreciation" of the value of the down payment and offer to purchase and contract mistakes the law regarding marital property. It is well-established, as this Court held in *Peak v. Peak*, 82 N.C. App. 700, 704, 348 S.E.2d 353, 356 (1986), that "property acquired in exchange for marital funds is considered marital property to the extent of the contribution even after separation." *Accord Freeman v. Freeman*, 107 N.C. App. 644, 651, 421 S.E.2d 623, 626-27 (1992) (holding that property acquired after separation may be classified as marital if "the source of funds used to acquire the property is marital"); *Talent v. Talent*, 76 N.C. App. 545, 554-55, 334 S.E.2d 256, 262 (1985) (holding that trial court erred in finding property purchased after separation to be entirely separate property when evidence showed husband used marital funds for down payment on property, explaining "[t]he fact that this marital property was used to acquire other property after the date of the parties' separation did not cause it to lose its marital character"), *superseded on other grounds by statute as recognized in Rhew v. Rhew*, 138 N.C. App. 467, 531 S.E.2d 471 (2000); *Phillips v. Phillips*, 73 N.C. App. 68, 75, 326 S.E.2d 57, 61 (1985) (holding that although husband gave wife funds to purchase condominium after separation, "[i]f the funds [the husband] gave [the wife] were marital funds, then their exchange for other property after separation does not convert them into separate property").

In this case, the evidence reveals that $89,000.00 of marital funds were used to purchase the Ballincourt house. Prior to separation, the marital estate had $43,400.00 invested in the house as a down payment and had $45,600.00 in a bank account. At the closing on the Ballincourt house, the $45,600.00 in marital funds was exchanged for further equity in the Ballincourt house. As a result, the marital estate had an equity interest worth $89,000.00 in the Ballincourt house. Thus, the Ballincourt house was acquired in exchange for marital property and, therefore, constitutes marital property unless plaintiff demonstrates that some portion of the property was acquired by the use of his separate funds.

Of primary importance, here, is the fact that "North Carolina has adopted the 'source of funds' rule in determining whether property is marital or separate." *McIver v. McIver*, 92 N.C. App. 116, 124, 374 S.E.2d 144, 149 (1988). According to the source of funds rule, "when both the marital and separate estates contribute *assets* towards the acquisition of property, each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property." *Wade v. Wade*, 72 N.C. App. 372, 382, 325 S.E.2d 260, 269 (emphasis added), *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

Plaintiff contends that "his procurement of borrowed funds, *i.e.*, the Coastal Mortgage Services, Inc. loan in the amount of $345,000, constituted a contribution of his separate funds to the Ballincourt House." This view is not in accord with North Carolina precedent. Under the source of funds rule, "acquisition is an on-going process," and "property is 'acquired' *as it is paid for*." *McLeod v. McLeod*, 74 N.C. App. 144, 148, 327 S.E.2d 910, 913 (emphasis added), *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985), *overruled in part on other grounds by Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986). As one leading family law commentator has explained with respect to secured debt:

> If property is *acquired* when the parties reduce the principal balance of a secured debt, property is logically not *acquired* to the extent that the principal balance of that debt remains unpaid. In other words, to the extent that the secured debt has not yet been repaid, the property has not yet been equitably *acquired* at all. *The mere assumption of debt, without more, does not constitute a contribution to the acquisition of property.*

Brett R. Turner, *Equitable Distribution of Property* § 5:26 (3d ed. 2005) (emphasis added).

Mr. Turner's analysis is consistent with this Court's rationale in cases deciding the extent of a separate interest in property owned prior to a marriage that became partially marital property during the marriage. In *Johnson v. Johnson*, 114 N.C. App. 589, 595-96, 442 S.E.2d 533, 537-38 (1994), this Court upheld the trial court's determination that the husband's separate property interest in real estate classified as "mixed" property was the sum of the husband's premarital down payment and closing costs, improvements to the property that increased its value, and mortgage principal reduction payments, but not the outstanding mortgage principal. Similarly, in

Mishler v. Mishler, 90 N.C. App. 72, 76, 367 S.E.2d 385, 387, *disc. review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988), this Court upheld the trial court's formula for determining the husband's separate contribution to "mixed" real estate as the sum of his premarital down payment, plus principal payments, minus outstanding mortgage debt on the property.

Under the facts of this case, we see no reason—and plaintiff has not provided one—why *Johnson's* and *Mishler's* holdings regarding premarital secured debt should not apply with equal force to post-separation secured debt. Thus, plaintiff's obtaining a mortgage on the Ballincourt house is not an "acquisition" of a separate property interest in the house. It is the paying off of the mortgage principal that would constitute the acquisition. With respect to any payments of principal, plaintiff did not assign error to or challenge on appeal the trial court's finding that "Plaintiff presented no evidence that he made payments to reduce the principal owed on either of [the] Ballincourt loans, nor did Plaintiff quantify the total amount of principal reduction, if any, from [the date of closing] until the date of trial."

In sum, under the source of funds approach, since the Ballincourt house was purchased with entirely marital funds, and plaintiff failed to present evidence of any amount of mortgage principal that he paid off using his separate property after separation, we conclude that the Ballincourt house is entirely marital property. The trial court, therefore, did not err in classifying it as such.

[2] The next question is whether the trial court erred in classifying the house's $181,000.00 in appreciation as divisible property. N.C. Gen. Stat. § 50-20(b)(4)(a) states that "[a]ll appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution" is to be classified as divisible property. The major exception is that "appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property." *Id.* Thus, under the statute, there is a distinction between active and passive appreciation when classifying divisible property. *See* Suzanne Reynolds, 3 *Lee's North Carolina Family Law* § 12.52(b)(i) (5th ed. 2002) [hereafter *Lee's Family Law*] ("The General Assembly has given divisible property status only to passive increases in value of marital and divisible property.").

"[P]assive appreciation" refers to enhancement of the value of property due solely to inflation, changing economic conditions, or

market forces, or other such circumstances beyond the control of either spouse. *O'Brien v. O'Brien*, 131 N.C. App. 411, 420, 508 S.E.2d 300, 306 (1998), *disc. review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999). *See Lee's Family Law* § 12.52(b)(i) ("[P]assive forces include interest, inflation, market forces, government action, labor of third parties, and contributions of separate funds. If these or similar forces cause a postseparation change in value of marital property before the date of distribution, then the [trial] court should classify the change in value as divisible property."). "Active appreciation," on the other hand, refers to "financial or managerial contributions" of one of the spouses. *O'Brien*, 131 N.C. App. at 420, 508 S.E.2d at 306. *See also Lawing v. Lawing*, 81 N.C. App. 159, 176, 344 S.E.2d 100, 112 (1986) (distinguishing between active increases such as "funds, talent or labor" and "passive increases due to interest and rising land value").

The critical issue under N.C. Gen. Stat. § 50-20(b)(4)(a) (emphasis added) is whether the increase or decrease in the value of the subject property is "*the result of*" post-separation actions or activities of a spouse. *See Lee's Family Law* § 12.52(b)(i) (noting that General Assembly has "classif[ied] as divisible property all postseparation changes in value unless those changes are 'the result of postseparation actions or activities of a spouse.' " (quoting N.C. Gen. Stat. § 50-20(b)(4)(a))). Plaintiff contends that his active efforts to close on the Ballincourt house are what render the $181,000.00 his separate property and not divisible property.

We note first that plaintiff's argument is inconsistent with the trial court's order making an interim allocation to plaintiff of the right under the Ballincourt contract to close on the house "in order to preserve the marital estate," but expressly providing that "the Defendant's rights and claims to said property shall be preserved until an equitable distribution of marital and divisible property . . . ." Plaintiff's contention that he is entitled to the Ballincourt house's appreciation as his own separate property because his acts of preservation provided the opportunity for the property to appreciate in value conflicts with the order's directive that defendant's marital and divisible property claims would be preserved notwithstanding plaintiff's actions.

In any event, with respect to this issue, the trial court determined in its equitable distribution order: "While Plaintiff's closing on the Ballincourt House may have preserved the marital estate's down payment of $43,400, the post-separation appreciation was not caused by

or the 'result of' the closing within the meaning of N.C.G.S. § 50-20(b)(4)a. Rather, the post-separation appreciation in the value of the Ballincourt House was the result of market forces alone, as stipulated by the Parties."

We agree with the trial court that the fact that the Ballincourt house, valued at $480,000.00, was part of the marital estate was due to plaintiff's efforts to preserve the marital estate, as permitted by the trial court's interim allocation award. The $181,000.00 increase in the value of the house following the closing was not the result of any efforts by plaintiff, but rather was, as stipulated by plaintiff at trial, solely the result of passive market forces. The appreciation, therefore, is by definition divisible property under N.C. Gen. Stat. § 50-20(b)(4)(a).

Plaintiff, however, cites *Hay v. Hay*, 148 N.C. App. 649, 559 S.E.2d 268 (2002), *superseded in part by statute as recognized in Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006), for the proposition that post-separation action taken to "preserve marital property" converts any subsequent appreciation into the separate property of the "preserving" spouse. In *Hay*, 148 N.C. App. at 653-54, 559 S.E.2d at 271-72, the husband, who had used his separate funds to preserve the marital home by making payments on the mortgage post-separation, contended that the decrease in the debt resulted in "appreciation in the value of the marital property" that should have been classified as divisible. In language relied upon by plaintiff here, this Court held in that case:

> [U]nder the plain language of N.C. Gen. Stat. § 50-20(b)(4)a, appreciation that results from the activities or actions of one spouse is not treated as divisible property. Therefore, *assuming defendant's mortgage payments resulted in an appreciation in the value of the marital home*, it was the result of his actions, and any resulting appreciation does not fall within the category of "divisible" property as defined by N.C. Gen. Stat. § 50-20(b)(4).

Id. at 655, 559 S.E.2d at 272 (emphasis added).

Hay cannot be read as holding that all efforts to preserve marital property necessarily mean that subsequent appreciation becomes the separate property of the spouse who acted to preserve the property. Notably, this Court did not hold that the preservation efforts resulted in separate property—it simply held that if there was any appreciation in value, within the meaning of the divisible property statute, it

was the result of the active efforts of payment. In short, *Hay* confirms that the appreciation must be the result of the spouse's actions.

Here, however, plaintiff's actions preserved the marital estate's down payment and right to purchase by closing on the property. That action resulted in the marital estate having a house worth $480,000.00. The subsequent $181,000.00 appreciation in the value of the house was not the result of any action by plaintiff—he took no action to enhance the value of the house following the closing. Although plaintiff's preservation efforts provided the *opportunity* for the market forces to increase the value of the house, that appreciation was not the result of his efforts. Instead, as he stipulated at trial, the appreciation was the result of market forces. Phrased differently, plaintiff did not generate any new value with his preservation actions: before the closing, the marital estate had funds in the amount of $89,000.00, and after closing, the marital estate had equity in the amount of $89,000.00. The trial court, therefore, correctly determined that the home's appreciation is entirely divisible property, rather than plaintiff's separate property.

II

[3] Plaintiff's final argument on appeal is that the trial court erred by ordering an equal distribution of the parties' marital and divisible property. N.C. Gen. Stat. § 50-20(c) provides: "There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable." Under N.C. Gen. Stat. § 50-20(c), "an equal division is made mandatory 'unless the court determines that an equal division is not equitable.' " *White*, 312 N.C. at 776, 324 S.E.2d at 832 (emphasis omitted) (quoting N.C. Gen. Stat. § 50-20(c)). The burden is on the party seeking an unequal division of the marital property to prove by a preponderance of the evidence that an equal division would not be equitable. *Hendricks v. Hendricks*, 96 N.C. App. 462, 464, 386 S.E.2d 84, 85 (1989), *cert. denied*, 326 N.C. 264, 389 S.E.2d 113 (1990).

N.C. Gen. Stat. § 50-20(c) enumerates several factors the trial court is required to consider in deciding what distribution of the property would be equitable. *Edwards v. Edwards*, 152 N.C. App. 185, 187, 566 S.E.2d 847, 849, *cert. denied*, 356 N.C. 611, 574 S.E.2d 679 (2002). The trial court has broad discretion in evaluating and applying the N.C. Gen. Stat. § 50-20 factors. *Munn v. Munn*, 112 N.C. App. 151, 157, 435 S.E.2d 74, 78 (1993). Thus, "[o]nly when the evidence fails to show *any* rational basis for the distribution ordered by the court will

its determination be upset on appeal." *Nix v. Nix*, 80 N.C. App. 110, 112, 341 S.E.2d 116, 118 (1986). Significantly, in this case, plaintiff does not challenge any of the trial court's findings as unsupported by competent evidence.

Instead, plaintiff first argues, based on his belief that the post-separation appreciation in the Ballincourt house should have been classified as his separate property, that the trial court failed to consider "the portion of the increase that is attributable to the Plaintiff-Appellant's active efforts" as a distributional factor. N.C. Gen. Stat. § 50-20(c)(12) permits the trial court to consider any "factor which the court finds to be just and proper." The trial court properly considered this issue, but disagreed with plaintiff, finding that "the $181,000 post-separation increase in the value of the Ballincourt House was totally passive and was not the result of either Party's actions." As discussed above, the trial court did not err in making this determination.

The trial court did not, however, ignore plaintiff's preservation efforts. N.C. Gen. Stat. § 50-20(c)(11a) enables the court to consider "[a]cts of either party to maintain, preserve, develop, or expand; or 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." Here, the trial court found

> With respect to factor (c)(11a), after the date of separation and before the date of distribution, . . . Plaintiff did preserve the marital estate by seeking and obtaining an interim distribution of the Ballincourt Contract and by closing on the Ballincourt House. The Court further finds that to the extent that Plaintiff has not withdrawn the marital estate's equity in the Ballincourt House, he has preserved the marital estate. The Court further finds that to the extent that Plaintiff has made mortgage payments on the Ballincourt House (thought [sic] Plaintiff presented no such evidence that he did make such payments), or otherwise prevented the foreclosure of the Ballincourt House, Plaintiff has preserved the marital estate.

Thus, as evidenced by its finding of fact, the trial court considered and weighed plaintiff's preservation actions in determining whether an equal distribution was equitable.

[4] Next, plaintiff argues that the trial court failed to give "adequate consideration" to "ample testimony" regarding defendant's post-

separation illicit drug use. Plaintiff does not claim that the trial court gave no consideration or weight to defendant's illicit drug use, but rather that it gave too little weight to the evidence. It is well-established, however, that "[w]hen the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996).

Plaintiff argues that the trial court should have given more weight to defendant's drug use because it is "the reason for [defendant]'s decrease in income, decrease in net worth and change in mental and physical health between the parties' date of separation through the date of the equitable distribution trial." Relying on *McKyer v. McKyer*, 179 N.C. App. 132, 632 S.E.2d 828 (2006), *disc. review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007), plaintiff contends that the trial court had the discretion under N.C. Gen. Stat. § 50-20(c)(1), which permits the court to take into account "[t]he income, property, and liabilities of each party at the time the division of property is to become effective," to impute to defendant a level of income commensurate with her earning capacity rather than her actual income.

McKyer, 179 N.C. App. at 146, 632 S.E.2d at 836 (discussing trial court's findings of fact relating to its decision to impute income for purposes of calculation of child support), was a child support case and is immaterial to the question of equitable distribution. Plaintiff cites no pertinent authority that would permit a trial court to impute income when making findings under N.C. Gen. Stat. § 50-20(c)(1). We need not decide whether a trial court may do so because, in any event, we cannot conclude, in this case, that the trial court abused its discretion in not specifically imputing income, given its extensive findings regarding defendant's drug use and earnings.

[5] Plaintiff also contends that the trial court improperly considered under N.C. Gen. Stat. § 50-20(c)(1) the attorneys' fees owed by defendant. Plaintiff asserts that the court's consideration of defendant's unpaid attorneys' fees as part of her overall debt "essen[tially] reimbursed" defendant her attorneys' fees. The trial court found that, "based upon Defendant's testimony and as set forth on Schedule K to the Amended Pre-Trial Order, . . . Defendant has assets of $53,000, but liabilities of $138,000 for a negative worth of -$85,000.00." The court's finding is based on defendant's testimony that she had "various charges," including attorneys' fees owed to the law firm representing her, totaling approximately $137,110.00.

Factor (c)(1) specifically identifies the liabilities of the parties as a consideration in determining whether an equal distribution is equitable. As the evidence presented at the equitable distribution hearing reveals, a major liability for defendant is her attorneys' fees. Plaintiff has not challenged the trial court's finding that defendant had liabilities of $138,000.00, including her attorneys' fees. Nor does plaintiff point to any evidence that the attorneys' fees were not really owed or could not result in a judgment against defendant. Plaintiff has failed to cite any authority suggesting that a liability based on attorneys' fees should be treated differently from other liabilities for the purposes of N.C. Gen. Stat. § 50-20(c)(1).

The court's judgment and order did not award defendant her attorneys' fees—there was no transfer of funds from plaintiff to defendant based on the fees. Defendant's net worth, which necessarily includes all her liabilities, was simply one factor among many informing the trial court's decision to deny both parties' claims for an unequal distribution and to instead order an equal distribution in accordance with N.C. Gen. Stat. § 50-20(c)'s presumption.

Plaintiff makes no other arguments in support of his claim that the trial court abused its discretion in ordering an equal distribution. The trial court, in this case, made detailed findings of fact on each factor set out in N.C. Gen. Stat. § 50-20(c) on which the parties presented evidence. It explained, in its order, why it found some evidence persuasive and other evidence unpersuasive. It then explained in detail how it weighed the factors. We could not ask for a more carefully drawn order. Although plaintiff may disagree with the trial court's credibility and weight determinations, those determinations are solely within the province of the trial court. We, therefore, affirm the trial court's equitable distribution judgment and order.

Affirmed.

Chief Judge MARTIN and Judge BEASLEY concur.

MITCHELL v. MITCHELL

[199 N.C. App. 392 (2009)]

ROBERT MITCHELL, PLAINTIFF v. CHARLENE MITCHELL (NOW NORWICH), DEFENDANT

No. COA08-1069

(Filed 1 September 2009)

1. Child Support, Custody, and Visitation— custody modification—notice of hearing

A *de novo* review revealed the trial court did not err in entering an order modifying child custody even though defendant contends the hearing supporting the order was held without proper notice to defendant in violation of her state and federal constitutional rights and in violation of the county's local rules.

2. Child Support, Custody, and Visitation— custody modification—sufficiency of findings of fact—substantial change in circumstances—best interests of child

The trial court did not err by concluding that plaintiff met his burden of proof on his motion for modification of child custody and by granting the same even though defendant contends plaintiff failed to show a substantial change in circumstances since entry of the permanent custody order, a connection between his alleged changes and the welfare of the children, and that a change in custody would be in the best interests of the child.

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

An assignment of error in a child custody modification case is dismissed because defendant failed to raise this constitutional issue at trial and even assuming *arguendo* that defendant preserved a due process issue, the trial court did not violate the local rules or commit any misconduct in the scheduling and hearing of this matter.

4. Child Support, Custody, and Visitation— custody modification—denial of motion for new trial

The trial court did not abuse its discretion in a child custody modification case by denying defendant's motion for a new trial under N.C.G.S. § 1A-1, Rule 59.

Appeal by defendant from orders entered 25 October 2007 by Judge Marcia H. Morey, District Court, Durham County; 9 November 2007 by Marcia H. Morey, District Court, Durham County; and 15

January 2008 by Judge Lillian B. Jordan, in District Court, Durham County. Heard in the Court of Appeals 8 April 2009.

Hayes Hofler, P.A., by R. Hayes Hofler, for plaintiff-appellee.

Lewis, Anderson, Phillips & Hinkle, PLLC, by Susan H. Lewis, for defendant-appellant.

STROUD, Judge.

On 9 November 2007, the trial court entered an order modifying custody, and on 15 January 2008, the trial court denied defendant's motion for a new trial. Defendant appeals from both orders. For the following reasons, we affirm.

I. Background

This case arises from a protracted and highly contentious custody dispute which began in December 2003. Both parties have filed numerous documents during the nearly four years of litigation leading up to the custody modification order which is at issue here. Due to the many motions, responses, and hearings over the years, the procedural history of this case is quite complex. We will therefore summarize only the facts which we deem pertinent to this appeal.

On 9 December 2003, plaintiff filed a complaint against defendant alleging that on 4 December 2003, he and defendant had separated after approximately eight years of marriage. Plaintiff's complaint requested, *inter alia*, temporary and permanent custody of plaintiff and defendant's two minor children or in the alternative, that the court grant plaintiff and defendant, joint custody of the children. On 18 December 2003, defendant filed her answer to plaintiff's complaint and a counterclaim requesting the trial court grant her temporary and permanent custody of the parties' minor children.

On 5 February 2004, Judge Morey entered the first temporary custody order. Due to the "high level of conflict" between the parties, on 29 March 2004, a consent order was entered appointing Dr. Betty Phillips as parenting coordinator. On 1 July 2004, Wendy Sotolongo was appointed as guardian *ad litem* "to represent the best interests of the children." By a 4 May 2005 consent order, the parties consented for Dr. Ginger Calloway to conduct a forensic psychological evaluation and custody evaluation. In July 2005, Judge Morey held a five-day hearing regarding custody and entered a continued temporary custody order on 26 July 2005; at the 26 July 2005 hearing, the

trial court also heard plaintiff's motion to remove the parenting coordinator, Dr. Phillips.

On 9 August 2006, a hearing was held before Judge Morey as to permanent custody. In October of 2005, Dr. Calloway took over as the parenting coordinator. On 10 October 2006, the trial court entered a *permanent* custody order ("2006 custody order") granting primary physical custody to defendant with specific visitation privileges to plaintiff. Plaintiff's visitation schedule was as follows:

a. [Daughter]

   i. So as to reduce contact between the parents, Plaintiff's visitation with [daughter] will be every other weekend from Friday at the end of after school care at 5:30PM until return to school on Monday morning between 8:00AM and 8:15AM. The Sunday overnight shall not commence until [daughter] has adjusted to school in the opinion of the Parent Coordinator.

   ii. On the weeks in which the Plaintiff does not have weekend visitation with [daughter] he shall have a Thursday visit beginning after her preschool lets out for the day at 2:45PM until 5:00PM Plaintiff will return [daughter] to the Defendant at Duke School at 5:00PM and then immediately depart from the school.

   iii. The visitation schedule outlined above for the minor child [daughter] shall begin after one month after the beginning of school or when determined appropriate by the Parent Coordinator, which ever occurs later. Pending the commencement of this schedule, [daughter] shall visit with the Plaintiff every other weekend from Friday at 5:00PM until Sunday night at 5:00PM when [daughter] shall be returned to the Defendant.

b. [Son]

   i. Plaintiff's visitation with [son] will remain the same. Said schedule is every other weekend from Wednesday after school until return to school on Monday morning between 8:00AM and 8:15AM. [Son] shall be allowed to remain at after school care until 5:30PM on each of the days he is enrolled in said care unless otherwise designated by the Parent Coordinator. In the event that [son] does not have

> school or is not in school for any reason on the Wednesday beginning the Plaintiff's visitation, the specific pick up/drop off arrangements shall be worked out by the Parenting Coordinator.

Furthermore,

> Holidays, school break, and summer vacation visits shall continue to be scheduled through the Parent Coordinator and pursuant to the parenting agreement. Until [daughter] is older she should not be away from the Defendant for holiday, school break, or summer vacation visits for more than four (4) consecutive overnights. . . .

The 2006 custody order also granted defendant sole legal custody of the children, except in cases of (1) medical attention, (2) access to the children's medical providers, medical records, educational providers, and educational records, and (3) extracurricular activities and sports, wherein both parents would have equal access and would share in decision-making authority. Dr. Calloway was ordered to continue as parenting coordinator.

After entry of the 2006 custody order, the counsel for each party withdrew and each party obtained new counsel. In January 2007, Dr. Calloway resigned as parenting coordinator. On 19 February 2007 defendant filed a motion for contempt against plaintiff.

On 7 May 2007, plaintiff filed a motion seeking "summer vacation time" with his children. On 10 May 2007, defendant filed a response to plaintiff's visitation motion. On 29 June 2007, the trial court filed an order granting plaintiff's request for "summer vacation time[.]"

On 25 June 2007, plaintiff filed a motion for relief from judgment pursuant to Rule 60 ("Rule 60 motion") seeking to set aside the 2006 custody order. In her motion for recusal of Judge Morey, filed on 23 July 2007, defendant characterized the Rule 60 motion as "attacking" the 2006 custody order "on the grounds that the Court acted without statutory and constitutional authority in entering said Order." The recusal motion went on to allege that "[p]laintiff's current attorney of record, Hayes Hofler, has threatened to sue the Hon. Marcia Morey in federal court." On 2 August 2007, defendant filed a second motion for contempt against plaintiff, alleging that plaintiff "has continued and escalated his campaign against the Children's therapists." On 25 September 2007, the trial court prohibited defendant from taking the deposition of Alyscia Ellis, plaintiff's former attorney.

On 28 September 2007, plaintiff filed a motion for modification of the 2006 custody order requesting, *inter alia*, "joint legal custody on a temporary and permanent basis" and "equal custodial time with his children on a temporary and permanent basis[.]" On 28 September 2007, plaintiff's attorney mailed defendant's attorney a notice of hearing for 25 October 2007 regarding the motion to modify custody, and on 1 October 2007, the notice of hearing was filed. Defendant responded to plaintiff's motion and the notice of hearing for 25 October 2007 by filing various documents relevant to this appeal. On 9 November 2007, based upon plaintiff's motion to modify custody, the trial court ordered, *inter alia*, the following:

1. The parties are hereby granted joint legal custody of the minor children; however because of the high conflict that has existed between the parties, joint legal custody shall be clarified by the following:

    a. The parties must both agree if there is to be any change from the children's current school placement or from their current therapeutic treatment. If one parent proposes a change from the current situation that the other parent does not agree to, the parties must consult with the Parent Coordinator.

    b. Each parent may make legal decisions regarding emergency medical/dental treatment, but must consult with each other regarding non-emergency procedures.

    c. For the next twenty-four months, the mother shall have primary decision making over [daughter]'s extracurricular activities; and the father shall have primary decision making over [son]'s extracurricular activities. All decisions shall be made in the children's best interests.

2. The parties will share physical custody of the children as follows:

    a. Beginning the first week of December 2007, [t]he father shall have physical custody of both children every other weekend from Thursday after school until Monday morning. Additionally, on alternate weeks, the father shall have [son] overnight on Wednesday and Thursday and [daughter] on Wednesday nights. Transitions are to occur at the same times and places and in the same manner as heretofore ordered, until the parent coordinator works out a more

exact schedule which will transition custody to an equal 50/50 basis by the first week of March, 2008.

b. Beginning in the first week of March, the parties shall share physical custody equally in a schedule that is known as 2-2-3. Two days with plaintiff, two days with defendant, three days with plaintiff, then alternating. Extended summer holidays with each parent shall be afforded equally.

. . . .

On 19 November 2007, defendant filed a motion for a new trial and stay of the 9 November 2007 order. On 15 January 2008, the trial court entered an order denying defendant's motions for a new trial and to stay the 9 November 2007 order. From the 9 November 2007 order modifying custody and 15 January 2008 order denying defendant's motion for a new trial, defendant appeals.[1]

II. Notice

[1] Defendant first contends that "the trial court committed reversible error in entering its 9 November 2007 order because the hearing supporting the order was held without proper notice to defendant in violation of her state and federal constitutional rights and in violation of the Local Rules." (Original in all caps.) We disagree and first note that defendant failed to make an argument regarding "her state and federal constitutional rights" to the trial court, and thus any issues regarding these contentions are waived. *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."); *see also State v. Cumber*, 280 N.C. 127, 131-32, 185 S.E.2d 141, 144 (1971) ("Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court." (citation omitted)).

As to her right to notice, defendant argues she

> was not provided adequate notice of the 25 October 2007 hearing. Although Defendant received a purported Notice of Hearing, she

1. Defendant's notice of appeal also notes defendant is appealing from a 25 September 2007 order, but as defendant has not challenged this order in her brief, we deem any appeals regarding this order abandoned. *See* N.C.R. App. P. 28(a) ("Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned.")

> later received the official court calendar for 25 October 2007 showing the matter on for pretrial only. Defendant took all reasonable steps to challenge the purported Notice of Hearing, including filing a Motion to Strike, and strenuously objecting at the hearing.

Thus, defendant contends she did not receive adequate notice that the modification for custody hearing would be held on 25 October 2007 as the "official court calendar" provided for only a "pretrial" hearing.

A. Adequacy of Notice

"Whether a party has adequate notice is a question of law, which we review *de novo*." *Swanson v. Herschel*, 174 N.C. App. 803, 805, 622 S.E.2d 159, 160 (2005). "N.C. Gen. Stat. § 50A-205 provides that notice and an opportunity to be heard must be provided to all interested parties before a child custody determination can be made." *Anderson v. Lackey*, 163 N.C. App. 246, 255, 593 S.E.2d 87, 92 (2004).

Defendant first directs our attention to *Scruggs v. Chavis* wherein "the record include[d] two dates for the hearing of defendants' motion[,]" 29 April 2002 on the notice of hearing and 6 May 2002 on the court calendar, and the confusion resulted in the plaintiff's counsel failing to appear. 160 N.C. App. 246, 247-48, 584 S.E.2d 879, 880 (2003). However, here, 25 October 2007 was the date on both the notice of hearing and court calendar and plaintiff's counsel did actually appear. Thus, we deem *Anderson* to be more apposite to this case. *See Anderson* at 255, 593 S.E.2d at 92. In *Anderson*, the plaintiff argued she received notice of the hearing, but "did not receive notice that the hearing would review possible visitation changes." *Id.*

This Court stated in *Anderson*,

> Adequate notice is defined as notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Furthermore, in *Danielson v. Cummings*, this Court held that no written notice of a motion was required to effectuate adequate notice to the opposing party where the motion was announced in open court.

Id. (citations and quotation marks omitted). This Court went on to analyze the dialogue during the hearing and concluded "that plaintiff was adequately apprised of the pendency of an altered visitation

schedule which afforded her an opportunity to present her objections." *Id.* at 255-56, 593 S.E.2d at 93.

Here, the record shows that plaintiff's counsel mailed plaintiff's motion for modification and notice of hearing for the 25 October 2007 hearing on 28 September 2007, almost one full month before the hearing was held. Furthermore, though the relevant court calendar showing a hearing regarding plaintiff's motion to modify custody did erroneously note that the hearing was "P/T," i.e., pretrial, it also noted that the hearing was scheduled for "1 Day[;]" the time estimate of one day should have put defendant on further notice that something more than a pretrial conference was scheduled, as pretrial matters are rarely, if ever, scheduled for an entire day of court.

In response to plaintiff's motion to modify, defendant filed a reply, two motions to strike, a motion for sanctions, a motion to dismiss, and at least seventeen exhibits. Defendant's numerous responses to the motion to modify custody indicate that she was well aware that the custody matter was scheduled for hearing on 25 October 2007 and that she strongly objected to holding the hearing on that date. For example, in her motion to strike the notice of hearing, defendant alleges that Family Court Rules ("Local Rules") require a pretrial conference and that the trial date is to be set at the pretrial conference. Defendant also alleged that the Local Rules required custody mediation prior to trial and that mediation had not been done. Defendant contended that the only matter properly before the court on 25 October 2007 was a pretrial conference, and defendant requested that the trial court strike the notice of hearing and sanction plaintiff for failure to follow the Local Rules. Defendant's motion to strike clearly demonstrates that defendant was aware that a modification of custody hearing was scheduled to be heard on 25 October 2007; though defendant objected to having the hearing on 25 October 2007 on several grounds, she cannot now claim she was unaware that the motion to modify was actually scheduled for hearing as the knowledge that a hearing was scheduled for that day is the premise of her motion to strike.

At the actual hearing regarding modification of the custody order, the trial court heard extensive arguments regarding defendant's various pretrial motions.[2] One primary dispute between counsel for both

2. As (1) there were a number of pending motions, including two contempt motions and plaintiff's Rule 60 motion, (2) various dates had been set and then evidently continued or rescheduled on various occasions, and (3) the record does not con-

parties appeared to be whether a hearing on the plaintiff's Rule 60 motion to set aside the 2006 custody order would be held before the hearing on modification, with defendant strongly arguing that the Rule 60 motion should be heard first.[3] Furthermore, it appears that defendant's counsel had previously, prior to the hearing date, asked the court to continue the 25 October 2007 hearing on the motion to modify and that the trial court had denied the motion to continue:

> MR. HOFLER [plaintiff's counsel]: I want to proceed on the Motion to Modify.
>
> THE COURT: Okay.
>
> MR. HOFLER: But, Your Honor, would recall that we left the Rule 60 Motion to be a separate hearing. You know, originally, it was scheduled for the Monday, and then—and then it was continued.
>
> You asked us to pick dates or you conferred with Mandy about dates about the Rule 60 Motion. She said the October 25 [sic] and, I think, November the 19th.
>
> And then we had earlier decided that the other motions, that all of these pending motions, would be heard after the Rule 60 Motion.
>
> So, as far as I an concerned, none of those motions are for hearing today, including the Rule 60 Motion.
>
> But the reason I proceeded the way I have is because it was evident to me that Ms. Lewis was going to do all she could to delay hearing a Rule 60 Motion. And, albeit, I was—I acceded to her desire to come down and talk to you about continuing, you had denied a continuance on that. I thought it was continued on the basis that that would give her time to do the deposition [of Alyscia Ellis] that she wanted to do.
>
> . . . .
>
> As it turns out, of course, there have been a slew of motions now filed. *If Your Honor recalls though, you denied the Motion— Your Honor, you denied the Motion to Continue the hearing on modification of custody, you denied that motion.*

---

tain relevant documents on several of these matters, it is difficult for us to discern exactly which motion counsel and the trial court are addressing.

3. Ultimately, the Rule 60 motion was heard immediately before the motion to modify. The Rule 60 motion was denied and is not at issue in this appeal.

> *Since you denied that motion and this hearing was set for trial, you denied their Motion to continue the modification hearing.*
>
> Then there have been all of these additional motions that were filed on the 23red [sic] and on the 17th.
>
> So our position is that the Rule 60 Motion is still pending, it has not been set for hearing. Ms. Lewis has given notice that she is not available in November. So the only way we could get this case heard about the welfare of the children before your term is up is to have this hearing today. And it's duly set, duly noticed, and so we're ready to proceed on that motion.

(Emphasis added). In responding to plaintiff's counsel's remarks, defendant's counsel noted that plaintiff's counsel "had misstated the facts" and that he was "riding roughshod over the local Rules." Furthermore, in response to some confusion as to which motion defendant's counsel was talking about, the trial court noted, "*The Motion to Continue today's hearing was denied.* Everyone should . . ." (Emphasis added.) Defendant's counsel interrupted, noting, "*I'm not talking about today's Motion, I'm talking about what he just said about the Rule 60 Motion.*" (Emphasis added.) Thus, one thing which seems to be clear from the dialogue at the modification hearing is that prior to 25 October 2007 defendant had made a motion to continue the hearing regarding the motion to modify, and the trial court had denied that motion.

Defendant's actions also indicate that she was *aware* the motion to modify custody would be heard on 25 October 2007 as defendant, her counsel, and witnesses were actually present at the modification hearing, and defendant was prepared to and did present testimony and twenty-two exhibits at the hearing. Considering the extensive motions and documents filed by defendant between the defendant's receipt of the notice of hearing and the hearing itself, the dialogue at the modification hearing, and defendant's actions, show that defendant knew or should have known that the trial court was going to hear the motion to modify custody on 25 October 2007. The record establishes that defendant was "apprise[d] . . . of the pendency of the action and afford[ed] . . . an opportunity to present [her] objections." *Id.* at 255, 593 S.E.2d at 92. We thus conclude that defendant received adequate notice of the hearing on the motion to modify custody.

B. Local Rules

Although defendant did have notice that the motion to modify custody was scheduled to be heard on 25 October 2007, she also contends that the court should not have heard the matter because it was scheduled in violation of the Durham County Local Rules. She argues that she

> was also entitled to rely on the court to enforce additional provisions of the Local Rules under which Plaintiff's Motion was not properly before the court. The Local Rules in effect at the time of this hearing specifically provide that pretrial conferences are required and shall be set. . . . The Local Rules also require mandatory custody mediation in all custody cases, including motions for modification, prior to any pretrial. . . . The Local Rules provide for sanctions for failure to comply, including dismissal of the claim and monetary fines. . . .
>
> . . . .
>
> In objecting to the hearing, Defendant sought enforcement of the plain terms of the Local Rules. The court failed to enforce them and sought to excuse that failure by waiving application of the same.

(Quotation marks omitted.)

In its order modifying custody the trial court found in finding of fact 22:

> Over objection from defendant's counsel, the court waived the local rules for any further pretrial or mediation, as there have been more than twenty scheduled hearings and continuances, all pertaining to custody issues, since this case was filed in 2003. Further, as the presiding judge, who has heard this case from its inception, will no longer be in the Family Court rotation, the Court believed it was in the best interests of the minor children to proceed and hear evidence on the plaintiff's Motion to Modify Custody.

Local rules "are rules of court which are adopted to promote the effective administration of justice by insuring efficient calendaring procedures are employed. *Wide discretion* should be afforded in their application so long as a proper regard is given to their purpose." *Forman & Zuckerman v. Schupak*, 38 N.C. App. 17, 21, 247 S.E.2d

266, 269 (1978) (citation omitted) (emphasis added). Rule 1.1 of the Durham County Family Court Domestic Rules ("rules") provides,

> The purpose of these Rules is to provide for the fair, just, and *timely resolution* of family domestic matters in the District Court Division of the 14th Judicial District, Durham County, in compliance with Rule 40(a), North Carolina Rules of Civil Procedure, and Rule 2(a), General Rules of Practice for Superior and District Courts. *We operate with a "one judge-one family system"* and each case will be assigned to one family court judge who has an assigned Case Coordinator.

14th Jud. Dist. Family Ct. Domestic R. 1.1 (Revised 9/08) (emphasis added). Here, Judge Morey, as the assigned judge, had held numerous hearings over approximately four years, but would soon be moving out of family court and would not be available to hear the motions if the matter were delayed. Based upon the Local Rules, Judge Morey appropriately considered her availability as the assigned judge in her decision to proceed with the hearing.

> One of the primary characteristics of the Family Court is its one judge, one family policy. This policy is often cited as the most critical component of any successful family court, as it helps avoid the fragmentation, the duplication of effort and expense, and the potential for conflicting court orders in a domestic case.

In re M.A.I.B.K., 184 N.C. App. 218, 225, 645 S.E.2d 881, 886 (2007) (citation, quotation marks, and brackets omitted).

Defendant is correct in noting that the rules require pretrial conferences and mediation for custody modification; *see* 14th Jud. Dist. Family Ct. Domestic R. 4.2, 7.1, however, the rules also provide that "[u]pon motion, good cause, and available court time, parties or their attorneys may request that the Court waive the pretrial conference and proceed directly to the hearing to dispose of the issue scheduled for a pretrial hearing[,]" 14th Jud. Dist. Family Ct. Domestic R. 4.2, and that "[t]he Court has discretion to decide whether a case shall be exempted from mediation without a hearing on the matter." 14th Jud. Dist. Family Ct. Domestic R. 7.8. The rules also provide that they "should be construed in such a manner as to avoid technical or unnecessary delay and to promote the ends of justice." 14th Jud. Dist. Family Ct. Domestic R. 1.2.

Considering the rules as a whole, specifically in light of (1) their stated purpose "to provide . . . timely resolution of family domestic

matters[,]" 14th Jud. Dist. Family Ct. Domestic R. 1.1, (2) operating under a "'one judge-one family' system[,]" *id.*, and (3) specific provisions regarding waiver of both pretrial and mediation conferences, *see* 14th Jud. Dist. Family Ct. Domestic R. 4.2, 7.8, we conclude that the trial court did not abuse its discretion in waiving a pretrial conference or mediation based on finding of fact 22. The trial judge who had presided over this case for approximately four years was clearly in the best position to determine whether a pretrial conference and/or mediation would be of sufficient benefit in this highly contentious case to justify further delay of the resolution of the matter. This argument is overruled.

III. Modification of Custody

[2] Defendant next contends "plaintiff failed to meet his burden of proof on his motion for modification of custody, and the trial court committed reversible error in granting the same" because "plaintiff failed to show [(1)] a substantial change in circumstances since entry of the 10 October 2006 permanent custody order[,]" (2) "a connection between his alleged changes and the welfare of the children[,]" and (3) "that a change in custody would be in the best interests of the children." (Original in all caps.) We disagree.

> It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody. The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. While allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.
>
> As in most child custody proceedings, a trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests. Therefore, if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child's best interests.
>
> The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine

whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges[.] Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.

In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial

court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman v. Shipman, 357 N.C. 471, 473-75, 586 S.E.2d 250, 253-54 (2003) (citations, quotation marks, and brackets omitted).

A. Substantial Change in Circumstances

Here, the trial court found a substantial change of circumstances in finding of fact 23 because:

a. Since the entry of the Permanent Custody Order, the Plaintiff has completed his fellowship in cardiology at Duke and is now an Associate Professor who has tailored his schedule for optimum time to spend with his young children. Further, plaintiff obtained credentials for a certificate in vascular ultrasound which enables him more flexibility to spend time with his family. Because of his increased self-awareness, he is increasingly capable of being a strong parent for these children.

b. Since the entry of the Permanent Order, the plaintiff has continued his therapy with Dr. Denise Barnes and is more aware of his emotional, psychological feelings and takes appropriate medication as needed.

c. Since the entry of the Permanent Order, the plaintiff has remarried. The plaintiff's wife appeared and testified and the Court finds that she respects her role as a step-parent and has a close, nurturing relationship with the minor children. The availability of this assistance will provide a stable and nurturing parental figure which will provide the children with an additional role model.

. . . .

e. Since the entry of the Permanent Order, the children have grown and matured. Specifically, [son] is doing well in school, now in the fourth grade. He has close friendships with children in the father's neighborhood. [Son] continues to be in therapy with Dr. J. Williams and appears to be thriving.

f. Since the entry of the Permanent Order, [daughter] is no longer a toddler, but a young child who is in her second year of preschool. She is sociable, funny, and appears to be doing well in the presence of both parents. She has continued to be in therapy and is very close to her brother . . . .

g. There have been no acts of domestic violence since 2003 as the parties have had no significant personal contact over the past three years.

At the hearing regarding modification of the custody order plaintiff, plaintiff's supervisor, plaintiff's wife, and Sarah Timberlake, who sometimes babysat the children, all gave testimony which would support findings of fact 23(a)-(g). Defendant contends that "[t]he only support for . . . Findings [a and b above] are Plaintiff's self-serving declarations that he had changed." Though there was evidence in addition to plaintiff's own testimony to support many of the findings of fact, the trial court could have relied only upon plaintiff's testimony if it deemed his testimony of sufficient credibility and weight. *In Re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) ("[W]hen a trial judge sits as both judge and juror, as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." (citation and quotation marks omitted)). We therefore conclude that there was substantial evidence upon which the trial court could find and conclude that there had been a substantial change of circumstances due to, *inter alia*, plaintiff's increased flexibility in his work schedule, continued therapy and implementation of what he learned in therapy, and his healthy remarriage.

B. Welfare of the Children

The trial court also found that finding of fact 23(a)-(g) and the following findings in finding of fact 24 constituted a "substantial change of circumstances" which "affects the welfare of the minor children":

a. The children have matured and progressed significantly since Dr. Calloway's custody evaluation which was a consideration in the entry of the permanent custody order.

b. The mother does not readily acknowledge the children's positive relationship with their father and the fact that they have matured and are capable of spending more quality time with him; and her continued animosity and perception at this time has adversely affected the welfare of the children.

c. The Order of "sole custody" in favor of the mother has resulted in alienation of the father in their school activities and has

resulted in limiting the father to the childrens' [sic] medical/psychological information, all to the detriment to the welfare of the children.

d. Since the entry of the Permanent Order, both parents are now uniquely qualified to be parents on an equal basis with their children. Both parents have much to offer the children from their unique parenting skills and both children are well cared for by both parents.

e. Two years ago the court-appointed forensic psychologist found that once the children matured, they could tolerate their father's intense displays of emotion (which were primarily directed at the defendant and have now diminished) and that the parents should share physical custody of the children on an equal basis. The father's intense display of emotions has lessened significantly and will continue to lessen as he settles into a new marriage and has more time with his children.

Again, there was substantial evidence in the transcript to support the trial court's findings as to the benefits to the children from plaintiff's flexible work schedule, plaintiff's progression in therapy, plaintiff's healthy remarriage, and plaintiff's "lessened" displays of emotion. In addition, there was substantial evidence to support the trial court's findings of an adverse impact on the children from defendant's continued "animosity and perception[,]" and plaintiff's limited access to medical and psychological information. Defendant's primary argument again is that the trial court's order is based only upon plaintiff's "self-serving declarations[,]" but as noted above, plaintiff's testimony is evidence upon which the trial court, in its discretion, may rely. *Id.* The evidence supports the trial court's findings and conclusion that the substantial changes in circumstances affected the welfare of the minor children.

C. Best Interests

As there was substantial evidence supporting the trial court's findings and conclusion that there had been a substantial change in circumstances and that these changes had affected the welfare of the children, we conclude the trial court did not err in concluding that joint legal custody was in the best interests of the children. Defendant has not demonstrated any reason that we should not "defer to the trial

court's judgment and not disturb its decision to modify an existing custody agreement."[4] *Shipman* at 475, 586 S.E.2d at 254. Therefore, this argument is overruled.

IV. Due Process

[3] Defendant also contends that "the trial court committed reversible error in entering its 9 November 2007 order because the cumulative effect of the court's numerous violations of defendant's procedural rights denied defendant's fundamental right to due process." (Original in all caps.) Defendant claims that [i]f the trial court's misconduct in this case is viewed in its totality, the court's Modification Order cannot withstand the test of fundamental fairness." However, we again note that defendant has failed to direct our attention to anywhere in the record where she raised a constitutional issue before the trial court, and "[a]ppellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court." *Cumber* at 131-32, 185 S.E.2d at 144. Even assuming *arguendo* that defendant had preserved a due process issue, we have already determined that the trial court did not violate the Local Rules or commit any "misconduct" in the scheduling and hearing of this matter. As defendant has failed to direct our attention to any point where she raised a due process violation to the trial court, this argument has been waived.

V. New Trial

[4] Lastly, defendant contends that "the trial court abused its discretion in denying defendant's motion for a new trial pursuant to Rule 59." (Original in all caps.) However, defendant's arguments regarding a new trial are the same as those presented above, all of which have been overruled or waived. Therefore, this argument is also overruled.

VI. Conclusion

We conclude that the trial court properly modified the custody order between plaintiff and defendant and denied defendant's motion for a new trial, and therefore we affirm.

4. We note that defendant argues briefly that the trial court erred in excluding her evidence of plaintiff's "continued bad conduct[,]" specifically defendant's exhibits 7 and 8. However, defendant cites no legal authority for these errors. *See* N.C.R. App. P. 28(b)(6). Furthermore, defendant's exhibits 7 and 8, which defendant contends show plaintiff's continued hostile behavior since the entry of the 2006 custody order, do not contain a single document from plaintiff dated *after* entry of the 2006 custody order and therefore could not be used to establish plaintiff's "continued bad conduct" after entry of the 2006 custody order.

AFFIRMED.

Judges ELMORE and ERVIN concur.

ARNOLD CLAYTON, EMPLOYEE, PLAINTIFF v. MINI DATA FORMS, INC., EMPLOYER, SENTRY INSURANCE CO., INC., CARRIER, DEFENDANTS

No. COA08-1119

(Filed 1 September 2009)

1. Workers' Compensation— sufficiency of findings of fact— nature of payments

An Industrial Commission opinion in a workers' compensation case was remanded (under *Rice*, 154 N.C. App. 680 (2002), and *Meares*, 172 N.C. App. 291 (2005)), for further findings of fact as to the nature of payments made to plaintiff during his return to part-time work, and plaintiff's various equitable arguments about the effect of giving defendants an offset are to be considered by the Commission on remand.

2. Workers' Compensation— 10% penalty—late payment of compensation—unilateral decision to pay partial disability benefits

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff was not entitled to payment by defendants of a 10% penalty for late payment of compensation under N.C.G.S. § 97-18(g) because defendants did not pay all of the workers' compensation benefits that were due, but unilaterally decided to pay partial disability benefits, together with wages, rather than the total disability benefits to which the Commission found plaintiff was entitled.

3. Workers' Compensation— denial of attorney fees—reasonable grounds to defend

The Industrial Commission did not abuse its discretion in a workers' compensation case by determining that defendants had reasonable grounds to defend plaintiff's claim and that plaintiff was not entitled to attorney fees under N.C.G.S. § 97-88.1.

Appeal by plaintiff from opinion and award entered 22 April 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 March 2009.

Seth M. Bernanke for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Rebecca L. Thomas and Ashley Baker White, for defendants-appellees.

GEER, Judge.

Plaintiff Arnold Clayton appeals from an opinion and award of the Full Commission. Plaintiff contends that the Commission was not authorized to offset his workers' compensation award by the amount of wages already paid to him by defendants while he was working in a position that the Commission later determined to be unsuitable. Although such an offset may be authorized by *Moretz v. Richards & Assocs., Inc.*, 316 N.C. 539, 342 S.E.2d 844 (1986), because the Commission failed to make the necessary findings as to the nature of defendants' payments under *Rice v. City of Winston-Salem*, 154 N.C. App. 680, 572 S.E.2d 794 (2002), we must reverse and remand.

Plaintiff also argues that defendants should be ordered to pay (1) a penalty of an additional 10% of the total compensation award for defendants' unilateral reduction of his compensation under N.C. Gen. Stat. § 97-18(g) (2007); and (2) plaintiff's attorneys' fees for defending his claim without reasonable grounds under N.C. Gen. Stat. § 97-88.1 (2007). Because in *Kisiah v. W.R. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 75, 476 S.E.2d 434, 435 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997), and *Bostick v. Kinston-Neuse Corp.*, 145 N.C. App. 102, 104, 549 S.E.2d 558, 560 (2001), this Court held that a defendant's unilateral termination or reduction of workers' compensation benefits warrants imposition of a 10% penalty under N.C. Gen. Stat. § 97-18(g), we reverse that portion of the Commission's opinion and award and remand for imposition of a 10% penalty. As for the attorneys' fees, however, we agree with the Commission's determination that defendants had reasonable grounds on which to defend against plaintiff's claims and, therefore, affirm the Commission's denial of plaintiff's request for attorneys' fees under N.C. Gen. Stat. § 97-88.1.

Facts

The majority of the Commission's findings of fact are unchallenged by the parties and, therefore, are binding on appeal. At the

time of the hearing before the deputy commissioner, plaintiff was 45 years old and had worked for defendant employer for 14 years as a press operator. In total, plaintiff had 22 years of experience working as a press operator for several companies. Prior to that, he was a professional musician.

While working for defendant employer, plaintiff ran the 11-inch pack press, working 10 hours per day, four days per week. Running the 11-inch pack press entailed installing the plate, a thin sheet of aluminum that weighs two or three ounces and contains the image to be printed, on the press and filling the press with ink. Plaintiff was also responsible for loading the paper to be used in the print job. The paper is stored either on the floor or on shelves approximately five feet high. A boxed stack of paper for the 11-inch pack press weighs 27 pounds. The task of loading the paper on the press, processing it, and unloading it required plaintiff to lift each stack of paper four times. Plaintiff would have between 14 and 27 jobs per day. Plaintiff stood constantly, with frequent reaching to work on the press and bending or squatting to retrieve paper from the floor.

On 16 February 2004, plaintiff was carrying a stack of paper when he slipped on a box on the floor, falling and landing on his left hip and shoulder. Plaintiff immediately had severe pain in his left hip and lesser pain in his left shoulder. Plaintiff's left leg was numb and his right leg was hurting. Plaintiff was taken to the hospital by ambulance and treated by Dr. William Primos and Dr. Alfred Rhyne. On 1 April 2004, defendants filed a Form 60 admitting the compensability of the injury and began paying plaintiff temporary total disability benefits.

After conservative measures failed, Dr. Rhyne performed microdiskectomies at L4-5 and L5-S1 on 8 June 2004. On 29 October 2004, Dr. Rhyne returned plaintiff to work for four hours a day with a limitation of 40 pounds lifting and limited squatting and bending. Dr. Rhyne reduced the weight restriction to 25 pounds on 17 December 2004. When plaintiff returned to work on the 11-inch pack press, he had difficulty lifting the 27-pound boxes of paper, and, therefore, on 22 March 2006, his restrictions were changed to 20 pounds lifting, for four hours a day, and made permanent. Dr. Rhyne determined that plaintiff was at maximum medical improvement as of 22 March 2006 and assigned a 15% rating to his back as a result of the injury.

Given plaintiff's permanent restrictions, defendant employer was limited to assigning plaintiff to work on its 7-inch pack press—the boxes of paper for that press weigh only 17 to 19.5 pounds. The 7-inch

pack press operates the same way as the 11-inch press, but while there are three 11-inch pack presses, there is only one 7-inch pack press. Running the 7-inch pack press entails some tasks plaintiff cannot perform: he cannot empty the box of scrap paper at the end of each run of the press or get some of the heavier paper down from the shelf, and someone must help him set the paper up on the press. Plaintiff stands during the entire four hours, except in between jobs when he sometimes has a chance to sit down on a nearby table.

Although plaintiff can work for four hours a day, defendant employer frequently does not have enough work for the 7-inch press to keep him busy for the entire four hours. When there is not enough work, plaintiff is sent home. Plaintiff usually calls or is called by his boss daily to find out if he is needed that day. Because plaintiff is concerned about driving on the interstate to work, he does not take pain medication before he drives to work. Plaintiff is "pretty drained" by the end of the shift and is absent due to back pain about once a month. Plaintiff takes sick leave or vacation for those absences. Plaintiff works a maximum of 20 hours per week.

During the 11 years that plaintiff has worked for defendant employer, the company had never, prior to plaintiff's injury, hired a part-time press operator. The owner of defendant employer testified that in the three years since plaintiff's injury, he hired one part-time press operator, but had to let him go because there was not enough work to justify his employment. He also testified that any new employee hired to work for defendant employer would be expected to learn to run all the presses.

Defendants' vocational expert, Jane G. Howard, conducted a market survey of printers to determine how many of them hire part-time employees for work on smaller printing presses or lighter duty work. She was able to make contact with 21 printing services, and two indicated they would hire people wanting reduced hours, although neither of those employers was currently hiring for part-time work. Plaintiff's vocational expert, Leanna Hollenbeck, testified that part-time press operator jobs were rarely available, and none were currently available.

Once plaintiff began working part-time for defendant employer, defendants paid plaintiff his wages and temporary partial disability compensation. Defendants did not, however, submit any form to the Commission or obtain Commission approval for the reduction in benefits to partial disability compensation.

On 8 September 2006, plaintiff filed a Form 33 Request for Hearing, seeking an award of total disability. On 17 August 2007, the deputy commissioner entered an opinion and award concluding that plaintiff's part-time employment was not suitable employment and did not establish wage earning capacity. The deputy commissioner, therefore, concluded plaintiff was totally disabled. The deputy commissioner ordered defendants to pay all unpaid indemnity for total disability, declined to give defendants a credit for wages paid for the part-time work, and ordered payment of a 10% penalty for late payment. Both plaintiff and defendants appealed to the Full Commission.

On 22 April 2008, the Commission issued an opinion and award, authored by Commissioner Laura Kranifeld Mavretic and joined by Commissioners Bernadine S. Ballance and Christopher Scott, affirming the deputy commissioner's opinion and award in part and modifying it in part. The Commission first concluded:

> [P]laintiff's part-time employment as a press operator for defendant-employer is not suitable employment and therefore the wages he earned in this part-time employment do not establish post-injury wage earning capacity. Therefore, plaintiff is totally disabled and is entitled to total disability compensation at the rate of $522.38 per week from November 1, 2004 until further Order of the Commission. This compensation is subject to a deduction for the total disability compensation already paid to plaintiff for the period from January 11, 2006 until he returned to part-time work for defendant-employer.

(Internal citations omitted.)

The Commission then addressed defendants' contention that they were entitled to a credit for the payment of wages and partial disability while plaintiff was performing the unsuitable employment. The Commission concluded that "[t]he payment of wages by defendant-employer and of partial disability by defendant-carrier were due and payable when made and therefore, pursuant to N.C. Gen. Stat. §97-42, defendants are not be [sic] entitled to a credit." The Commission continued, however, that "even though no credit should be awarded, an employer is not required to make duplicative payments of benefits payable under the Workers' Compensation Act and an injured worker cannot receive more than he is entitled to receive by statute." The Commission then concluded that

plaintiff has received all the compensation to which he was entitled and therefore the Commission in its discretion holds that defendants are entitled to a credit for wages and partial disability compensation paid to plaintiff during the period plaintiff has continued to work for defendant-employer on a part-time basis.

The Commission also reversed the deputy commissioner's conclusion that plaintiff was entitled to payment of a 10% penalty for late payment of compensation. The Commission ordered instead that defendants pay a sanction of $500.00 to the Commission for violation of N.C. Gen. Stat. § 97-18(b). Finally, the Commission concluded that "[t]he defense of this claim was reasonable and not stubborn, unfounded litigiousness and, therefore, plaintiff is not entitled to attorney's fees pursuant to N.C. Gen. Stat. §97-88.1." Plaintiff timely appealed to this Court.

Discussion

"The scope of this Court's review of an Industrial Commission decision is limited 'to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.' " *Wooten v. Newcon Transp., Inc.*, 178 N.C. App. 698, 701, 632 S.E.2d 525, 528 (2006) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)), *disc. review denied*, 361 N.C. 704, 655 S.E.2d 405 (2007). Findings of fact made by the Commission "are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding." *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002). "The Commission's conclusions of law are subject to *de novo* review." *Id.*

I

[1] Plaintiff first assigns error to the Commission's conclusion that defendants are entitled to have plaintiff's workers' compensation award reduced by the amount of wages paid by defendant employer to plaintiff during his return to part-time work.[1] The Commission held that no credit was available to defendants under N.C. Gen. Stat. § 97-42 (2007) because these payments were due and payable when made. *See* N.C. Gen. Stat. § 97-42 ("Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and

1. Plaintiff has not, on appeal, argued that the Commission erred in deducting from his award the amounts paid in partial disability benefits.

payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation."). Neither of the parties dispute this conclusion.

The Commission then concluded, however, that

> even though no credit should be awarded [under N.C. Gen. Stat. § 97-42], an employer is not required to make duplicative payments of benefits payable under the Workers' Compensation Act and an injured worker cannot receive more than he is entitled to receive by statute. *Moretz v. Richards & Associates, Inc.*, 316 N.C. 539, 342 S.E.2d 844 (1986); *Estes v. N.C. State University*, 102 N.C. App. 52, 404 [sic] S.E.2d 384 (1991). The Commission concludes that plaintiff has received all the compensation to which he was entitled and therefore the Commission in its discretion holds that defendants are entitled to a credit for wages and partial disability compensation paid to plaintiff during the period plaintiff has continued to work for defendant-employer on a part-time basis.

In arguing that this conclusion—which awards defendants an offset despite the fact that no credit is available under N.C. Gen. Stat. § 97-42—was error, plaintiff focuses on the Commission's use of the word "credit." Plaintiff asserts that "[t]here is no statutory or common law basis for any discretion on the part of the Commission to grant a credit in this circumstance."

While the Commission unfortunately used the word "credit," N.C. Gen. Stat. § 97-42, addressing credits, does not set out the sole bases for deductions or offsets with respect to awards of disability benefits. It is apparent from the Commission's conclusion of law quoted above that rather than ordering a credit under N.C. Gen. Stat. § 97-42, the Commission was ordering a reduction or offset based on the Supreme Court's decision in *Moretz*, 316 N.C. at 542, 342 S.E.2d at 847, which was subsequently further explained by this Court in *Estes v. N.C. State Univ.*, 102 N.C. App. 52, 58, 401 S.E.2d 384, 387 (1991).

In *Moretz*, 316 N.C. at 540, 342 S.E.2d at 845, the defendants were ordered to pay permanent partial disability benefits for 180 weeks, but had already paid temporary total disability benefits for 362 weeks and two days. They contended that they should get a credit under N.C. Gen. Stat. § 97-42 for the compensation already paid to the plaintiff. 316 N.C. at 540, 342 S.E.2d at 845-46. The Supreme Court, however, held:

> Because defendants accepted plaintiff's injury as compensable, then initiated the payment of benefits, those payments were due and payable and were not deductible under the provisions of section 97-42, *so long* as the payments did not exceed the amount determined by statute or by the Commission to compensate plaintiff for his injuries.

Id. at 542, 342 S.E.2d at 846.

The Supreme Court then clarified that the proviso in this holding meant that the inquiry did not end with a conclusion that no credit was available under N.C. Gen. Stat. § 97-42, pointing out that "[r]egarding the issue of excessive payment, then, the question remains whether plaintiff is entitled to further compensation for his disability." 316 N.C. at 542, 342 S.E.2d at 846. The Court then concluded:

> According to the payment schedule of section 97-31 and in accord with the findings of the Commission, plaintiff was entitled to 180 weeks of disability payments. Plaintiff has received nearly 255 weeks of disability payments since that date. Plaintiff has therefore already received more than he was entitled by statute to receive. We hold that, regardless of how the payments made to plaintiff were characterized, the date upon which he reached his maximum recovery determined the initiation of the statutorily scheduled period of benefits for his remaining disability. Plaintiff has already been fully compensated for his injury, and we hold that defendants owe plaintiff no additional compensation.

Id., 342 S.E.2d at 847. Thus, in *Moretz*, even though no credit was available under N.C. Gen. Stat. § 97-42, the defendants were entitled to an offset for the workers' compensation payments already made to the plaintiff.

This Court applied the *Moretz* holding in *Estes*, 102 N.C. App. at 58, 401 S.E.2d at 387, observing that even "where a credit is not allowed, *Moretz* requires an additional determination as to whether an employee would thereby receive more than he is entitled by statute to receive." In *Estes*, the Court first held that defendants were not entitled to a credit under N.C. Gen. Stat. § 97-42 because the payments were due and payable when made. 102 N.C. App. at 58, 401 S.E.2d at 387. The Court then explained:

> The real question in the case now before the Court is whether the accumulated sick and vacation leave paid to plaintiff may lawfully be used by defendant to offset any amount of temporary

> total disability determined by the Industrial Commission to be owing to plaintiff under the Workers' Compensation Act.

Id.

In addressing this question, the Court noted that under the Workers' Compensation Act, N.C. Gen. Stat. § 97-6 and -7, "employers including the State are prohibited from providing benefits in lieu of paying workers' compensation." 102 N.C. App. at 58, 401 S.E.2d at 387. The Court then reasoned that vacation and sick leave benefits were not wage replacement payments because they were different in nature than workers' compensation benefits. Unlike workers' compensation benefits, which can only be given for work-related injuries, employees can use vacation and sick leave for a variety of reasons—for personal or family illnesses, for other personal reasons, for absences due to inclement weather, or "to renew physical and mental capabilities." *Id.* at 58-59, 401 S.E.2d at 387-88. The Court concluded:

> Such benefits have nothing to do with the Workers' Compensation Act and are not analogous to payments under a disability and sickness plan. Unlike the employee in *Moretz*, plaintiff in the instant case cannot be held to have received duplicative payments for his injury or to have received more than he was entitled by the Workers' Compensation Act to receive.

Id. at 59, 401 S.E.2d at 388.

In his brief, plaintiff does not address the applicability of the *Moretz* and *Estes* decisions to this case. Plaintiff, however, points to N.C. Gen. Stat. § 97-42.1 (2007) as demonstrating that the General Assembly did not intend to authorize any deductions other than for credits as set out in N.C. Gen. Stat. § 97-42 and unemployment benefits as set out in N.C. Gen. Stat. § 97-42.1. Plaintiff argues that the fact that "the Legislature saw fit to carve out [an] exception [in § 97-42.1] 'proves the rule' that no discretion was intended to be given to the Commission when payments were 'due and payable when made.' " N.C. Gen. Stat. § 97-42.1 became law in 1985—before *Moretz* and *Estes* were decided—and, accordingly, that statute cannot be a basis for revisiting the holdings in those cases.

Moretz and *Estes* do not, however, fully resolve this issue. Subsequently, in *Rice*, 154 N.C. App. at 684-85, 572 S.E.2d at 797-98, this Court articulated the test for determining whether previous payments made by an employer can qualify for an offset of an employee's

workers' compensation award based on *Moretz* and *Estes*. The Court explained that "even where [an employer's] payments were 'due and payable,' and thus, no credit is allowed, an employee may not receive more in wage supplements than he is entitled to receive under the Workers' Compensation Act." *Id.* at 684, 572 S.E.2d at 797 (citing *Moretz*, 316 N.C. at 542, 342 S.E.2d at 845-46; *Estes*, 102 N.C. App. at 58, 401 S.E.2d at 387). Therefore, "where an employer makes payments to an employee under a wage-replacement program, that employer is not required to make duplicative payments but is entitled to an offset against the workers' compensation benefits." *Id.*

The Court then concluded that it was required to remand to the Commission for further findings of fact:

> In the present case, the Commission correctly found that payments to plaintiff under the Plan were due and payable when made. However, the Commission failed to (1) make findings concerning the nature of the Plan and (2) determine whether the Plan was a wage-replacement benefit equivalent to workers' compensation benefits or whether the Plan served separately to entitle plaintiff to additional payments over and beyond the workers' compensation benefits. Therefore, this matter is remanded to the Commission to make additional determinations in accordance with this opinion.

Id. at 685, 572 S.E.2d at 798. In this case, the Commission did not apply the test set out in *Rice* or make the findings of fact required by *Rice*.

The decision under *Moretz*, *Estes*, and *Rice* is not simply a matter of mathematical calculation. The Commission cannot simply total the amounts paid by the defendants to determine whether those amounts equal or exceed the workers' compensation to which a plaintiff is entitled. In *Meares v. Dana Corp./Wix Div.*, 172 N.C. App. 291, 295, 615 S.E.2d 912, 916 (2005), the defendants argued that the severance payments made to the plaintiff by the defendant should be considered in determining whether the plaintiff was entitled to additional compensation. The defendants argued that "'[t]he court does not need to make a finding that the payment was tantamount to workers' compensation or that the benefits compensated him for his disability.' " *Id.* at 298, 615 S.E.2d at 918. This Court pointed out, however, that "[d]efendant cites no authority for this assertion, and relevant jurisprudence suggests otherwise." *Id.* (citing *Rice*, 154 N.C. App. at 684-85, 572 S.E.2d at 798).

The Court ultimately rejected the defendants' claim that they were entitled to an offset under *Moretz*:

> [T]he record contains no evidence that plaintiff's severance pay was in any way associated with his injury, disability, or workers' compensation claim. Defendant's severance agreement contains no indication that severance pay was part of a disability insurance plan or disability wage-replacement plan, or that it might be paid to compensate plaintiff for injury or disability. And, it is undisputed that plaintiff's severance pay began several months before his disabling surgery, and was calculated on the basis of his years of service to the company. The record evidence all suggests that plaintiff's severance pay had nothing to do with workers' compensation, and that he would have received the same amount of severance pay for the same duration if he had not been disabled.

Id. at 298, 615 S.E.2d at 918. *See also Allmon v. Alcatel, Inc.*, 124 N.C. App. 341, 345-47, 477 S.E.2d 90, 92-93 (1996) (holding that settlement received by claimant in federal discrimination suit did not count as "wage replacement" for which offset was authorized, because discrimination claim arose from employer's alleged discrimination, and workers' compensation claim arose from workplace accident).

Here, the Commission found that the work that plaintiff was performing for defendant employer was unsuitable, but did not find that the payments made to plaintiff for that work were tantamount to workers' compensation, that the payments were a wage-replacement benefit equivalent to workers' compensation, or were meant to compensate plaintiff for his disability. Moreover, the Commission specifically found that while plaintiff was performing this unsuitable work for defendant employer, he was required to "call[] in sick due to back pain about once a month" and used sick time or vacation leave for these absences. Thus, during the period in which plaintiff was working in the unsuitable part-time job and not receiving total disability compensation, he was required to use up vacation or sick leave. Even though *Estes* holds that such benefits cannot be used to offset unpaid workers' compensation benefits, it appears that the Commission's ruling, which does nothing to account for that leave, has that effect.

In short, we must remand for further findings of fact as to the nature of the payments made to plaintiff under *Rice* and *Meares*. Plaintiff also makes various equitable arguments about the effect of

giving defendants an offset in this case. Those arguments are for consideration by the Commission and may be urged by plaintiff on remand.

II

[2] Plaintiff next contends the Commission erred in concluding that he "is not entitled to payment by defendants of a 10% penalty for late payment of compensation" under N.C. Gen. Stat. § 97-18(g). That statute provides:

> If any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

Plaintiff argues that the Commission should have assessed a 10% penalty because defendants unilaterally decided to give themselves an offset by paying only partial disability benefits during the time plaintiff was working part-time. Plaintiff argues that defendants were required to formally notify the Commission that they were reducing plaintiff's benefits, and the failure to do so warrants the 10% penalty. Resolution of this issue is controlled by our decisions in *Kisiah*, 124 N.C. App. at 75, 476 S.E.2d at 435, and *Bostick*, 145 N.C. App. at 104, 549 S.E.2d at 560.

The plaintiff, in *Kisiah*, was injured at work and began to receive temporary total disability benefits. He returned to work on a part-time basis for the defendant, but at the start of his third week back at work, he was fired. The defendant discontinued payment of total disability benefits beginning the date the plaintiff returned to part-time work for the defendant, even though the defendant had not requested and received approval by the Commission to do so. 124 N.C. App. at 75, 476 S.E.2d at 435. Subsequently, after the plaintiff sought a hearing, the defendant mailed the plaintiff a check that the defendant contended was payment for temporary partial disability benefits for the period in which the defendant had ceased all payments to the plaintiff. The defendant then began making regular payments to the plaintiff in the amount it contended was appropriate as temporary partial disability. *Id.*

This Court reversed the Commission's finding that "no basis" existed upon which to assess a penalty against the defendant. *Id.* at 83, 476 S.E.2d at 440. The Court explained that under N.C. Gen. Stat. § 97-18(g), any installment of compensation not paid within 14 days after it is due is subject to a 10% late payment penalty charge. 124 N.C. App. at 83, 476 S.E.2d at 440. The Court said that "[o]n its own, defendant decided it was entitled to completely cease temporary total disability payments to plaintiff." *Id.* The record showed that the defendant had not filed a Form 24, Application to Stop Payment of Compensation, and the Commission's opinion and award did not mention receipt of that Form. Because "this [was] the exact behavior N.C. Gen. Stat. § 97-18 was enacted to prevent[,]" the defendant was subject to the 10% penalty. *Id.*

Similarly, in *Bostick*, 145 N.C. App. at 104, 549 S.E.2d at 560, the parties entered into a Form 21 agreement in which the defendant agreed to pay total disability for "necessary weeks" and began making such payments. Subsequently, the plaintiff returned to work in a modified job with the defendant and later left that job for another employer. *Id.* at 105, 549 S.E.2d at 560. While he was working for the other employer part-time, the defendant paid him partial disability, but then unilaterally stopped making the payments altogether. *Id.* at 106, 549 S.E.2d at 560.

This Court held that the plaintiff's job was not suitable employment and that because the defendants had failed to rebut the presumption of disability, the plaintiff was entitled to continuing total disability. *Id.* at 108, 549 S.E.2d at 562. The Court then held:

> In this case, the approved Form 21 constituted an award of the Commission, *see* G.S. § 97-82(b); Workers' Compensation Rule 503, and defendants never sought permission from the Commission to terminate compensation, *see* G.S. § 97-18(b); Workers' Compensation Rule 404. Because the provisions of G.S. § 97-18(g) are mandatory ("there *shall* be added"), we are compelled to conclude that a 10% penalty is due.

Id. at 110, 549 S.E.2d at 563. *See also Tucker v. Workable Co.*, 129 N.C. App. 695, 703-04, 501 S.E.2d 360, 366 (1998) (holding that 10% penalty was appropriate sanction for defendant's unilateral termination of payments).

Here, defendants filed a Form 60 and initiated payments of total disability benefits pursuant to that Form 60. *See Calhoun v. Wayne*

Dennis Heating & Air Conditioning, 129 N.C. App. 794, 797, 501 S.E.2d 346, 348 (1998) (holding that employer's execution of Form 60 is award of the Commission), *disc. review dismissed*, 350 N.C. 92, 532 S.E.2d 524 (1999). Subsequently, when plaintiff returned to part-time work with defendant employer, defendants terminated the total disability benefit payments without notifying the Commission, precisely as occurred in *Kisiah*, *Bostick*, and *Tucker*. Based on these prior decisions, the Commission should have ordered that defendants pay a 10% penalty for late payment of plaintiff's benefits. *See also Burchette v. East Coast Millwork Distribs., Inc.*, 149 N.C. App. 802, 809-10, 562 S.E.2d 459, 464 (2002) (upholding imposition of 10% penalty because defendant-employer terminated total disability compensation without filing Form 28T).

Defendants argue that because they paid plaintiff wages and partial disability, they paid plaintiff all he was due and that he, therefore, is not entitled to a 10% penalty. Defendants have overlooked the fact that they did *not* pay all of the workers' compensation benefits that were due, but unilaterally decided to pay partial disability benefits (together with wages) rather than the total disability benefits to which the Commission found plaintiff was entitled. In determining whether a penalty is authorized under N.C. Gen. Stat. § 97-18(g), the focus is on whether workers' compensation payments that were due under the law were actually paid. Here, they were not, even though the Commission may decide that defendants are entitled to an offset of any amounts due as a result of non-workers' compensation payments made. We, therefore, reverse and remand for the imposition of a 10% penalty.

III

[3] Finally, plaintiff contends the Commission erred in determining that defendants had reasonable grounds to defend plaintiff's claim and that "plaintiff is not entitled to attorney's fees pursuant to N.C. Gen. Stat. §97-88.1." N.C. Gen. Stat. § 97-88.1 provides:

> If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them.

In *Meares v. Dana Corp.*, 193 N.C. App. 86, 93, 666 S.E.2d 819, 825 (2008), *disc. review denied*, 363 N.C. 129, 673 S.E.2d 359 (2009), this Court explained:

> Review of an award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 is [sic] requires a two-part analysis. First, [w]hether the [party] had a reasonable ground to bring a hearing is reviewable by this Court *de novo*. For a reviewing court to determine whether a defendant had reasonable ground to bring a hearing, it must consider the evidence introduced at the hearing. The determination of reasonable grounds is not whether the party prevails in its claim, but whether the claim is based on reason rather than stubborn, unfounded litigiousness.

(Internal citations and quotation marks omitted.) If this Court agrees that the party lacked reasonable grounds, then we review the Commission's decision whether to award attorneys' fees and the amount awarded for abuse of discretion. *Id.*

Plaintiff contends defendants' argument that they were entitled to have the partial disability and wage payments they made set off against the total disability ultimately awarded was unreasonable and warrants the imposition of attorneys' fees. We do not agree. Defendants prevailed on the issue whether they were entitled to an offset for partial disability payments made to plaintiff. With respect to the question of a set off for the wages defendants paid to plaintiff, our earlier discussion of *Moretz* and *Estes* demonstrates the existence of a substantial issue that defendants reasonably litigated.

With respect to the suitability of the part-time position, based upon our review of the evidence and the applicable law, we do not believe that defendants' choice to litigate the issue was based on stubborn, unfounded litigiousness. While defendants ultimately did not prevail, their contention that plaintiff could perform the job—which he did for two years—was not unreasonable, and defendants presented testimony of the employer's owner and a vocational expert that arguably supported defendants' position that the position did not involve make work. Defendants' defense of plaintiff's claim was supported by evidence and rational arguments, and, therefore, we affirm the trial court's decision to deny attorneys' fees.

Reversed and remanded in part; affirmed in part.

Judges McGEE and BEASLEY concur.

RUTH ANN MORRIS, PLAINTIFF v. SOUTHEASTERN ORTHOPEDICS SPORTS MEDICINE AND SHOULDER CENTER, P.A., KEVIN P. SPEER, EXECUTIVE SURGICAL CENTER, INC., STOCKS SURGICAL CENTER, P.L.L.C., AND LEWIS HENRY STOCKS, III, DEFENDANTS

No. COA08-1372

(Filed 1 September 2009)

1. Appeal and Error— record—documents excluded by trial court

Documents concerning plaintiff's treating physician should not have been excluded from the record on appeal in a medical malpractice action in which plaintiff's expert witness designation (PEWD) was in dispute. Under Appellate Rule 11(c), the trial court is not to decide whether material desired in the record by either party is relevant; moreover, the doctor's deposition and affidavit go to the heart of the issues on appeal and are clearly relevant.

2. Appeal and Error— record—petition for certiorari—expert witness designation—included

A petition for *certiorari* was granted to include plaintiff's expert witness designation in the record on appeal where defendant had asked to exclude it on the grounds that it was not considered by the trial court. Not being considered is not the same as not being submitted, which defendants do not dispute.

3. Appeal and Error— record—petition for certiorari—deposition—submitted to trial court

In a dispute over the settlement of an appellate record, *certiorari* was granted to include a deposition that defendant contended was not submitted to the trial court. The deposition was submitted because plaintiff filed a Notice of Filing and handed a copy to the court at the hearing. There was no prejudice because defense counsel attended the deposition and vigorously examined the doctor.

4. Appeal and Error— record—affidavit—filed on day of hearing and before entry of judgment—timely

An affidavit from a treating physician in a medical malpractice case should have been included in the record on appeal where defendants argued that the affidavit was not timely filed but the record did not support that contention. The affidavit was

clearly filed on the day of the hearing and well before entry of judgment, and defendants have not argued that the affidavit was not timely served on them.

5. Medical Malpractice— identification of expert—compliance with discovery order—timeliness

Dismissal of plaintiff's medical malpractice complaint was not an appropriate discovery sanction to the degree that the dismissal was based upon any failure of plaintiff to identify an expert witness in accordance with the Consent Discovery Scheduling Order (CDSO).

6. Medical Malpractice— identification of expert—retained for other purposes

A Rule 9(j) dismissal was improper where it was based on the treating physician's deposition testimony that the treatment given was below the standard of care and that he was willing to testify to that opinion before the suit was filed. Rule 9(j) does not require that the person who gives an opinion as to the standard of care prior to filing the complaint be an expert witness whom plaintiff has specifically retained for this purpose only.

Appeal by plaintiff from order entered 24 January 2007 by Judge Orlando F. Hudson, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 6 May 2009.

The Law Offices of Robert O. Jenkins, by Robert O. Jenkins, for plaintiff-appellant.

Crawford & Crawford, LLP, by Renee B. Crawford, Robert O. Crawford, III, and Heather J. Williams, for defendant-appellees.

STROUD, Judge.

Plaintiff appeals from the order dismissing her medical negligence complaint with prejudice pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. We reverse and remand.

I. Background

On 23 September 2002, plaintiff fractured her right clavicle while rollerblading. Plaintiff sought treatment from defendant Kevin P. Speer, M.D. ("Dr. Speer"), an employee of defendant Southeastern

Orthopedics Sports Medicine and Shoulder Center, P.A. ("South eastern") in Wake County. Dr. Speer inserted and later removed a pin from plaintiff's right clavicle, but the fracture did not heal. On 3 February 2003, Dr. Speer completely removed plaintiff's right clavicle.

Plaintiff later sought treatment from Carl J. Basamania, M.D. ("Dr. Basamania") for related shoulder problems. Dr. Basamania performed three surgeries on plaintiff's shoulder, the last on 17 June 2005.

On 12 January 2005, plaintiff filed a complaint in Superior Court, *Durham* County against Southeastern and Dr. Speer.[1] The complaint alleged medical negligence in the removal of plaintiff's clavicle. The complaint specifically asserted compliance with Rule 9(j) of the North Carolina Rules of Civil Procedure.

Defendants answered on 16 March 2005, denying that plaintiff's injuries had been caused by any negligence on their part. The answer also asserted the affirmative defense of contributory negligence on the grounds that plaintiff had failed to return for post-operative followup care. Defendants served plaintiff with Rule 9(j) interrogatories.

On 26 April 2005, plaintiff served her answers to defendant's Rule 9(j) interrogatories. Plaintiff averred that she had contacted Dr. Donald Ferlic on or about 20 October 2004 and that on or about 15 November 2004 Dr. Ferlic stated that he was willing to testify that defendants breached the applicable standard of care.

Plaintiff's Expert Witness Designation (or "PEWD") was served on defendants' counsel by first-class mail on 1 June 2006. The PEWD was filed, according to the file stamp on the face of the document, on 2 June 2006 with the ***Wake*** County Clerk of Superior Court. The PEWD named Dr. Basamania as an "expert witness who may be called to testify at the trial of this action[.]" The PEWD noted, however, that "Dr. Basamania is not a retained expert witness, but instead will offer his testimony as Ms. Morris' subsequent treating physician."

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1. On 4 January 2006, plaintiff amended the complaint to add Lewis Henry Stocks III, M.D. and Stocks Surgical Center, P.L.L.C. (successor to Executive Surgical Center, Inc.) as defendants. However, on 2 May 2008 plaintiff voluntarily dismissed those two defendants with prejudice. Dr. Stocks and Stocks Surgical Center, P.L.L.C. are not parties to this appeal.

A Consent Discovery Scheduling Order (or "CDSO") was signed by Judge Kenneth C. Titus on 29 August 2006[2] and filed on or about 1 September 2006. The CDSO required, in pertinent part:

> 2. By **June 1, 2006**, the plaintiff shall identify any and all expert witnesses whom she may call to testify at trial.
>
> . . . .
>
> 4. Plaintiff will make all expert witnesses available for deposition by **August 1, 2006**.

(Emphasis in Original.)

On or about 27 November 2006, defendants moved to dismiss the complaint for failure to comply with Rule 9(j) certification requirements. The specific basis for defendants' motion was that Dr. Ferlic's deposition testimony indicated he did not review the standard of care until after plaintiff's complaint had already been filed.

On 5 December 2006, Dr. Basamania was deposed and examined by both parties. Dr. Basamania testified that plaintiff's care fell below the applicable standard. Dr. Basamania stated, that in October 2004, he had communicated to plaintiff's attorney that he considered removal of plaintiff's clavicle to be below the applicable standard of care and that he was willing to testify to that fact.

Also on 5 December 2006, plaintiff served supplemental answers to defendants' Rule 9(j) interrogatories. The supplemental answers were filed with the trial court on 9 January 2007. The supplemental answers averred that plaintiff had contacted Dr. Basamania on or about 5 October 2004 and that Dr. Basamania stated at that time his willingness to testify that defendants breached the applicable standard of care in treating plaintiff.

The trial court heard the motion to dismiss on or about 9 January 2007. On 24 January 2007, the trial court dismissed with prejudice plaintiff's complaint against Southeastern and Dr. Speer on the basis of Rule 9(j) non-compliance. Plaintiff appeals from the 24 January 2007 order of dismissal.

II. Record on Appeal

The parties were unable to settle the record by agreement. On 2 October 2008, plaintiff moved the trial court to judicially settle the

2. The CDSO purported to be signed by Judge Titus on 29 August 200**7** though it was filed on or about 1 September 200**6**. We assume that it was actually signed on 29 August 2006, before it was filed.

record on appeal. Defendants objected, *inter alia*, to inclusion of the following documents:

> [1] The plaintiff's Designation of Expert Witnesses should not be included in the Record on Appeal in that the designation was not considered by the trial court and is not material or relevant to the issues which are the basis of the appeal.
>
> [2] The transcripts of the depositions of Carl Basamania, M.D., on September 26, 2006 and December 5, 2006 should not be included in the Record on Appeal or considered by the appellate court in that these materials were not submitted to the trial court for its consideration on the defendants' motion to dismiss which forms the basis of this appeal[.]
>
> [3] The Notice of Filing and attached affidavits [of, *inter alia*, Dr. Basamania,] should not be included in the Record on Appeal in that they were not timely filed and were not considered by the trial court[.]

The trial court sustained defendants' objections and settled the record accordingly.

On 3 November 2008, plaintiff filed a Rule 11(c) Supplement to the Printed Record on Appeal ("the Supplement") with this Court. The Supplement included Plaintiff's Expert Witness Designation and the 5 December 2006 deposition of Dr. Basamania. The Supplement also included a 4 January 2007 affidavit from Dr. Basamania stating that on 5 October 2004, he had communicated his willingness to testify to his opinion that plaintiff's care fell below the applicable standard.

Also on 3 November 2008, plaintiff filed a petition for a writ of certiorari with this Court requesting review of the trial court's order settling the record on appeal on the basis that the order erroneously excluded, *inter alia*, the three documents enumerated above.

Rule 11(c) of the North Carolina Rules of Appellate Procedure states, in pertinent part:

> If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in three copies of a volume captioned "Rule 11(c) Supplement to the Printed Record on Appeal," along with any ver-

> batim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 9(c) or 9(d); *provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered, shall not be included.* Subject to the additional requirements of Rule 28(d), items in the Rule 11(c) supplement may be cited and used by the parties as would items in the printed record on appeal.
>
> If a party does not agree to the wording of a statement or narration required or permitted by these rules, *there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. . . .*
>
> . . . .
>
> The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 9(c)(1) and *to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal*, non-duplicative, or otherwise suited for inclusion in the record on appeal.

N.C.R. App. P. 11(c) (emphasis added).

A. Relevance

[1] Only the objection to the PEWD expressly mentions relevance, but defendants imply that each of disputed documents involving Dr. Basamania is irrelevant. Defendants argue that plaintiff's claim must rest only upon Dr. Ferlic's opinion, which discovery later indicated was formed *after* the complaint was filed, because plaintiff had initially identified only Dr. Ferlic as an expert for purposes of Rule 9(j) compliance. Defendants further argue that the documents related specifically to Dr. Basamania are irrelevant because "Dr. Basamania is not a retained expert witness, but instead will offer his testimony as Ms. Morris' subsequent treating physician."

We first note that the trial court is specifically "*not to decide* whether material desired in the record by either party is *relevant* to

the issues on appeal[.]" N.C.R. App. P. 11(c) (emphasis added). Review by the trial court on the grounds that the PEWD, deposition, and affidavit were not relevant to the appeal was improper.

Oddly, defendants' argument that Dr. Basamania is "not a retained expert witness" is based solely on a statement in the same PEWD which they now contend is irrelevant. In fact, Dr. Basamania's deposition testimony and affidavit go to the heart of the issues raised by this appeal, so we conclude they are clearly relevant.

B. Consideration by the Trial Court

Defendants also argue that the three documents should not be included on the record on appeal because they were either not submitted for consideration to the trial court or were not considered by the trial court at hearing on the motion to dismiss. As defendants' argument varies slightly as to each document, we will address each individually.

1. PEWD

[2] Defendants requested the trial court to exclude the PEWD on the grounds that it "was not considered by the trial court." However, review by the trial court on those grounds was improper.

According to *Carson v. Carson*:

> Defendant's request [to settle the record on appeal] was improper because a party may only request the trial court "settle the record on appeal" if that party "contends that materials proposed for inclusion in the record or for filing therewith . . . were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof . . . ." [N.C.R. App. P. 11(c).] None of these contentions were made by either defendant or plaintiff and thus *review by the trial court would have been improper.*

177 N.C. App. 277, 280, 628 S.E.2d 439, 441 (2006). Contending that material is not *considered* by the trial court is different from contending that the material was not "***submitted*** for consideration." *See* N.C.R. App. P. 11(c) (emphasis added). Although plaintiff initially filed the PEWD in the wrong county, defendants do not dispute that the PEWD was *submitted* for consideration to the trial court. Neither the record nor the briefs contain any indication that defendants ever objected to the PEWD on the basis that it was filed in the wrong county or that it was not *submitted* for consideration by the trial court at the time of the hearing on the motion to dismiss.

The PEWD was served on defendants, bringing it within the scope of documents allowed to be included in a Rule 11(c) Supplement to the Record on Appeal. N.C.R. App. P. 11(c) ("[A]ny item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered, shall not be included."). Accordingly, we grant plaintiff's petition for writ of certiorari as to the PEWD and will consider it as part of our review.

2. Deposition of Dr. Basamania

[3] Defendants contended to the trial court that the deposition of Dr. Basamania was "not submitted to the trial court for its consideration[.]" However, plaintiff filed a Notice of Filing of Dr. Basamania's deposition on 9 January 2007 and alleges on appeal, without dispute by defendants, that he handed a copy of the deposition to the trial court at the hearing. We conclude that Dr. Basamania's deposition was submitted to the trial court for its consideration.

Furthermore, we perceive no prejudice to defendant in reviewing Dr. Basamania's deposition in this appeal because defense counsel attended the deposition and vigorously examined Dr. Basamania. In fact, during the deposition of Dr. Basamania, defendants' attorney acknowledged, "you have been identified as an expert witness in the case . . . ." *See Stines v. Satterwhite*, 58 N.C. App. 608, 613, 294 S.E.2d 324, 328 (1982) ("We note that the [plaintiff's] affidavit . . . in no way surprised [defendant]. Hence, we find no prejudice."). Accordingly, we grant plaintiff's petition for writ of certiorari as to the deposition of Dr. Basamania and consider it as part of our review.

3. Affidavit of Dr. Basamania

[4] Defendants contended to the trial court that the affidavit of Dr. Basamania "should not be included in the Record on Appeal in that [it was] not timely filed and [was] not considered by the trial court[.]" We have already rejected the proposition that a trial court has authority to review a request to exclude a document from the record on appeal simply on the basis that it had not been *considered* by the trial court. *See supra* Part II.B.1.

Defendants' brief on appeal explains that they deem the affidavit "not timely filed," because "there was no basis for the court to consider . . . materials that were not filed until after the court rendered a decision." There is no transcript in the record to support this statement; the record shows only that the affidavit was filed on the day of the hearing, 9 January 2007, while the trial court entered the order dismissing the action on 24 January 2007.

Even if the affidavit was filed after rendering of judgment, defendants cite no rule, nor are we aware of one, which states that an affidavit in opposition to a Rule 9(j) motion to dismiss is not timely filed unless it is filed before judgment is *rendered*. *See Precision Fabrics Group, Inc. v. Transformer Sales and Service, Inc.*, 344 N.C. 713, 719, 477 S.E.2d 166, 169 (1996) (error to exclude affidavit opposing summary judgment simply because it is not filed until the day of the hearing). "The announcement of judgment in open court is the mere rendering of judgment," and is subject to change before "entry of judgment." *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 214, 580 S.E.2d 732, 737 (2003) (citation and quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). "A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." 158 N.C. App. at 214, 580 S.E.2d at 737 (citation, brackets and quotation marks omitted). The affidavit was clearly filed on the day of hearing and well before *entry* of judgment. Defendants have not argued that the affidavit was not timely *served* upon them. The trial court should have overruled defendants' objection based on the timeliness of filing.

Because we conclude the documents referring to Dr. Basamania are relevant and were not untimely filed, we grant plaintiff's petition for writ of certiorari as to the PEWD, Dr. Basamania's affidavit and deposition. Accordingly, we will consider these documents as part of the record on appeal.[3]

III. Proper Time to Identify Experts

[5] Defendants contend that the affidavit and deposition of Dr. Basamania are unavailing because "Dr. Basamania was not identified as a [Rule] 9(j) expert . . . prior to the deadline established by the Consent Discovery Scheduling Order." In effect, defendants argue that discovery sanctions for failure to timely identify experts are sufficient grounds to support the trial court's dismissal of plaintiff's complaint without consideration of the merits of plaintiff's substantive claims.

A. Dates set by Consent Discovery Scheduling Order

Defendants specifically argue:

> The Consent Discovery Scheduling Order in this case provided that the plaintiff 'shall identify any and all expert witnesses whom

3. Because the PEWD, the deposition of Dr. Basamania, and the affidavit of Dr. Basamania are dispositive of this appeal, we need not consider any of the other issues raised in plaintiff's writ of certiorari.

> she may call to testify at trial by ***April 1, 2005***.' Plaintiff was required to make all expert witnesses available for deposition by ***June 1, 2006***. Plaintiff did serve Supplemental Answers to Defendants' Rule 9(j) Interrogatories on December 5, 2006, and filed that same with the court on January 9, 2007. This was obviously well outside the scope of the Consent Discovery Scheduling Order, and was entirely improper.

(Emphasis added.) The Consent Discovery Scheduling Order ("CDSO"), signed by the trial court on 29 August 2006, filed on or about 1 September 2006, and *attached to defendants' brief as an appendix* actually states:

> 2. By **June 1, 2006**, the plaintiff shall identify any and all expert witnesses whom she may call to testify at trial.
>
> . . . .
>
> 4. Plaintiff will make all expert witnesses available for deposition by **August 1, 2006**.

(Emphasis in Original.)

As emphasized above, the dates which defendants contend to be dispositive as to whether Dr. Basamania may be considered as an expert witness for purposes of Rule 9(j) compliance are inaccurately stated in defendants' brief. However, we have no reason to believe that defendants have intentionally tried to mislead the court, since the correct dates appear in the appendix to their brief. For that reason, we assume the erroneous dates to be an oversight rather than an attempt to deliberately mislead this Court, but we admonish counsel to take particular care in quoting documents accurately, especially when their argument depends on it.

B. Analysis

Though defendants do not cite Rule 26 of the North Carolina Rules of Civil Procedure, they apparently base their timeliness argument on it. Rule 26 states, in pertinent part:

> In a medical malpractice action . . . the judge shall . . . direct the attorneys for the parties to appear for a discovery conference. At the conference the court . . . shall . . . . [e]stablish an appropriate schedule for designating expert witnesses, consistent with a discovery schedule . . . ; and [e]stablish by order an appropriate discovery schedule designated so that, unless good cause is

> shown at the conference for a longer time, and subject to further orders of the court, discovery shall be completed within 150 days after the order is issued . . . ; and [] [a]pprove any consent order which may be presented by counsel for the parties relating to [expert witness designation or discovery scheduling], unless the court finds that the terms of the consent order are unreasonable.
>
> If a party *fails to identify an expert witness as ordered*, the court shall, upon motion by the moving party,[4] impose an appropriate sanction, which may include *dismissal of the action*, entry of default against the defendant, or exclusion of the testimony of the expert witness at trial.

N.C. Gen. Stat. § 1A-1, Rule 26 (f1) (2007) (emphasis and footnote added).

To the extent that the trial court's dismissal was based upon any failure of plaintiff to identify an expert witness in accordance with the CDSO, we do not agree that dismissal of plaintiff's complaint was an appropriate discovery sanction in this situation. First, sanctions are not appropriate when a discovery order requires a party to do the impossible. *Laing v. Liberty Loan Co.*, 46 N.C. App. 67, 71, 264 S.E.2d 381, 384 (citing *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L. Ed. 2d 1255 (1958) (reversing dismissal of complaint for failure to comply with discovery order when foreign law prohibited compliance)), *disc. review denied*, 300 N.C. 557, 270 S.E.2d 109 (1980). It was clearly impossible for plaintiff to comply with a discovery order that required compliance before the order was signed by the trial judge on 29 August 2006 and filed on or about 1 September 2006.

Second, as to Dr. Basamania, plaintiff had *already* complied with the CDSO as to identification of him as an expert witness when the CDSO was entered.[5] Plaintiff identified Dr. Basamania, as re-

4. There is nothing in the record to indicate that defendants' motion to dismiss was based even in part upon a request for sanctions pursuant to Rule 26. However, while Rule 26(f1) appears to require "motion by the moving party," such a motion may not be necessary in all cases, as the North Carolina Supreme Court did not require such a motion in *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) ("[D]efendants did not move for sanctions pursuant to Rule 26(f1); instead, they moved for summary judgment pursuant to Rule 56. Nevertheless, in the interests of justice and to avoid additional delay, we will review plaintiff's appeal pursuant to our authority under Rule 2 of the North Carolina Rules of Appellate Procedure.").

5. The fact that plaintiff had already identified Dr. Basamania as an expert witness before entry of the CDSO may be one reason why the parties agreed to enter into a consent order which set deadlines that had already passed when it was filed.

quired by Rule 26(f1), as an expert on 1 June 2006. This date was in accordance with the CDSO. Further, there is nothing in the record to indicate that Dr. Basamania was not made available for the taking of his deposition in a timely manner as required by the CDSO. Although his deposition was actually taken on 5 December 2006, the record does not indicate that he was not "available for deposition" prior to 1 August 2006. The record is silent as to the reason that his deposition was not taken sooner.

Third, defendants expressly waived the right to move for rejection of Dr. Basamania's 5 December 2006 deposition on the basis that it was not scheduled in accordance with the CDSO by clearly stipulating at the beginning of the deposition:

> Any objections of any party hereto as to notice of the taking of said deposition or as to the *time and place thereof* . . . shall be taken as *hereby waived*; . . . [and] all formalities and requirements of the statute with respect to *any formalities not herein expressly waived are hereby waived, especially including the right to move for the rejection of this deposition before trial* for any irregularities in the taking of the same, either in whole or in part *or for any other cause* . . . .

(Emphasis added.)

In light of the above, effectively dismissing plaintiff's complaint as a sanction for failure to comply with the discovery order, as defendants urge, would have been erroneous. Instead, we will consider the issues regarding Dr. Basamania's qualifications on the merits.

IV. Treating Physician as a Rule 9(j) Expert

[6] Plaintiff contends that Rule 9(j) dismissal was improper because Dr. Basamania[6] "had provided an opinion that the care in questions [sic] was below the applicable standard of care and that he was willing to testify to that opinion prior to the suit being filed." As evidence, plaintiff relies on Dr. Basamania's deposition testimony that in October of 2004 he "indicated that [he] considered removing the clavicle to be below the standard of care[.]" Plaintiff also relies on an affidavit signed by Dr. Basamania on 4 January 2007 which stated: "My opinion that removal of or recommendation of removal of Ms. Morris' clavicle was below the standard of care has not changed since I first

6. Because we decide in plaintiff's favor on this issue, we need not address the parties' arguments regarding the affidavit and deposition of plaintiff's "retained expert," Dr. Ferlic.

began treating her and since I first spoke with [plaintiff's attorney] in October 2004. I am still willing to testify to those opinions." In response, defendants argue that, "[a]ccording to the plaintiffs's designation filed on June 2, 2006, Dr. Basamania was in fact not an expert, and had only agreed to testify as subsequent treating physician." We agree with plaintiff.

A. Standard of Review

In reviewing an order dismissing a medical malpractice case for want of Rule 9(j) compliance, this Court has stated:

> [W]hen ruling on such a motion, a court must consider the facts relevant to Rule 9(j) and apply the law to them. Thus, a plaintiff's compliance with Rule 9(j) requirements clearly presents a question of law to be decided by a court, not a jury. A question of law is reviewable by this Court *de novo*."

Phillips v. Triangle Women's Health Clinic, Inc., 155 N.C. App. 372, 376, 573 S.E.2d 600, 603 (2002) (citations omitted), *aff'd per curiam*, 357 N.C. 576, 597 S.E.2d 669 (2003).

B. Controlling Law

Rule 9(j) states in pertinent part:

> Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless . . . [t]he pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2007).

Plaintiff's complaint clearly asserts Rule 9(j) compliance on its face, but "it is also now well established that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate." *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008). What must be established in discovery is not whether the witness is "in fact not an expert[,]" but whether "there is ample evidence in th[e]

record that a reasonable person armed with the knowledge of the plaintiff at the time the pleading was filed would have believed that [the witness] would have qualified as an expert under Rule 702." *Trapp v. Maccioli*, 129 N.C. App. 237, 241, 497 S.E.2d 708, 711, *disc. review denied*, 348 N.C. 509, 510 S.E.2d 672 (1998).

C. *Trapp* Analysis

The first prong of *Trapp* is to determine "the knowledge of the plaintiff at the time the pleading was filed[.]" 129 N.C. App. at 241, 497 S.E.2d at 711; *see also Thigpen v. Ngo*, 355 N.C. 198, 205, 558 S.E.2d 162, 167 (2002) ("Rule 9(j) expert review must take place before the filing of the complaint."). On 1 June 2006, plaintiff served defendants with an expert witness designation. The document stated that plaintiff

> hereby designates the following expert witnesses who may be called to testify at the trial of this action: 1. **Carl Basamania, M.D.** . . . **Durham, NC** . . . . Dr. Basamania is not a retained expert witness, but instead will offer his testimony as [plaintiff's] subsequent treating physician. . . . Dr. Basamania may offer testimony on the following: (1) [t]he standard of care for the treatment [of plaintiff's original injury] . . . . [and] (6) that *it was below the standard of care to perform a total claviculectomy on [plaintiff.]*

(Bold font in original; italics added.)

When Dr. Basamania was subsequently deposed on 5 December 2006, he testified that he had formed an opinion that the standard of care had been breached and had expressed his willingness in October 2004 to testify to that fact. Dr. Basamania also signed an affidavit on 4 January 2007 stating that on 5 October 2004 he had communicated to plaintiff's attorney his willingness to testify to his opinion that plaintiff's care fell below the applicable standard. Defendants do not dispute the factual allegations of Dr. Basamania's affidavit or deposition as to the timing of his review of plaintiff's care, his formation of an opinion regarding the standard of care, or his willingness to testify. We conclude that plaintiff's care was reviewed by Dr. Basamania and he was willing to testify that plaintiff's care fell below the applicable standard before the complaint was filed. This fact was within plaintiff's knowledge at the time the complaint was filed.

The second prong of *Trapp* is whether "a reasonable person . . . would have believed that [the witness] would have qualified as an

expert under Rule 702." 129 N.C. App. at 241, 497 S.E.2d at 711. Rule 702 requires, in pertinent part:

> In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:
>
> (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
>
> a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
>
> b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.
>
> (2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:
>
> a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
>
> b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C. Gen. Stat. § 8C-1, Rule 702(b) (2007).

At the time the complaint was filed, Dr. Basamania was an orthopedic surgeon, the same specialty as defendant Dr. Stocks. This fact would have caused a reasonable person to believe Dr. Basamania

would have met the requirements of Rule 702(b)(1)(a). Dr. Basamania is also Chief of Adult Reconstructive Shoulder Surgery and an Assistant Professor of Surgery in the Division of Orthopedic Surgery at Duke University Medical Center in Durham, North Carolina. At the time of the occurrence of the acts giving rise to the action, Dr. Basamania had been at Duke University Medical Center for four years. These facts would cause a reasonable person to believe that Dr. Basamania also met the requirements of Rule 702(b)(2).

We find no evidence which arose during discovery suggesting that Dr. Basamania could not be reasonably expected to qualify as an expert and no evidence that Dr. Basamania was ever unwilling to testify as to the standard of care. Even though the PEWD stated that Dr. Basamania was "not a retained expert witness, but instead [would] offer his testimony as [plaintiff's] subsequent treating physician[,]" discovery provided ample evidence "that a reasonable person armed with the knowledge of the plaintiff at the time the pleading was filed would have believed that [Dr. Basamania] would have qualified as an expert under Rule 702." *Trapp*, 129 N.C. App. at 241, 497 S.E.2d at 711. Rule 9(j) does not require that the person who gives an opinion as to the standard of care prior to filing the complaint be an expert witness whom the plaintiff has specifically retained for this purpose only. A treating physician may provide the review required by Rule 9(j) as long as he or she meets the qualifications of the rule. Accordingly, this assignment of error is overruled.

V. Conclusion

Plaintiff's complaint facially complied with Rule 9(j). Upon consideration of Dr. Basamania's qualifications and opinion as to the standard of care, which were properly before the trial court, plaintiff's statement of compliance with Rule 9(j) was supported by the facts. Accordingly, we reverse the trial court order dismissing plaintiff's complaint for failure to comply with Rule 9(j) and remand to the trial court for further proceedings.

Reversed and Remanded.

Judges ELMORE and ERVIN concur.

FRANK BAUMAN, MICHAEL BROUGH, PAM JONES, GENE FRAZELLE, AND GREG TILLMAN, PLAINTIFFS v. WOODLAKE PARTNERS, LLC, WOODLAKE PARTNERS, LIMITED PARTNERSHIP, DEFENDANTS, FRANK A. DUBE, KARL B. KILLINGSTAD, JUDITH R. KILLINGSTAD, WITHERS G. HORNER, ELIZABETH A. HORNER, AND ELIZABETH LANTZ, DEFENDANT-INTERVENORS

No. COA08-897

(Filed 1 September 2009)

1. Trials— nonjury trial—failure to make specific findings of fact—failure to make separately stated conclusions of law

The trial court did not err in a nonjury trial by failing to make specific findings of fact and separately state its conclusions of law. The Court of Appeals was able to adequately evaluate the propriety of the trial court's order and plaintiffs were not entitled to a judgment in their favor under any view of the evidence.

2. Waters and Adjoining Lands— navigable waterway—public trust doctrine

The trial court did not err by failing to determine that Crane's Creek constituted a navigable waterway so that a lake formed by damming the creek was subject to the public trust doctrine and available for use by the public without charge. A stream cannot be said to be navigable in fact for purposes of subjecting a lake created by damming that stream to the public trust doctrine in the absence of evidence tending to show that the pertinent stream is passable by watercraft over an extended distance both upstream of, under the surface of, and downstream from the lake.

Appeal by Plaintiffs from judgment entered 16 January 2008 by Judge Lindsay R. Davis, Jr. in Moore County Superior Court. Heard in the Court of Appeals 9 March 2009.

Van Camp, Meachum & Newman, PLLC, by Michael J. Newman, for Plaintiffs.

Gill & Tobias, LLP, by Douglas R. Gill, for Defendants.

West & Smith, LLP by Stanley West, for Defendant-Intervenors.

ERVIN, Judge.

Plaintiffs, owners of real property situated in Woodlake Country Club (Woodlake), appeal a judgment entered by the trial court in

favor of Defendants, Woodlake Partners, LLC, and Woodlake Partners, Limited Partnership, the owner and developer of Woodlake. Plaintiffs sought, among other things, a declaration that Defendants' imposition of a lake access fee charged to those Woodlake property owners desiring boating privileges was contrary to law and could not be enforced. For the reasons stated below, we affirm the trial court's judgment.

Factual Background

Woodlake is a gated residential community located near Vass in Moore County. Among its varied amenities is a lake with a surface area of approximately 1,200 acres formed by the damming of two creeks, one of which is known as Crane's Creek.

Ingolf Boex (Boex) is the Defendants' sole shareholder and president. In 2000, after obtaining sole ownership of Defendants, Boex adopted the Woodlake Constitution and By-Laws, which supplemented Woodlake's Rules and Regulations. According to the Rules and Regulations, two categories of membership were available at Woodlake: a Premiere Membership and a Social Membership.[1] Regardless of whether one was a Premiere or Social resident, all members enjoyed unfettered access to the lake without the necessity for paying a fee.

At a Board of Advisors meeting held in November, 2004, Boex announced plans to implement new membership categories and rights that were to become effective 1 January 2005. Among the changes Boex intended to implement was the imposition of an annual lake access fee of $1,250 that had to be paid in order for a property owner to operate a boat on the lake.

On 12 May 2005, Plaintiffs filed a declaratory judgment action against Defendant in which Plaintiffs requested that the court examine the relevant provisions of the Woodlake Constitution, By-laws, Rules and Regulations and the applicable law in order to determine the rights of the parties. Among the declarations sought by Plaintiffs was a pronouncement that "the purported implementation by Defendant[] of a lake access fee violates the parties' agreements and violates the Plaintiff's right of access to navigable waters as set forth

1. The essential difference between the two categories of membership at Woodlake is that a Premiere membership provided membership in the Woodlake Golf Association while the Social membership did not. A third category of membership, transitional membership, is not relevant to the present dispute.

in applicable state and federal law."[2] Plaintiffs subsequently filed an amended complaint on 27 May 2005.

On 22 July 2005, Defendants filed a motion for judgment on the pleadings and an answer in which they denied the material allegations of Plaintiffs' complaint and requested that the complaint be dismissed with prejudice. On 5 September 2005, Frank A. Dube, Karl P. Killingstad, Judith R. Killingstad, Withers G. Horner, Elizabeth Horner, and Elizabeth Lantz filed a motion to intervene and a complaint in intervention in which they sought leave to participate in this proceeding in alignment with Defendants. On 19 November 2005, Judge Donald L. Smith entered a Consent Order allowing Intervenors' intervention and authorizing Intervenors to file an answer to Plaintiffs' amended complaint. On 22 December 2005, Intervenors filed an answer and counterclaim in which they denied the material allegations of Plaintiffs' amended complaint and requested the court to uphold Defendant's actions. On 17 February 2006, Plaintiffs filed a reply to Intervenors' counterclaim.

This case came on for trial before Judge Lindsay R. Davis, Jr., at the 14 January 2008 civil session of Moore County Superior Court. At that session of court, the parties eventually stipulated to an agreed-upon resolution of all issues related to the proper interpretation of the Constitution and By-Laws and Rules and Regulations. In light of the parties' agreement, the trial court determined that "the only issue to be tried [was] whether the waters of the lake [were] "navigable waters." The lone disputed issue was heard by the trial court, sitting without a jury.

At trial, Plaintiff, Frank Bauman (Bauman), presented evidence on behalf of himself and the other Plaintiffs.[3] Bauman testified that he and plaintiffs, Mike McGee (McGee) and Don Jones (Jones), took a half-mile canoe trip on Crane's Creek upstream from the lake during the summer of 2006. The trip taken by Bauman, Jones, and McGee was videotaped, and the videotape was introduced into evidence. At the time of their voyage up Crane's Creek, Bauman and

2. Due to the nature of the relief sought and the number of affected parties, Plaintiffs requested that this case be certified as a class action pursuant to N.C. Gen. Stat. § 1A-1, Rule 23. By means of an order dated 4 August 2005, Judge James M. Webb certified this case as a class action, allowing all Woodlake members to intervene as plaintiffs in the action.

3. Defendant and Intervernors were provided with an opportunity to introduce evidence, but elected not to do so.

Jones utilized a canoe that was approximately seventeen feet in length while McGee paddled a twelve-foot kayak.

The boats were launched near a bridge on McLaughlin Road, which runs north and south and separates Woodlake on the east from other privately owned land on the west. At the point where the canoe was launched, the creek was approximately 100 feet in width. At the conclusion of the half-mile trip, the width of the stream from bank to bank remained the same. In addition, the three men encountered a tributary of Crane's Creek during their travels that appeared to be navigable itself.

As they traveled upstream in a westerly direction, the three men dipped their oars, which were approximately six to eight feet in length, into the water at various points in order to measure its depth. When the three men tested the water's depth in this manner, their oars were completely submerged.

Aside from describing his trip up Crane's Creek, Bauman testified that Crane's Creek appeared to be navigable by small boat at the point where it intersected Crane's Creek Road and Cypress Creek Road, which are located about two to three miles upstream from the lake. Although Bauman had not personally paddled along Crane's Creek below the dam that created the lake, he testified that he was aware that others had done so.

After Plaintiffs rested, Defendants and Intervenors elected to refrain from presenting evidence and moved to dismiss. After hearing the arguments of counsel, the trial court took the matter under advisement. On 16 January 2008, the trial court entered an Order and Judgment in which it determined "that the [D]efendants[']] and [D]efendant-[I]ntervenors[']] motions to dismiss at the close of the evidence are granted, and [P]laintiffs' claim based on the [D]efendants' imposition of a fee for use of the lake is dismissed, with prejudice." In the concluding paragraph of its order, which attempted to explain the basis for its decision, the trial court stated that:

> The "test" for navigability . . . requires a showing that the body of water is navigable by watercraft in its natural condition. "Natural condition" clearly means without modification at the hands of man. *See Fitch v. Selwyn Village*, 234 N.C. 632, 635, 68 S.E.2d 255, 257 (1951), which involved a claim based on attractive nuisance, and in which the Court distinguished between artificial impoundments and streams which flow in their "natural state." The plain-

> tiffs offered evidence that the lake is man-made, by the damming of two creeks. They offered evidence that one of the creeks, Cranes Creek, is navigable in its natural condition upstream of the lake, but no evidence whether it is navigable in its natural condition at the site of the lake or downstream. . .

Plaintiffs noted an appeal to this Court from the trial court's judgment.

Procedural Issues and Standard of Review

[1] Trials conducted by the court sitting without a jury are governed by N.C. Gen. Stat. § 1A-1, Rule 41. N.C. Gen. Stat. § 1A-1, Rule 41(b) provides, in pertinent part, that:

> After the plaintiff, in an action . . . without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

Ordinarily, the standard of review on appeal from a judgment entered by a trial judge sitting without a jury is whether there was competent evidence to support the trial court's findings of fact and whether the trial court's conclusions of law were proper in light of such facts. *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 37, 351 S.E.2d 786, 792 (1987). The trial court's factual findings in such a proceeding are treated in the same manner as a jury verdict and are conclusive on appeal if they are supported by the record evidence. *Hunt v. Hunt*, 85 N.C. App. 484, 488, 355 S.E.2d 519, 521 (1987). A trial court's conclusions of law, however, are reviewable *de novo*. *Wright v. T&B Auto Sales, Inc.*, 72 N.C. App. 449, 325 S.E.2d 493, 495 (1985).

According to Plaintiffs, the trial court erred by failing to make specific findings of fact and to separately state its conclusions of law. Generally speaking, Plaintiffs have accurately described what a trial court is supposed to do at the conclusion of a non-jury trial. "In all actions tried upon the facts without a jury . . . the court *shall* find the facts specially and state separately its conclusions of law thereon and

direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(1)(1); *Pineda-Lopez v. N.C. Growers Ass'n*, 151 N.C. App. 587, 589, 566 S.E.2d 162, 164 (2002) (emphasis in original). Furthermore, "[t]he requirement that findings of fact be made is mandatory, and the failure to do so is reversible error." *Graphics, Inc. v. Hamby*, 48 N.C. App. 82, 89, 268 S.E.2d 567, 571 (1980) (citing *Carteret County General Hospital Corp. v. Manning*, 18 N.C. App. 298, 300, 196 S.E.2d 538, 539 (1973)); *see also Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999).

Admittedly, the trial court's order is not couched in the usual form, in which separately-numbered findings of fact are followed by separately-numbered conclusions of law, all of which lead up to and provide a justification for the result reached by the trial court. The absence of such separately-stated findings of fact and conclusions of law does not, even if erroneous, invariably necessitate a grant of appellate relief. Instead, the critical factor in determining whether an alleged error necessitates a new trial or some other form of relief is the extent to which "this Court is unable to determine the propriety of the order unaided by findings of fact explaining the reasoning of the trial court." *Hill*, 135 N.C. App. at 518, 520 S.E.2d at 800. Assuming *arguendo* that the trial court's order lacks sufficient, separately-numbered findings and conclusions to comply with N.C. Gen. Stat. § 1A-1, Rules 41(b) and 52(a), we do not believe that such an error necessitates an award of appellate relief in this instance for two different, albeit related, reasons.

First, as we have already noted, the trial court found that Plaintiffs "offered evidence that the lake is man-made, by the damming of the two creeks" and that "one of the creeks, Crane[']s Creek, is navigable in its natural condition upstream of the lake." However, the trial court also noted that Plaintiffs offered "no evidence whether [Crane's Creek] was navigable in its natural condition at the site of the lake or downstream." In view of the fact that we are able to discern the factual basis for the trial court's decision from the language of its order, we conclude that the trial court's failure to separately state the basis for its decision in the form of traditional findings and conclusions has not precluded us from ascertaining the extent to which the trial court's decision has adequate evidentiary support and the extent to which the trial court properly applied the law to the facts. Thus, since we are able to adequately evaluate "the propriety of the order," *Hill*, 135 N.C. App. at 518, 520 S.E.2d at 800, we do not believe that an award of appellate relief is necessary

in this case even if the trial court's failure to set out separately enumerated findings of fact and conclusions of law violated N.C. Gen. Stat. § 1A-1, Rules 41(b) and 52(a).

Secondly, despite the fact that a trial judge sitting without a jury serves as the trier of fact and "may weigh the evidence, find the facts against plaintiff and sustain defendant's motion [for involuntary dismissal] at the conclusion of his evidence even though plaintiff has made out a *prima facie* case which would have precluded a directed verdict for defendant in a jury case," *Helms v. Rea*, 282 N.C. 610, 619, 194 S.E.2d 1, 7 (1973), the trial court may have also faced a situation in which Plaintiff was not entitled to relief under any theory given the facts in the record. In such an instance, no remand for proper findings is necessary even if the trial court failed to make proper findings. *Green Tree Financial Servicing Corp. v. Young*, 133 N.C. App. 339, 341, 515 S.E.2d 223, 224 (1999) (stating that "when a court fails to make appropriate findings or conclusions, this Court is not required to remand the matter if the facts are not in dispute and only one inference can be drawn from them"); *Harris v. N.C. Farm Bureau Mut. Ins. Co.*, 91 N.C. App. 147, 150, 370 S.E.2d 700, 702 (1988) (stating that "a remand to the trial court is not necessary if the facts are not in dispute and if only one inference can be drawn from the undisputed facts.") As a result, we conclude that, in the event the evidence presented to the trial court, even when considered in the light most favorable to Plaintiff, is insufficient to sustain a decision in Plaintiff's favor, a failure to make adequate findings of fact and conclusions of law as required by N.C. Gen. Stat. § 1A-1, Rules 41(b) and 52(a), will not be deemed to constitute prejudicial error. For the reasons set forth below, we do not believe that Plaintiffs are entitled to judgment in their favor under any view of the evidence, so that no award of appellate relief is required here for that reason as well.

Substantive Analysis

[2] On appeal, Plaintiffs contend that the trial court erred by failing to determine that Crane's Creek constitutes a navigable waterway, so that the lake is subject to the public trust doctrine and available for use by the public without charge. According to Plaintiffs, the public trust doctrine is applicable to "those lakes that are created by interrupting the flow of a naturally occurring navigable stream." Petitioners equate North Carolina's "navigable-in-fact" test to a recreational boating test, under which the ability to travel up and down a stream in a kayak would render that stream navigable in law and, therefore, subject to the public trust doctrine. After careful review of

the applicable law and the evidence presented at trial, we conclude that Plaintiffs failed to adequately demonstrate the navigability of Crane's Creek, so that the lake at Woodlake is not subject to the public trust doctrine.

Though "the extent of the public trust ownership of North Carolina is confused and uncertain . . . the Supreme Court of North Carolina has affirmed original state ownership of . . . lands under all waters navigable-in-fact." Thomas J. Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C.L.Rev. 1, 17 (1970-71). Under the public trust doctrine, navigable waters are held in trust for the public based on "inherent public rights in these lands and waters." *Gwathmey v. State of North Carolina*, 342 N.C. 287, 293, 464 S.E.2d 674, 677 (1995). The rights of the public in waters subject to the public trust doctrine are established by common law and extend to "the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State[.]" N.C. Gen. Stat. § 1-45.1.

According to the Supreme Court:

> The controlling law of navigability as it relates to the public trust doctrine in North Carolina is as follows: "'If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation.' " [136 N.C.] at 608-09, 48 S.E. at 588 (quoting *Attorney General v. Woods*, 108 Mass. 436, 440 (1871)). In other words, if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose. Lands lying beneath such waters that are navigable in law are the subject of the public trust doctrine. . . .

Gwathmey, 342 N.C. at 301, 464 S.E.2d at 681. As a result, "the public ha[s] the right to [] unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are *in their natural condition* capable of such use." *Gwathmey*, 342 N.C. at 300, 464 S.E.2d at 682 (quoting *State v. Baum*, 128 N.C. 600, 38 S.E. 900, 901 (1901) (emphasis added)). The public retains the right to travel, by watercraft, on waters which are in their natural condition, capable of such use, without the consent of the riparian owners. *Gwathmey*, 342 N.C. at 300-01, 464 S.E.2d at 682.

Gwathmey clearly states that the public has a right to unobstructed navigability of waters in their natural state. Water that is navigable in its natural state flows without diminution or obstruction. *Wilson v. Forbes*, 13 N.C. 30, 35 (1828). As the trial court noted, "plaintiffs contend that[,] if the lake is navigable in fact, that is enough to sustain their position that the defendants cannot impose a use fee." Thus, the principal issue before the trial court was whether Crane's Creek was "navigable in fact."

At most, the competent evidence presented by Plaintiffs demonstrated that one could take a canoe and a kayak one half mile upstream on Crane's Creek from the lake and that Crane's Creek appeared passable in a canoe or kayak at two road crossings several miles upstream from the lake. Thus, when taken in the light most favorable to Plaintiffs, the evidence reflects, as the trial court found, that "Cranes Creek[] is navigable in its natural condition upstream of the lake"[4] and that there was "no evidence whether it was navigable in its natural condition at the site of the lake or downstream."[5] As a result, the issue presented for decision by this Court is whether such evidence would suffice, if believed, to support a finding that the lake is subject to the public trust doctrine.

In attempting to demonstrate that the record evidence sufficed to demonstrate that the lake is subject to the public trust doctrine, Plaintiffs candidly admit that they have not identified any decisions of the Supreme Court or of this Court that address the issue which is before us in this case. For that reason, Plaintiffs place principal reliance on two decisions from other jurisdictions in support of their

4. Actually, Plaintiffs' evidence did not demonstrate that Crane's Creek was navigable by canoe or kayak for its entire length between the lake and the two road crossings described by Bauman. Instead, Plaintiffs' evidence merely tended to show that Crane's Creek could be navigated in such craft for a half mile upstream from the lake and at two other isolated upstream points. Thus, the trial court's finding is actually more favorable to Plaintiffs than the evidence that they adduced at trial.

5. Admittedly, Bauman testified that he had heard that someone else had traveled in a canoe on Crane's Creek downstream from the lake. Aside from the fact that the testimony that Bauman "kn[e]w people that had" "put in below the dam and tried to paddle the creek" likely constituted inadmissible hearsay, N.C. Gen. Stat. § 8C-1, Rule 802, which the trial court is presumed to have disregarded in reaching its decision, *In re Foreclosure of Brown*, 156 N.C. App. 477, 487, 577 S.E.2d 398, 405 (2003) ("When sitting without a jury, the trial court is able to eliminate incompetent testimony, and the presumption arises that it did so."), nothing in this portion of Bauman's testimony indicates that water conditions were normal at the time that these attempts were made or that they were even successful. As a result, there is no error in the trial court's failure to determine that Crane's Creek was navigable in fact below the dam that resulted in the creation of the lake.

contentions. After carefully examining these decisions, we do not believe that they support Plaintiffs' position.

In *State v. Head*, 330 S.C. 79, 498 S.E.2d 389 (1997), the defendant was convicted of violating a statute which prohibited fishing "on the lands of another." The 246 acre site, known as Black's Pond, on which the defendant was charged with illegally fishing was created by damming Black Creek in Lexington County, South Carolina. *Id.* at 84, 498 S.E.2d at 391. The dispositive issue in *Head* was whether Black's Pond was navigable and, thus, subject to the public trust doctrine. *Id.* at 88, 498 S.E.2d at 393. In support of his contention that the water was open to public use, the defendant "produced aerial photographs as well as a map entitled 'Navigable Waters of South Carolina' " which had been produced by the South Carolina Water Resources Commission "reflect[ing] the Commission's determination of navigable waterways through its interpretation of the applicable statutes and regulations," which "list[ed] . . . the relevant area of Black Creek as a navigable waterway." *Id.* at 85, 498 S.E.2d at 392. Although a lower tribunal found that the damming of Black Creek rendered it nonnavigable, *Id.*, the South Carolina Court of Appeals held that "the existence of occasional natural obstructions to navigation . . . or artificial obstructions to navigation, such as dams, generally does not change the character of an otherwise navigable stream" and reversed the defendant's conviction for violating the relevant statute. *Id.* at 90, 498 S.E.2d at 394 (citation omitted).

In *Diversion Lake Club v. Heath*, the owners of property on the shores of a lake created by the damming of the Medina River filed suit to enjoin the defendants from boating and fishing in the lake waters. 126 Tex. 129, 86 S.W.2d 441 (1935). The defendants, in turn, asserted their rights to use the lake under the public trust doctrine. *Id.* Prior to the damming of the lake, the Medina River had been designated as navigable by Texas statute. *Id.* at 132, 86 S.W.2d at 442. In deciding that the defendants were entitled to access to the lake under the public trust doctrine, the Texas Supreme Court determined that "statutory navigable streams in Texas are public streams," that "their beds and waters are owned by the State in trust for the benefit and best interests of all the people," and that such streams are "subject to use by the public for navigation, fishing and other lawful purposes, as fully and to the same extent that the beds and waters of streams navigable in fact are so owned and so held in trust and subject to such use." *Id.* at 138, 86 S.W.2d at 445.

Although we do not quarrel with the result reached in either of the cases upon which Plaintiffs rely, both are readily distinguishable from the present case. In both *Head* and *Diversion Lake Club*, the streams that fed into Black Pond and Diversion Lake had been declared navigable by public agencies. Plaintiffs have not produced similar evidence in this case. Moreover, we do not believe, and are not holding, that the mere fact that a dam has been placed across a navigable stream, without more, suffices to render that stream non-navigable. Were we to adopt such a rule, many of the major rivers in North Carolina, such as the Catawba and the Yadkin, would become non-navigable, which would be a troubling result. Finally, while *Head* contains language to the effect that the ability to use small boats on a stream renders it navigable in fact, that decision does not provide us with much guidance on the proper disposition of this case, which hinges on whether evidence that a stream can be traversed in small boats in isolated locations renders that stream navigable in fact for purposes of the public trust doctrine. Thus, we do not find either of the out-of-state decisions upon which Plaintiffs place principal reliance to be particularly useful in resolving the issue before us in this case.

After careful consideration of the record evidence, we conclude that Plaintiff's evidence, as reflected in the trial court's findings, does not suffice to support a determination that Crane's Creek is navigable in fact. As we have already noted, Plaintiff's evidence tends to establish merely that Crane's Creek is navigable in canoes and kayaks for about a half mile upstream from the lake and at a couple of upstream road crossings at a greater distance from the lake. Plaintiffs did not present any evidence addressing the navigability of Crane's Creek prior to the formation of the lake. Moreover, the record does not contain evidence that would support a finding that Crane's Creek was or had been navigable downstream from the lake or under the area now covered by the lake under normal conditions. Furthermore, there were significant "holes" in Plaintiffs' evidence relating to the navigability of Crane's Creek. For example, Bauman testified on cross-examination that:

> Q Now Cranes Creek comes roughly down west, comes under U.S. 1, and then comes over to Woodlake. Is that correct?
>
> A Correct
>
> Q So you didn't—you didn't attempt to put your kayak or your canoe in Cranes Creek over to the west at U.S. 1?

A No.

Q And did you—did you attempt to put your kayak or your canoe into Cranes Creek below the dam which is roughly at the far eastern end of Woodlake?

A I didn't, no.

. . .

Q Have you done—have you done any examinations of the Cranes Creek territory or the Woodlake territory using U.S. Coast and Geodetic Survey Maps or anything else like that?

A I have seen maps, yes.

Q But you haven't studied those?

A It depends on what you mean by study.

Q Or done—done calculations, that sort of thing?

A No.

Q And did you—did you ever look at any maps or U.S.G.S. surveys that existed before the Woodlake dam was installed?

A I—I—Yes, I have seen some. Yes.

Q And do you have those with you?

A No.

Finally, despite the trial court's findings with respect to the navigability of Crane's Creek upstream from the lake, Bauman provided testimony on cross-examination that raised questions about the extent to which the expedition which he, Jones, and McGee took occurred during a time in which there were normal water conditions.

Q Mr. Bauman, on the videotape that we watched, would it be fair to say that in that area you were paddling, just from observing the video, there was very little current?

A Yes. The current was not an issue with us.

Q In fact, the current in the area you paddled in was negligible, wasn't it?

A The current is negligible? Yes, I'd say.

Q Okay

A Yes

. . .

Q So the water impounded by the lake in fact impounds the water—that is, the water backed up all the way to the bridge you put in at is water that's backed up from the dam, isn't it, as opposed to the original creek?

A I can't say that.

Q Well, as soon as you go under McLaughlin Bridge there, is it not true that it's very wide right there, far wider than the creek, that immediately widens out?

A Not a great deal, no. It's about the same size as you come through the bridge there. And it stays pretty much the same size. It might be a little wider as you get to the golf course, yes.

Q It's not the original creek bank there, is it?

A I have no idea.

Q And wouldn't it be fair to say that because there's no current in the area you were paddling and it is wider than—certainly than the creek as you get up into it that most of the area you were paddling is actually impounded backed-up water?

A I didn't say there wasn't current. I just said there wasn't current that impeded our progress. I'm quite sure that there was probably current there. I've seen current—I've seen current there a number of times.

Thus, the record evidence, even when taken in the light most favorable to Plaintiffs, merely tends to show that Crane's Creek was navigable in small watercraft at various points upstream from the lake.

After a thorough review of the record and the applicable law, we conclude that a stream cannot be said to be navigable in fact for purposes of subjecting a lake created by damming that stream to the public trust doctrine in the absence of evidence tending to show that the stream in question is passable by watercraft over an extended distance both upstream of, under the surface of,[6] and downstream from the lake. If we were to find that Plaintiffs' evidence sufficed to trigger

6. Obviously, the determination of whether a stream was navigable in fact under the surface of a lake should hinge upon its navigability as of the time before the lake existed.

application of the public trust doctrine in this instance, we would effectively be holding that the navigability of a stream should be tested using short segments of the relevant waterway and that the same stream could have short, intermittent, intermingled navigable and non-navigable sections, a result which would introduce considerable confusion and difficulty into the application of the public trust doctrine in North Carolina. We do not believe that such a result is mandated by or consistent with applicable North Carolina law and decline to adopt such an approach.

As a result, for the reasons set forth above, we hold that the trial court correctly concluded that the absence of evidence tending to show that Crane's Creek was "navigable in fact" for a meaningful distance both upstream of, under the surface of, and downstream from the lake precluded a finding that the lake was subject to the public trust doctrine. Furthermore, given that Plaintiffs' evidence was insufficient to permit a valid determination that the lake was subject to the public trust doctrine and that the trial court correctly concluded that Plaintiffs' failure to demonstrate that Crane's Creek was navigable under the surface of and downstream from the lake, any error that the trial court may have committed by failing to make separately-numbered findings and conclusions does not necessitate an award of appellate relief. Thus, the trial court's determination that Plaintiffs had failed to demonstrate that the lake is subject to the public trust doctrine should be affirmed.

Conclusion

Thus, we conclude that Plaintiffs received a fair trial free from prejudicial error. As a result, the trial court's judgment should be, and hereby is, affirmed.

AFFIRMED.

Chief Judge MARTIN and JUDGE WYNN concur.

COUCOULAS/KNIGHT PROPERTIES, LLC, PLAINTIFF v. TOWN OF HILLSBOROUGH, A NORTH CAROLINA MUNICIPALITY AND ITS BOARD OF COMMISSIONERS, DEFENDANTS

No. COA08-1087

(Filed 1 September 2009)

1. Zoning— rezoning request denied—not discriminatory

The superior court erred by overturning the denial of plaintiff's rezoning request on the ground that it was unduly discriminatory. Substantial evidence supported the Town's denial and there was no evidence that plaintiff was treated differently from others similarly situated. The superior court did not apply the whole record test properly.

2. Zoning— consistency statement—approval of rezoning not required

Plaintiff's cross-assignment of error in a zoning case was overruled where plaintiff contended that approval of the rezoning request was required after the Board's adoption of a statement that the rezoning was consistent with the Town's zoning plan. Consistency between the proposed rezoning and the plan does not mean that denial of the proposal was inconsistent.

3. Zoning— rezoning—discretion of Board—not limited by ordinance

The Town was not required to approve plaintiff's rezoning request by language in an ordinance that the discretion of the Board to deny rezoning is not limited if it determines that the rezoning is not in the public interest. The ordinance gives the Board the authority to deny requests that are not in the public interest; the public interest safety valve is not applicable here.

4. Zoning— denial of change—not arbitrary and capricious—comments of Board members

The denial of a zoning request was not arbitrary and capricious where nothing in the record supported the assertion that any of the Board members acted arbitrarily; rather, the whole record indicates that the Board gave careful consideration to the request and that those members who voted against it did so with a reasonable basis.

Judge CALABRIA dissenting.

Appeal by defendants from order and judgment entered 1 April 2008 by Judge Donald W. Stephens in the Orange County Superior Court. Heard in the Court of Appeals 21 May 2009.

Brown & Bunch, PLLC, by LeAnn Nease Brown, for plaintiff-appellee.

The Brough Law Firm, by Robert E. Hornik, Jr., for defendants-appellants.

BRYANT, Judge.

The Board of Commissioners of the Town of Hillsborough (defendants) appeal from an order and judgment of the Orange County Superior Court concluding that the denial of plaintiff's conditional use zoning request unintentionally treated plaintiff in a manner different than other similarly situated applicants and was unduly discriminatory toward plaintiff, overturning the denial, and remanding the zoning request to defendants with instructions to grant the request. Defendants also appeal from a judgment and order requiring defendants to take action on plaintiff's conditional use permit request. As discussed below, we reverse.

Facts

Plaintiff owns 2.16 acres of land in three separate lots located at the intersection of North Churton Street and Corbin Street in Hillsborough, North Carolina ("the property"). A small portion of the property is zoned NB (neighborhood business) and the remainder of the property is zoned R-20 (medium density residential). The R-20 district allows development of neighborhoods primarily composed of single and two-family residences. The property is also located within Hillsborough's historic district.

North Churton Street is designated by the Churton Street Corridor Strategic Plan ("the plan") as a "district gateway." According to the plan, district gateways function as "transition points between one district and another."

On 28 July 2006, plaintiff submitted a request to rezone the property to a Entranceway Special Use ("ESU") zoning district. Hillsborough's Zoning Ordinance established an ESU district pursuant to N.C. Gen. Stat. § 160A-382, and, pursuant to that statute, property may be zoned an ESU district only in response to a petition by the owner of the property.

Defendants bring forth the following arguments on appeal: whether the superior court erred by (I) determining that the denial of plaintiff's rezoning request had the unintentional consequence of being unduly discriminatory and treating plaintiff in a manner different than others similarly situated; (II) ordering defendants to grant plaintiffs' rezoning request; (III) ordering defendants to take action on plaintiffs' application for a special use permit in 07 CVS 685.

Through cross-assignment of error pursuant to N.C. R. App. P. 10(d), plaintiff argues the superior court deprived him of an alternative basis in law for supporting the final order and judgment on the following bases: (I) defendants' actions were inconsistent with the purposes of Hillsborough's comprehensive plan; (II) defendants' denial did not bear a substantial relationship to the public health, safety, morals or welfare and was not in the public interest; and (III) defendants' actions were whimsical, willful, unreasonable, arbitrary, and capricious.

Defendants' Arguments

[1] Defendants argue that the superior court erred in overturning its denial of plaintiff's rezoning request on the ground that the Board's decision resulted in plaintiff being treated differently than other similarly situated applicants and was unduly discriminatory. We agree.

"Ordinarily, the only limitation upon [a municipal body's] legislative authority is that it may not be exercised arbitrarily or capriciously." *Allred v. City of Raleigh*, 277 N.C. 530, 545, 178 S.E.2d 432, 440 (1971). Furthermore,

> [w]hen the most that can be said against [zoning] ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare.

In re Appeal of Parker, 214 N.C. 51, 55, 197 S.E. 706, 709, *disc. appeal dismissed*, *Parker v. Greensboro*, 305 U.S. 568, 83 L. Ed. 358 (1938). In determining whether a Board decision is arbitrary and capricious, "the reviewing court must apply the 'whole record' test." *Sun Suites Holdings, LLC, v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 528, *writ of supersedeas and disc.*

review denied, 353 N.C. 280, 546 S.E.2d 397 (2000) (internal citation and quotation marks omitted). This test

> requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the [Board's] decision is supported by substantial evidence.
>
> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The reviewing court should not replace the [Board's] judgment as between two reasonably conflicting views; [w]hile the record may contain evidence contrary to the findings of the [Board], this Court may not substitute its judgment for that of the [Board].

SBA, Inc. v. City of Asheville City Council, 141 N.C. App. 19, 26, 539 S.E.2d 18, 22 (2000) (internal quotation marks and citations omitted). Further, in reviewing the superior court's order

> the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.

Amanini v. N.C. Dep't of Human Resources, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994) (internal citations omitted). "[A] determination [that the trial court erred in its review] might well require remand of the case to the trial court for its application of the proper standard of review." *Sun Suites*, 139 N.C. App. at 274, 533 S.E.2d at 528 (citation omitted). However, in the interests of judicial economy, when the entirety of the record is before us, this Court may conclude remand is unnecessary. *See id.*, 533 S.E.2d at 528-29. Thus, "if we conclude there is substantial evidence in the record to support the Board's decision, we must uphold it." *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998).

Here, the superior court stated the proper standard of review, the whole record test; however, because substantial evidence supports the Board's decision, we conclude that the court did not apply the whole record test properly.

Pursuant to N.C.G.S. § 160A-385(a), when a valid protest petition has been submitted in response to a rezoning request, as the parties agree occurred here, the rezoning does not become effective except by a favorable vote of three-fourths of the Board, a supermajority.

N.C. Gen. Stat. § 160A-385(a)(1) (2007). The record shows an active debate among board members about the appropriateness of the ESU designation for the property during the 9 April 2007 meeting where the matter was considered. Essentially, the meeting minutes indicate that two board members expressed concern that the ESU designation was not intended for residential or historic district properties, while three board members believed that the ESU designation was appropriate for the property. Reflecting these opinions, the vote was three to two in favor of the rezoning. Thus, a simple majority of the Board actually supported plaintiff's proposed project, but the supermajority required by section 160A-385(a)(1) did not.

The superior court, in its review of the Board's decision, concluded that

> the result of the vote of the Board . . . denying plaintiff's conditional use rezoning request had the unintended consequence and result of treating plaintiff in a manner that is different than other similarly situated applicants for rezoning requests and of being unduly discriminatory to plaintiff.

The superior court failed to make a conclusion about whether substantial evidence in the record supported the Board's decision. Instead, the superior court overturned the Board's decision based on an equal protection argument.

"The Fourteenth Amendment to the United States Constitution and Article I Sec. 19 of the Constitution of North Carolina provide that no person shall be deprived of the equal protection of the laws." *Durham Council of the Blind v. Edmisten, Att'y Gen.*, 79 N.C. App. 156, 158, 339 S.E.2d 84, 86 (1986), *appeal dismissed and disc. review denied*, 316 N.C. 552, 344 S.E.2d 5 (1986). "Equal protection guards citizens from being treated differently under the same law from others who are similarly situated." *Gainey v. N.C. Dep't of Justice*, 121 N.C. App. 253, 262, 465 S.E.2d 36, 43 (1996).

After a thorough review of the whole record, we are unable to identify any evidence, let alone substantial evidence, that plaintiff was treated differently from others similarly situated. The superior court in its order made the following finding of fact, which appears to be the main basis for the conclusion quoted above:

> 63. Some Commissioners observed that denial of plaintiff's conditional use rezoning request was not consistent with prior actions

of the Board such as a recently approved project on Churton Street, in the Historic District that included condominiums.

Plaintiff cites various comments made by board members during the 9 April 2007 meeting which he contends show differential treatment. For example, Commissioner Hallman opined that denial of this project based on a strict application of zoning ordinances or on a technicality would be inconsistent with past actions. In addition, Commissioner Dancy, in voicing support for the project, noted that issues similar to those raised by the project were raised during the Board's consideration of the condominiums on Weaver Street, a project which was approved. However, these comments do not support the portion of the superior court's finding that the Board had "recently approved [a] project on Churton Street, in the Historic District that included condominiums." In fact, the parties stipulated that none of the prior ESU rezoning requests concerned property in the historic district.

The comments cited by plaintiff reflect differing opinions by various members, but they are not evidence of undue discrimination and different treatment of similarly situated properties. Simply put, neither the board members' comments nor any other part of the record specifies a single specific property that is similarly situated to the property here in terms of size, proposed use, density, historic nature or any other factor for which an ESU rezoning request was granted.

The Board's decision was supported by substantial evidence and the superior court erred in replacing the Board's "judgment as between two reasonably conflicting views" about whether the rezoning request should be granted. *See SBA*, 141 N.C. App. at 26, 539 S.E.2d at 22. Reviewing courts may not "substitute [their] opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body." *Ashby v. Town of Cary*, 161 N.C. App. 499, 503, 588 S.E.2d 572, 574 (2003) (internal citation and quotation marks omitted).

Further, the superior court erred in remanding the matter in 07 CVS 685 for the Board to consider plaintiff's special use permit application for the property. Plaintiff does not dispute that rezoning of the property was a prerequisite to obtaining an ESU special use permit pursuant to zoning ordinances §§ 2.16 and 4.39. Because the superior court erred in 07 CVS 684 by ordering the Board to grant plaintiff's rezoning request, plaintiff was not entitled to Board action on the special use permit application.

Plaintiff's Cross-Assignments of Error

[2] Appellate Rule 10(d) is "designed to protect appellees who have been deprived . . . of an alternative basis in law upon which their favorable judgment might be supported and who face the possibility that on appeal prejudicial error will be found in the ground upon which [the] judgment was actually based." *Stevenson v. Dept. of Ins.*, 45 N.C. App. 53, 56-7, 262 S.E.2d 378, 380 (1980). Plaintiff first argues that the consistency statement adopted by the board pursuant to N.C. Gen. Stat. §160A-383 required rezoning of the property. This argument is without merit.

Plaintiff is correct that this statute requires that

> [z]oning regulations shall be made in accordance with a comprehensive plan. When adopting or rejecting any zoning amendment, the governing board shall also approve a statement describing whether its action is consistent with an adopted comprehensive plan and any other officially adopted plan that is applicable, and briefly explaining why the board considers the action taken to be reasonable and in the public interest. That statement is not subject to judicial review.

N.C. Gen. Stat. §160A-383 (2009). The Board here adopted a consistency statement, which provided that the rezoning request was consistent with Hillsborough's comprehensive zoning plan. Plaintiff contends that this action required rezoning approval because "failure to zone in a manner consistent with the Comprehensive Plans cannot withstand judicial scrutiny." Plaintiff's reasoning is misplaced. The fact that the rezoning would have been consistent with the comprehensive zoning plan does not mean than that denying the rezoning request and maintaining the status quo was *inconsistent* with the comprehensive plan. There is no suggestion that the zoning in place at the time of the request was inconsistent with the comprehensive zoning plan. This cross-assignment of error is overruled.

[3] Plaintiff next argues that the Board's failure to approve the rezoning "did not bear a substantial relationship to the public health, safety or welfare and was not in the public interest." Plaintiff then cites language from zoning ordinance § 2.16(d) stating that "nothing in this section is intended to limit the discretion of the Board . . . to deny [rezoning] if it determines that the proposed rezoning is not in the public interest" and notes that the Board here made no such finding. Plaintiff asserts that, because the rezoning request complied with all

ESU criteria, the Board was required to approve the request unless it found that rezoning was *not* in the public interest. This argument indicates a misunderstanding of the plain language of the ordinance, which simply gives the Board the authority to deny requests that are not in the public interest, even if they otherwise comply with the ESU criteria. Here, the public interest "safety valve" is inapplicable as a supermajority of the Board failed to approve the rezoning.

[4] Finally, plaintiff argues that the two Board members voting against the rezoning request acted in bad faith and that the denial of the request was arbitrary and capricious. "The 'arbitrary or capricious' standard is a difficult one to meet." *Lewis v. N.C. Dep't of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989). Decisions are arbitrary and capricious only when "they are patently in bad faith, . . . or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment. . . ." *Id.* (internal citations and quotation marks omitted).

The dissent asserts that "Commissioner Lloyd voted no because she stated that only commercial property was intended to be part of ESU zoning, that the Vision 2010 Plan was intended to prohibit apartments or condominiums in the Historic District, and that ESU was drafted to accommodate 'something large south of town." While Commissioner Lloyd did make those comments, she did not explain the basis of her vote. The dissent makes much of Commissioner Lloyd's expression of her opinion about the purposes behind various ordinances. The mere fact that a commissioner expresses her opinions of the intention behind an ordinance does not reflect bad faith.

The dissent also contends that Commissioner Gering "lacked impartiality" because he suggested a distinction between "entranceways" and "gateways" in the Churton Street Corridor Plan. The dissent contends that this concern with "semantics" shows that he could not be impartial. In actuality, the record shows that these comments were made in the context of Commissioner Gering's concern about ESU rezoning in the historic district, something that had not previously been done.

Under the correct standard of review, the whole record test, the reviewing court's task is not to comb through the record for comments reflecting disagreements, mistakes or misunderstandings, but to determine whether substantial evidence supported the commissioners' decisions in voting against the rezoning. As noted above, the

parties stipulated that none of the previously granted ESU rezoning requests concerned property in the historic district. The record reveals that after a motion was made for rezoning, Commissioner Gering reiterated that he believed the proposed project was "not in keeping with . . . the historic district nature of the neighborhood." There is nothing in the record to suggest that this distinction was not the basis for the no votes from Commissioners Gering and Lloyd.

Nothing in the record supports the assertion that any of the Board members acted arbitrarily; rather, as discussed above, the whole record indicates that the Board gave careful consideration to the request and that those members voting against it did so with a reasonable basis, namely that the historic district property was not appropriate for designation as an ESU district.

REVERSED.

Judge ELMORE concurs.

Judge CALABRIA dissents in a separate opinion.

CALABRIA, Judge, dissenting.

I disagree with the majority's decision to reverse the trial court. The majority holds that the trial court erred in concluding that the denial of plaintiff's conditional use rezoning request unintentionally treated plaintiff in a manner different than other similarly situated applicants and was unduly discriminatory. Because I conclude that substantial evidence exists that the Board of Commissioners' ("the Board") denial of plaintiff's request was unduly discriminatory, and, alternatively, that those Board members voting against the request acted in an arbitrary and capricious manner, I would affirm the trial court. Thus, I respectfully dissent.

"[I]n order to be legal and proper, conditional use zoning. . . must be reasonable, neither arbitrary *nor unduly discriminatory*. . ." *Chrismon v. Guilford Cty.*, 322 N.C. 611, 622, 370 S.E.2d 579, 586 (1988) (emphasis added). The zoning power is subject to "the constitutional limitation forbidding arbitrary and unduly discriminatory interferences with the right of property owners." *In re Ellis*, 277 N.C. 419, 424, 178 S.E.2d 77, 80 (1970).

The majority holds that the Board's denial of plaintiff's rezoning request was not unduly discriminatory because no evidence exists to

support the conclusion that plaintiff's property was treated differently than other similarly situated properties. I disagree.

"[A] trial court's findings of fact in a bench trial have the force of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though there may be evidence that would support findings to the contrary." *County of Moore v. Humane Soc'y of Moore County, Inc.*, 157 N.C. App. 293, 295, 578 S.E.2d 682, 684 (2003).

The majority contends that the trial court erred in finding as fact that the denial of plaintiff's request was inconsistent with "prior actions of the Board such as a recently approved project on Churton Street, in the Historic District that included condominiums" because "the parties stipulated that none of the prior rezoning requests concerned property in the historic district, as is the property here."

In the instant case, the trial court's finding that is considered error by the majority is adequately supported by substantial evidence in the record, including Commissioner Dancy's statements in the record that denial of plaintiff's request was inconsistent with previous actions of the Board in which it has "done a lot of different things to accommodate" other projects which were not in strict compliance with zoning regulations. Commissioner Dancy specifically noted that "the same type of issues" in the present case had also come up when the Board reviewed approval of the condominiums at Weaver Street. Commissioner Dancy was referring to the Gateway Center project, which was approved in the Historic District even though the plans for the top floors of that building were made up of residential condominiums when the project was approved. This evidence is sufficient to support the trial court's finding.

The majority, in order to discredit the trial court's finding, makes reference to a stipulation of the parties that refers to an entirely different issue. The stipulation referenced by the majority states:

> Hillsborough has rezoned twenty-five parcels as part of five separate applications for conditional use rezoning to Entranceway Special Use. They are different sizes and in different locations throughout Town. These properties contain different uses. Three of the five conditional use rezonings include substantial residential components. Only two of the five are large scale. The smallest project is 4.5 acres in area. *None of the parcels is located in Hillsborough's Historic District.* In none of these

> approvals has the Board stated that the definition of "entranceway" was a factor to consider or that residential use was not allowed in the ESU district.

(emphasis added). This stipulation clearly refers to the fact that there are no parcels located in the Historic District that have been approved for Entranceway Special Use ("ESU") zoning. The stipulation does not state that there are no projects which include condominiums that have been approved in the Historic District. The majority opinion fails to recognize that the trial court's finding and the stipulation of the parties deal with two different issues, and thus this stipulation cannot be used to discredit the trial court's finding of fact.

Therefore, I disagree with the majority's conclusion that the only support for the trial court's finding is the differing opinions of various Board members. The trial court found as fact, supported by substantial evidence, that other approved projects in the Historic District have had residential condominiums. Since plaintiff's project was denied because it was a project in the Historic District that had residential condominiums, plaintiff's project was treated differently than other similarly situated projects. As a result, the trial court correctly concluded as a matter of law that the Board's denial of plaintiff's rezoning request was unduly discriminatory.

The majority also concluded that the record did not support a finding that the two Board members voting against the rezoning request acted in bad faith and that the denial of the request was arbitrary and capricious. I disagree.

A decision is "arbitrary and capricious 'if it clearly evinces a lack of fair and careful consideration or want of impartial, reasoned decisionmaking.' " *Vulcan Materials Co. v. Guilford Cty. Bd. of Comrs.*, 115 N.C. App. 319, 324, 444 S.E.2d 639, 643 (1994)(quoting *Joyce v. Winston-Salem State Univ.*, 91 N.C. App. 153, 156, 370 S.E.2d 866, 868 (1988)). Decisions that are made "patently in bad faith," are "whimsical," or "lacked fair and careful consideration" are arbitrary and capricious. *Summers v. City of Charlotte*, 149 N.C. App. 509, 518, 562 S.E.2d 18, 25 (2002). Since the two members who voted against the request cited reasons wholly unsupported by the Zoning Ordinance, the Comprehensive Plans (including the Churton Street Corridor Plan ("the CSC Plan"), the Strategic Growth Plan and the Vision 2010 Plan), or the facts in the record, the failure to approve plaintiff's rezoning request was arbitrary and capricious.

Commissioner Lloyd voted "no" because she stated that only commercial property was intended to be part of ESU district zoning, that the Vision 2010 Plan was intended to prohibit apartments or condominiums in the Historic District, and that ESU district zoning was created to accommodate "something large south of Town." These reasons demonstrate that Commissioner Lloyd failed to give fair and careful consideration to the evidence before the Board.

The Permitted Use Table—Special Use Districts, found at § 3.4.1 of the Zoning Ordinance, specifically lists "Residential" as a permissible use in ESU district zoning as long as the residential use is "part of a planned/mixed use development." Plaintiff's proposed project was a "planned/mixed use development," as it would include a residential component as well as the already established Sinclair Station, which contains office and commercial space. This clearly falls within the ESU district requirement. Further, the Zoning Ordinance requires that projects be a minimum of 2 acres to qualify for ESU district zoning. Plaintiff's property is 2.16 acres. Based on the contradictions between Commissioner Lloyd's reasons for denial and the evidence, her "no" vote for these reasons could not have been the result of "reasoned decisionmaking."

Commissioner Lloyd's statement that the Vision 2010 Plan was intended to prohibit apartments or condominiums in the Historic District further renders her decision to deny plaintiff's request arbitrary and capricious. First, nothing in the Vision 2010 Plan precludes condominiums in the Historic District. Instead, the Vision 2010 Plan speaks of a "diversity of housing opportunities" supporting a "diverse community." Second, as noted above, the Gateway Center project was approved in the Historic District even though it contained a residential condominium component. Third, any project to be built in the Historic District would still need approval from the Historic District Commission. Any design concerns for the project would be remedied and addressed in that review.

The record also suggests that Commissioner Lloyd was not impartial when determining that plaintiff's project did not comport with the Vision 2010 Plan. Commissioner Lloyd specifically stated that she had "worked on the Vision 2010 Plan." She admitted that while not having any more apartments or condominiums in the Historic District was discussed, it was "not written into the Plan." Her further statements that this idea was "overlooked" and that it "had certainly been the intent" suggest that *Commissioner Lloyd* intended for additional restrictions to be contained in the Vision 2010 Plan but

that, for whatever reason, her proposals were not accepted and included in the final draft. Therefore, Commissioner Lloyd's reasoning for denying plaintiff's rezoning request on this basis was not the result of impartial decisionmaking, but rather on the basis of what Commissioner Lloyd wished the law to be. Commissioner Lloyd's denial of plaintiff's rezoning request was thus arbitrary and capricious.

The record also indicates that Commissioner Gering's vote against plaintiff's rezoning request was arbitrary and capricious. A full review of the record suggests that Commissioner Gering also failed to give "fair and careful consideration" to the evidence before him and that he was not impartial in his decisionmaking.

Commissioner Gering voted against plaintiff's request because he believed that the location of the property at the corner of Churton and Corbin Streets was not an "entranceway" into the Town of Hillsborough, but was instead a "district gateway" and that the Zoning Ordinance required the property to be an "entranceway" for approval. This reasoning directly conflicts with evidence in the record and a careful analysis of the Zoning Ordinance.

The Zoning Ordinance states that the purpose of an ESU district is to provide "for the development of well planned and fully integrated projects containing a diverse mixture of commercial, office, and employment uses *along the primary entrances to the Town of Hillsborough.*" (emphasis added). Further, the Ordinance requires that property proposed for ESU rezoning:

> 1) Is adjacent to and has frontage along a street classified as an arterial or higher *that leads into the Hillsborough area*; and
>
> 2) If so located in relationship to existing or proposed public streets that traffic generated by the development of the tract proposed for rezoning can be accommodated without endangering the public health, safety, or welfare; and
>
> 3) Will be served by Hillsborough water and sewer lines when developed.

(emphasis added). Thus, based on the plain language of the Zoning Ordinance, in order to qualify for ESU district zoning, a property must be located on a road that *leads into Town*. Plaintiff's property is located at the corner of North Churton Street and Corbin Street. Churton Street is "a key transportation link for commuters and visi-

tors from all directions" and "forms the central transportation corridor serving Hillsborough." Churton Street "connects Hillsborough to Chapel Hill/Carrboro and I-40 to the south and to Caswell County, and Person County via Hwy 57, to the north." Additionally, the Corbin/Churton Street intersection is "one block from the city limits" and Sinclair Station was specifically approved because the Board believed it was located at an "entranceway" to Hillsborough. With no requirement that property rezoned as an ESU district must be an "entranceway," no definition of "entranceway" in the Zoning Ordinance, and specific evidence in the record demonstrating that Churton Street *is* an entranceway into the Town of Hillsborough, Commissioner Gering's refusal of plaintiff's rezoning request was not the result of reasoned decisionmaking.

Commissioner Gering's refusal of plaintiff's rezoning request also lacked impartiality. Commissioner Gering heavily debated with Commissioner Lowen about the purported distinction between an "entranceway" and a "gateway" as defined by the CSC Plan. Yet Commissioner Gering's insistence that the distinction was so great as to support denial of plaintiff's rezoning request on the basis of such semantics stemmed from the fact that he "had a great deal of involvement in crafting the [CSC] Plan." Thus, Commissioner Gering's denial of plaintiff's rezoning was not impartial, but rather, like Commissioner Lloyd, was from the viewpoint of one advocating for what he wished the law to be. Although no part of the CSC Plan prohibits ESU district zoning, Commissioner Gering believed it was a "misreading" of the plan to support any other interpretation. Commissioner Gering's denial of plaintiff's rezoning request was thus not an impartial, reasoned decision made after a fair and careful consideration of the evidence, but was instead arbitrary and capricious.

Because the trial court correctly concluded that the Board's denial of plaintiff's request was improper, I would also affirm that portion of the trial court's order remanding the matter in 07 CVS 685 for the Board to consider plaintiff's special use permit application for the property.

The trial court should be affirmed.

STATE OF NORTH CAROLINA v. JIHAD RASHID MELVIN

No. COA09-62

(Filed 1 September 2009)

1. Homicide— first-degree murder—instruction—mutually exclusive offenses—accessory after the fact

The trial court committed plain error in a first-degree murder case by failing to instruct the jury that it could only convict defendant of first-degree murder or accessory after the fact to first-degree murder, but not both.

2. Homicide— first-degree murder—mutually exclusive offenses—new trial

Defendant is entitled to a new trial in a first-degree murder case where defendant was convicted of two mutually exclusive crimes that carried substantially different penalties and collateral consequences. The Court of Appeals cannot substitute its judgment for that of the jury and hold that the trial court should have arrested judgment on the murder conviction when the jury should be properly charged with determining which of the mutually exclusive crimes was committed by defendant.

Appeal by defendant from judgment entered 4 August 2008 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 10 June 2009.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

HUNTER, Robert C., Judge.

On or about 21 March 2007, Almario Millander ("Millander") was fatally shot with a handgun in a trailer belonging to Kenneth Adams ("Adams") in Onslow County, North Carolina. On 10 July 2007 Jihad Rashid Melvin ("defendant") was indicted on charges of first degree murder and accessory after the fact to first degree murder in connection with Millander's murder. Defendant was convicted by a jury of both charges on 4 August 2008. The court arrested judgment of the accessory after the fact conviction, entered judgment of the first

degree murder conviction, and sentenced defendant to life imprisonment without parole. Defendant now appeals. After careful review, we vacate the judgment and order a new trial.

Background

The State's evidence at trial tended to show that on 21 March 2007, Robert Ridges ("Ridges") sold cocaine to Millander. Tony Cole ("Cole") and defendant were present during the transaction. Soon after the sale, Ridges, Cole, and defendant were inside a vehicle preparing to drive away when Millander approached the car with a sawed off shotgun claiming that Ridges had sold him counterfeit cocaine. The three men drove away without any violence occurring at that time. According to Cole, Ridges stated that "[h]e was going to get [Millander]." The three men then went to the home of "Dee Dee" where they smoked marijuana for an unspecified amount of time. At some point during their visit at Dee Dee's, Ridges procured a handgun outside of the presence of Cole and defendant.

Ridges, Cole, and defendant then went to "Collins' Estates Mobile Home Park" in search of Millander. Once at the mobile home park, the men encountered Adams who informed them that Millander was in his trailer. Ridges entered Adams's trailer through the back door alone while Cole and defendant waited outside. Ridges then began shooting at Millander. Defendant and Cole ran to the car they had arrived in and waited for Ridges who subsequently emerged from the trailer. Defendant then drove the three men away from the scene. Adams told police that Ridges had been the sole shooter and that he did not see defendant enter the trailer at any time. Millander was shot once in the lower right leg and once in the chest, which was the cause of death.

The evidence also tended to show that after Ridges, Cole, and defendant left Adams's trailer, they went to a gas station. Cole and Ridges went into the gas station to make their purchases while defendant waited in the car. While in the gas station, Ridges spoke with an unidentified person. After leaving the gas station, the men were enroute to a friend's house when a law enforcement officer attempted to pull them over for a routine traffic stop. After pulling the car onto the side of the road, Ridges, Cole, and defendant exited the car and ran into the nearby woods. Once the officer left the area, the men emerged from the woods, wiped down the car to remove fingerprints, and attempted to set it on fire. Ridges, Cole, and defendant were picked up by another person, and as they were

driven down the highway, they disposed of the handgun used to kill Millander. Portions of this weapon were recovered during the murder investigation and the gun was identified as the one used to shoot Millander.

At trial, Elijah Ridges ("Elijah"), the brother of Robert Ridges, testified that on 23 March 2007, he drove his brother and another person to Fayetteville, North Carolina. At trial, he claimed that he could not identify defendant as the other person he transported, but said that defendant had the same body type as that individual. However, Elijah previously told law enforcement that defendant was the other person he drove to Fayetteville. Defendant was later apprehended in Onslow County.

Analysis

[1] Defendant first argues that the trial court erred in failing to instruct the jury that it could only convict defendant of first degree murder or accessory after the fact to first degree murder, but not both.

While defendant requested that the offenses be severed at a pretrial conference in July 2008, defendant did not request a jury instruction at that time regarding the jury's ability to convict defendant of both charges, nor did he request such an instruction at trial. At trial, defendant made no objections to the proffered jury instructions. Accordingly, defendant has not properly preserved this assignment of error. N.C. R. App. P. 10(b)(2). However, defendant has requested plain error review.

> [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)).

Defendant was charged with first degree murder based on the theories of acting in concert and aiding and abetting, and being an accessory after the fact to first degree murder. "The elements required for conviction of first-degree murder are (1) the unlawful killing of another human being, (2) with malice, and (3) with premeditation and deliberation." *State v. Lawson*, 194 N.C. App. 267, 279, 669 S.E.2d 768, 776 (2008), *disc. review denied*, 363 N.C. 378, —— S.E.2d —— (2009). "The acting in concert doctrine allows a defendant acting with another person for a common purpose of committing some crime to be held guilty of a murder committed in the pursuit of that common plan even though the defendant did not personally commit the murder." *State v. Roache*, 358 N.C. 243, 306, 595 S.E.2d 381, 421 (2004). "'The distinction between [a defendant being found guilty of] aiding and abetting and acting in concert . . . is of little significance. Both are equally guilty.' " *State v. Bonnett*, 348 N.C. 417, 440, 502 S.E.2d 563, 578 (1998) (quoting *State v. Williams*, 299 N.C. 652, 656, 263 S.E.2d 774, 777 (1980)), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999). "An 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).

Though defendant does not argue that the jury should not have been presented both charges, we will nonetheless discuss this matter as it directly relates to the instruction issue. In the case of *State v. Jewell*, 104 N.C. App. 350, 409 S.E.2d 757 (1991), *aff'd per curium*, 331 N.C. 379, 416 S.E.2d 3 (1992), the defendant pled guilty to being an accessory after the fact to murder and the trial court found as an aggravating factor that the defendant aided and abetted the murder, a charge which was dismissed pursuant to his plea arrangement. *Id.* at 351, 409 S.E.2d at 758. The defendant claimed on appeal "that accessory after the fact and aiding and abetting are joinable offenses and therefore the latter cannot be used to aggravate a sentence for the former." *Id.* at 352, 409 S.E.2d at 759. The State argued "that accessory after the fact and aiding and abetting [murder] are not joinable [offenses for trial] because they are two separate and distinct offenses and are mutually exclusive." *Id.* at 353, 409 S.E.2d at 759. The Court in *Jewell* stated:

> We agree that the two offenses are mutually exclusive but find that this is not determinative. We note first that an aider and abettor is treated as a principal. Thus, in the context of mutually

> exclusive offenses, being an aider and abettor to a crime is equivalent to being the principal to a crime. Being the principal to a crime and being an accessory after the fact to that crime are two separate and distinct offenses. However, where the offenses for which defendant is indicted and tried arise out of the same transactions, it is not a bar to joinder that they are mutually exclusive. The fact that aiding and abetting and accessory after the fact are mutually exclusive offenses means only that defendant cannot be convicted of both.
>
> We thus conclude that the offenses of accessory after the fact of a felony and being an aider and abettor to that felony are joinable offenses for purposes of indictment and trial, even though a defendant cannot be convicted of both.

Id. at 353-54, 409 S.E.2d at 759-60 (citations omitted).

The Court further stated that "[t]he acts of defendant which gave rise to the indictments on charges of first degree murder and accessory after the fact of murder arose from a 'series of acts or transactions connected together or constituting parts of a single scheme or plan.' " *Id.* at 353, 409 S.E.2d at 759 (quotation omitted).

The Court in *Jewell* held that the trial court could aggravate the defendant's sentence if it found "by a preponderance of the evidence that the defendant aided and abetted in the commission of that crime . . . ." *Id.* at 359, 409 S.E.2d at 763. Nevertheless, *Jewell* clearly states that a defendant may be tried for aiding and abetting murder *and* being an accessory after the fact to that murder, but the defendant cannot be convicted of both crimes because they are mutually exclusive and arise out of the same transaction. *Id.* at 353-54, 409 S.E.2d at 759-60; *see also State v. McIntosh*, 260 N.C. 749, 753, 133 S.E.2d 652, 655 (1963) (holding that a participant in a felony cannot be an accessory after the fact to that felony); *State v. Keller*, 198 N.C. App. ——, ——, —— S.E.2d ——, —— (2009) (holding that "[t]he trial court . . . erred in accepting defendant's guilty plea to both second degree murder and accessory after the fact to first degree murder" because the offenses are mutually exclusive); *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.").

Accordingly, the trial court in the present case properly allowed both charges to go to the jury. However, the crux of this case is

whether the trial court was *required* to instruct the jury that defendant could only be convicted of the principal felony of first degree murder *or* of being an accessory after the fact to first degree murder. The State contends that the trial court is not required to give such an instruction; rather, the court is required to arrest judgment on the accessory after the fact conviction if the defendant is convicted of both crimes, which is the action the court took in this case. *Jewell* did not address this specific issue. In *Jewell*, the defendant pled guilty to being an accessory after the fact to murder and the murder charge was dismissed; therefore, a jury trial never occurred. *Id.* at 351, 409 S.E.2d at 758.

A year prior to this Court's decision in *Jewell*, our Supreme Court determined when an instruction, such as the one at issue in this case, must be given. In *State v. Speckman*, 326 N.C. 576, 391 S.E.2d 165 (1990):

> The jury found the defendant guilty of both embezzlement and false pretenses. On appeal, the Court of Appeals concluded that the crimes of embezzlement and false pretenses are, by definition, mutually exclusive offenses and, therefore, that the trial court had erred in denying the defendant's motion at trial to require the State to elect to try him for one offense or the other, but not for both offenses. The Court of Appeals held, however, that the trial court's consolidation of the two offenses in a single judgment prevented any prejudice to the defendant.

Id. at 578, 391 S.E.2d at 166. The Supreme Court overturned the Court of Appeals and held:

> [A]s to [the] embezzlement and false pretenses charges, the legislature intended to give full effect to our original common law rule against requiring the State to elect between charges, *if the felonies charged allegedly arose from the same transaction*. Where, as here, there is substantial evidence tending to support both embezzlement and false pretenses arising from the same transaction, the State is not required to elect between the offenses. Indeed, if the evidence at trial conflicts, and some of it tends to show false pretenses but other evidence tends to show that the same transaction amounted to embezzlement, the trial court should submit both charges for the jury's consideration. *In doing so, however, the trial court must instruct the jury that it may convict the defendant only of one of the offenses or the other, but not of both.*

Id. at 579, 391 S.E.2d at 167 (internal citation omitted) (emphasis added). *Speckman* further found the trial court's error to be prejudicial, stating:

> The separate convictions for mutually exclusive offenses, even though consolidated for a single judgment, have potentially severe adverse collateral consequences. Therefore, consolidating the two convictions and entering a single judgment did not reduce the trial court's error to harmless error. . . .
>
> Further, given the peculiar posture in which this case comes before us, we conclude that there is a "reasonable possibility" that a different result would have been reached at trial as to both charges, *had the trial court correctly instructed the jury that it could convict the defendant only of one offense or the other, but not of both*. Therefore, the defendant is entitled to a new trial on both charges.

Id. at 580, 391 S.E.2d at 168 (internal citations omitted) (emphasis added).

In sum, *Jewell* made it clear that murder and accessory after the fact to murder are mutually exclusive offenses that arise out of the same transaction, and defendant may only be convicted of one or the other, but did not specifically address the jury instruction issue. *Jewell*, 104 N.C. App. at 353-54, 409 S.E.2d at 759-60. However, our Supreme Court in *Speckman* held that if two offenses are mutually exclusive and arise out of the same transaction, both offenses may be submitted to the jury, but the trial court "must instruct the jury that it may convict the defendant only of one of the offenses or the other, but not of both." *Speckman*, 326 N.C. at 579, 391 S.E.2d at 167.

Based on the holdings of *Jewell* and *Speckman*, we hold that the trial court in this case properly allowed the jury to consider both charges, but the court was required to instruct the jury that it could only convict defendant of one of the charges, either first degree murder or accessory after the fact to first degree murder.

Though we have found that the trial court erred in failing to give the instruction, the standard of review on this issue is plain error. While none of the applicable cases specifically involve plain error review, in *State v. Hames*, 170 N.C. App. 312, 612 S.E.2d 408, *disc. review denied*, 360 N.C. 70, 622 S.E.2d 496 (2005), the defendant did not preserve the jury instruction issue for appellate review and this Court utilized Rule 2 to reach the merits. *Id.* at 320-21, 612 S.E.2d at

413-14. There, the defendant was convicted of attempted voluntary manslaughter and assault with a deadly weapon inflicting serious injury upon the same person, and judgment was entered on both convictions. *Id.* at 313, 612 S.E.2d at 409. The defendant argued that the trial court should have arrested judgment on one of the convictions because they are mutually exclusive crimes. *Id.* at 320, 612 S.E.2d at 413. This Court agreed with the defendant in part, holding the two crimes to be mutually exclusive, but determined that the correct remedy was a new trial, not arrest of judgment. *Id.* at 323, 612 S.E.2d at 415. The Court cited *Speckman's* requirement that the jury be instructed that it may only convict the defendant of one of the mutually exclusive crimes. *Id.* at 322, 612 S.E.2d at 414. As in *Hames*, the issue before us has not been preserved; however, we hold that the failure of the trial court to give the necessary instruction amounts to plain error since we find that "'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *McCaskill*, 676 F.2d at 1002).

We further hold that the error was not cured by the trial court's decision to arrest judgment on the accessory after the fact conviction. If properly instructed, the jury might have determined that defendant was guilty of accessory after the fact to murder and not guilty of the murder itself. We decline to substitute our judgment for that of the jury.

The State nevertheless argues that defense counsel invited the trial court's error. "[A] defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *cert. denied*, 355 N.C. 216, 560 S.E.2d 141 (2002); N.C. Gen. Stat. § 15A-1443(c) (2007).

At a pretrial conference in this matter, the following dialogue took place:

> THE COURT: So if—is the jury instructed they can only—if they were to find the defendant guilty of first-degree murder, they would not consider accessory after the fact, or do you allow them both to go and then the court arrests one judgment, as opposed to the other?
>
> [PROSECUTION]: It would be my position that both would go to the jury and, if the jury were to find the defendant guilty of both,

the court would arrest judgment, just like you do with possession of stolen property and larceny. That would be my position, Judge.

THE COURT: If we have a jury verdict to impose, if the first-degree murder case were to be—

[PROSECUTION]: Reversed on appeal, that's right Judge.

THE COURT: And if you chose not to pursue it. Mr. Paramore, your response?

[DEFENSE COUNSEL]: Judge I've read . . . [*State v. Jewell*] and, as an officer of the court—in the other court, as a prosecutor in 1985, I did exactly the same thing. I tried both. Both verdicts were allowed . . . to go to the jury, and the jury returned verdicts, and [the judge] arrested the verdict on one case, the accessory after. So that would—I can't, in good faith, argue that that's not the law in North Carolina.

The State claims that defense counsel invited any error with regard to the jury instruction at issue. Though defense counsel neglected to request the proper jury instruction at trial, we do not find that he invited the trial court's error at the pretrial conference.

At the pretrial conference, defense counsel sought to sever the two offenses on the grounds that they were "inconsistent as a matter of law." Defense counsel cites to *Jewell*, which does not address the need for a "*Speckman* instruction" and only pertains to joinder of mutually exclusive offenses. Defense counsel confuses the issue with regard to arresting judgment on the accessory conviction, but he does not assert that the trial court does not have to give the jury an instruction on convicting defendant of only one of the crimes charged. In fact defense counsel never brings up the issue of jury instructions at the pretrial conference. He correctly states the holding in *Jewell* and explains to the court that in another case he prosecuted, approximately twenty-eight years prior, the trial court arrested judgment on the accessory conviction. We find that this statement by defense counsel did not invite the trial court's error in failing to properly instruct the jury at trial.

Disposition

[2] Defendant argues that a new trial is warranted due to the trial court's error. There is some inconsistency in the case law with regard to the disposition of cases like the one before us where a "*Speckman* instruction" was not properly given. In *Speckman*, where the trial

court had consolidated the two convictions into one judgment, a new trial was ordered. *Speckman*, 326 N.C. at 580, 391 S.E.2d at 168.

After *Speckman*, this Court held in *State v. Hall*, 104 N.C. App. 375, 410 S.E.2d 76 (1991), "[a] defendant is not prejudiced, however, where the trial court fails to give the required instruction, the jury returns guilty verdicts on the mutually exclusive offenses, and the trial court vacates the judgment for the mutually exclusive offense providing the more serious punishment." *Id.* at 387, 410 S.E.2d at 83. In *Hall*, the trial court "submitt[ed] to the jury three separate conspiracy [to traffic in cocaine] charges covering the period of 10 April 1989 through 31 May 1989 (Conspiracy I), and the periods of 10 April 1989 through 15 April 1989 and 23 April 1989 through 31 May 1989 (Conspiracies II) . . . ." *Id.* at 386, 410 S.E.2d at 82. The jury found the defendants guilty of both Conspiracy I and Conspiracies II, and the trial judge arrested judgment on the Conspiracy I charge. *Id.* The defendants were sentenced to "two consecutive, forty-year sentences for their two conspiracy convictions." *Id.* at 381, 410 S.E.2d at 79. This Court held that the trial court should have arrested judgment on the Conspiracies II conviction, which carried a "more serious punishment[,]" rather than the Conspiracy I conviction, and remanded the case back to the trial court to correct the error and resentence the defendants. *Id.* at 387, 410 S.E.2d at 83.

While *Hall* indicates that this Court can remedy the trial court's error by ordering the court to arrest judgment of the murder conviction and sentence defendant based on the accessory conviction, we find this case to be distinguishable from *Hall*. In *Hall*, the defendants were convicted of three counts of conspiracy to commit the same crime, trafficking cocaine. *Id.* at 378, 140 S.E.2d at 77. The Court stated, "[o]n the facts presented here, either one agreement was made or two agreements were made. Both views cannot exist at the same time. Therefore, the offenses of Conspiracies I and II are mutually exclusive offenses." *Id.* at 386, 410 S.E.2d at 82. Conspiracies II carried with it a harsher penalty only because it contained two separate counts of conspiracy that did not overlap in time. Conspiracy I encompassed the same time period as Conspiracies II, but the resulting penalty would have been less because Conspiracy I contained only one count of conspiracy. In *Hall*, the jury was evaluating the same crimes that allegedly took place during the same time frame, which individually would carry the same penalty.

In the present case, defendant was convicted of two mutually exclusive crimes that carried substantially different penalties and col-

lateral consequences. Again, we cannot substitute our judgment for that of the jury and hold that the trial court should have arrested judgment on the murder conviction. Given the proper instruction, the jury might have found defendant guilty of murder and not accessory after the fact. Accordingly, we find that *Hall* is not controlling here.

In the more recent case of *State v. Hames*, discussed *supra*, the defendant was sentenced to two concurrent terms of imprisonment for the convictions of assault with a deadly weapon inflicting serious injury and attempted voluntary manslaughter. *Hames*, 170 N.C. App. at 323, 612 S.E.2d at 415. The Court found that these two convictions were mutually exclusive and the proper instruction was not given. *Id.* Accordingly, the Court overturned the convictions and ordered a new trial, rather than arresting judgment on one of the convictions. *Id.* Soon after *Hames* was decided, this Court addressed the same situation in *State v. Yang*, 174 N.C. App. 755, 622 S.E.2d 632 (2005), *disc. review denied*, 360 N.C. 296, 628 S.E.2d 12 (2006) where the defendant was convicted of the mutually exclusive crimes of voluntary manslaughter and assault with a deadly weapon inflicting serious injury. *Id.* at 761, 622 S.E.2d at 636. The defendant was sentenced to 148 to 214 months imprisonment. *Id.* at 759, 622 S.E.2d at 635. Relying on *Hames*, the Court ordered a new trial. *Id.* at 762, 622 S.E.2d at 636.

Here, there was not a consolidation of the convictions as seen in *Speckman*, *Hames*, and *Yang*; however, we find the present case to be analogous to those cases, which also dealt with two mutually exclusive crimes that could potentially carry different penalties and collateral consequences. The jury should be properly charged with determining which of the mutually exclusive crimes was committed by defendant.[1] Accordingly, we order a new trial. Due to our decision on this issue, we need not address defendant's remaining assignments of error.

Conclusion

We hold that the trial court committed plain error in failing to instruct the jury that it could convict defendant of first degree murder or accessory after the fact to first degree murder, but not both. Because we cannot substitute our judgment for that of the jury, we vacate the judgment and order a new trial.

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1. Courts in other jurisdictions have ordered a new trial in similar circumstances. *See Jackson v. State*, 276 Ga. 408, 413, 577 S.E.2d 570, 575 (Ga. 2003); *State v. Hinton*, 227 Conn. 301, 321, 630 A.2d 593, 603 (Conn. 1993); *People v. Robinson*, 538 N.Y.S.2d 122, 123, 145 A.D.2d 184, 186 (N.Y. App. Div. 1989).

New Trial.

Judges STEELMAN and GEER concur.

LILLIAN EVANS, PLAINTIFF v. CONWOOD LLC D/B/A TAYLOR BROTHERS, EMPLOYER, TRAVELERS INSURANCE COMPANY, CARRIER, AND/OR CONWOOD LLC D/B/A TAYLOR BROTHERS, EMPLOYER, SELF-INSURED (ESIS/ACE-USA INSURANCE CO., ADJUSTING AGENT), DEFENDANTS

No. COA08-1368

(Filed 1 September 2009)

1. Workers' Compensation— carpal tunnel syndrome—compensable occupational disease—findings

The Industrial Commission did not err in a workers' compensation case by holding that plaintiff's carpal tunnel syndrome was a compensable occupational disease. The Commission's findings are supported by competent evidence and are binding. It is not for the appellate court to reweigh the evidence.

2. Workers' Compensation— last injurious exposure—findings supported by evidence

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff's last injurious exposure occurred after the employer became self-insured. The Commission's findings are supported by competent evidence in the record and the appellate court cannot reweigh the evidence.

3. Appeal and Error— unpublished opinions—sanctions not imposed

Sanctions were not imposed for a violation of the appellate rules in citing an unpublished opinion, but counsel are admonished to use care in the citation of unpublished opinions.

Appeal by defendants from an Opinion and Award filed 11 July 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 March 2009.

Walden & Walden, by Daniel S. Walden, for employee-plaintiff-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by Philip J. Mohr, for self-insured-defendants-appellants Taylor Brothers and ESIS/ACE-USA Insurance Company.

Orbock Ruark & Dillard, PA, by Mark A. Leach, for defendants-cross-appellant Travelers Insurance Company.

STEELMAN, Judge.

The record supports the Industrial Commission's finding that plaintiff's employment placed her at an increased risk of developing carpal tunnel syndrome. The record also supports the Industrial Commission's finding that plaintiff's occupational disease is compensable. The Industrial Commission was correct in finding that plaintiff was last injuriously exposed to the hazards of carpal tunnel syndrome after Taylor Brothers became self-insured, with ESIS/ACE-USA becoming the adjusting agent. In our discretion, we do not impose sanctions on counsel for Taylor Brothers and ESIS/ACE-USA.

I. Factual and Procedural Background

In August 1984, Lillian Evans (plaintiff) became an employee at the Taylor Brothers plant in Winston-Salem. Plaintiff has continuously and exclusively worked there performing various job duties, which have included spare packer, pouch dumper, bartelt operator, packer, inspector, inspector bartelt operator, box machine operator, bartelt feeder, and spare operator. In performing these jobs, plaintiff was required to use her hands and wrists for six to seven hours a day, with two fifteen minute breaks and a thirty minute lunch break. Plaintiff testified she used her hands and wrists to bend, extend, stretch, push, and pull.

On 10 February 2005, plaintiff went to see her primary care physician, Dr. Cressent Hudson (Dr. Hudson), complaining of left hand numbness and tingling, which was worse in the mornings and after doing activities with her hands at work. Dr. Hudson diagnosed plaintiff with carpal tunnel syndrome (CTS) and prescribed wearing a left wrist splint at night, Ibuprofen, and icing the left wrist twice a day.

In January 2006, plaintiff reported to her supervisor and the production manager that she was experiencing left wrist pain. On 26 January 2006, plaintiff returned to Dr. Hudson complaining of

left wrist pain radiating up into her left forearm and left hand weakness. Plaintiff told Dr. Hudson she thought the pain stemmed from repetitive motions at work. Dr. Hudson ordered nerve conduction velocity testing.

On 13 February 2006, Dr. G. Frank Crowell (Dr. Crowell), a neurologist, interpreted the nerve conduction study as showing that plaintiff had "Left carpal tunnel syndrome—moderate." On 2 March 2006, Dr. Hudson referred plaintiff to Dr. Gregg E. Cregan (Dr. Cregan), an orthopaedic hand specialist.

On 27 March 2006, Dr. Cregan evaluated plaintiff who supplied a history of pain for eighteen months in her left elbow with numbness and tingling in the fingers of her left hand. Plaintiff rated her pain severity as 10 on a 10-scale, with 10 being the worst. Dr. Cregan diagnosed her with left CTS and long, second trigger finger, which is a thickening in the ligament overlying the flexor tendon in the forearm. Dr. Cregan recommended that she have a left carpal tunnel release and a long trigger finger release. The surgery was scheduled for June 2006. An issue arose prior to surgery as to whether plaintiff's health insurance was going to pay for the surgery or whether it was covered under worker's compensation. The surgery was postponed until August 2006. Plaintiff continued working full-time pending resolution of this issue.

On 2 June 2006, Taylor Brothers became self-insured, with defendant ESIS/ACE-USA (ESIS/ACE) becoming the adjusting agent. On 14 June 2006, plaintiff completed a written "Injury Report" stating that she had "been experiencing severe pain" in her left hand for "well over a year[,]" that her pain had become "progressively worse," and that Dr. Cregan recommended surgery.

On 29 June 2006, Taylor Brothers completed Industrial Commission (Commission) Form 19 reporting plaintiff's injury. The date of injury was shown as 1 February 2006. The same day, Travelers completed Commission Form 61 denying liability pending receipt of additional information.

On 10 August 2006, Dr. Cregan performed a left carpal tunnel release and a left long trigger finger release. Dr. Cregan noted that plaintiff's transverse carpal ligament was "exceptionally thickened and tight," which confirmed the diagnosis of CTS. Dr. Cregan's practice group directed that plaintiff remain out of work until 23 October 2006.

On 1 September 2006, plaintiff filed Commission Form 18 seeking an award of compensation based upon her CTS. The date of injury was shown as 1 January 2006. On 19 October 2006, plaintiff filed Commission Form 33 seeking a hearing on her claim. On 23 October 2006, plaintiff returned to her regular job duties at Taylor Brothers. On 1 March 2007, the Commission added ESIS/ACE as a carrier-defendant to this matter. Travelers and ESIS/ACE each contended that they were not the carrier at risk at the time of plaintiff's last injurious exposure.

On 11 July 2008, the Commission issued an Opinion and Award holding that plaintiff had suffered injury as a result of a compensable occupational disease, and awarded plaintiff temporary total disability benefits for the period of 10 August through 22 October 2006 at the rate of $463.75 per week and additional disability benefits pursuant to N.C. Gen. Stat. § 97-31(12) for a period of twenty weeks at the rate of $463.75 per week based upon a 10% permanent partial disability rating to plaintiff's left hand. The Commission found that the last injurious exposure was on 9 August 2006 and ordered that Taylor Brothers and ESIS/ACE pay these amounts, together with past and future related medical expenses. Taylor Brothers and ESIS/ACE were awarded a credit pursuant to N.C. Gen. Stat. § 97-42 in the amount of $3,060.04 for the short-term disability benefits paid to plaintiff.

Taylor Brothers and ESIS/ACE appeal. Travelers cross-assigned as error the holding of the Commission that plaintiff suffers from a compensable occupational disease.

II. Standard of Review

"The standard of review on appeal to this Court from an award by the Commission is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001) (citing *Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996)). The Commission's findings of fact are conclusive on appeal if supported by any competent evidence. "Thus, on appeal, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citations and quotations omitted).

III. Diagnosis of Carpal Tunnel Syndrome

[1] In their first argument, Taylor Brothers and ESIS/ACE contend that the Commission erred in holding that plaintiff's CTS was a compensable occupational disease. In this argument, they contend that findings of fact 5, 8, and 10-14 were not supported by competent evidence. Cross-appellant, Travelers, makes a similar argument, attacking findings of fact 5, 10, and 11. We disagree.

The Worker's Compensation Act enumerates specific medical conditions in N.C. Gen. Stat. § 97-53, which are automatically deemed to be occupational diseases. N.C. Gen. Stat. § 97-53 (2007). CTS is not among the enumerated conditions. If a disease is not specifically listed, it may still qualify under N.C. Gen. Stat. § 97-53(13), which defines occupational disease as:

> Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

N.C. Gen. Stat. § 97-53(13) (2007).

Our Supreme Court has interpreted N.C. Gen. Stat. § 97-53(13) to require that plaintiff establish three elements to demonstrate an occupational disease:

> (1) the disease must be characteristic of and peculiar to the claimant's particular trade, occupation or employment;
>
> (2) the disease must not be an ordinary disease of life to which the public is equally exposed outside of the employment; and
>
> (3) there must be proof of causation (proof of a causal connection between the disease and the employment).

Smith-Price v. Charter Pines Behavioral Ctr., 160 N.C. App. 161, 166, 584 S.E.2d 881, 885 (2003) (citations omitted). Plaintiff does not need to prove her disease originates exclusively from or be unique to her particular occupation to satisfy the first and second elements. "All ordinary diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d

359, 365 (1983) (citing *Booker v. Medical Center*, 297 N.C. 458, 472-75, 256 S.E.2d 189, 198-200 (1979)). The first two elements are satisfied if her employment exposed plaintiff to a greater risk of contracting the disease than the general public. "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation." *Id.* at 94, 301 S.E.2d at 365 (internal citation omitted). To prove the final element, plaintiff must prove that her employment significantly contributed to or was a significant causal factor in the development of her disease. *Id.* at 101, 301 S.E.2d at 369-70. "This is so even if other non-work-related factors also make significant contributions, or were significant causal factors." *Id.*, 301 S.E.2d at 370.

Defendants' argument focuses upon the testimony of Dr. Cregan, plaintiff's treating physician who testified concerning medical causation. Defendants contend Dr. Cregan answered "leading hypothetical questions in Plaintiff's favor" because the job description given by plaintiff was "woefully inadequate," and Dr. Cregan acknowledged he had no personal knowledge of plaintiff's job duties. They argue the actual job descriptions given by the employer were correct and demonstrate that plaintiff's different job positions would not significantly contribute to the development of CTS. Therefore, they argue plaintiff has not established a causal connection between her employment and the CTS.

Taylor Brothers and ESIS/ACE offer an unpublished case from this Court, which they contend stands for the proposition that when a physician's causation opinion is based solely upon an inaccurate hypothetical, the opinion cannot serve as a basis to find the disease compensable. *See Smith v. Beasley Enters., Inc.*, 148 N.C. App. 559, 560 S.E.2d 885 (2002) (unpublished). However, in *Smith*, the Full Commission concluded that plaintiff had failed to demonstrate her carpal tunnel syndrome was an occupational disease, and plaintiff argued that the medical opinions she offered were sufficient evidence to satisfy N.C. Gen. Stat. § 97-53(13). This Court affirmed the Commission and noted that the defendant in *Smith* correctly pointed out that the medical opinions offered by witnesses were based on a hypothetical question inaccurately describing plaintiff's job duties. *Id.* (citing *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 486 S.E.2d 252 (1997)). In *Lineback*, this Court stated, "Although the Commission may choose not to believe the evidence after considering it, it may not wholly disregard or ignore *competent* evidence." *Lineback*, 126 N.C. App. at 680, 486 S.E.2d at 254 (citations

omitted) (emphasis added). So long as the record contains some evidence, which supports facts presumed in the hypothetical question, factual conflicts and the probative force of such evidence is for the Commission to resolve. *Matthews v. City of Raleigh*, 160 N.C. App. 597, 606-07, 586 S.E.2d 829, 837 (2003) (quoting *Blassingame v. Asbestos Co.*, 217 N.C. 223, 236, 7 S.E.2d 478, 486 (1940)).

> Further, the omission of a material fact from a hypothetical question does not necessarily render the question objectionable or the answer incompetent. It is left to the cross-examiner to bring out facts supported by the evidence that have been omitted and thereby determine if their inclusion would cause the expert to modify or reject his earlier opinion.

Rutledge, 308 N.C. at 91, 301 S.E.2d at 364 (citations omitted).

In the instant case, the Commission concluded plaintiff had sufficiently demonstrated that her CTS was an occupational disease and based part of its conclusion on Dr. Cregan's testimony. Dr. Cregan testified CTS is more common in people who "do gripping, squeezing kind of activities or high-speed typing . . . ." Dr. Cregan testified he did not have any history, besides plaintiff's employment, that plaintiff was exposed to other potential causes of CTS. He then answered questions presented by Taylor Brothers and ESIS/ACE's attorney who informed him of Taylor Brothers' descriptions of plaintiff's job duties. Dr. Cregan stated that if certain details were true, then some of plaintiff's job duties would not have contributed to her CTS. He further testified that for plaintiff's employment to be a contributing factor to CTS, her job duties would have to entail repetitive grasping, squeezing, and full flexing, and the job duties described to him by defendants' attorney did not involve those activities.

As to Dr. Cregan's testimony, the Commission found:

> 10. Dr. Cregan opined that plaintiff's employment with defendant caused or significantly contributed to the development of her left carpal tunnel syndrome and left middle trigger finger condition. Additionally, Dr. Cregan opined that plaintiff's employment with defendant exposed her to an increased risk of developing her left carpal tunnel syndrome and left middle trigger finger condition as compared to members of the general public not so exposed.
>
> 11. Based on the credible lay and medical evidence of record, the undersigned find that plaintiff's employment with defendant caused or significantly contributed to the development of her left

carpal tunnel syndrome and left middle trigger finger condition. Additionally, based upon the credible lay and medical evidence of record, the undersigned find that plaintiff's employment with defendant exposed her to an increased risk of developing her left carpal tunnel syndrome and left middle trigger finger condition as compared to members of the general public not so exposed.

12. Through August 9, 2006, plaintiff continued performing her regular duties for defendant. Until that date, the credible evidence of record is that plaintiff's symptoms continued to worsen. Additionally, Dr. Cregan has opined that the last day plaintiff worked for defendant would be the last day she was exposed to the hazards of carpal tunnel syndrome.

. . .

18. Medical records from a February 10, 2005 examination of plaintiff by Dr. Hudson reflect that plaintiff reported experiencing symptoms related to carpal tunnel syndrome following activities at work. However there is no evidence that Dr. Hudson informed plaintiff that her condition was work-related. Plaintiff contends that she was first informed by a competent medical professional of the possible work-related nature of her left carpal tunnel syndrome on April 16, 2007 by Dr. Cregan. []

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The courts may set aside findings of fact only upon the ground they lack evidentiary support." *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965) (citations omitted). Besides Dr. Cregan's testimony, the Commission based its conclusions on lay testimony. Both plaintiff and Tracy Glenn (Glenn), personnel manager for Taylor Brothers, testified. Glenn stated that plaintiff used her hands for approximately two hours a day, two and a half days a week for a period of fifty weeks in a calendar year. He testified this amount of time was calculated by focusing, "on actual hand motions the time—the approximate time that she would be using her hands in an eight hour shift—possibly." Plaintiff testified that she continuously used her hands and wrists, and stated that "depending on where [she] was working at, [she] would maybe be relieved for about three minutes at the most[.]"

The Commission's findings of fact are supported by competent evidence in the record and are binding on appeal. Plaintiff testified before the Commission that in her general job duties as a laborer for

Taylor Brothers, she used her hands and wrists for approximately six to seven hours a day. In describing the hand and wrist motions she made in performing her duties, plaintiff stated, "Uh, bending, extending, stretching, pulling—just hand motions. Just using them constantly doing something." She further testified that she made twisting, rotating, grabbing, and squeezing motions. Plaintiff's testimony competently supports the hypothetical question presented to Dr. Cregan as to whether plaintiff's job placed her at an increased risk for contracting CTS and whether the disease was caused by her employment. This evidence validates Dr. Cregan's answer that if plaintiff's job duties involved repetitive squeezing and grasping, then her employment would be a contributing factor in the development of CTS.

The Commission also heard testimony from both sides as to plaintiff's job duties. The Commission gave greater weight to plaintiff's evidence than to defendants' evidence. It is not for this Court to reweigh the evidence. "The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Jones v. Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965).

This argument is without merit.

IV. Last Injurious Risk

[2] In their second argument, Taylor Brothers and ESIS/ACE contend the Commission erred in finding that plaintiff's last injurious exposure occurred after Taylor Brothers became self-insured, with ESIS/ACE becoming the adjusting agent. They argue that if plaintiff has proven she has suffered a compensable occupational disease, then it was during the time when Travelers was the insurance carrier.

N.C. Gen. Stat. § 97-57 states:

> In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

N.C. Gen. Stat. § 97-57 (2007).

The term "last injuriously exposed" is defined as "an exposure that proximately augmented the disease to any extent, however slight." *Mann v. Technibilt, Inc.*, 193 N.C. App. 193, 195, 666 S.E.2d

851, 855 (2008) (citing *Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362). Exposure at work to elements "which can cause an occupational disease can be so slight quantitatively that it could not in itself have produced the disease." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 358, 524 S.E.2d 368, 374 (2000) (citing *Caulder v. Waverly Mills*, 314 N.C. 70, 72, 331 S.E.2d 646, 647 (1985)), *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000).

Taylor Brothers and ESIS/ACE argue the Commission erred by interpreting "last injurious exposure" to mean the period of time when plaintiff was exposed to the hazards of the employment. They argue the correct definition of "last injurious exposure" is the time when the employment augments the disease process.

As this Court has stated:

> It must have been fully understood by those who wrote the law fixing the responsibility on the employer in whose service the last injurious exposure took place, that situations like this must inevitably arise, but the law makes no provision for a partnership in responsibility, has nothing to say as to the length of the later employment or the degree of injury which the deleterious exposure must inflict to merit compensation. It takes the breakdown practically where it occurs—with the last injurious exposure.

Jones v. Beaunit Corp., 72 N.C. App. 351, 353-54, 324 S.E.2d 624, 625 (1985) (citation omitted). The first insurance carrier is liable only if plaintiff's CTS had reached the point of saturation at the time the second insurance carrier had assumed the risk. *Id.* at 354, 324 S.E.2d at 626.

The Commission found:

> 12. Through August 9, 2006, plaintiff continued performing her regular duties for defendant. Until that date, the credible evidence of record is that plaintiff's symptoms continued to worsen. Additionally, Dr. Cregan has opined that the last day plaintiff worked for defendant would be the last day she was exposed to the hazards of carpal tunnel syndrome.
>
> 13. Plaintiff was last injuriously exposed to the hazards of carpal tunnel syndrome and left middle trigger finger condition in her employment with defendant on August 9, 2006, at which time defendant was self-insured, with ESIS/ACE-USA acting as the servicing agent.

Based on these findings, the Commission concluded that Taylor Brothers and ESIS/ACE were liable for plaintiff's injuries.

Plaintiff testified her symptoms worsened after 1 June 2006 and continued until her surgery. Her pain, weakness, and numbness worsened and interfered with her sleep. Dr. Cregan stated that waking up at night with a numb and tingly hand, regardless of pain, is an important criterion for surgery. He further opined it is possible for CTS to worsen between the time the person meets the criteria for surgery and when the surgery is actually performed. As for the last time plaintiff had exposure to the employment hazards, Dr. Cregan stated that if the Commission "felt like this work environment was to some degree causing an effect that resulted in carpal tunnel syndrome, then the last day she worked would be the last time she had exposure to the hazard, . . . worsening the carpal tunnel."

This Court cannot reweigh the evidence, and our role is to examine the record to see if any competent evidence supports the findings. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. The Commission's findings of fact are supported by competent evidence in the record, and these findings in turn support the Commission's conclusion that plaintiff's last injurious exposure to the hazards of her employment was after liability for the risk shifted from Travelers to Taylor Brothers, with ESIS/ACE acting as the adjusting agent.

This argument is without merit.

III. Violation of Appellate Rules of Procedure by Counsel for Taylor Brothers and ESIS/ACE

[3] In their brief, Taylor Brothers and ESIS/ACE cite the case of *Smith v. Beasley Enters., Inc.*, 148 N.C. App. 559, 560 S.E.2d 885 (2002). This case was reported pursuant to Rule 30(e) of the Rules of Appellate Procedure. This rule provides that citation of unpublished opinions is disfavored. Such an opinion may be cited if a party believes that it has precedential value to a material issue in the case, and there is no published opinion that would serve as well. When an unpublished opinion is cited, counsel must do two things: (1) they "must indicate the opinion's unpublished status;" and (2) they must serve a copy of the opinion on all other parties to the case and on the court. N.C.R. App. P. 30(e)(3) (2007). In the instant case, counsel did neither of these things. This conduct was a violation of the Rules of Appellate Procedure. In our discretion, we hold that this conduct was not a gross violation of the Rules of Appellate Procedure meriting

the imposition of sanctions. However, counsel is admonished to exercise greater care in the future citation of unpublished opinions.

AFFIRMED.

Judges BRYANT and ELMORE concur.

RON MEDLIN CONSTRUCTION, A PARTNERSHIP, AND GEORGE RONALD MEDLIN, INDIVIDUALLY, PLAINTIFFS v. RAYMOND A. HARRIS AND SARAH N. HARRIS, DEFENDANTS

AND

RON MEDLIN CONSTRUCTION, A PARTNERSHIP, AND GEORGE RONALD MEDLIN, INDIVIDUALLY, PLAINTIFFS AND THIRD PARTY PLAINTIFFS v. INTRACOASTAL SERVICE, INC.; JOHN BIRD, D/B/A BIRD ROOFING; LINDSAY WADE MILLSAPS, D/B/A ENGINEERED PLUMBING; ED NEWSOME'S HARDWOOD FLOORING, INC.; AND THE PAINT DOCTOR, THIRD-PARTY DEFENDANTS

No. COA06-1665-2

(Filed 1 September 2009)

Quantum Meruit— unlicensed individual and licensed company—contract only with individual—focus on subject matter rather than parties

In an opinion that supersedes a prior opinion in the same case, *Ron Medlin Constr. v. Harris*, 189 N.C. App. 363, the trial court's grant of summary judgment to defendants in a *quantum meruit* case involving an unlicensed contractor was affirmed. The contract was with Ron Medlin, while the license was held by Ron Medlin Construction. Although plaintiffs argued that Ron Medlin Construction could bring a *quantum meruit* claim against defendants because it was not a party to the contract, the focus in *quantum meruit* is on whether there is an express contract on the subject matter at issue and not on whether there was a contract between the parties.

Judge JACKSON dissents in a separate opinion.

Appeal by plaintiffs from order entered 5 September 2006 by Judge B. Craig Ellis in Brunswick County Superior Court. Heard in the Court of Appeals 22 August 2007. Opinion filed 18 March 2008. Petition for rehearing granted 19 May 2008. The following opinion supersedes and replaces the opinion filed 18 March 2008.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Robin K. Vinson, for plaintiffs-appellants.

Shipman & Wright, L.L.P., by Gary K. Shipman and Matthew W. Buckmiller, for defendants-appellees.

GEER, Judge.

This appeal arises out of a contract entered into between plaintiff George Ronald Medlin ("Medlin") and defendants Raymond and Sarah Harris to build a house. Plaintiffs Medlin and Ron Medlin Construction, a general partnership, appeal from the trial court's grant of summary judgment in favor of defendants on plaintiffs' claim for breach of contract and, alternatively, for relief based on *quantum meruit*. On appeal, plaintiffs do not dispute that summary judgment was proper as to Medlin because he was not a licensed general contractor on the date he entered into the contract. Plaintiffs argue, however, that because Ron Medlin Construction was not a party to the express contract entered into by Medlin and defendants, it is entitled to bring an action in *quantum meruit* against defendants. Because this Court has already rejected such a claim in *Jenco v. Signature Homes, Inc.*, 122 N.C. App. 95, 468 S.E.2d 533 (1996), we affirm.

Facts

In September 2002, defendants entered into a written construction contract with Medlin for a single-family residence to be built at 1770 Twisted Oak Lane SW in Brunswick County. At the time the contract was signed, Medlin was not a licensed general contractor in North Carolina. Ron Medlin Construction is a North Carolina general partnership consisting of Medlin and his wife as general partners. Ron Medlin Construction had its general contractor's license at the time defendants and Medlin signed the contract.

Ron Medlin Construction (1) maintained a checking account for materials and labor during construction in the names of defendants and "Ronald Medlin"; (2) purchased materials and labor for the project; (3) obtained building permits, inspections, and certificates of occupancy; and (4) constructed the house at 1770 Twisted Oak Lane SW in Brunswick County. Defendants paid in excess of $725,000.00 towards the cost of construction, and the house was appraised at $1,300,000.00 after completion.

Following completion of the construction, a dispute arose between plaintiffs and defendants as to additional moneys allegedly

owed on the project. Defendants questioned the validity of the construction contract and refused to make further payments under it. Plaintiffs subsequently brought claims for (1) a declaratory judgment of the rights of each plaintiff, (2) *quantum meruit*/unjust enrichment, (3) negligent misrepresentation, and (4) a constructive trust. Defendants counterclaimed for (1) negligence and (2) unfair and deceptive trade practices. Following discovery, the trial court granted summary judgment to defendants on 1 September 2006. Plaintiffs timely appealed to this Court.

On 18 March 2008, this Court, in *Ron Medlin Constr. v. Harris*, 189 N.C. App. 363, 369, 658 S.E.2d 6, 11 (2008), reversed the trial court's grant of summary judgment to defendants, holding that Ron Medlin Construction could maintain an action in *quantum meruit* against defendants. On 22 April 2008, defendants filed a petition for rehearing, and on 19 May 2008, that petition was granted. This opinion supersedes the original opinion.

Discussion

The sole question raised by this appeal is whether Ron Medlin Construction can bring an action in *quantum meruit* against defendants. We review a trial court's ruling on a motion for summary judgment de novo. *Va. Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 384-85, 343 S.E.2d 188, 190-91, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). This Court must determine, based upon the evidence presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, 276 S.E.2d 283 (1981).

The parties agree that the contract between Medlin and defendants is unenforceable because Medlin was not a licensed general contractor. *See Brady v. Fulghum*, 309 N.C. 580, 586, 308 S.E.2d 327, 331 (1983) ("[W]e adopt the rule that a contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor. It cannot be validated by the contractor's subsequent procurement of a license."), *superseded by statute on other grounds as stated in Hall v. Simmons*, 329 N.C. 779, 407 S.E.2d 816 (1991). Further, it is undisputed that Medlin may not, under controlling case law, recover under a theory of *quantum meruit*. *See Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 329, 330 S.E.2d 664, 667 (1985) ("Plaintiff also argues that if it is not entitled to payment pursuant to the contract, it should be permitted to recover on the theory of *quantum*

meruit. The same rule which prevents an unlicensed contractor from recovering for breach of the construction contract also denies recovery on the theory of *quantum meruit*.").

Ron Medlin Construction contends, however, that since the express contract was between Medlin and defendants, Ron Medlin Construction—which was not a party to the express contract—may still recover based on *quantum meruit*. This conclusion cannot be reconciled with *Jenco* or the controlling principles governing *quantum meruit* recoveries.

In *Jenco*, 122 N.C. App. at 96-97, 468 S.E.2d at 533-34, the plaintiffs entered into a contract with Signature Homes, Inc. to purchase a residential subdivision lot on which Signature Homes, Inc. would build the plaintiffs a house. At that time, Signature Homes, Inc. was not a licensed general contractor. An addendum to the contract designated Craig Wieser, doing business as Signature Homes, Inc., as the seller. Wieser had a general contractor's license. *Id.* at 97, 468 S.E.2d at 534. After construction started on the plaintiffs' home, Wieser transferred all existing projects that he had been supervising to a new corporation called Signature Homes Corporation. Signature Homes Corporation had an unlimited general contractors' license. *Id.* The parties did not contend that Signature Homes Corporation was a party to the plaintiffs' contract.

Ultimately, "Craig Wieser d/b/a Signature Homes, Inc." and Signature Homes Corporation filed a claim of lien against the plaintiffs' property. In response to plaintiffs' suit against Signature Homes, Inc., Craig Wieser, and Signature Homes Corporation to cancel the lien, the defendants contended that (1) Wieser, as a party to the contract, was entitled to recover for breach of contract or, alternatively, (2) Wieser and Signature Homes Corporation were entitled to recover under a theory of *quantum meruit*. *Id.* at 98, 468 S.E.2d at 534.

This Court held that the contract between Signature Homes, Inc. and the plaintiffs was unenforceable because Signature Homes, Inc. did not have its general contractor license at the time the contract was signed. *Id.* at 99-100, 468 S.E.2d at 535. The Court concluded that the subsequent appointment of Wieser as the seller "did not cure the illegal contract which existed at the time that the contract was signed." *Id.* at 100, 468 S.E.2d at 535. The Court then addressed defendants' *quantum meruit* theory and held: "This argument is also without merit because recovery under quantum meruit is not applicable where there is an express contract." *Id.*, 468 S.E.2d at 536.

Jenco involved three defendants: (1) the unlicensed original seller, Signature Homes, Inc.; (2) the licensed individual, Wieser, who was subsequently designated as the seller and arguably a party to the contract; and (3) the licensed corporation, Signature Homes Corporation, who built the house, but was not a party to the contract. Wieser and Signature Homes Corporation both claimed that they were entitled to recover based on *quantum meruit*, and this Court concluded that the defendants—including Signature Homes Corporation, who was not a party to the contract—were barred because of the existence of the express contract. *Id.*

We have been unable to identify any meaningful distinction between the position of Signature Homes Corporation in *Jenco* and the position of Ron Medlin Construction in this case. Neither was ever a party to the express contract to build the home. Both, however, at the request of the original seller/contractor built the home that was the subject of the contract. *Jenco*, therefore, is controlling.

This view of *Jenco* is consistent with controlling law regarding *quantum meruit* recoveries. Plaintiffs mistakenly argue that only an express contract between the parties precludes a claim for *quantum meruit*. In fact, this Court has held: "It is a well established principle that an express contract precludes an implied contract *with reference to the same matter*. It is stated in 12 Am. Jur., Contracts, Section 7, page 505: 'There cannot be an express and an implied contract *for the same thing* existing at the same time.' " *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) (emphasis added) (internal citations omitted). Thus, the focus, in the *quantum meruit* context, is on whether there is an express contract *on the subject matter at issue* and not on whether there was a contract between the parties.

In *Vetco*, the plaintiff had entered into a contract with a third party to provide materials for the building of houses on lots, some owned by the third party and some owned by the defendant. The defendant would not pay for the materials used to build the homes on the lots it owned. Our Supreme Court held that since the plaintiff had "proved an express contract with [the third party] for the purchase of the materials used in the construction of houses in Cedar Forest Estates, it was error for the court to submit the case to the jury on the theory of an implied contract on the part of the defendant to pay for materials sold and delivered to another under an express contract." *Id.* at 715, 124 S.E.2d at 909.

Here, as in *Vetco*, Ron Medlin Construction proved an express contract between defendants and Medlin for the building of the house. Under *Vetco*, Ron Medlin Construction, even though it was not a party to the contract, could not sue on the theory of an implied contract for the building of the house—the subject of the express contract.

Application of this principle is consistent with the rationale expressed by our Supreme Court in *Brady* as justification for the rule prohibiting unlicensed contractors from recovering on contracts they entered into illegally. The Court explained:

> [W]hen a legislature invokes its police power to provide statutory protection to the public from fraud, incompetence, and irresponsibility, as ours has done with the contractor licensing statutes, courts impose greater penalties on violators. 6A A. Corbin, Corbin on Contracts § 1512 (1962). Making contracts unenforceable by the violating contractor produces "a salutary effect in causing obedience to the licensing statute." *Id.* These public policy considerations militate against permitting unlicensed general construction contractors to enforce their contracts. Denying the contractor the right to enforce his contract effectuates the statutory purpose and legislative intent of providing the public with optimum protection.

309 N.C. at 584-85, 308 S.E.2d at 331. This "statutory purpose and legislative intent of providing the public with optimum protection," *id.* at 585, 308 S.E.2d at 331, would not be promoted if an individual who violated the contractor licensing statutes could then, in effect, enforce his contract by the means of having another entity perform the contract and sue based on *quantum meruit*.

Medlin was not licensed and was prohibited by law from entering into a contract with defendants. He, therefore, cannot recover under the contract or in *quantum meruit*. We can perceive no rational basis for allowing Medlin to avoid the consequences of his violation by transferring, without defendants' agreement, responsibility for the building of the home to Ron Medlin Construction, which then has sued to obtain in *quantum meruit* the recovery that Medlin cannot by law obtain. If this result seems harsh, our Supreme Court in *Brady* has already observed: "If, by virtue of these rules, harsh results fall upon unlicensed contractors who violate our statutes, the contractors themselves bear both the responsibility and the blame." *Id.* at 586, 308 S.E.2d at 332.

In sum, we are bound by *Jenco* and *Vetco* and hold, consistent with those opinions, that Ron Medlin Construction is not entitled to recover under a theory of *quantum meruit*. The trial court's grant of summary judgment to defendants is, therefore, affirmed.

Affirmed.

Judge CALABRIA concurs.

Judge JACKSON dissents in a separate opinion.

JACKSON, Judge, dissenting.

Because I perceive that the principle that there can be no implied contract where an express contract exists on the same subject matter is meant to apply between the same parties, I must respectfully dissent.

The majority primarily relies upon two cases to conclude that Ron Medlin Construction cannot recover in *quantum meruit* against defendants because there was an express contract between defendants and George Ronald Medlin: [*Vetco*] *Concrete Co. v.* [*Troy*] *Lumber Co.*, 256 N.C. 709, 124 S.E.2d 905 (1962) ("*Vetco*") and *Jenco v. Signature Homes, Inc.*, 122 N.C. App. 95, 468 S.E.2d 533 (1996).

The majority is correct that in *Vetco*, our Supreme Court stated that "'[t]here cannot be an express and an implied contract for the same thing existing at the same time.' " *Vetco*, 256 N.C. at 713, 124 S.E.2d at 908 (quoting 12 Am. Jur. *Contracts* § 7 (1938)). However, the end of the paragraph from which the quotation is taken contains this additional language: "It is further stated in a footnote [in American Jurisprudence] that, 'Perhaps it is more precise to state that where *the parties* have made a contract for *themselves*, covering the whole subject matter, no promise is implied by law.' " *Id.* at 714, 124 S.E.2d at 908 (emphasis added). This additional language makes clear that *Vetco* was referring to the fact that the same parties cannot have both an express and an implied contract for the same thing.

It was after this discussion of the general principle in *Vetco* that the Supreme Court continued discussing the rule as applied to a third party:

> The same rule has been applied to benefits conferred under a special contract with a third person. When there is a contract be-

> tween two persons for the furnishing of services or goods to a third, the latter is not liable on an implied contract simply because he has received such services or goods.

Id. (quoting 12 Am. Jur. *Contracts* § 7, n.20 annots. (1938)). In *Vetco*, there was an express contract between the plaintiff and another party to provide materials to construction sites, some of which were owned by the other party, some of which were owned by the defendant—who was not a party to the express contract.

Unlike in *Vetco*, we do not have a third-party beneficiary situation in the case *sub judice*. Defendants, as buyers, did not contract with George Ronald Medlin, as seller, to provide goods or services to Ron Medlin Construction, a third party. Defendants were not third parties benefitting from an express contract between George Ronald Medlin and Ron Medlin Construction. Here, defendants contracted with George Ronald Medlin to provide services to them. Ultimately, Ron Medlin Construction provided those services to defendants.

Further, if we return to the source upon which *Vetco* relied for these principles, we learn that an implied contract is not always precluded by the existence of an express contract. "The mere fact that the parties have attempted to make an express contract but have not succeeded in making it enforceable with respect to some of its terms does not prevent the implication of a promise to pay for benefits conferred thereunder." 12 Am. Jur. *Contracts* § 7 (1938).

In *Jenco*, the Court concluded: "Defendants argue in the alternative that they are entitled to recover payment under the theory of *quantum meruit*. This argument is also without merit because recovery under *quantum meruit* is not applicable where there is an express contract." *Jenco*, 122 N.C. App. at 100, 468 S.E.2d at 536 (citing *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E.2d 507 (1968); *Brady v. Fulghum*, 309 N.C. 580, 308 S.E.2d 327 (1983)) (italics added). Two of the three defendants in *Jenco* were signatories to the express contract. *See id.* at 99-100, 468 S.E.2d at 534. According to the opinion, Signature Homes Corporation—who did not sign the express contract—did not seek to recover based upon a breach of contract; however, it—as well as Craig R. Wieser—did seek to recover *in the alternative* based upon *quantum meruit*. *Id.* at 100, 468 S.E.2d at 536.

It is not clear that the Court considered that, as a practical matter, Signature Homes Corporation could not argue *quantum meruit* in the alternative if it had not argued breach of contract in the first

instance. Had it done so, it is not clear that the Court would have reached the same conclusion as to Signature Homes Corporation. Further, as stated in the original majority opinion in this case, the *Jenco* opinion did not address whether Craig R. Wieser—who had a valid contractor's license—could have recovered had he not signed the original express contract. *Ron Medlin Constr. v. Harris*, 189 N.C. App. 363, 367, 658 S.E.2d 6, 10 (2008) ("*Medlin I*"). The Court also did not address whether Signature Homes Corporation could validly have entered into a new express contract with the Jencos.

I do not question the inability of George Ronald Medlin to recover against the express contract. He was not a licensed contractor at the time he entered into the contract. However, George Ronald Medlin is not seeking to recover on the contract. He is seeking only to have the rights of the various parties declared. The party seeking to recover for the value of the house it constructed for defendants is Ron Medlin Construction—a separate and distinct legal entity from George Ronald Medlin—which is duly licensed as a general contractor.

As stated in *Medlin I*, in this case, plaintiffs George Ronald Medlin and Ron Medlin Construction alleged that Ron Medlin Construction, and not George Ronald Medlin, "built a residence on defendants' property reasonably believing it had the right to do so, based upon defendants' express contract." *Medlin I*, 189 N.C. App. at 367, 658 S.E.2d at 10. Defendants "denied the existence of an express contractual relationship between themselves and [Ron] Medlin Construction[.]" *Id.* Therefore, Ron Medlin Construction proceeded upon a theory of *quantum meruit*. *Id.*

> [T]he purpose of the licensing requirement is to protect the public from incompetent contractors. Although [George Ronald] Medlin was not a licensed contractor, he was the qualifying individual for [Ron] Medlin Construction, which was formed on 28 September 1990. [Ron] Medlin Construction was issued an Intermediate Residential license on 16 January 1991, and its license was changed to an Intermediate Building license in 1993, after [George Ronald] Medlin passed the exam for a building contractor's license. [George Ronald] Medlin was a licensed contractor from 21 May 1986 until 31 December 1992. [Ron] Medlin Construction, not [George Ronald] Medlin, seeks to recover the value of its services in building defendants' home. The North Carolina general contractor licensing requirements bar recovery by an unlicensed general contractor. [Ron] Medlin Construction is not an unlicensed general contractor.

Id. at 367-68, 658 S.E.2d at 10. Accordingly, I do not believe Ron Medlin Construction's claim is barred by the licensing requirements of the State Licensing Board for General Contractors.

Because I do not believe that defendants' express contract with George Ronald Medlin precludes Ron Medlin Construction from recovering in *quantum meruit* on an implied contract, I would reverse. As expressed in the original majority opinion in this appeal: "At all times relevant to this case, plaintiff Medlin Construction was a licensed contractor. Defendants may not use the licensing statutes as a shield to avoid any obligations owing to plaintiff Medlin Construction for the building of their home." *Medlin I*, 189 N.C. App. at 368-69, 658 S.E.2d at 11.

JUDY WILLIAMS, PLAINTIFF-APPELLANT v. CRAFT DEVELOPMENT, LLC; CRAFT HOLDINGS, LLC; AND DAN JOHNSON, DEFENDANTS-APPELLEES, AND THIRD-PARTY PLAINTIFFS v. MARK LOWDER AND DANITA HINSON, CO-EXECUTORS OF THE ESTATE OF HAROLD J. FURR, THIRD-PARTY DEFENDANTS-APPELLEES

No. COA09-3

(Filed 1 September 2009)

1. Contracts— breach of contract—summary judgment

The trial court did not err by granting defendants' motion for summary judgment on plaintiff's claim for breach of contract because the record was devoid of evidence that plaintiff argued her theory before the trial court.

2. Contracts— breach of implied covenant of good faith and fair dealing—summary judgment improper

The trial court erred by granting defendants' motion for summary judgment on plaintiff's claim for breach of the implied covenant of good faith and fair dealing in a case arising from the sale of property with a perpetual life estate. There were issues of material fact and credibility.

3. Contracts— specific performance—summary judgment

The trial court did not err by granting defendants' motion for summary judgment on plaintiff's claim for specific performance in an action involving the sale of land with a perpetual life estate. By plaintiff's own admission, she was not able to perform due to her misunderstanding of her interest in the property.

4. Civil Procedure— motion to amend—timeliness—bad faith—undue prejudice—undue delay

The trial court did not abuse its discretion in a breach of contract case by denying plaintiff's motion to amend her complaint.

Appeal by Plaintiff from orders entered 17 September 2008 by Judge R. Stuart Albright in Superior Court, Stanly County. Heard in the Court of Appeals 10 June 2009.

Essex Richards, P.A., by Edward G. Connette and Russell Fergusson, for Plaintiff-Appellant.

Ferguson, Scarbrough, Hayes, Hawkins, & DeMay, P.A., by James E. Scarbrough, for Defendants-Appellees and Third-Party Plaintiffs.

Bowling Law Firm, PLLC, by Kirk L. Bowling, for Third-Party Defendants-Appellees.

McGEE, Judge.

Plaintiff moved into a house in Stanly County in 2003 to provide assistance to her sister, Annie Quinn (Quinn), and to Harold G. Furr (Furr). Quinn and Furr were companions and both were in failing health. Plaintiff also helped Furr with duties related to his business. Furr owned A.J. Furr, Inc. (the company), which was still in existence at the time of this appeal. Furr was the sole stockholder in the company, and treated the assets of the company as his personal assets. The majority of Furr's assets, including the house in which he, Quinn, and Plaintiff resided, were in fact owned by the company. The house was located on approximately sixty-two acres of land (the property) in Stanly County.

Plaintiff was not paid for her services to Quinn and Furr. According to Plaintiff, Furr told Plaintiff he would eventually compensate her for her assistance. Third-Party Defendant Mark Lowder (Lowder) was Furr's attorney, and assisted Furr with legal representation involving both business and personal issues. Lowder was aware that title to the property was held by the company. Shortly before Furr's death in October 2003, Lowder drafted a will for Furr, which Furr executed. In the will, Furr purported to grant a life estate in the property to both Quinn and Plaintiff upon Furr's death. Pursuant to Furr's will, Lowder and Furr's daughter, Third-Party Defendant Danita Hinson (Hinson), were appointed co-executors of Furr's estate (the estate).

Quinn and Plaintiff were informed of the purported life estates after Furr's death, and they continued to live at the property. Quinn died in 2005, and Plaintiff continued to live at the property after that time.

Craft Development, LLC; Craft Holdings, LLC; and Dan Johnson (Defendants) were real estate developers who contacted Lowder in 2006 to inquire about the possibility of purchasing the property. Lowder informed Defendants that, according to Furr's will, Plaintiff possessed a life estate in the property. Lowder further informed Defendants that the estate would not entertain a proposal for sale of the property unless the life estate issue was resolved. Defendants contacted Plaintiff, and Plaintiff agreed to sell her purported life estate to Defendants for $185,000.00. The estate was informed of this agreement and agreed to sell the property to Defendants for $865,000.00. Both contracts for sale named the company as the owner of the property. Defendants performed a title search on the property before closing and decided at some point in time that they would not close on their contract with Plaintiff. However, Defendants did not inform Plaintiff or the estate of their decision. Defendants claim they made this decision after the title search revealed that the property was owned by the company, not Furr, and therefore Furr had no authority to grant a life estate to Plaintiff pursuant to Furr's will. Defendants closed the sale with the estate on 18 April 2007, and title to the property was transferred to Defendants. Plaintiff was first informed that Defendants did not intend to purchase her purported life estate after Defendants had obtained title to the Property.

Plaintiff filed a complaint against Defendants on 31 August 2007, stating claims for breach of contract, implied covenant of good faith and fair dealing, constructive fraud, fraud, unfair and deceptive trade practices, specific performance, and punitive damages. Defendants filed a third-party complaint against the estate on 7 December 2007. Defendants alleged in their complaint that the estate made material misrepresentations to Defendants concerning Plaintiff's purported life estate. Defendants requested that the estate be held responsible for costs incurred by Defendants as a result of Plaintiff's action, and for any potential award Plaintiff might be granted pursuant to Plaintiff's claims against Defendants.

Plaintiff filed a motion for partial summary judgment on Plaintiff's claims for breach of contract and specific performance on 19 November 2007. Plaintiff's motion was denied by order entered 17 December 2007. All parties subsequently filed motions for summary judgment, which were heard on 8 September 2008. Plaintiff filed a

motion on 12 September 2008 to amend her complaint to add the company as a Defendant.

The trial court entered two orders on 17 September 2008. In its first order, the trial court granted Defendants' motion for summary judgment, and dismissed Plaintiff's claims against Defendants. The trial court denied Plaintiff's motion for summary judgment, and determined that the estate's motion for summary judgment was moot. In its second order, the trial court denied Plaintiff's motion to amend her complaint to add the company as a defendant. Plaintiff appeals. Additional relevant facts will be discussed in the body of this opinion.

I.

[1] In Plaintiff's first, second and third arguments, she contends the trial court erred in granting Defendants' motion for summary judgment because Plaintiff had stated an actionable claim for breach of contract and had offered a forecast of evidence to support that claim. We disagree.

Plaintiff relies upon a provision in the contract entered into between Plaintiff and Defendants wherein Defendants agreed to purchase Plaintiff's life estate in the property. The contract states in relevant part:

> After the Contract Date, Buyer shall, at Buyer's expense, cause a title examination to be made of the property before the end of the Examination Period. In the event that such title examination shall show that Seller's title is not fee simple marketable and insurable, subject only to Permitted Exceptions, then Buyer shall immediately notify Seller in writing of all such title defects and exceptions, as of the date Buyer learns of the title defects, and Seller shall have thirty (30) days to cure said noticed defects.

Plaintiff contends on appeal that Defendants did not inform her of the issue concerning the validity of her life estate in the property, as required by the terms of the contract, and thus she was not given thirty days to attempt to address this issue and move forward with the sale. Defendants argue that the discovery that the property was wholly owned by the company, and not Furr, means that Furr was without authority to devise a life estate to Plaintiff in his individual capacity (*i.e.* as a bequest in his personal will). Defendants contend that, because Furr had no power to convey a life estate in the property to Plaintiff, Plaintiff never obtained a life estate and un-

divided fee simple title was held by the company. Defendants argue, therefore, that Plaintiff's illusory life estate did not constitute a defect in title requiring Defendants to notify Plaintiff under the terms of the contract.

In the materials presented to the trial court in support of both Plaintiff's and Defendants' motions for summary judgment, there was a disagreement between Plaintiff and Defendants concerning whether Plaintiff possessed a valid life estate. Plaintiff, in her pleadings and other materials in support of her motion for summary judgment, did not advance her theory that Defendants breached the contract by failing to notify Plaintiff when they became aware of a potential issue with the validity of Plaintiff's purported life estate in the property.[1]

In fact, in her deposition, Plaintiff consistently contended that she held a valid life estate, and never suggested she should have been informed of the issue surrounding her purported life estate in order to allow her to correct any defects in her purported title to that life estate. Plaintiff's deposition testimony indicates that, in her opinion, there was no potential defect in the title because Plaintiff's purported life estate was completely valid. Plaintiff again asserted the validity of her life estate in her "Motion to Amend Complaint," filed 12 September 2008, four days *after* the hearing on the cross-motions for summary judgment. In her motion to amend, Plaintiff stated: "The evidence shows that Plaintiff was granted a possessory life estate interest in certain property. Plaintiff contends that she was granted a valid life estate[.]"

If the summary judgment hearing was recorded, no transcript of that hearing was included in the record. We therefore have no means of determining what arguments Plaintiff may have made to the trial court at that hearing. "'This Court . . . is bound by the record as certified and can judicially know only what appears of record.' 'It is the appellant's duty and responsibility to see that the record is in proper form and complete.' " *State v. Brown*, 142 N.C. App. 491, 492-93, 543 S.E.2d 192, 193 (2001) (citations omitted); *see also Hill v. Hill*, 13 N.C. App. 641, 642, 186 S.E.2d 665, 666 (1972). Because the record before us is devoid of any evidence that Plaintiff argued this issue before the trial court, Plaintiff is prohibited from arguing this issue for the first time on appeal. *Floyd v. Executive Personnel Grp.*, 194

1. In the depositions of Dan Johnson and Mark Lowder, Defendants did ask some questions concerning this provision in the contract, but there is no evidence in the record that this theory was further developed or argued to the trial court.

N.C. App. 322, ——, 669 S.E.2d 822, 828 (2008). Failure to argue an issue before the trial court constitutes abandonment of that argument, and it will, other than in certain limited circumstances not relevant in this case, preclude appellate review of that issue. N.C.R. App. P. 10(b)(1); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 363-64 (2008). This argument is without merit.

Plaintiff's second argument involves interpretation of the language from the purchase contract cited above. As we have held that Plaintiff's breach of contract argument is not properly before us, Plaintiff's arguments concerning the relevant language of the contract are not properly before us either, and we do not address them. This argument is dismissed.

Plaintiff's third argument presents no clear legal theory for redress. In sum, Plaintiff seems to be arguing that Defendants knew about the issues surrounding Plaintiff's purported life estate before entering into the contract with Plaintiff. Plaintiff further argues that "[e]xistence of this knowledge by [D]efendants prior to their execution of the [contract] could be interpreted as a waiver of the defects claimed by [D]efendants." Again, because we have held that Plaintiff's breach of contract claim based upon the "defects" clause in the contract is not properly before us, Plaintiff's third argument is also not properly before us.

II.

[2] In Plaintiff's fourth argument, she contends that the trial court erred by granting Defendants' motion for summary judgment because Plaintiff had stated an actionable claim for breach of contract and breach of the implied covenant of good faith and fair dealing. We agree in part.

In her brief to this Court, Plaintiff only includes her contentions concerning her claim for breach of the implied covenant of good faith and fair dealing. Because Plaintiff makes no argument in this section of her brief concerning any breach of contract claim unrelated to her claim that Defendants breached the implied covenant of good faith and fair dealing, our review is limited to that issue. 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).

> Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

> the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). On appeal of a trial court's allowance of a motion for summary judgment, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Evidence presented by the parties is viewed in the light most favorable to the non-movant.

Summey v. Barker, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citation omitted). On appeal, an order granting summary judgment is reviewed *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (citation omitted).

"'In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.' " *Bicycle Transit Authority v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation omitted); *see also Governor's Club, Inc. v. Governor's Club Ltd. P'ship*, 152 N.C. App. 240, 251-52, 567 S.E.2d 781, 789 (2002).

The following relevant evidence was presented to the trial court: Defendant Dan Johnson (Johnson) was a licensed real estate broker. Johnson testified in his deposition that Defendants "buy millions of dollars' worth of property a year." Defendants had hired Jerry Copeland (Copeland), a real estate broker from Charlotte, to join Defendants for the purpose of locating and purchasing property in the area, including property in Stanly County. Copeland became aware of the property and "contacted *A. J. Furr, Incorporated* over in Locust, and . . . talked to one of the girls that worked there" who informed Copeland that the property might be for sale. (Emphasis added). Johnson, Copeland and David Cuphbertson, the owner of the Craft companies, met with Lowder and Hinson at Lowder's office to discuss the property. Lowder stated in an affidavit that he was an attorney who had represented Furr in Furr's business dealings since 1994, and that he had prepared Furr's will, including the purported grant of a life estate to Plaintiff. Lowder further stated in his affidavit that "Furr owned 100% of the stock in his corporations and managed his affairs with little or no distinction between his business and personal financial affairs." In his affidavit, Lowder further stated:

4. During 2006, Dan Johnson and other representatives of Craft Development and Craft Holdings contacted me as Co-Executor of the Estate on numerous occasions to inquire about purchasing the home of Harold Furr on Coley Store Road. I advised Mr. Johnson and others from Craft, that the property was not for sale because of the life estate granted to [Plaintiff].

5. Mr. Johnson inquired of me if the property could be purchased if the life estate was no longer an issue. I indicated to Mr. Johnson, with the agreement of Co-Executor Danita Hinson, that we would consider an offer to purchase the property if the life estate was purchased from [Plaintiff]. [Plaintiff] had lived in the Coley Store Road property pursuant to the life estate since 2003. The Co-Executors honored the life estate granted to [Plaintiff] because it was clearly Mr. Furr's intent to grant her a life estate in the property.

6. I was advised by Mr. Johnson that Craft Development had entered into a contract with [Plaintiff] for the purchase of her life estate. We then negotiated a sale to Craft *because the life estate had been purchased from [Plaintiff]. Absent the contract between Craft and [Plaintiff] for the purchase of her life estate, the property would not have been sold by the Estate to Craft or anyone else.* (Emphasis added).

Johnson affirmed by affidavit and deposition testimony that Lowder and Hinson had informed Defendants that Plaintiff had a life estate and that Defendants would have to settle that issue with Plaintiff before Furr's estate would consider selling the property. Johnson stated: "We prepared a contract to buy the land from *A.J. Furr Inc.* We also prepared a contract to buy a life estate from [Plaintiff]." (Emphasis added). Contracts were in fact prepared by Defendants in which Defendants agreed to purchase Plaintiff's "life estate" and agreed to purchase the property from the seller, listed as "A.J. Furr, Inc." Defendants' contract with Plaintiff was executed on 8 December 2006. Defendants' contract with "A.J. Furr, Inc." was executed on 18 January 2007. Johnson admitted that, because the estate had informed him that Plaintiff had a life estate but the tax records listed the owner of the property as "A.J. Furr, Inc.," he "wanted to cover all the bases there of possible ownership." Johnson further admitted that he was "not aware of anything" that the title search revealed that Defendants did not already know. Defendants closed on the sale of the property pursuant to the "A.J. Furr, Inc." contract, but did not

close on Plaintiff's contract. In his deposition, Johnson admitted Defendants did not inform Plaintiff that they were not going to close on her life estate until after they had closed on the property pursuant to the "A.J. Furr, Inc." contract.

Upon this forecast of evidence, we cannot say, as a matter of law, that no issues of material fact exist concerning this issue. When viewed in the light most favorable to Plaintiff, the evidence could lead a reasonable trier of fact to believe Defendants knew that Plaintiff did not hold a life estate in the property before they drafted and executed the sales contract with Plaintiff. A reasonable mind could determine Defendants executed the contract with Plaintiff as an artifice to induce the estate to sell Defendants the property, never intending to honor the contract with Plaintiff. It is undisputed the estate informed Defendants that they would have to remedy the life estate issue with Plaintiff before the estate would consider selling the property to Defendants.

We hold this issue was not properly decided on summary judgment, as there were issues of material fact and credibility involved. *Barker*, 357 N.C. at 496, 586 S.E.2d at 249. Determination of these issues is the sole province of the trier of fact, following trial. We reverse and remand to the trial court for further action on this claim consistent with this holding.

III.

[3] In Plaintiff's fifth argument, she contends the trial court erred in granting Defendants' motion for summary judgment on her claim for specific performance. We disagree.

Plaintiff, citing *McLean v. Keith*, 236 N.C. 59, 71, 72 S.E.2d 44, 53 (1952), states in her brief: "The remedy of specific performance is available to 'compel a party to do precisely what [it] ought to have done without being coerced by the court.' " Plaintiff, citing *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981), also states in her brief: "A 'party claiming the right to specific performance must show the existence of a valid contract, its terms, and either full performance on [her] part or that [she] is ready, willing and able to perform.' " Plaintiff contends that she was "ready and willing to perform the contract as written. Her ability to perform was compromised by her misunderstanding of her interest and the [D]efendants' failure to notify and grant the agreed upon thirty day term for her to correct the claimed defect in her title." Accepting Plaintiff's argument as stated, she does not meet the elements necessary for a claim of

specific performance. By Plaintiff's own admission, she was not "able" to perform, due to "her misunderstanding of her interest[.]" Plaintiff's misunderstanding cannot transform an inability to perform into an ability to perform. Plaintiff argues that she could have potentially corrected the defect had she been given the notice required under the contract. We have previously held that Plaintiff has not preserved this argument for appellate review, and we do not consider it here. This argument is without merit.

IV.

[4] In Plaintiff's sixth argument, she contends the trial court erred in denying her motion to amend her complaint as untimely. We disagree.

The hearing on the cross-motions for summary judgment was conducted on 8 September 2008. Plaintiff filed her motion to amend her complaint seeking to add the company as a defendant on 12 September 2008. The trial court filed its order denying Plaintiff's motion for summary judgment and granting Defendants' motion for summary judgment on 17 September 2008. The trial court stated in its 17 September 2008 order denying Plaintiff's motion to amend: "Defendants' motions for summary judgment were heard by this court . . . and the court took the matter under advisement until September 12, 2008 in order for the court to review the evidence and the memorandums of law submitted by the parties." The trial court further stated: "On September 12, 2008 the parties again appeared before the court to receive the ruling of the court and at that time [P]laintiff moved for the first time to amend the complaint to avoid a possible adverse summary judgment ruling." The trial court denied Plaintiff's motion to amend "for the reason that, among other things, it is untimely[.]"

Plaintiff contends the reason she did not move to amend her complaint earlier is because Lowder's deposition contradicted certain of his earlier positions, which had been supportive of Plaintiff's claims.

> Under Rule 15(a) of the North Carolina Rules of Civil Procedure, leave to amend a pleading shall be freely given except where the party objecting can show material prejudice by the granting of a motion to amend. A motion to amend is directed to the discretion of the trial court. The exercise of the court's discretion is not reviewable absent a clear showing of abuse.

Martin v. Hare, 78 N.C. App. 358, 360-61, 337 S.E.2d 632, 634 (1985) (citations omitted).

> "In the absence of any declared reason for the denial of leave to amend, this Court may examine any apparent reasons for such denial." Reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments.

Id. at 361, 337 S.E.2d at 634 (citation omitted). It is Plaintiff's burden to prove the trial court abused its discretion in denying her motion to amend. *Id.*, 337 S.E.2d at 635.

We hold that Plaintiff has not carried her burden of showing a clear abuse of discretion by the trial court in denying her motion to amend. Lowder was deposed on 11 July 2008, more than two months before Plaintiff filed her motion to amend. The transcript of Lowder's deposition was completed on 29 July 2008, more than one and a half months before Plaintiff filed her motion to amend. Plaintiff had ample time to file a motion to amend to include the company as a defendant before the 8 September 2008 summary judgment hearing if Lowder's deposition testimony was the impetus for her motion. In light of these facts, we defer to the trial court's discretionary determination that Plaintiff filed her motion to amend the same day that the trial court delivered its rulings on the cross-motions for summary judgment in order "to avoid a possible adverse summary judgment ruling." This determination by the trial court supports both "bad faith" and "undue prejudice" for its denial of the motion to amend.

Further, though there is no set time limit for filing motions to amend, *North River Ins. Co. v. Young*, 117 N.C. App. 663, 671, 453 S.E.2d 205, 210-11 (1995), we hold the fact that Plaintiff did not move to amend her complaint until more than a year after she filed her original complaint, and the fact that she did not move to amend until after the hearing on the cross-motions for summary judgment, are sufficient grounds to deny her motion to amend based upon "undue delay." *See Wall v. Fry*, 162 N.C. App. 73, 80, 590 S.E.2d 283, 287 (2004). We hold the trial court did not abuse its discretion in denying Plaintiff's motion to amend. This argument is without merit.

Affirmed in part, reversed and remanded in part.

Judges JACKSON and ERVIN concur.

LINDA WEATHERLY NALE, PLAINTIFF v. ETHAN ALLEN, AND ST. PAUL TRAVELERS, DEFENDANTS

No. COA09-55

(Filed 1 September 2009)

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

An assignment of error not argued in defendants' brief was deemed abandoned.

2. Workers' Compensation— causation—expert testimony—speculation and conjecture

The Industrial Commission erred in a workers' compensation case by finding that plaintiff's right knee injury was causally related to the compensable left knee injury where plaintiff's self-diagnosis was inadequate to establish medical causation and the expert medical testimony presented was insufficiently reliable to qualify as competent evidence on causation.

3. Workers' Compensation— sufficiency of findings of fact—conflicting as a matter of law

The Industrial Commission erred in a workers' compensation case by awarding plaintiff temporary total disability payments for a period of time and this issue is remanded to the Commission for further findings of fact. The Commission upon remand should determine the date plaintiff left the employ of defendant in North Carolina, where and when she worked in South Carolina, and the reason for her termination in South Carolina.

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

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

Appeal by defendants from an Opinion and Award filed 10 September 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 June 2009.

The Sumwalt Law Firm, by Vernon Sumwalt and Mark T. Sumwalt, for employee-plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Jeremy T. Canipe and M. Duane Jones, for employer-carrier-defendant-appellants.

STEELMAN, Judge.

Plaintiff was required to prove, by expert medical testimony, that her right knee injury was a direct and natural result of her compensable left knee injury. This causal link was not established by plaintiff's expert witness. As to defendant's second argument, there is a conflict in the findings of the Industrial Commission, and this matter is remanded for additional findings of fact.

I. Factual and Procedural Background

In July 2005, Linda Weatherly Nale (plaintiff) was employed as an interior designer in Charlotte at Ethan Allen Interiors Inc. (Ethan Allen). Her duties included greeting people when they came to the store, going to clients' residences to deliver accessories, and picking up materials and supplies from the warehouse. Plaintiff was on her feet "quite a bit," and "would walk quite a ways around into the store."

On 14 July 2005, plaintiff was in the warehouse searching for fabric when her left foot became wedged in between boxes. She fell forward and twisted her left knee. Plaintiff continued working without reporting the incident. That weekend, plaintiff went on vacation, and her pain "continued to get worse . . . ." Plaintiff went to the emergency room upon her return to Charlotte.

On 26 July 2005, plaintiff went to Northcross Urgent Care in Huntersville complaining of left knee pain and a swollen, numb foot. Dr. Hal Armistead (Dr. Armistead) imposed work restrictions including wearing a splint, lifting no more than ten pounds, and no stooping, bending or twisting. The work restrictions were delivered to plaintiff's manager, Michelle Jones (Jones) that same day. Plaintiff continued to work. Over the next several months, plaintiff saw four different doctors seeking treatment for her left knee.

On 13 September 2005, Ethan Allen completed Industrial Commission (Commission) Form 19 reporting plaintiff's left knee injury. On 16 September 2005, Ethan Allen's carrier filed a Form 61 with the Commission denying the claim, pending further investigation and receipt of medical records from all treating physicians. On 21 October 2005, Ethan Allen's carrier filed another Form 61 denying the claim based on plaintiff's failure to execute a medical authorization sheet listing her physicians and their contact information.

On 29 November 2005, Dr. Christopher Bensen (Dr. Bensen), an orthopaedic surgeon, directed that plaintiff not work until 12 De-

cember 2005. On 19 December 2005, Dr. Scott L. Smith (Dr. Smith), who practiced with Dr. Bensen, placed plaintiff on work restrictions "with sedentary work only with no walking more than 15 minutes an hour and no bending, stooping, squatting, or kneeling." Plaintiff was further restricted from climbing stairs or ladders.

On 24 August 2006, plaintiff sought treatment from Dr. H. Del Schutte, Jr. (Dr. Schutte). Dr. Schutte recommended arthroscopic surgery on plaintiff's left knee. On 7 September 2006, Dr. Schutte performed a chondroplasty, shaving loose or frayed cartilage from her knee. Dr. Schutte's surgical note stated that plaintiff had "some injury to the cartilage and some fraying of her meniscus." Following surgery, plaintiff experienced a significant reduction in pain. Dr. Schutte encouraged her to be active, and she resumed running for exercise.

The Commission found that plaintiff voluntarily left her employment with Ethan Allen on 1 May 2006, drew unemployment compensation from that date, and returned to work on 28 December 2006. On 26 February 2007, plaintiff requested that her claim be assigned for hearing.

On 7 March 2007, plaintiff returned to Dr. Schutte complaining of pain in her left knee and that "her left knee needs to be lubricated." X-rays taken of her left knee revealed "medial wear and joint space narrowing in the medial aspect with some bone spurs." Dr. Schutte injected her left knee with steroids.

On 9 May 2007, plaintiff returned to Dr. Schutte, complaining of pain in her right knee. Earlier that week, plaintiff twisted her right knee and "felt a pop." Dr. Schutte administered a cortisone injection. The injection relieved the pain until she tried to get into her vehicle and felt another pop in her right knee. On 16 May 2007, plaintiff told Dr. Schutte that her right knee had "just started hurting a few weeks ago," and she thought "it [was] because her left knee had been hurting in the past." Plaintiff stated she had been placing more weight on her right knee.

On 26 June 2007, Dr. Schutte performed a chondroplasty and excision of plica on plaintiff's right knee. Plica is scar tissue on the inner lining of the capsule in the knee. Dr. Schutte also removed fluid from plaintiff's right knee. On 11 July 2007, Dr. Schutte opined that she had "a greater than 50% chance of requiring bilateral total knee anthroplasties in the future."

On 10 September 2008, the Commission filed an Opinion and Award ruling that plaintiff's left knee injury was a compensable injury, and plaintiff's right knee condition was causally related to her compensable left knee injury. The Commission awarded plaintiff total disability compensation for 241 days based on an average weekly wage of $770.97, a total of $17,695.60 pursuant to N.C. Gen. Stat. § 97-29. Past, present, and future medical expenses related to her left and right knee injuries were also awarded.

Defendants appeal.

II. Standard of Review

This Court's standard of review of an Opinion and Award of the Industrial Commission is "whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law." *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997) (citing *Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 426 S.E.2d 424 (1993)). The Commission's findings of fact are conclusive on appeal if supported by competent evidence. This is true even if there is evidence to support a contrary finding. *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981) (citations omitted). "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). In determining whether competent evidence supports the findings of fact, the evidence is to be viewed in the light most favorable to plaintiff. *Davis v. Harrah's Cherokee Casino*, 362 N.C. 133, 137, 655 S.E.2d 392, 395 (2008) (citations omitted). Plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence. *Id.*

III. Left Knee Injury

[1] Defendants assigned error to the Commission's award pertaining to plaintiff's left knee injury but have failed to argue the assignment of error in their brief. It is thus deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

IV. Right Knee Injury Not Causally Related to Left Knee Injury

[2] In their first argument, defendants contend the Commission erred in finding that plaintiff's right knee injury was causally related to the compensable left knee injury. We agree.

The Worker's Compensation Act "was never intended to provide the equivalent of general accident or health insurance." *Vause v. Equipment Co.*, 233 N.C. 88, 92, 63 S.E.2d 173, 176 (1951). An injury is only compensable if it arises "out of and in the course of the employment." N.C. Gen. Stat. § 97-2(6) (2007). Plaintiff bears the burden of proving each element of compensability. *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003) (citing *Harvey v. Raleigh Police Dept.*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553, *disc. rev. denied*, 325 N.C. 706, 388 S.E.2d 454 (1989)). A subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. As long as the primary injury is shown to have arisen out of and in the course of employment, then every natural consequence flowing from that injury likewise arises out of the employment. *Starr v. Paper Co.*, 8 N.C. App. 604, 611, 175 S.E.2d 342, 347 (1970) (quoting Larson's Workmen's Compensation Law § 13.00). The subsequent injury is not compensable if it is the result of an independent, intervening cause. "'An intervening cause is one occurring entirely independent of a prior cause. When a first cause produces a second cause that produces a result, the first cause is a cause of that result.' " *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 260, 614 S.E.2d 440, 445 (2005) (quoting *Petty v. Transport, Inc.*, 276 N.C. 417, 426, 173 S.E.2d 321, 328 (1970)), *disc. review denied*, 360 N.C. 61, 621 S.E.2d 177 (2005). "To show causal relation, 'the evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation . . . .' " *Everett v. Well Care & Nursing Servs.*, 180 N.C. App. 314, 319, 636 S.E.2d 824, 828 (2006) (quoting *Gilmore v. Board of Education*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)).

Defendants contend that the evidence does not support the following findings of fact of the Commission:

> 20. Plaintiff's left knee has continued to hurt since September 2006. Several weeks before May 2007, Plaintiff's right knee started to hurt more. By May 9, 2007, Plaintiff had twisted her right knee and felt a pop. Several days later, her knee popped again when her knee gave way while she was getting into her car.
>
> 21. Dr. Schutte was of the opinion, and the Full Commission finds as fact, that Plaintiff's overcompensation of her knees caused problems with Plaintiff's right knee. Dr. Schutte state[d] specifically during deposition: "I have no doubt that her right

> knee was working hard[er] than her left knee, given that she has arthritis in her left knee and was favoring that knee.["] And Plaintiff testified that although she had no right knee problems prior to her work-related accident, she began to have right knee problems following the accident. Plaintiff stated at the hearing before the Deputy Commissioner: "[B]ecause I had tried to shelter the left knee so much, I had made my right knee and my right leg bear all the weight." Based upon a review of the record in this matter, the Full Commission finds that the greater weight of the evidence shows that Plaintiff's overcompensation of her right side more than likely caused, contributed to, or aggravated the underlying pathology in Plaintiff's right knee to the point that her right knee became symptomatic.

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274 (citations omitted). However, the Commission's findings of fact may be set aside on appeal when there is a complete lack of competent evidence to support them. *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citing *Saunders v. Edenton Ob/Gyn Ctr.*, 352 N.C. 136, 140, 530 S.E.2d 62, 65 (2000)).

The Commission's finding that plaintiff's right knee injury was causally related to the compensable left knee injury is based upon plaintiff's own self-diagnosis and the expert medical testimony of Dr. Schutte. "[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Because plaintiff's testimony is not adequate to establish medical causation, we focus solely upon Dr. Schutte's expert medical testimony. Such medical expert testimony is not sufficiently reliable to qualify as competent evidence on issues of medical causation when it is based merely upon speculation and conjecture. *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (quoting *Young*, 353 N.C. at 230, 538 S.E.2d at 915).

Plaintiff contends that Dr. Schutte's medical opinion was that her compensable left knee injury caused her right knee injury. This contention is not supported by Dr. Schutte's testimony. Dr. Schutte testified as follows:

Q. Let me ask you about this statement in the May 16th medical note. It says: "She started shifting her weight over the past month to the right knee following the injections." And she had problems with her left knee. Is shifting weight over something called over compensation?

. . .

Q. Is that a possible cause for an aggravation of any underlying diagnoses in the right knee to make them symptomatic?

A. Yes, it's possible.

. . .

Q. If I were to ask you that Miss Nale had the injury that we had talked about back in July of 2005. That if she did not have the right knee problems at that time, and did not have any right knee problems until about the time in March of 2007 or April of 2007 when she came to you for the injection of the left knee. And then reported to you in May 2007 that she had what sounded to be mechanical symptoms of the popping, the clicking and pain getting up from the knee from shifting her weight over to that knee.

If I were to ask you to assume that those subjective complaints of hers were credible and valid, do you have an opinion to a reasonable degree of medical certainty, again not to an absolute degree, but a reasonable degree as to whether there was a contribution in her right knee symptoms from her left knee injury.

. . .

A. *I have no doubt that her right knee was working harder than her left knee, given that she has arthritis in her left knee and was favoring that knee.* The finding, at the time that we scoped her knee was she had a plica, which is a band of scar tissue, which in her case, is another condition to wear away the scar tissue. The plica is not something that would form as a result of over activity on that knee, that's just one of those things that happens.

. . .

Q. And let me separate the other one. I think I just asked you this a second ago. If you assumed that she had not had right knee problems until the time frame that she had the left knee injection, and she started shifting her weight over, according to your medical records, and assuming that the Industrial

> Commission would say that history was credible, is that the likely cause, at least by the history, that Miss Nale gave to you that of her right knee symptom?
>
> . . .
>
> A. I thought the history I had was that she had a twisting injury the Friday before I saw her.

(emphasis added).

"Although expert testimony as to the *possible* cause of a medical condition is admissible if helpful to the jury, it is insufficient to prove causation, particularly when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Holley*, 357 N.C. at. 233, 581 S.E.2d at 753 (citations and quotations omitted). Dr. Schutte's answers to the above questions indicate that he believed plaintiff's right knee injury stemmed from a twisting injury and a plica. He stated the plica was not something that would develop due to over-activity. Plaintiff cites this Court to the portion of Dr. Schutte's testimony that: "no doubt that her right knee was working harder than her left knee" to support her assertion that her right knee injury stemmed from her favoring her left knee. However, when asked if this over-compensation could be an aggravating factor underlying the symptoms of plaintiff's right knee, Dr. Schutte only said it was possible. "Doctors are trained not to rule out medical possibilities no matter how remote; however, mere possibility has never been legally competent to prove causation." *Id.* at 234, 581 S.E.2d at 754 (citing *Young*, 353 N.C. at 233, 538 S.E.2d at 916). Dr. Schutte never provides a causal link, rising to a level above mere possibility, between plaintiff's compensable left knee injury and her right knee injury. "Although medical certainty is not required, an expert's 'speculation' is insufficient to establish causation." *Id.* (quoting *Young*, 353 N.C. at 233, 538 S.E.2d at 916).

Plaintiff had the burden of establishing that the right knee injury was the direct and natural result of the compensable left knee injury. This had to be shown through expert medical testimony. *Cannon*, 171 N.C. App. at 262, 614 S.E.2d at 445 (citations omitted). Plaintiff failed to meet this burden. Dr. Schutte's testimony was that the plica was *not* the result of over-activity of the right knee arising from the left knee injury. We are not persuaded by plaintiff's attempt to lift one sentence out of Dr. Schutte's answer, while ignoring the balance of his answer to the same question.

We also reject the Commission's attempt to establish causation based upon plaintiff's self-diagnosis of the cause of her right knee injury, and the temporal sequence of the two injuries. It is not for the Commission to render its own expert medical opinions. *Edmonds v. Fresenius Med. Care*, 165 N.C. App. 811, 818-19, 600 S.E.2d 501, 506 (2004) (Steelman, J., dissenting), *rev'd per curiam for reasons stated in dissent*, 359 N.C. 313, 608 S.E.2d 755 (2005).

V. Temporary Total Disability

[3] In their second argument, defendants contend the Commission erred in awarding plaintiff temporary total disability payments for the period of time between 1 May 2006 and 28 December 2006. We remand this issue to the Commission for further findings of fact.

Defendants contest findings of fact numbers nineteen and twenty, and argue that these findings do not support Conclusion of Law number six, which states, "Plaintiff was totally disabled because of her injury for the 241 days between May 1, 2006, and December 28, 2006. N.C. Gen. Stat. § 97-29." They contend that plaintiff "cannot establish and has failed to satisfy her burden with respect to 'disability.' " We note the record reveals that this period of disability predated any injury to the right knee and is thus solely attributable to the left knee.

The Worker's Compensation Act defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2007).

In order to support a conclusion that plaintiff was disabled, the Commission must find:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment,
>
> (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and
>
> (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982) (citing *Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E.2d 588

(1971)). Plaintiff bears the burden of proving both the extent and degree of her disability. *Brown v. S & N Communications, Inc.*, 124 N.C. App. 320, 329, 477 S.E.2d 197, 202 (1996) (citing *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 475, 374 S.E.2d 483, 485 (1988)).

As to plaintiff's incapacity to earn wages, the Commission found:

> 15. Plaintiff worked during all periods in which her doctors allowed her to work. Both before and after May 1, 2006, Plaintiff continued to have the medical restrictions given to her by Dr. Smith and Dr. Bensen. She continued to work at Defendant-Employer even though her normal work activities exceeded those restrictions.
>
> 16. On May 1, 2006, Plaintiff voluntarily left Defendant-Employer's Charlotte location and moved to Charleston, South Carolina, to remarry. After the injury on July 14, 2005, Plaintiff states she began to shift her weight from her left side to her right side because of her left knee pain.
>
> . . .
>
> 19. Between May 1, 2006, and December 28, 2006, Plaintiff received unemployment compensation while in South Carolina and looked for other work. She satisfied all of the job search requirements under the law for purposes of receiving unemployment compensation, but did not get hired. Plaintiff was capable of some work between May 1, 2006, and December 28, 2006, and made a reasonable effort to find other work during this period, but without success. On December 28, 2006, Plaintiff returned to work in Charleston, South Carolina.

Defendants argue that plaintiff has not satisfied the third prong of *Hillard* because she voluntarily chose to resign her position at Ethan Allen. We decline to discuss this argument because findings of fact sixteen and nineteen are in conflict as a matter of law.

If plaintiff voluntarily quit her employment with Ethan Allen in North Carolina, she could not be drawing unemployment from the State of North Carolina. N.C. Gen. Stat. § 96-14 (2007)[1]. Further, she

1. This statute has been amended by 2009 N.C. Sess. Laws ch. 301 (2009). This amendment does not take effect until 1 January 2010, thus not affecting the outcome of this case.

could not have quit her job in North Carolina on 1 May 2006 and immediately have begun collecting unemployment compensation from the State of South Carolina.

The record on this matter is not totally clear. It appears that plaintiff left the employ of Ethan Allen in North Carolina in February of 2006 and went to work at an Ethan Allen store in Charleston, South Carolina. Plaintiff lost this job when the store was bought out, and she was not retained as an employee. She then began drawing unemployment in South Carolina based upon her employment in Charleston on 1 May 2006.

It is not the role of the appellate courts to make findings of fact. *Bowen v. ABF Freight Sys., Inc.*, 179 N.C. App. 323, 330-31, 633 S.E.2d 854, 859 (2006). It is the role of the Industrial Commission to make findings of fact. *Id.* at 327, 633 S.E.2d at 857 (citations omitted). Based upon the findings made by the Commission, we are unable to decide the appellant's second argument. This case is remanded to the Commission for additional findings of fact resolving the conflicts in the Commission's Opinion and Award. Specifically, the Commission shall determine the date plaintiff left the employ of Ethan Allen in North Carolina, where and when she worked in South Carolina, and the reason for her termination in South Carolina.

[4] Defendants have failed to argue their remaining assignments of error in their brief, and they are thus deemed abandoned pursuant to Rule 28(b)(6) of the Rules of Appellate Procedure. N.C.R. App. P. 28(b)(6).

REVERSED IN PART, REMANDED FOR ADDITIONAL FINDINGS OF FACT IN PART.

Judges HUNTER, ROBERT C. and GEER concur.

IN RE: BOUNDARY DISPUTE BETWEEN LOTS 97 AND 98 OF THE C.M. BOST ESTATE, ANDERSON/GRIFFIN PROPERTIES, LLC, OWNER OF LOT 97, PETITIONER v. R.L. WALLACE CONSTRUCTION COMPANY, INC., AND J.M. BARRETT AND WIFE, SHEREE T. BARRETT, OWNERS OF LOT 98, RESPONDENTS

No. COA08-1453

(Filed 1 September 2009)

1. Real Property— boundary line dispute—sufficiency of findings of fact

The trial court did not err in a case arising out of a dispute regarding the location of a boundary line by its findings of fact even though petitioner contends they were based upon mere hypothetical evidence or conjecture because the trial court properly used its authority as trier of fact to determine which evidence to find credible.

2. Real Property— boundary line dispute—sufficiency of conclusions of law

The trial court did not err in a case arising out of a dispute regarding the location of a boundary line by its conclusions of law where the trial court properly concluded that existing monuments, custom, usage, courses, and distances all supported respondents' line as representing the true boundary between the lots.

Appeal by petitioner from judgment entered 8 November 2007 by Judge Susan C. Taylor in Cabarrus County Superior Court. Heard in the Court of Appeals 21 May 2009.

Richard M. Koch for petitioner.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James E. Scarbrough, for respondent Wallace.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for respondents Barrett.

ELMORE, Judge.

This case arose as a result of a dispute regarding the location of the boundary line that runs between land owned by Anderson/Griffin Properties (petitioner) and R.L. Wallace Construction Company, J. M. Barrett, and Sheree T. Barrett (together, respondents). Petitioner appeals from the judgment entered in a bench trial by the

Superior Court of Cabarrus County. The trial court adjudged the line as proposed by respondents to be the true boundary line between petitioner's and respondents' properties. For the reasons herein, we affirm.

I

Petitioner owns lot 97 and respondents own lot 98 of the C. M. Bost Estate (Bost Estate) located near Midland in Cabarrus County. The Bost Estate consists of a number of lots, many of which are located in the tract of land that falls between Bethel School Road to the north, U.S. Hwy 601 to the east, and Norfolk Southern Railway line to the south. Respondent Wallace's predecessor in interest acquired title to lot 98 in September 1973. By mesne conveyances, respondent Barrett acquired title to the front portion of Lot 98 of the Bost Estate. This portion consists of 1.25 acres of land and adjoins lot 97 at its intersection with Hwy 601. In June 2000, petitioner acquired title to a portion of lot 97 of the Bost Estate. The deeds conveying title to petitioner contain a metes and bounds description that describes a line "[b]eginning at an iron stake in the west edge of the Cabarrus-Monroe Highway, front corner of Lot Nos. 97 and 95 [*sic*] and runs thence with the dividing line of Lot Nos. 97 and 98, N. 70-30 W. 1470 feet to an iron stake on the north bank of the creek, corner of Lot Nos. 98 and 104." The location of this line is the subject of this appeal.

The disputed boundary is the southern boundary of lot 97 and northern boundary of lot 98. The cause of the dispute is a mathematical error contained in the Bost Estate map. As a result of this error, there is not enough land in the Bost Estate property to satisfy all the distances that are shown on the 1945 Bost Estate map from the intersection of Bethel School Road and Highway 601 to the southernmost point on the map. This so-called "floating error" could lead to a margin of error of up to 50 feet in the distances shown on the Bost Estate map. The location of the boundary as contended by petitioner is referred to herein as the Griffin line, and the location of the boundary line as contended by respondents is referred to herein as the Wallace line. The Griffin line lies further south than the Wallace line, and runs through two buildings that have been in existence since 1973.

The subject property has been surveyed multiple times since 1945. The earliest available map of the Bost Estate is a survey map that was completed in 1945 by Guy Fisher. According to this map, which is recorded in Map Book 7, Page 23, Cabarrus County Registry,

iron axles or stakes mark the corners of lot 98. When respondent Wallace's predecessor in interest acquired title to lot 98 in September 1973, Jack Ritchie performed a survey of the property and determined the Bost Estate map to represent the true boundary between lots 97 and 98. Ritchie was later discovered not to be a licensed land surveyor. However, in his survey, Ritchie relied on Fisher's corners as being located by the iron axles. In 1990, when respondent Wallace sold some property to respondent Barrett, Jim Craddock performed a survey and marked the boundary line in question. Craddock did another survey in 1999. Petitioner hired surveyor Carroll Rushing to locate the common front corner and common boundary line of lots 97 and 98. Rushing performed a survey of the disputed boundary line in 2000 before this litigation began, and Rushing re-did that survey in 2002 based on additional discoveries toward the southern portion of the lot. Surveyor Greg Flowe, who was hired by respondent Wallace, performed a survey of the land in November 2000. Flowe used the iron axles and stakes as corners of the property and monuments to the south of the property to determine the location of the boundary line. Flowe's survey stated that the original Ritchie survey appeared to be correct and his calculations put the disputed boundary line within a foot of the boundary on the Ritchie survey. Respondent Wallace also hired another professional land surveyor, Thomas Harris, to study the existing surveys and research the location of the boundary line between lots 97 and 98. Harris found axle irons that marked the boundary as the Wallace line. He also found old hack marks on the trees growing along the Wallace line. Such hack marks are typically used to establish a property line because they are more effective than iron stakes in the ground, which can be easily pulled up and moved over.

In December 2000, petitioner filed an action for a processioning proceeding pursuant to Chapter 38 of the North Carolina General Statutes to determine the location of the true boundary line between lots 97 and 98. N.C. Gen. Stat. § 38-3(a) (1999). The Clerk of Superior Court held a hearing on the matter and then commissioned Mel G. Thompson & Associates (Thompson) to conduct a survey of the disputed property. A Thompson employee, surveyor Robert Spidel, who was deceased by the time of the trial, performed the survey. The Thompson survey was completed on 3 February 2003 and found the Griffin line to be the correct boundary between the two lots. Mel Thompson supervised Spidel's work and testified as to the methodology used by Spidel. The hierarchy of evidence that surveyors typically use to draw a survey map gives artificial or man-made monuments

precedence over courses and distances. However, Spidel used the courses and distances methodology to determine the corners of the property and the boundary between lots 97 and 98 because he thought this methodology was more reliable in this case.

Based on the results of the Thompson survey, the Clerk of Superior Court entered an order in support of petitioner's contention. Respondents appealed that order and the matter was heard de novo by the trial court on 4 September 2007. Because all parties waived a jury trial, the trial judge heard witness testimony and reviewed all evidence. On 8 November 2007, the court entered an eight-page judgment that contained fifty-four findings of fact and six conclusions of law. The court found that the preponderance of evidence supported the Wallace line as the true common boundary between lots 97 and 98 of the Bost Estate. Petitioner now appeals that judgment.

II

[1] Petitioner argues that the trial court's findings of fact are based upon mere hypothetical evidence or conjecture. Specifically, petitioner challenges the following findings of fact:

> 26. The front axle iron and the rear axle iron marking the corners of the Wallace line are old yet similar in age and appearance and were probably placed in the ground by the same person at the same time.
>
> 27. The axle irons are likely from old equipment such as farm equipment.
>
> 28. During WW II iron was scarce and surveyors and property owners sometimes used old parts of equipment to serve as boundary monuments.
>
> 29. Surveyors Craddock and Flowe determined that the Wallace line was the true boundary line of lots 97 and 98 and that the axle irons were the front and rear common corners [of] lots 97 and 98.
>
> * * *
>
> 33. Using the iron on the east edge of Muddy Creek as a control corner or starting point and proceeding in a northerly direction with the courses and distances and irons in line described on the C. M. Bost Estate map recorded in Map Book 7, Page 24, the axle iron on the west side of Hwy 601 contended by Wallace to be the front common corner of lots 97 and 98, is only 4.72 feet from the

location called for by the C. M. Bost Estate map. This is within an excellent degree of tolerance considering the fact that the C. M. Bost Estate was subdivided and surveyed in 1945.

34. The front axle iron and rear axle iron are also supported and confirmed as being the true front and rear common corners of lots 97 and 98 by (a) calculating from existing irons to the north along Hwy 601 and to the west, (b) calculating from existing irons to the north along Bethel Road and along the rear lot lines of the C. M. Bost Estate lots, and (c) calculating from existing irons to the south at Muddy Creek and the Clontz land and the railroad line.

35. Irons located to the north, south, and west of lots 97 and 98 support and confirm the contention that said front and rear axle irons are the true front and rear common corners of lots 97 and 98.

36. The Norfo[l]k Southern Railroad line has existed to the south of lots 97 and 98 for over 100 years and is shown on the map of the C. M. Bost Estate.

37. An iron in the northern right of way line of Norfo[l]k Southern Railroad is a distance of 964.9 feet from the front common corner of lots 97 and 98.

38. Surveyor Craddock measured a distance of 963.33 feet from the iron in the northern right of way line of the Norfo[l]k Southern Railroad to the front axle iron. Surveyor Flowe measured the same distance as being 963.88 feet to the front axle.

39. Based on the distance to the northern right of way line of Norfo[l]k Southern Railroad at Hwy 601, the front common corner between the parties as contended by Wallace is located within a few feet of where it should be located.

* * *

45. The existing rear axle iron contended by Wallace as the rear common corner of the parties is located on the north side of Muddy Creek. The C. M. Bost Estate map calls for an iron at the corner to be located on the north side of Muddy Creek. The existing axle iron is on the inside bend in the creek making it unlikely that the creek eroded the bank causing the iron to be moved over the years. Water in a creek erodes on the outside of a creek bend where the water flows faster. Accretion, not erosion, usually

occurs on the inside of a bend in the creek because the water flow is slower.

46. Axle irons are sometimes referred to simply as irons by surveyors.

47. The Griffin line was not marked by monuments of any kind at the time he purchased it.

48. The Wallace line is well marked by old cuts on trees, old axle irons at the corners, and several irons in the line between the corners.

In a bench trial, the standard of review on appeal is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). "If the court's factual findings are supported by competent evidence, they are conclusive on appeal, even though there is evidence to the contrary." *Lagies v. Myers*, 142 N.C. App. 239, 246, 542 S.E.2d 336, 341 (2001). In evaluating the credibility of witnesses, the trial judge determines "the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Terry's Floor Fashions, Inc. v. Crown Gen. Contr'rs, Inc.*, 184 N.C. App. 1, 10, 645 S.E.2d 810, 816 (2007) (citation and quotations omitted). "If different inferences may be drawn from the evidence, [the trial judge] determines which inferences shall be drawn and which shall be rejected." *Id.* (alteration in original; citation and quotations omitted). However, the appellate court reviews the trial court's conclusions of law *de novo*. *Kraft v. Town of Mt. Olive*, 183 N.C. App. 415, 418, 645 S.E.2d 132, 135 (2007).

The purpose of a processioning proceeding is "to establish the true location of disputed boundary lines." *Pruden v. Keemer*, 262 N.C. 212, 216, 136 S.E.2d 604, 607 (1964) (emphasis removed). In such a proceeding, what constitutes the true boundary line is a matter of law and where it is located is a matter of fact. *Smothers v. Schlosser*, 2 N.C. App. 272, 274, 163 S.E.2d 127, 129 (1968). While the question of what constitutes the true boundary between two parcels of land is a question of law for the court, where the boundary is located on the ground is a question of fact. *Cutts v. Casey*, 271 N.C. 165, 167-68, 155 S.E.2d 519, 521 (1967). Petitioner carries the burden of proof to show the true location of the disputed boundary line. *Plemmons v. Cutshall*, 234 N.C. 506, 510, 67 S.E.2d 501, 504 (1951). However, if a petitioner fails to show "by the greater weight of evidence the loca-

tion of the true dividing line at a point more favorable to them than the line as contended by the defendants," then the fact finder must resolve the issue of location of the boundary line "in accord with the contentions of the defendants." *Cornelison v. Hammond*, 225 N.C. 535, 536-37, 35 S.E.2d 633, 634 (1945).

In the case *sub judice*, both parties waived a jury trial and designated the trial judge as the trier of fact. As a trier of fact, the judge was allowed to consider evidence and witness testimony to ascertain the location of the boundary. *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (during a bench trial, "[t]he trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him"). Based on the testimony of Craddock, Wallace, Harris, and Flowe, the trial court entered findings of fact 26 through 29, 33 through 40, and 45 through 48. Craddock, Flowe, and Harris, all licensed and experienced land surveyors, provided testimony that the Wallace line is marked by axle irons and also by markings in the trees. Craddock found axle irons that mark the original corners of the Bost estate, including the front common corner of lots 97 and 98. By using a surveying methodology that was slightly different, Flowe confirmed the location of the front corner. Flowe worked from the railroad track and proceeded north along Highway 601. Surveyor Harris checked the work of Craddock and Flowe, and determined the Wallace line as the true boundary. Respondent Wallace also testified that old axle irons marked the common front corner between his property and that owned by petitioner. Respondent Wallace and petitioner's predecessor in interest recognized this as the true common front corner of the two lots.

On the other hand, petitioner's surveyor, Carroll Rushing, testified that the Griffin line was the true boundary between the two lots. However, Rushing "built this line" by starting at a point to the north of Hwy 601 and proceeding with the distances of the other lots until he "established" the front common corner of lots 97 and 98. Furthermore, Rushing also testified that he was hired to "re-establish" the line between lots 97 and 98. The trial court found that Rushing "tried to restore footage to petitioner's lot 97," rather than honor the original axle irons that marked the boundary of lots 97 and 98. That is, Rushing did not attempt to locate the original boundary line; he simply tried to restore the shortage that arose due to the floating error by establishing a new line. The court also found this practice to be in conflict with established land survey practices, where surveyors try to retrace old boundaries by "walking in the

shoes of the original surveyor" and "following in the tracks of the original surveyor."

We hold that there was competent evidence to support the trial court's findings of fact 26 through 29, 33 through 40, and 45 through 48. Although petitioner produced evidence that disagreed with the evidence presented by respondents, the trial court correctly used its authority as a trier of fact to determine which evidence to find credible. Therefore, as a finder of fact, the trial judge was allowed to find that the location of the boundary between lots 97 and 98 was the Wallace line.

III

[2] Petitioner next makes a broad argument that the trial court's conclusions of law are not supported by its findings of fact. We disagree. The trial court considered competent and substantial evidence to enter its findings of fact 26 through 29, 33 through 40, and 45 through 48. We hold that these findings of fact support the trial court's conclusions of law. The trial court did not err in concluding that the preponderance of evidence supports the Wallace line as being the true common boundary between lots 97 and 98 of the Bost Estate. The trial court also correctly concluded that existing monuments, custom and usage, and courses and distances all support the Wallace line as representing the true boundary line between the lots.

Petitioner also argues that the trial court's following conclusion of law does not support a result in favor of respondents: "6. In locating a boundary line shown on a map, the surveyor's job is to walk in the shoes of the original surveyor rather than 're-establish' the line or 'restore' footage to a lot." Petitioner claims that only his witnesses (surveyors Rushing and Spidel) walked in the shoes of the original surveyor, and that respondents' surveyors relied on incorrect maps. In support of its claim, petitioner states that Rushing did an "overlay" of the original Bost Estate map. Petitioner does not explain how an overlay supports his argument that Rushing "walked in the shoes" of the original surveyor. The trial court's conclusion of law 6 relates to its finding that, by retracing the original survey, respondents' surveyors followed the correct procedure. In effect, petitioner is challenging the trial court's findings that Craddock and Flowe located and used old axle irons to determine the true front and rear corners of lots 97 and 98 (findings of fact 33 through 39). The trial court heard witness testimony to determine that respondents' surveyors correctly viewed their job as retracing the original survey to determine the true

boundary. Craddock testified that, when retracing a survey, the goal is to find the point on the ground where the original surveyor placed the axle iron. Harris testified that his job was not to reestablish a corner, but to find old axle irons to verify where the original corner would be. Since the trial court's conclusions of law are supported by valid findings of fact, we refuse to disturb them on appeal.

Petitioner also contends that the hierarchy of evidence followed by the trial court to determine the true common boundary is not conclusive. Information relating to this hierarchy is not a conclusion of law made by the court, and instead is entered as a finding of fact. Specifically, the court's finding of fact 16 states:

> 16. Due to the error, to locate accurately the boundaries and corners of the original lots of the C. M. Bost Estate, the better practice is to rely less on the courses and distances shown on the maps of the C. M. Bost Estate and more on the natural and artificial monuments and custom and usage of the property owners.

We cannot agree with petitioner's contention. There was adequate evidence to support the court's finding regarding this hierarchy. This evidence consisted of the testimony presented by licensed land surveyors: Thompson, Craddock, and Flowe. As the trier of fact, the trial court properly evaluated the testimony offered by the witnesses and drew reasonable inferences from this testimony. Thompson explained that, within the hierarchy of evidence, natural monuments were most important, followed by artificial or man-made monuments, then marked lines, and finally courses and distances. Flow used monuments (iron axles) as the corners of the property because they were reliable. Similarly, Craddock's multiple surveys of the boundary were based on the Ritchie and Fisher corners, as marked on the lots by iron axles.

Furthermore, North Carolina law provides adequate support for the court's finding that natural and artificial monuments control course and distances. In deciding the location of a disputed boundary line, "the general rule is that natural objects and artificial monuments control courses and distances." *Newkirk v. Porter*, 237 N.C. 115, 120, 74 S.E.2d 235, 239 (1953); *see also Trust Co. v. Miller*, 243 N.C. 1, 9, 89 S.E.2d 765, 771 (1955). Therefore, the trial court's findings of fact adequately support its conclusions of law and we hold that petitioner's arguments lack merit.

IV

We hold that the trial court made its findings of fact based on competent evidence. These findings support the court's conclusions of law relating to existing monuments, custom and usage, and courses and distances. The court also correctly concluded that a preponderance of the evidence supports the Wallace line as the true boundary between lots 97 and 98 of the Bost Estate. The trial court correctly adjudged and decreed that the true boundary line between properties owned by petitioner and respondents is the line proposed by respondents.

Affirmed.

Judges BRYANT and CALABRIA concur.

MARY LUE JACKSON, PLAINTIFF v. PAUL CULBRETH, SHIRLEY CULBRETH AND 406 PARTNERS, LLC, SUCCESSOR IN INTEREST TO ACE MORTGAGE FUNDING, LLC, DEFENDANTS

No. COA08-1079

(Filed 1 September 2009)

1. Judgments— default—quiet title

The trial court erred by entering a default judgment quieting title before all of defendant's claims to the property had been adjudicated.

2. Judgments— default—findings

The trial court erred in an action to quiet title by making findings in a default judgment that were contradictory and not supported by the evidentiary record and then making conclusions based on those findings. The evidence does not support the findings and the court did not articulate its rationale with specificity.

3. Judgment— default—motion to reconsider—equity and justice

The trial court abused its discretion in a quiet title action by denying defendant's motion to reconsider where the underlying default judgment was based on erroneous findings and a misapplication of law. Equity and justice required the court to allow defendant to defend the claim on the merits.

Appeal by defendant 406 Partners, LLC, from default judgment entered 3 October 2007 and order entered 9 June 2008, by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 May 2009.

No brief filed for plaintiff-appellee.

Patrick D. Sarsfield II, for 406 Partners, LLC defendant-appellant.

HUNTER, JR., Robert N., Judge.

I. Facts

This appeal arose from a title dispute between cotenants, Mary Lue Jackson ("plaintiff") and Paul and Shirley Culbreth (the "Culbreths") and the Culbreths' lender, 406 Partners, LLC. The property is known as 2519 Southwest Boulevard, Charlotte, North Carolina (the "property"). Plaintiff and Paul Culbreth initially obtained a joint tenancy with right of survivorship in the property from a deed from Lillie Propst dated 27 August 2002, and recorded on 5 September 2002 in Book 14031, at pages 141-43, in the Mecklenburg County Public Registry (the "Propst Deed").

Subsequently, a second deed dated 3 August 2005 and recorded 29 August 2005 in Deed Book 19251, at pages 927-29, in the Mecklenburg County Public Registry, purported to convey the interest of plaintiff and her husband, James Lawrence Jackson (the "Jacksons") to the Culbreths (the "Second Deed"). Claiming the Second Deed to be a forgery, plaintiff, through counsel, demanded the Culbreths cancel or void the deed. This demand went unmet.

After the recording of the Second Deed, the Culbreths signed a promissory note and Deed of Trust mortgaging the property for $52,000.00 to Ace Mortgage Funding, LLC ("Ace Mortgage"), the predecessor in interest to defendant 406 Partners, LLC (the "defendant"). The deed of trust was recorded on 7 August 2006.

On 23 January 2007, plaintiff commenced this action to quiet title to the property and served Ace Mortgage, its trustee Archer Land Title, and the Culbreths. Plaintiff complained, among other things, that the Second Deed was a forgery, and was never signed or authorized by plaintiff or her husband. Plaintiff's complaint further alleged that the Culbreths "were fully aware of the forged nature of the [Second Deed]" and that the Jacksons "had denied the authenticity of the [Second Deed] and had requested that [the Second Deed] be

voided." Plaintiff also complained that Ace Mortgage "entered into a transaction" with the Culbreths "based upon the forged deed and upon the obvious misrepresentations by the [Culbreths]." Plaintiff sought the court's declaration: (1) of her "rights, status, and the legal validity of her claim to ownership of the Property"; (2) that she was the "rightful owner of a one-half interest in the Property, as a joint tenant with Paul Culbreth" based on the Propst Deed; and (3) that the Second Deed and Deed of Trust be declared null and void.

Because no answer or responsive pleading was filed on behalf of Ace Mortgage, plaintiff filed on 7 May 2007 a Motion for Entry of Default against Ace Mortgage. The Mecklenburg County Clerk of Court entered a default against Ace Mortgage on 29 June 2007. Likewise, because no responsive pleading or answer was filed on behalf of the Culbreths, plaintiff subsequently filed a Motion for Entry of Default against the Culbreths on 5 July 2007. The Mecklenburg County Clerk of Court then entered a default against the Culbreths on 24 July 2007.

On 3 August 2007, plaintiff filed a Motion for Default Judgment pursuant to Rule 55(b)(2) of the North Carolina Rules of Civil Procedure against Ace Mortgage and the Culbreths. On 3 October 2007, the trial court entered an order setting aside the entry of default against Ace Mortgage, substituting defendant for Ace Mortgage as party-defendant, and granting defendant ten days to file a responsive pleading.[1] Defendant's answer, filed the same day, denied that the Second Deed was forged or that defendant entered the transactions based on the forgery or on misrepresentations of the Culbreths. In addition, on 3 October 2007, the court entered a Default Judgment against the Culbreths pursuant to Rule 55 of the North Carolina Rules of Civil Procedure. After reciting the history of procedural default against the Culbreths, discussed *ante*, the court made the following "Conclusions of Law":

> 1. That Plaintiff, Mary Lue Jackson is the rightful owner of a one-half, undivided interest in the property . . . as a tenant-in-common with Paul Culbreth . . . .
>
> 2. That the Deed dated August 3, 2005 . . . is null and void.
>
> 3. That the Deed of Trust . . . in the original amount of fifty-two thousand and 00/100 ($52,000.00) . . . is null and void[.]

1. The record is unclear as to the transfer of the lien from Ace Mortgage to defendant.

4. The Register of Deeds for Mecklenburg County is hereby Ordered to file a copy of this Court's Order in its records[.]

Subsequently, on 12 October 2007, defendant filed a Motion to Reconsider pursuant to Rules 52(b) and 59 of the North Carolina Rules of Civil Procedure. The court denied the Motion to Reconsider on 3 June 2008, and on 19 June 2008, defendant appealed.

II. Issues

On appeal, defendant argues that the trial court erred by: (1) entering a default judgment against the Culbreths after defendant filed its answer to the complaint; (2) extending the default judgment to defendant and ruling that it was bound by facts deemed admitted by the default judgment, and by finally adjudicating the rights between plaintiff and defendant; and (3) making findings of fact in the default judgment that were contradictory and not supported by the evidentiary record and making conclusions of law based on such findings of fact. Additionally, defendant argues that the trial court abused its discretion by denying defendant's Motion to Reconsider, where the underlying default judgment was based on erroneous findings of fact and a misapplication of law.

III. Analysis

Default Judgment

[1] Plaintiff's claim, an action to quiet title, is a *quasi in rem* proceeding which seeks judgment affecting "the interests in the status, property or thing[s] of all persons served pursuant to Rule 4(k) of the Rules of Civil Procedure." N.C. Gen. Stat. § 1-75.3(c). "'In rem' proceedings encompass any action brought against a person in which essential purpose of suit is to determine title to or affect interest in specific property located within territory over which court has jurisdiction." *Green v. Wilson*, 163 N.C. App. 186, 189, 592 S.E.2d 579, 581 (quoting *Black's Law Dictionary* 793 (6th ed. 1990)), *disc. review improvidently allowed*, 359 N.C. 186, 606 S.E.2d 117 (2004).

Central to plaintiff's claim to quiet title is a judicial declaration of the status of the Second Deed purportedly conveying fee simple title from plaintiff to the Culbreths. Defendant succeeded to the Culbreths' interest in the property when it received a beneficial interest in the property by means of the Deed of Trust. Defendant contends that, because the Second Deed was properly acknowledged, it is entitled to rely on the presumption in favor of the legality of a writ-

ten instrument by a certifying officer in forecasting evidence of a meritorious defense. Defendant contends that allowing the default judgment to stand "would have the unjust effect of preventing an answering defendant from raising a meritorious defense merely because another defendant failed to appear in a lawsuit." Defendant further contends that because it was properly served in the matter, has a recorded interest in the land, and has sufficiently forecasted a meritorious defense, its interest in an *in rem* action cannot be summarily adjudicated in a default proceeding between plaintiff and the Culbreths. We agree.

The United States Supreme Court enunciated in *Frow v. De La Vega*:

> The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all.

Frow v. De La Vega, 82 U.S. 552, 554, 21 L. Ed. 60, 61 (1872). This Court in *Moore v. Sullivan* applied the *Frow* principle stating that "in the default judgment situation when a plaintiff has alleged joint liability, a default judgment should not be entered against the defaulting defendant if one or more of the defendants do not default." *Moore v. Sullivan*, 123 N.C. App. 647, 650, 473 S.E.2d 659, 661 (1996); *see also Leonard v. Pugh*, 86 N.C. App. 207, 356 S.E.2d 812 (1987); *Harris v. Carter*, 33 N.C. App. 179, 234 S.E.2d 472 (1977). An entry of default should instead be entered, which cuts off a defaulting defendant's right to participate on the merits. *Moore*, 123 N.C. App. at 650, 473 S.E.2d at 661.

Plaintiff argued in her objection to defendant's Motion to Reconsider that she "made no claim of wrongdoing against the Defendant 406 Partners, LLC" and thus would like to declare the claim "separate" from those advanced against the Culbreths. The *quasi in rem* nature of plaintiff's claim undercuts this argument.

Plaintiff's complaint to quiet title is an action *in rem* against the Culbreths *and* defendant's predecessor in interest, Ace Mortgage. In item number five of the complaint, plaintiff states that the Second Deed is a "forgery" that "was never signed or authorized by [the Jacksons]." In item number six of the complaint, plaintiff complains that the Culbreths "were fully aware" of the "forged nature of the deed." In item number seven, plaintiff complains that Ace Mortgage, "based upon the forged deed and upon the obvious misrepresentations by the [Culbreths] . . . entered into a transaction with [the Culbreths]." Until all of the claims have been adjudicated against all defendants, title questions would remain in the lawsuit.

Plaintiff's claims regarding funding based on the alleged forgery and the allegedly obvious misrepresentations are inextricably linked to plaintiff's claims against the Culbreths regarding the forgery and their knowledge of the same. The claims share a common set of facts and circumstances. As such, plaintiff made a "joint charge against several defendants." *See Frow*, 82 U.S. at 554 21 L. Ed. at 61. Because Ace Mortgage was predecessor in interest to defendant and the trial court set aside the default judgment against Ace Mortgage and substituted defendant as a party defendant, these claims for rights to the title are effectively made against defendant, where it stands in the stead of Ace Mortgage. We hold, therefore, that the trial court erred in entering the Default Judgment quieting title in absence of defendant's default. *See Moore*, 123 N.C. App. at 650, 473 S.E.2d at 661.

In *Little v. Barson Fin. Servs. Corp.*, the plaintiff sought to quiet title to a parcel of real estate. *Little v. Barson Fin. Servs. Corp.*, 138 N.C. App. 700, 531 S.E.2d 889, *disc. review denied*, 352 N.C. 675, 545 S.E.2d 440, *disc. review dismissed*, 352 N.C. 675, 545 S.E.2d 426 (2000). The trial court entered a default judgment against non-responding defendants, quieted title to the property, and ordered that the plaintiffs were the sole owners of the property. *Id.* This Court explained that "a default judgment against the non-responding defendants did not make any admissions on behalf of defendant-appellants, bar any of their defenses or claims, or prejudice their rights." *Id.* at 703, 531 S.E.2d at 891. Accordingly, this Court ruled that the trial court erred in quieting title based on a default judgment, because the defendant-appellants should have had an opportunity to defend the claims. *Id.*

In the instant case, although the trial court's default judgment was against the Culbreths for their failure to answer or otherwise

respond, the court's conclusions of law not only declare as null and void the Second Deed, but also declare as null and void the Deed of Trust naming Ace Mortgage Funding, LLC as the lender. Both conclusions of law extend the judgment in favor of plaintiff and against the Culbreths to defendant and end any potential rights defendant may have had in the property.

In accordance with this Court's reasoning in *Moore* and *Little*, we hold that the court should not have entered a default judgment quieting title until all defendants' claims to the property had been adjudicated. *See id.*

Findings of Fact and Conclusions of Law

[2] Next, defendant argues the trial court erred by making findings of fact in the default judgment that were contradictory and not supported by the evidentiary record and making conclusions of law based on such findings of fact. Defendant contends that "Paragraph 1 of the Order contained in the Default Judgment was erroneous since it purports to give Plaintiff-Appellee a one-half, undivided interest in the Property as a tenant-in-common with Defendant-Appellee, Paul Culbreth." We agree.

"'[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " *Knight v. Higgs*, 189 N.C. App. 696, 699, 659 S.E.2d 742, 746 (2008) (citation omitted). "'Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated.' " *In re D.R.B.*, 182 N.C. App. 733, 736, 643 S.E.2d 77, 79 (2007) (citation omitted). Evidence must support the findings, the findings must support the conclusions of law, and the conclusions of law must support the ensuing judgment. *Lake Gaston Estates Prop. Owners Ass'n v. County of Warren*, 186 N.C. App. 606, 610, 652 S.E.2d 671, 673 (2007).

Here, the trial court found as a fact that the Culbreths failed to timely respond to plaintiff's complaint and that an entry of default was entered against the Culbreths. Based on the findings of fact, the court concluded that the entry of default against the Culbreths was proper and that an entry of a default judgment granting plaintiff the relief sought was proper. The judgment entered erroneously declared plaintiff "the rightful owner of a one-half, undivided interest

in the property described in the Complaint as a *tenant-in-common* with Paul Culbreth"; declared the Second Deed "null and void"; and declared the Deed of Trust "null and void." (Emphasis added.)

First, the evidence does not support the findings because the trial court's finding as to the ownership as tenants-in-common is erroneous; the Propst Deed conveyed the property to defendant Paul Culbreth and to plaintiff as joint tenants with right of survivorship and not as tenants-in-common. Second, the trial court did not articulate its rationale with any specificity in declaring the Second Deed or the Deed of Trust "null and void," and thus failed to provide sufficient details for effective appellate review. *See In re D.R.B.*, 182 N.C. App. at 736, 643 S.E.2d at 79. Likewise, in its order on 406 Partners' Motion to Reconsider, the trial court did not articulate its reasons for denying the motion. Therefore, the evidence does not adequately support the findings, the findings do not adequately support the conclusions of law, and the conclusions of law do not adequately support the ensuing judgment. *See Lake Gaston Estates Prop. Owners Ass'n*, 186 N.C. App. at 610, 652 S.E.2d at 673. It was, therefore, error for the trial court to make findings of fact in the default judgment that were contradictory and not supported by the evidentiary record and to make conclusions of law and order based on such findings of fact.

Abuse of Discretion

[3] Defendant's final argument is that the trial court abused its discretion by denying its motion to reconsider where the underlying default judgment was based on erroneous findings of fact and a misapplication of law. We agree.

"We review the trial court's denial of a motion for reconsideration for abuse of discretion and reverse only upon 'a showing that [the] ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 344, 634 S.E.2d 548, 555 (citation omitted), *disc. review denied, appeal dismissed*, 361 N.C. 167, 639 S.E.2d 650 (2006).

Defendant filed a Motion for Reconsideration pursuant to Rules 52(b) and 59 of the North Carolina Rules of Civil Procedure. Rule 52(b) provides as follows:

> Amendment—Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly.

> The motion may be made with a motion for a new trial pursuant to Rule 59.

N.C. Gen. Stat. § 1A-1, Rule 52(b) (2007). Pursuant to Rule 59(a), a new trial may be granted to a party when there is an "[e]rror in the law occurring at the trial and objected to by the party making the motion," and for "[a]ny other reason heretofore recognized as grounds for new trial." N.C. Gen. Stat. § 1A-1, Rule 59(a)(8)-(9) (2007). Under prior case law, our Supreme Court has approved a new trial, for example, when equity and justice so require. *Walston v. Greene*, 246 N.C. 617, 617, 99 S.E.2d 805, 806 (1957).

Defendant argued in its Motion to Reconsider that it denied the material allegations of plaintiff's complaint and that the entry of a default judgment against the Culbreths was "premature." As defendant explained, a decision on the merits in favor of plaintiff would entitle plaintiff to judgment against all defendants and would prevent defendant—an answering defendant—from raising a meritorious defense solely due to the Culbreths' failure to respond.

In denying defendant's motion, the trial court stated that it reconsidered the pleadings of record and defendant's brief. The court made no additional findings of fact or conclusions of law on which to base its denial of the Motion to Reconsider.

Reading Rules 52 and 59 together, we hold that the trial court, upon defendant's Motion to Reconsider, should have amended its findings, made additional findings, and amended its judgment because equity and justice required the court to allow defendant to defend its claim on the merits. *See Walston*, 246 N.C. at 617, 99 S.E.2d at 806. The result was exactly as defendant contended in its motion. Upon the default judgment entry against the Culbreths, defendant was prevented from arguing the claims on the merits. Defendant has succeeded in showing the trial court abused its discretion in denying defendant's Motion to Reconsider.

IV. Conclusion

In *Beard v. Pembaur*, this Court stated that "'the law generally disfavors default judgments, [and] any doubt should be resolved in favor of setting aside an entry of default so the case may be decided on its merits.' " *Beard v. Pembaur*, 68 N.C. App. 52, 56, 313 S.E.2d 853, 855 (citation omitted), *disc. review denied*, 311 N.C. 750, 321 S.E.2d 126 (1984); *see also Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E.2d 794 (1971). Because the trial court's findings of fact and

conclusions of law were insufficient to address the merits of plaintiff's claims, and because its order was based in part on erroneous conclusions of law, there remains doubt as to the merits of the claims. Pursuant to the principle in *Beard*, we reverse the trial court's entry of default judgment against the Culbreths and remand to the trial court for consideration of the merits of the claims. Based on this error, we further hold the trial court abused its discretion in denying defendant's Motion to Reconsider.

Reversed and remanded.

Judges WYNN and JACKSON concur.

WILLIAM SYKES, EMPLOYEE-PLAINTIFF v. MOSS TRUCKING COMPANY, INC., EMPLOYER, PROTECTIVE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA08-1039

(Filed 1 September 2009)

1. Workers' Compensation— treatment—good faith effort

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff had made a good faith effort to comply with the treatment of his authorized physician and thus erred by concluding that defendants shall reinstate temporary total disability benefits and medical compensation benefits to plaintiff.

2. Workers' Compensation— vocational rehabilitation services—justification for failure to cooperate

The Industrial Commission erred in a workers' compensation case by concluding that defendants had sufficient opportunity to offer vocational rehabilitation services to plaintiff and that plaintiff's failure to cooperate with vocational rehabilitation services was justified. Defendants could not have offered vocational rehabilitation services to plaintiff since plaintiff was not under the care of an authorized physician and there was no authorized treating physician to oversee plaintiff's rehabilitation.

Appeal by defendants from opinion and award entered 22 May 2008 by the Industrial Commission. Heard in the Court of Appeals 11 February 2009.

Teague, Campbell, Dennis & Gorham, LLP, by John A. Tomei, for defendants-appellants.

Plaintiff-appellee appears pro se.

ELMORE, Judge.

Moss Trucking Company, Inc. (defendant Moss Trucking), and Protective Insurance Company (together, defendants) appeal from the 22 May 2008 opinion and award entered by the North Carolina Industrial Commission. The opinion by the majority of the Industrial Commission found in favor of William Sykes (plaintiff) and reinstated his temporary total disability benefits and medical compensation benefits. Defendants argue that the findings of fact made by the Industrial Commission majority are not supported by competent evidence, nor are its conclusions of law justified by its findings of fact. Defendants maintain that plaintiff is not in compliance with a previous order of the Industrial Commission, and, therefore, his benefits should remain suspended. We agree with defendants and reverse the 22 May 2008 opinion and award.

I

On 4 October 1990, plaintiff sustained an admittedly compensable injury to his lower back while working as a long haul truck driver for defendant Moss Trucking. The North Carolina Industrial Commission approved an Agreement for Compensation for Disability, and defendant Moss Trucking's insurance carrier, Protective Insurance Company, began paying temporary total disability compensation to plaintiff. Plaintiff received the payments from 6 November 1990 until 30 November 1998 at the rate of $399.00 per week. During this time, plaintiff sought treatment from a number of different doctors and specialists. Two of these doctors, Dr. George Charron and Dr. Alan Towne, provided differing recommendations about plaintiff's medical recovery and his ability to return to gainful employment. Dr. Charron, an orthopedic surgeon, believed that plaintiff had reached maximum medical improvement and could return to work. Dr. Towne, a neurologist, did not believe that plaintiff had reached maximum medical improvement and recommended further treatment. Because of the differing recommendations, on 24 February 1997, a full evidentiary hearing was held before Deputy Commissioner W. Bain Jones, Jr., and he entered his opinion and award on 15 July 1997. In his opinion and award, Deputy Commissioner Jones held that defendants were entitled to direct

plaintiff's medical treatment, the parties were to use good faith efforts in proceeding with the vocational rehabilitation and prescribed medical treatment, and defendants were not entitled to terminate or suspend benefits. One of the conclusions of law specifically states that plaintiff must "use all good faith efforts to comply with the medical treatment provided by" Dr. Gilbert Snider, a physician authorized by defendants.

In January 1998, Dr. Snider confirmed that he was plaintiff's treating physician, but also noted that "plaintiff had repeatedly and in no uncertain terms expressed his dissatisfaction with Dr. Snider and his desire to have Dr. Snider removed as his treating physician." In the meantime, plaintiff had filed two additional motions to change his treating physician to Dr. Towne; these motions were denied by the Industrial Commission on 11 February 1998. Deputy Commissioner Jones entered an opinion and award on 11 February 1998 designating Dr. Robert Hansen[1] as plaintiff's new treating physician. The opinion also stated that plaintiff's failure to comply with Dr. Hansen's treatment would result in termination of compensation. Between March 1998 and November 1998, plaintiff saw Dr. Hansen several times and underwent a series of tests at Dr. Hansen's recommendation. In April 1999, Dr. Hansen opined that plaintiff had reached maximum medical improvement, that plaintiff's pain could be managed with medication, and that plaintiff could be retrained to do sedentary work. Plaintiff expressed dissatisfaction with Dr. Hansen's treatment and refused further treatment or evaluation.

The matter was reviewed again by the Industrial Commission, and the Full Commission entered an opinion and award on 1 October 1999. The Industrial Commission unanimously suspended plaintiff's compensation benefits upon finding that, as of 30 November 1998, plaintiff had admittedly and unjustifiably refused to comply with the treatment instructions of Dr. Hansen, and plaintiff had admittedly and unjustifiably refused to comply with the vocational rehabilitation programs offered by defendants—specifically, that plaintiff had "failed to use good faith efforts to comply with the treatment instructions of Dr. Hansen[.]" Plaintiff appealed to this Court, which unanimously affirmed the Industrial Commission's decision in its decision of 20 February 2001.

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1. We note that Dr. Hansen's name is spelled as both "Hanson" and "Hansen" in various opinions by the Industrial Commission throughout the course of this litigation, but as the most recent opinion—that being appealed here—along with both parties' briefs to this Court spell it "Hansen," we use that spelling herein.

Following a gap in treatment of approximately six years, plaintiff returned to Dr. Hansen on 14 February 2005. During this visit, plaintiff represented to Dr. Hansen that he was getting treatment from Dr. Towne and two other doctors at the Medical College of Virginia, and that he wished to continue treatment from those doctors. Not knowing the details of the litigation on this matter, Dr. Hansen acquiesced to plaintiff's request. Dr. Hansen later testified that his "referral" to plaintiff's existing physicians was made at plaintiff's request after he expressed a strong preference to continue treatment with those physicians. On 14 February 2005, Dr. Hansen did not render any medical treatment to plaintiff and no follow-up appointments were made.

On 14 June 2005, the case was returned to Deputy Commissioner Philip A. Baddour, III, "for the taking of additional evidence and further hearing regarding the issue of plaintiff's compliance with medical treatment as it relates to the possible reinstatement of plaintiff's benefits." In the opinion and award entered 31 December 2006, Deputy Commissioner Baddour found plaintiff to be in compliance with the medical treatment requirements that were established by the 1 October 1999 opinion and award of the Industrial Commission based on Dr. Hansen's "referral" of plaintiff to Drs. Towne, Hyman, and Bullock. Defendants appealed to the Full Commission, arguing that, since plaintiff had not complied with the medical treatment ordered, they were unwilling to offer vocational rehabilitation services to plaintiff and that his benefits should remain suspended. On 22 May 2008, the majority opinion and award of the Full Commission affirmed Deputy Commissioner Baddour's finding that plaintiff was now in compliance with the treatment of Dr. Hansen. The majority concluded that "[p]laintiff cannot further comply with the 1 October 1999 order of the Full Commission ordering him to cooperate with vocational rehabilitation until Defendants offer it" and "[a]ny failure of Plaintiff to cooperate with the vocational rehabilitation services under the circumstances is justified." Defendants were ordered to reinstate temporary total disability benefits and medical compensation to plaintiff as of 31 December 2006. Commissioner Diane Sellers dissented from the opinion and award, stating that plaintiff did not substantially comply with the 1 October 1999 order, and that plaintiff had not provided a justifiable reason for his continued non-compliance with the order. Defendants now appeal to this Court.

II

[1] Defendants first argue that the Industrial Commission majority opinion and award erred in concluding that plaintiff had made a good faith effort to comply with the treatment of Dr. Hansen as required by the 1 October 1999 order. Specifically, defendants contend that, due to its erroneous findings and conclusions in the 22 May 2008 opinion and award, the Industrial Commission incorrectly awarded additional workers' compensation benefits to plaintiff on and after 31 December 2006. We agree.

When an appellate court reviews an award entered by the Industrial Commission, the review "is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citations omitted). In reviewing the Industrial Commission's award, "appellate courts may set aside a finding of fact only if it lacks evidentiary support." *Holley v. Acts, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003). Furthermore, the Industrial Commission's "conclusions of law are fully reviewable" by the appellate courts. *Saunders v. Edenton Ob/Gyn Ctr.*, 352 N.C. 136, 140, 530 S.E.2d 62, 65 (2000).

The purpose of section 97-25 of the Workers' Compensation Act is "to authorize the Commission to direct the course of treatment and penalize non-compliance by suspending compensation." *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 18, 510 S.E.2d 388, 394 (1999); *see also* N.C. Gen Stat. § 97-25 (2007) ("In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.").

> The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service.

N.C. Gen Stat. § 97-25 (2007). This Court has held that suspension of compensation benefits is permitted under section 97-25 upon the

"'refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure.' " *Scurlock v. Durham County Gen. Hosp.*, 136 N.C. App. 144, 148, 523 S.E.2d 439, 441 (1999) (quoting N.C. Gen. Stat. § 97-25) (remanding case to Industrial Commission to determine whether the plaintiff was willing to cooperate with the defendant's offers of medical treatment and rehabilitative services with her authorized physician). Non-compliance with an order directing medical treatment by a designated physician is proper grounds to suspend compensation. *Matthews*, 132 N.C. App. at 19, 510 S.E.2d at 394 (finding non-compliance where the plaintiff maintained that she attended one appointment with the designated doctor, but there was no support for this appointment in the record). If there is evidence in the record that supports a finding of plaintiff's refusal to accept medical treatment or rehabilitative services after being ordered by the Industrial Commission to do so, then the Industrial Commission is justified in suspending the benefits while plaintiff remains in non-compliance. *Swain v. C & N Evans Trucking Co.*, 126 N.C. App. 332, 337, 484 S.E.2d 845, 849 (1997) (finding non-compliance where plaintiff "quit rehabilitation . . . after only two or three sessions and was unwilling to pursue further treatment").

This Court does not agree with plaintiff's claim that his 14 February 2005 appointment constituted compliance with the Industrial Commission's order. It is clear from the record that plaintiff's purpose in this appointment was not to resume treatment with Dr. Hansen; rather, his purpose was to obtain a referral to the physicians of his choice, none of whom was authorized to treat him by the Industrial Commission. The record reflects the following: Dr. Hansen later testified that his "referral" to Drs. Towne, Hyman, and Bullock was made at plaintiff's request. At this visit, plaintiff represented to Dr. Hansen that the only reason for his visit was to obtain a referral that would allow a reinstatement of the terminated benefits. Dr. Hansen also testified that he was willing to continue treating plaintiff and that plaintiff would be welcomed back as a patient. However, based on plaintiff's preference to continue treatment with his existing doctors, Dr. Hansen acquiesced to plaintiff's request. Dr. Hansen did not examine plaintiff or prescribe any medications, and plaintiff did not schedule any follow-up appointments.

In essence, plaintiff did not return to Dr. Hansen to re-establish a treatment relationship; his return visit was simply a way to circumvent the Industrial Commission's previous order. We do not regard plaintiff's effort in seeking this referral to be "a good faith effort to

comply" with the previous order. Thus, as properly found by Commissioner Sellers in her dissent, plaintiff's behavior did not constitute substantial compliance with the Industrial Commission's opinion and award of 1 October 1999.

Furthermore, while we note that, where a plaintiff willfully refuses medical treatment, the benefits may not be suspended if " 'the circumstances justif[y] the refusal[,]' " *Johnson v. Jones Group, Inc.*, 123 N.C. App. 219, 226, 472 S.E.2d 587, 591 (1996) (quoting N.C. Gen. Stat. § 97-25), plaintiff did not provide any reason, to say nothing of a justifiable one, for his continued non-compliance with the order. Commissioner Sellers noted in her dissent that plaintiff has a long history of refusing to comply with the Industrial Commission's orders and had made repeated attempts to circumvent the same.[2]

We hold that the Industrial Commission erred in finding that, as of 14 February 2005, plaintiff is in compliance with the treatment recommendations of Dr. Hansen. In its 1 October 1999 order, the Industrial Commission suspended plaintiff's benefits until such time as he complied with vocational rehabilitation and the medical treatment of Dr. Hansen. We do not find in the record competent evidence that plaintiff is now in compliance with the 1 October 1999 order via treatment by Dr. Hansen. As such, the majority Industrial Commission opinion erred in concluding that plaintiff had made a good faith effort to comply with the portion of the order requiring him to comply with Dr. Hansen's treatment, because no competent evidence supports a conclusion that plaintiff resumed treatment with Dr. Hansen.

Upon fully reviewing the Industrial Commission's conclusions of law, we find that its conclusions are not justified by its erroneous finding that plaintiff made good faith efforts to comply with Dr. Hansen's medical treatments. Therefore, we find that the Industrial Commission incorrectly concluded that defendants shall reinstate temporary total disability benefits and medical compensation benefits to plaintiff as of 31 December 2006. *See Matthews*, 132 N.C. App. at 19, 510 S.E.2d at 394 (holding that, "[b]ecause there is no competent evidence indicating that [plaintiff] was treated by her designated physician, the Commission could not conclude that [plaintiff] rein-

2. Despite being ordered repeatedly to comply with the medical treatment recommendations of Dr. Hansen, plaintiff continued attempting to circumvent the orders by filing further Requests for Hearings in 2001 and 2004. Both these requests resulted in plaintiff being sanctioned by the Industrial Commission. We note that, to date, plaintiff has not paid fines arising out of these sanctions.

stated her right to compensation by compliance with the order directing treatment"); *Sanhueza v. Liberty Steel Erectors*, 122 N.C. App. 603, 608, 471 S.E.2d 92, 95 (1996).

III

[2] Defendant next argues that the Industrial Commission erred in concluding that defendants had sufficient opportunity to offer vocational rehabilitation services to plaintiff and that plaintiff's failure to cooperate with vocational rehabilitation services was justified. Specifically, defendant assigns error to the following finding of fact made by the Industrial Commission:

> 24. Until Defendants offer vocational rehabilitation services to Plaintiff, he cannot demonstrate his willingness to cooperate. Defendants have had sufficient opportunity to offer vocational rehabilitation services to Plaintiff since he returned to Dr. Hansen on 14 February 2005, and at least after the opinion and award of Deputy Commissioner Baddour filed 31 December 2006.

Defendant also assigns error to the following conclusion of law entered by the Industrial Commission:

> 3. Although the Full Commission's 7 April 2005 Order remanding this case to the Deputy Commissioner section for hearing only dealt with the "issue of [P]laintiff's compliance with medical treatment as it relates to the possible reinstatement of [P]laintiff's benefits," Defendants have admitted through counsel that they have not and are unwilling to offer vocational rehabilitation services to Plaintiff because they contend he is not in compliance with the medical treatment ordered in the 1 October 1999 opinion and award. Defendants have had a Deputy Commissioner opinion since 31 December 2006 ruling that Plaintiff has complied with the medical treatment ordered. Plaintiff cannot further comply with the 1 October 1999 order of the Full Commission ordering him to cooperate with vocational rehabilitation until Defendants offer it. Any failure of Plaintiff to cooperate with vocational rehabilitation services under the circumstances is justified. N.C. Gen. Stat. § 97-25.

(Alterations in original.)

According to the 1 October 1999 order, defendants' vocational rehabilitation efforts to allow plaintiff to return to the work force

should be made under the supervision of plaintiff's authorized treating physician. *See* N.C. Gen. Stat. § 97-25.5 (2007) ("The Commission may adopt utilization rules and guidelines, consistent with this Article, for vocational rehabilitation services and other types of rehabilitation services."). However, plaintiff refuses to seek treatment from Dr. Hansen, the physician who has been authorized by the Industrial Commission to provide treatment to plaintiff. On the contrary, plaintiff has been ignoring orders of the Industrial Commission and seeking medical treatment from unauthorized physicians since 1999. Furthermore, there is no evidence in the record that defendants' counsel made any admissions before the Industrial Commission with regard to vocational rehabilitation services that may or may not have been offered to plaintiff. Since plaintiff was not under the care of an authorized physician and there was no authorized treating physician to oversee plaintiff's vocational rehabilitation, defendants could not have offered vocational rehabilitation services to plaintiff. The Industrial Commission erroneously concluded that plaintiff's failure to cooperate with vocational rehabilitation was justified.

IV

Plaintiff is not in compliance with the 1 October 1999 order of the Industrial Commission ordering him to comply with the medical treatment of Dr. Hansen. We therefore reverse the 22 May 2008 opinion and award of the Industrial Commission and hold that the suspension of plaintiff's workers' compensation benefits should continue. We also hold that, given plaintiff's non-compliance with the medical treatment ordered by the Commission, his failure to cooperate with vocational rehabilitation is not justified.

Reversed.

Judges CALABRIA and STROUD concur.

IN THE MATTER OF: FORECLOSURE OF A DEED OF TRUST EXECUTED BY LOREN L. BRADBURN AND WIFE, LORIE C. BRADBURN DATED JANUARY 4, 2007, RECORDED AT DEED BOOK 1815, PAGE 1563

No. COA08-1263

(Filed 1 September 2009)

Mortgages and Deeds of Trust— violation of licensing statute—debt voidable but not void—weighing of equities

A trial court order declaring a Deed of Trust illegal and unenforceable due to the mortgage company's violation of the licensing statute was remanded where the court determined that the mortgage company had failed to prove the existence of a valid debt. The Note and Deed of Trust are subject to being declared unenforceable for public policy reasons, but the contract is not void as a matter of law. It is appropriate for the trial court on remand to consider that neither party has "clean hands" in this transaction.

Appeal by petitioner from orders entered 6 February 2008 and 19 March 2008 by Judge Kimberly Taylor in Iredell County Superior Court. Heard in the Court of Appeals 12 March 2009.

Shumaker, Loop & Kendrick, LLP, by William H. Sturges and Frederick M. Thurman, Jr. for Paragon Mortgage Holdings, LLC, and Paragon Mortgage, Inc., petitioner-appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Phillip K. Woods, for The Office of the Commissioner of Banks of North Carolina, Amicus Curiae.

Legal Aid of North Carolina, Inc., by Celia Pistolis and Suzanne Chester; North Carolina Justice Center, by Charlene McNulty; Land Loss Prevention Project, by Mary Henderson; and Pisgah Legal Services, by William John Whalen, Amicus Curiae.

Pope McMillan Kutteh Privette Edwards & Schieck, PA, by Martha N. Peed and Anthony S. Privette, for respondents-appellees.

JACKSON, Judge.

Paragon Mortgage Holdings, LLC ("PMH") and Paragon Mortgage, Inc. ("PMI") (collectively "Paragon") appeal the trial court's order

declaring as illegal and unenforceable the Deed of Trust upon which they sought to foreclose. For the reasons stated below, we remand.

On or about 22 December 2006, PMI filed an application with the North Carolina Commissioner of Banks ("the COB") to act as a mortgage banker pursuant to section 53-243.05 of the Mortgage Lending Act ("MLA"). On 4 January 2007, Loren L. and Lorie C. Bradburn ("the Bradburns") executed a Balloon Adjustable Rate Note (the "Note") in the original sum of $383,500.00 payable to PMI. The Note was secured by a North Carolina Deed of Trust (the "Deed of Trust") also executed 4 January 2007, and recorded in the Iredell County Register of Deeds on 10 January 2007. On 9 January 2007, PMI assigned the Note and Deed of Trust to PMH. Also on 9 January 2007, PMH assigned the Note and Deed of Trust to a third mortgage company—CSE Mortgage LLC ("CSE"). These assignments were recorded eight months later on 20 September 2007. The Note and Deed of Trust were re-assigned to PMH on 15 November 2007, effective 11 July 2007. The re-assignment was recorded on 29 November 2007.

The Bradburns made their first payment on the Note, but failed to make any further payments. On 3 May 2007, PMI—having no legal interest in the Note and Deed of Trust, as it had assigned its interest to PMH on 9 January 2007—notified the Bradburns that they were in default. On 2 July 2007, PMH, through its attorney, notified the Bradburns, *inter alia*, that the principal and interest due on the Note had grown to $408,779.48. At that time, PMH had no legal interest in the Note and Deed of Trust, also having assigned its interest in both to CSE on 9 January 2007. Paragon, through a trustee pursuant to the Deed of Trust, began foreclosure proceedings on 30 July 2007, providing notice to the Bradburns on or about 31 July 2007. After foreclosure proceedings had begun, the COB issued a license to PMI on 13 August 2007, authorizing it to engage in the business of a mortgage broker or mortgage banker within the State of North Carolina.

The foreclosure proceeding was heard by the Iredell County Clerk of Superior Court on 19 November 2007. The Clerk found as fact that PMI was not licensed to act as a mortgage broker or mortgage banker at the time the Bradburns executed the Note and Deed of Trust. Accordingly, it concluded that PMI had failed to prove the existence of a valid debt because the Note was not enforceable. Paragon appealed to the Superior Court.

The trial court conducted a *de novo* hearing on 7 January 2008. In its 6 February 2008 order, the trial court found as fact that PMI was

not licensed to act as a mortgage broker or mortgage banker on 4 January 2007.[1] The trial court concluded as a matter of law that by acting as a mortgage banker with respect to the Note, PMI was in direct violation of North Carolina General Statutes, section 53-243.02. It further concluded that because of this violation, the Note and Deed of Trust were illegal and unenforceable; therefore, Paragon had failed to prove the existence of a valid debt. Paragon appeals.

Paragon argues that the trial court erred in concluding as a matter of law that there was no valid debt and that the Note and Deed of Trust were illegal and unenforceable. We agree.

When the trial court sits without a jury, "'the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " *Luna v. Division of Soc. Servs.*, 162 N.C. App. 1, 4, 589 S.E.2d 917, 919 (2004) (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). Paragon does not argue that there was any error in the trial court's findings of fact. The trial court's conclusions of law are reviewable *de novo*. *Id.*

The Bradburns contend that contracts made in violation of the law are invalid and unenforceable, citing *Courtney v. Parker*, 173 N.C. 479, 92 S.E. 324 (1917):

> It is well established that no recovery can be had on a contract forbidden by the positive law of the State, and the principle prevails as a general rule whether it is forbidden in express terms or by implication arising from the fact that the transaction in question has been made an indictable offense or subjected to the imposition of a penalty.

Id. at 480, 92 S.E. at 324 (citations omitted).

Paragon, however, contends that the controlling language from *Courtney* is not the portion cited by the Bradburns; rather, the controlling portion is:

> [T]he imposition of a penalty, without more, will not always have the effect of avoiding the contract, but . . . when the agreement is not immoral or criminal in itself, the courts, on perusal of the entire statute, its language, purpose, etc., may determine whether it was the meaning and intent of the Legislature to restrict the

1. The order was subsequently amended on or about 18 March 2008 to correct the petitioner's legal name.

> operation of the law to the penalty as expressed and specified therein or give it the further effect of avoiding the contract.

Id. at 481, 92 S.E. at 325. In *Courtney*, the Court cited *Ober v. Katzenstein*, 160 N.C. 439, 76 S.E. 476 (1912), as an "illustration of the position." *Id.* In *Ober*, the Court refused to void a contract for failure to comply with the statute requiring registration of a foreign corporation.

> For its failure to comply with the provisions of the statute the plaintiff company is liable to an action by the Attorney-General for the forfeiture provided by this section. But the statute does not invalidate either the express contract made between the plaintiff and the defendant nor, indeed, the implied contract raised by the receipt of the goods of the former by the defendant.

Ober v. Katzenstein, 160 N.C. 439, 440-41, 76 S.E. 476, 477 (1912). The Court continued: "If the State, in addition to the penalty, had desired to render invalid the contract and to deny a recovery thereon, it would have so enacted, as it has done in regard to gambling and other illegal contracts." *Id.* at 441, 76 S.E. at 477.

Here, the MLA does not statutorily invalidate a contract executed in violation of its licensing provisions. However, Paragon directs our attention to the Consumer Financing Act ("CFA")—also found in Chapter 53—which does. North Carolina General Statutes, section 53-166 provides that any "contract of loan, the making or collecting of which violates any provision of this Article . . . is void[.]" N.C. Gen. Stat. § 53-166(d) (2007). The CFA was enacted in 1961. The MLA was enacted forty years later in 2001. Based upon our reading of the CFA, it is clear that had the General Assembly intended to impose the same penalty it did in the CFA, it could have included language in the MLA leading to the same result, that is, a contract that was void *ab initio* in the face of a violation of the statute.

Instead, the MLA provides the limited remedy that the COB "may require a licensee to pay to a borrower or other individual any amounts received by the licensee or its employees in violation of Chapter 24 of the General Statutes." N.C. Gen. Stat. 53-243.12 (j) (2007). No provision for a remedy in a situation such as the one we confront in the instant case is provided, as usury—the subject of Chapter 24—is not the issue before us. However, we note that the General Assembly recently amended the MLA to add the following subsection to the section concerning disciplinary authority—effective 1 January 2009:

> In the event the Commissioner shall have evidence that a material violation of law has occurred in the origination or servicing of a loan then being foreclosed or then delinquent and in threat of foreclosure, and that the putative violation would be sufficient in law or equity to base a claim or affirmative defense which would affect the validity or enforceability of the underlying contract or the right to foreclose, then the Commissioner may notify the Clerk of Superior Court, and the Clerk shall suspend foreclosure proceedings on the mortgage for 60 days from the date of the notice. In the event that the Commissioner notifies the Clerk, the Commissioner shall also notify the servicer, if known, and provide an opportunity to cure the violation or provide information to the Commissioner to rebut the evidence of the suspected violation. If the violation is cured or the information satisfies the Commissioner that no material violation has occurred, the Commissioner shall notify the Clerk so that the foreclosure proceeding may be resumed.

2008 N.C. Sess. Laws 228, sec. 9. Even with recent extraordinary concerns about predatory lending and the "mortgage crisis," the General Assembly has not chosen to impose the severe penalty it put in place in the CFA—that of nullifying a contract.

As *Ober* instructs, we are constrained to understand that had the legislature desired to impose the onerous penalty of voiding the contract—as it has in the CFA—it would have enacted legislation to that effect. Therefore, our reading of *Courtney* leads us to conclude that a contract made in violation of the MLA is not void *ab initio*.

However, we also are mindful of *Courtney's* directive "that no recovery can be had on a contract forbidden by the positive law of the State[.]" *Courtney*, 173 N.C. at 480, 92 S.E. at 324. We note that at the time the transaction at issue took place, entering into a mortgage transaction without a valid license from the COB constituted a Class I felony. *See* N.C. Gen. Stat. § 53-243.14 (2007).[2] Therefore, "on perusal of the entire statute, its language, purpose, etc.," *Courtney*, 173 N.C. at 481, 92 S.E. at 325, we review on what basis the trial court may determine whether the transaction here ought to be enforced.

Although there is no mandate in the MLA, the following section included in the same bill is instructive:

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2. The criminal penalty has since been revised to be a Class 3 misdemeanor. *See* 2008 N.C. Sess. Laws 228, sec. 11.

> The Legislative Research Commission may study the implementation and enforcement of this act, and the Act to Prohibit Predatory Lending enacted in the 1999 Session of the General Assembly, (S.L. 1999-332), to determine whether they have successfully reduced predatory lending practices and whether further reforms may be necessary or appropriate.

2001 N.C. Sess. Laws 393, sec. 8. This section is a clear expression of the General Assembly's continuing concern regarding predatory lending practices, which it first addressed in 1999 in adopting "a predatory lending law to limit abusive practices in home mortgage lending." *In re Tetterton*, 379 B.R. 595, 598 (E.D.N.C. 2007); N.C. Gen. Stat. § 24-1 *et seq*. Like the CFA, Chapter 24 dealing with usurious interest rates provides an explicit remedy for violations of the Act. Specifically, section 24-2 provides for either forfeiture of the interest paid on the note, or twice the amount of interest paid, depending on the egregiousness of the circumstances surrounding the case. N.C. Gen. Stat. § 24-2 (2007).[3]

Initially, "the taint of usury made the contract void both as to principal and interest, into whosoever hands it might come, and so likewise any appearance, shift or device whereupon or whereby an illegal rate of interest was received or taken was declared to be void." *Moore v. Woodard*, 83 N.C. 531, 532-33 (1880). The legislature amended the law to its current policy of interest forfeiture in 1877. 1876-77 N.C. Sess. Laws 91, sec. 3. As noted in *Moore*, over a century ago, "it is the duty of the courts so to expound and apply the law as to carry out the legislative intent." *Moore*, 83 N.C. at 533. Where, as here, we have a usury statute that allows only the forfeiture of interest and a consumer financing act that allows voiding the entire contract, but a mortgage lending act with no specific remedy for an aggrieved borrower, our task is profoundly difficult.

Based upon the foregoing, we believe that *Courtney* dictates that the contract is not void as a matter of law; however, the transaction may yet be avoided. *See Courtney*, 173 N.C. at 480, 92 S.E. at 324 ("In reference to an avoidance of a contract by reason of an implied prohibition, it is the rule very generally enforced that recovery is denied to the offending party when the transaction in question is in violation of a statute establishing a general police regulation to 'safeguard the public health or morals or to protect the general public from fraud or

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3. In appropriate circumstances the aggrieved party may be able to elect a remedy pursuant to the Unfair and Deceptive Trade Practices Act.

imposition.' "). Because the trial court determined that Paragon "failed to prove by a preponderance of the evidence the existence of a valid debt as required by N.C.G.S. 45-21.16," we must remand to the trial court for further consideration in light of this opinion. On remand, it is appropriate for the trial court to consider that neither party has "clean hands" in this transaction.

Here, PMI was aware of the licensing requirements, having applied for a license on or about 22 December 2006. Notwithstanding the fact that PMI knew that it was required to have a license, and that it did not have a license, PMI acted as a mortgage broker or mortgage banker in violation of section 53-243.02 when it entered into the Note and Deed of Trust with the Bradburns on 4 January 2007—seven business days after applying for a license.

The Note contained the following terms, *inter alia*: (1) an initial interest rate of 10.99 percent—yielding an initial monthly payment of $3512.22; (2) interest-only payments for the first ten years, beginning 1 March 2007; (3) a balloon payment of the outstanding principal and any unpaid interest or other charges on 1 February 2017; (4) a variable interest rate which could change *monthly* beginning 1 September 2007; (5) a variable interest rate which could reach as high as eighteen percent but no lower than 10.99 percent; (6) a late payment fee of five percent of the overdue payment—yielding an initial penalty of $175.61; and (7) a default interest rate of eighteen percent.

Although it is not impermissible for a mortgagee to assign a note and deed of trust shortly after their creation, the assignments here could raise questions. The Note and Deed of Trust were assigned on 9 January 2007, one day prior to their recordation. These assignments were not recorded until 20 September 2007, after foreclosure proceedings had been initiated. The re-assignment to PMH was not executed until 15 November 2007, conveniently stating that it was effective 11 July 2007, prior to the commencement of foreclosure proceedings. This re-assignment was recorded 29 November 2007, *after* the clerk heard the matter and *after* she filed her order denying the foreclosure. The clerk found as fact that PMI was the holder of the Note and Deed of Trust. According to the *record* at the time the clerk heard the foreclosure proceeding, PMI was not the holder of the Note and Deed of Trust; CSE was. It does not appear as though the clerk was made aware of the various re-assignments in this matter.

We further note that on 3 May 2007 when PMI contacted the Bradburns with respect to the outstanding debt, and on 2 July 2007

when PMH contacted the Bradburns with respect to the default, neither PMI nor PMH held the Note and Deed of Trust; CSE did. Both had assigned their interests in the Note and Deed of Trust on 9 January 2007. Nonetheless, it appears that PMI and PMH continued to treat the Note and Deed of Trust as though their interest in them continued unabated.

Nonetheless, the terms of the Note and Deed of Trust permitted the holder to accelerate and declare as immediately due and payable in full the entire balance of the loan, upon the Bradburns' failure to make timely payments. Although such a term is common, in this case the first payment was not due until 1 March 2007. That payment was made. The Bradburns did not make their 1 April 2007 payment. PMI notified the Bradburns of their default on 3 May 2007, at which time a ten-day grace period applied to the 1 May 2007 payment. Again, we note that this notification was not sent by CSE—the holder of the Note and Deed of Trust. Paragon immediately began the foreclosure process. Again, we note the legislature's apparent intent to curb predatory lending. *See* 2001 N.C. Sess. Laws 393, sec. 8.

We recognize that the Bradburns were not innocent in this matter. They entered into a loan, the terms of which we presume they were made aware. They made only one payment.

Because Paragon violated the licensing statute, the Note and Deed of Trust it sought to foreclose is subject to being declared unenforceable for public policy reasons. However, it is the province of the trial court, not the appellate court, to weigh the evidence and decide the equities. Therefore, we remand to the trial court to determine whether the Note and Deed of Trust are unenforceable under the facts and circumstances of this case.

REMAND.

Judges STEPHENS and STROUD concur.

IN RE K.C. & C.C.

[199 N.C. App. 557 (2009)]

IN THE MATTER OF: K.C. AND C.C.

No. COA09-445

(Filed 1 September 2009)

1. Appeal and Error— appealability—untimely appeal—writ of certiorari

DSS's motion to dismiss respondent mother's appeal in a child neglect case is granted because respondent mother failed to note a timely appeal from the disposition order, and she was required by N.C.G.S. § 7B-1001(a)(3) to do so as a prerequisite for appealing issues arising from the adjudication order as a matter of right. However, the Court of Appeals exercised its discretion under N.C. R. App. P. 21 to allow respondent's petition for writ of *certiorari* in light of the facts of the case.

2. Child Abuse and Neglect— failure to adopt visitation plan—invited error

The trial court did not err in a child neglect case by failing to adopt an appropriate visitation plan in its disposition order as required by N.C.G.S. § 7B-905(c) where the unchallenged findings of fact revealed that respondent was generally unwilling to do anything to promote her reunification with the juveniles and was in no position to complain when the trial court did what the respondent effectively asked it to do.

Appeal by respondent mother from an adjudication order entered 13 November 2008 and a disposition order entered 20 November 2008 by Judge Eula E. Reid in Currituck County District Court. Heard in the Court of Appeals 4 August 2009.

Courtney S. Hull, for appellee Currituck County Department of Social Services.

Pamela Newell Williams, for appellee guardian ad litem. Robin E. Strickland, for appellant respondent-mother.

ERVIN, Judge.

Respondent-Mother, Judith C., appeals from adjudication and disposition orders entered by the trial court finding her children, K.C. (Keith) and C.C. (Carol)[1], to be neglected juveniles on the grounds

1. Keith and Carol are both pseudonyms used in this opinion for the purpose of protecting the privacy of the juveniles and for ease of reading.

that the trial court erred in failing to include a visitation plan in its order as required by N.C. Gen. Stat. § 7B-905(c). After careful review, we affirm the trial court's adjudication and disposition orders.

[1] We must first address the motion to dismiss Respondent-Mother's appeal filed by the Currituck County Department of Social Services ("DSS") and a related petition for writ of certiorari filed by Respondent-Mother. On 15 December 2008, Respondent-Mother filed a timely notice of appeal from the trial court's adjudication order, which was entered on 13 November 2008. The 15 December 2008 notice of appeal referenced the adjudication order, but not the disposition order, which had been entered on 20 November 2008. Respondent-Mother subsequently filed an amended notice of appeal on 30 January 2009 seeking relief from both the adjudication and disposition orders. In seeking dismissal of Respondent-Mother's appeal, DSS argued that the amended notice of appeal was not filed within 30 days of the entry of the disposition order; that appeals from an adjudication order have to be taken in conjunction with an appeal from the related disposition order; and the amended notice of appeal, which was the only notice of appeal that referenced the disposition order, was not filed in a timely manner.

After careful review of the record and the applicable law, we agree that Respondent-Mother failed to note a timely appeal from the disposition order and that she was required to file a timely notice of appeal from the disposition order as a prerequisite for appealing issues arising from the adjudication order as a matter of right, N.C. Gen. Stat. § 7B-1001(a)(3) (limiting appeals in juvenile matters conducted "under this Subchapter" to a specified array of orders, including "[a]ny initial order of disposition and the adjudication order upon which it is based"). For that reason, we are constrained to grant DSS's motion to dismiss Respondent-Mother's appeal.

Respondent-Mother has, however, filed a petition seeking the issuance of writ of certiorari pursuant to N.C.R. App. P. 21 in order to permit review of the trial court's orders in the discretion of the court in the event that we conclude that her appeal as of right should be dismissed. According to Respondent-Mother, her failure to note a timely appeal from the trial court's disposition order did not occur as the result of any fault of her own and that, once her trial counsel learned of his mistake, he immediately filed an amended notice of appeal in an attempt to rectify his error. In light of these facts and the importance of issues involving the relations between parents and their children, we elect to exercise our discretion and will allow

respondent's petition for a writ of certiorari so as to permit us to review both of the trial court's orders. N.C.R. App. P. 21. Thus, we will proceed to examine Respondent-Mother's challenge to the trial court's orders on the merits.

On 28 May 2008, DSS filed petitions alleging that both Keith and Carol were abused, neglected, and dependent juveniles. On the same day, DSS was granted non-secure custody of both Keith and Carol. According to the allegations set out in the petitions, DSS had been involved with the family in question since the late 1990s. Respondent-Mother and her ex-husband had adopted several children, about whom DSS began to receive reports relating to inappropriate supervision. The first two reports were unsubstantiated. The third report involved the drowning of two small grandchildren in the family pool, a tragedy which occurred while the children were left unsupervised. After this incident Respondent-Mother and her husband separated.

By the filing of the DSS petitions, Keith and Carol, both of whom were teenagers, were the only children still living in Respondent-Mother's home. DSS stated that it was aware of reports that Respondent-Mother kept the refrigerator and food pantry padlocked so Keith and Carol could not obtain access to the food. DSS further alleged that Respondent-Mother was not cooperative with the childrens' school regarding free lunch and that the children were not provided with lunch money, a fact that forced them to borrow food from friends.

Immediately prior to the filing of the DSS petition, Respondent-Mother filed a juvenile complaint against Keith and Carol in which she alleged that they were undisciplined. After DSS was requested to investigate the allegations set out in Respondent-Mother's petition and Respondent-Mother was ordered to cooperate with DSS, a social worker went to the house. At that time, Respondent-Mother became hostile, stated that she disagreed with the requirement that she cooperate with DSS, and demanded that Keith and Carol be removed from the home immediately. As a result of Respondent-Mother's behavior, verbal abuse, and the neglect of the children, DSS took the children into custody, placed them with an older sister, and filed juvenile petitions alleging that Keith and Carol were "exposed to an injurious environment, verbal abuse, lack of basic needs, and are dependent as the mother wants them out."

At a child planning conference held on 4 June 2008, a Memorandum of Agreement and Consent Order was agreed to by all parties

except Respondent-Mother. The agreement addressed the placement of the juveniles, visitation, and other issues regarding the matters at issue in this proceeding. Respondent-Mother did not agree that Keith and Carol should be placed with their older sister and stated that, if the children would stop disrupting her home and threatening her, she would eventually allow them to return. By means of an order of the same date, the trial court concluded that it would not be in the juveniles' best interest to return home and that the juveniles should be placed in "the discretion" of DSS.

On 18 September 2008, this case came on for adjudication before the trial court. According to uncontested findings of fact made by the trial court in its 10 November 2008 adjudication order, Respondent-Mother does not generally allow Keith and Carol to be in the family home unless she is present because "the children do not belong in the home when she is not at home." In the event that Respondent-Mother is not at home, the children can contact their sister. Respondent-Mother did not allow the juveniles to have keys to the family home because they kept losing them.

Both children have been diagnosed with various disorders, including attention deficit hyperactivity disorder and post traumatic stress disorder. In addition, Keith has been diagnosed with depression and Carol has been diagnosed with bi-polar disorder. Respondent-Mother did not seek counseling for the children after August 2006 and did not assist the children with taking their medications. In fact, Respondent-Mother threw the juveniles' medicine away out of fear that her grandchildren would find those substances when visiting her home.

Respondent-Mother stated she locks up all of the food "because the children destroy and contaminate the food." There was damage to the walls in Respondent-Mother's home, some of which was caused by the children. Respondent-Mother filed a juvenile complaint against Keith and Carol in April 2008; however, this petition was dismissed following an investigation. Respondent-Mother did not want the children to live with her, claiming that she is afraid for her safety, and stating that she would not provide care or supervision for them.

A social worker sent to interview Respondent-Mother reported that Respondent-Mother "repeatedly screamed . . . that the children were a danger to her and themselves and belonged in a group home." According to the social worker, she "removed the children" because "she observed [Respondent-Mother] hysterically screaming and ex-

hibiting an inability to regulate her tone and actions, voice hostility and raving as to the children," which the social worker "perceived to be an immediate safety risk to the children." According to the social worker, Respondent-Mother "has flatly refused to work with the Department towards reunification even though [DSS] has offered things such as visitation, mental health treatment, parenting curriculums, case management/case planning, transportation for [Respondent-Mother] and the children, referrals for therapy and mentor services, assignment services, eyeglass voucher . . ., free lunch services . . ., home visits with the placement provider, and permanency planning meetings." Based on these and other findings of fact, the trial court adjudicated both Keith and Carol to be neglected and dependent juveniles and ordered that they remain in DSS custody.

The disposition hearing was held on 26 September 2008. At that time DSS requested that the permanent plan be guardianship with a relative. At the disposition hearing, Respondent-Mother objected to the placement of the children with their sister. Respondent-Mother further stated that she would not work with DSS, that she would not participate in visitation because she did not want to be guarded, and that she did not want the children back with her until they got under control.

The trial court found in its 20 November 2008 disposition order that Respondent-Mother refused to work toward reunification and was not receptive to parenting training, choosing instead to blame the children for their behaviors and refusing to accept any responsibility for the damaged relationship between the children and herself. In addition, both Keith and Carol stated that they wanted to remain in their current placement. As a result, the trial court concluded that the best interests of the children would be served by leaving them in the custody of DSS, with placement continuing to be with the children's sister, and relieving DSS of the necessity for attempting to reunify Keith and Carol with Respondent-Mother.

[2] The sole issue raised by Respondent-Mother on appeal is that the trial court erred by failing to adopt an appropriate visitation plan in its disposition order as is required by N.C. Gen. Stat. § 7B-905(c). Although we agree that the trial court did not include a valid visitation plan in its orders, we conclude that any error committed by the trial court in this respect was invited by Respondent-Mother and that, for that reason, Respondent-Mother is not entitled to relief on appeal stemming from the trial court's failure to adopt a visitation plan.

According to N.C. Gen. Stat. § 7B-905(c):

> 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. If the director subsequently makes a good faith determination that the visitation plan may not be in the best interests of the juvenile or consistent with the juvenile's health and safety, the director may temporarily suspend all or part of the visitation plan. The director shall not be subjected to any motion to show cause for this suspension, but shall expeditiously file a motion for review.

This Court has previously held that, "[i]n the absence of findings that the parent has forfeited [his or her] right to visitation or that it is in the child's best interest to deny visitation[,] 'the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place[,] and conditions under which such visitation rights may be exercised.' " *In re E.C.*, 174 N.C. App. 517, 522-23, 621 S.E.2d 647, 652 (2005) (quoting *In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971)). As a result, even if the trial court determines that visitation would be inappropriate in a particular case or that a parent has forfeited his or her right to visitation, it must still address that issue in its dispositional order and either adopt a visitation plan or specifically determine that such a plan would be inappropriate in light of the specific facts under consideration.

The trial court did not directly address the issue of visitation at the disposition hearing or make any provision for visitation between Respondent-Mother and the juveniles in the disposition order.[2] Furthermore, the disposition order does not reflect that the trial court found that Respondent-Mother had forfeited her right to visitation with the children or that visitation between Respondent-Mother and the juveniles would be harmful to Keith and Carol. However, the

2. The disposition order does contain an ordering clause providing that the children's father "shall establish a visitation plan to see the children—in coordination with [the sister's] schedule (for respite, to provide increased supervision, to maintain family relationships)."

trial court did allude to the issue of visitation in numerous findings made in the disposition order, none of which have been challenged by Respondent-Mother on appeal. For example, the trial court found that "[s]ince [the] Child Planning Conference on June 4, 2008, [Respondent-Mother] has made no efforts to follow through with agreed upon recommendations." Respondent-Mother called DSS to cancel visitation with Keith and Carol on 9 June 2008 since "it would be pointless because they do not want to be a part of her family and that she is afraid for her own safety and safety to her property." According to the trial court, "[Respondent-Mother] expressed no plans to see the children" at that time. The trial court also found that Respondent-Mother "stated that she does not wish to see them[3]," that "she is not going to be a supportive parent," and that she "is not interested in working with the children right now." According to the trial court, Respondent-Mother "has not visited with the children since they were removed" "because she will not feel guarded." The trial court found that Respondent-Mother expressed no willingness "to cooperate with [DSS] to get her children back" since "she cannot work with [DSS] until her children are under control and they are not under control." The trial court found that Respondent-Mother "has flatly refused to work with [DSS] towards reunification even though [DSS] has offered things such as visitation, ..." As a result, it is clear from the trial court's unchallenged findings of fact that Respondent-Mother had declined to engage in visitation with Keith and Carol, had expressly stated that she did not want to see Keith and Carol, and was generally unwilling to do anything to promote reunification between herself and the juveniles since she claimed that the existing problems were the children's fault and because DSS needed to address and resolve the children's problems before there was any need for Respondent-Mother to take any action to restore her relationship with them.

According to well-established North Carolina law, a litigant will not be heard to complain on appeal about a decision that a trial judge made at that litigant's request. *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971) ("Ordinarily, one who causes (or we think joins in causing) the court to commit error is not in a position to repudiate his action and assign it as ground for a new trial. . . . Invited error is not ground for a new trial."); *Overton v. Overton*, 260 N.C. 139, 144-45, 132 S.E.2d 349, 353 (1963) ("However, in this case respondents may not assert the objection that the court wrongfully

3. The trial court also noted that "[t]he children stated that they do not want to have contact with her either."

placed the burden of proof of the issue upon them" since "[t]hey requested in their prayer for instructions that the burden of proof be so placed, and the court complied."). In this case, Respondent-Mother could have hardly made her lack of interest in visiting with Keith and Carol clearer. As the trial court's unchallenged findings indicate, Respondent-Mother disclaimed any interest in seeing the children until DSS "fixed" them. Having specifically invited the trial court to honor her wishes by not providing for visitation between herself and the children, Respondent-Mother is in no position to complain when the trial court did what Respondent-Mother effectively asked the trial court to do. As a result, given that Respondent-Mother invited the outcome reached in the only portion of the trial court's order which she has challenged in her brief, Respondent-Mother is not entitled to any relief on appeal. Thus, the trial court's adjudication and disposition orders should be, and hereby are, affirmed.

AFFIRMED.

Judges Stephens and Stroud concur.

ESTATE OF VERA HEWETT, ET AL, PLAINTIFFS v. COUNTY OF BRUNSWICK, DEFENDANT

No. COA08-1071

(Filed 1 September 2009)

Immunity— governmental—voluntary program to remove junk

Defendant Brunswick County was entitled to governmental immunity and should have been granted summary judgment in an action arising from a free program to remove junk items from citizen's property on request, with the purpose of protecting and maintaining property values, eliminating public health or environmental nuisances, and protecting public safety and welfare. Although plaintiffs argued that the program was proprietary because it was not an undertaking that could be performed only by the government, prior cases have held that cleaning up a municipality or collecting trash and junk were governmental functions.

Appeal by defendant from order entered 6 June 2008 by Judge William F. Fairley in Brunswick County Superior Court. Heard in the Court of Appeals 10 March 2009.

J. Eric Altman for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by James R. Morgan, Jr. and Robert T. Numbers, II, for defendant-appellant.

GEER, Judge.

Defendant, the County of Brunswick, appeals from the trial court's order denying the County's motion for summary judgment on the ground of governmental immunity. On appeal, the County contends that plaintiffs' suit is barred because the operation of the Appearance and Code Enforcement ("ACE") Program—through which the County would remove without charge certain items from its citizens' property—was a governmental function. Because we agree, we reverse the trial court's denial of the County's motion for summary judgment and remand for entry of summary judgment in favor of the County.

Facts

The County operated the ACE Program from 20 August 2001 until 1 July 2007. Under that program, the County removed junk items such as dilapidated mobile homes, junked vehicles, and abandoned structures—from its citizens' property upon request, free of charge. The purpose of the ACE program was "to improve the appearance of Brunswick County, protect and maintain property values, eliminate public health and/or environmental nuisances and protect public safety and welfare."

The County was asked to demolish and remove a barn on the property of Irene Holden, located at 1487 Holden Beach Road in Supply, North Carolina. On 15 October 2003, County employees instead mistakenly demolished barns on the properties of Vera H. Hewett and Vera L. Hewett, located at 2150 Ouida Trail, SW and 1535 Holden Beach Road, SW in Supply, North Carolina.

On 14 June 2006, plaintiffs—the Estate of Vera H. Hewett, Vera L. Hewett, O. Kenneth Hewett, and Jeris D. Hewett—filed a complaint against the County, alleging claims for negligence, unjust enrichment, and conversion. Plaintiffs contended that "[a]gents of the defendant negligently destroyed the barns located on [their] property and

owned by the plaintiffs without the plaintiffs' consent" and that "[a]gents of defendant negligently removed the contents of said barns which included, but were not limited to: various antiques, tools, irreplaceable motor parts and building supplies." Plaintiffs further alleged that the County was unjustly enriched by keeping the contents of the demolished barns without paying for them and that the County "converted to [its] own use those items of personal property" recovered from the barns.

On 19 May 2008, the County filed a motion for summary judgment, contending that it was "entitled to summary judgment as a matter of law because Plaintiffs cannot overcome Brunswick County's affirmative defense of governmental immunity." On 6 June 2008, the trial court entered an order denying the County's motion for summary judgment. The County gave notice of appeal on 3 July 2008.

Discussion

On appeal, the County contends it is entitled to summary judgment because it is protected from plaintiffs' suit by sovereign immunity. We first note that a trial court's denial of a motion for summary judgment is an interlocutory order that ordinarily is not immediately appealable. *Anderson v. Town of Andrews*, 127 N.C. App. 599, 601, 492 S.E.2d 385, 386 (1997). "Although a party generally has no right to immediate appellate review of an interlocutory order, we have held that orders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right." *Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283, *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996). The County's appeal, therefore, is properly before this Court.

"When the denial of a summary judgment motion is properly before this Court, as here, the standard of review is *de novo*." *Free Spirit Aviation, Inc. v. Rutherford Cty. Airport Auth.*, 191 N.C. App. 581, 583, 664 S.E.2d 8, 10 (2008). Summary judgment is appropriate only 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.R. Civ. P. 56(c). Summary judgment should be granted "'if the non-moving party is unable to overcome an affirmative defense offered by the moving party.' " *Free Spirit Aviation*, 191 N.C. App. at 583, 664 S.E.2d at 10 (quoting *Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007)).

"'Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity.' " *Evans v. Hous. Auth. of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (quoting *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997)). The doctrine, however, "covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Id.*

The parties in this case dispute whether the ACE program constituted a governmental function.[1] In *Evans*, the Supreme Court described the difference between governmental and proprietary functions as follows:

> "Any activity of the municipality which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State, rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary."

Id. at 54, 602 S.E.2d at 671 (quoting *Millar v. Town of Wilson*, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942)).

The Court acknowledged that it had "provided various tests for determining into which category a particular activity falls," but stressed that it had also "consistently recognized one guiding principle":

> "[G]enerally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing."

Id. (quoting *Britt v. City of Wilmington*, 236 N.C. 446, 451, 73 S.E.2d 289, 293 (1952)).

Thus, "[t]he liability of cities and towns for the negligence of their officers or agents, depends upon the nature of the power that the cor-

1. The County also argued in its brief that its participation in a county risk pool did not waive its governmental immunity with respect to claims for property damage because those claims are not covered by the policy. As plaintiffs have chosen not to challenge this argument, we do not address it. Nothing in this opinion should be construed as expressing any view as to whether the county risk pool policy did or did not waive immunity as to the claims asserted by plaintiffs in the complaint.

poration is exercising, when the damage complained of is sustained." *Moffitt v. City of Asheville*, 103 N.C. 237, 254, 9 S.E. 695, 697 (1889). As the *Moffitt* Court explained over a century ago:

> When such municipal corporations are acting (within the purview of their authority) in their ministerial or corporate character in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents, subject to their control, although they may be engaged in some work that will enure to the general benefit of the municipality. . . .
>
> On the other hand, where a city or town in exercising the judicial, discretionary or legislative authority, conferred by its charter, or is discharging a duty, imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence.

Id. at 254-55, 9 S.E. at 697.

In line with the principle set out in *Britt* and reaffirmed in *Evans*, plaintiffs argue that the ACE program is proprietary because it is not an undertaking that could only be performed by the government. Plaintiffs point out that the ACE program is a demolition and junk removal service that could be performed by any corporation, individual, or group of individuals.

In response, the County relies on *McIver v. Smith*, 134 N.C. App. 583, 518 S.E.2d 522 (1999), *disc. review improvidently allowed*, 351 N.C. 344, 525 S.E.2d 173 (2000), in which this Court interpreted the language in *Britt*. In *McIver*, the plaintiffs argued that under *Britt*, a county "ambulance service is a proprietary activity because it is providing a service that any private individual or corporation could provide." *McIver*, 134 N.C. App. at 587, 518 S.E.2d at 526. This Court rejected that argument, explaining that "[a]ctivities which can be performed *only* by a government agency are shielded from liability, while activities that can be performed by either private persons or government agencies may be shielded, depending on the nature of the activity." *Id.*

The Court reasoned that "[t]his interpretation of *Britt* is the only way to reconcile its holding with other cases." *Id.* The Court noted

that "children may be educated by either public schools or private schools, but public schools are still granted governmental immunity." *Id.* Similarly, the Court pointed out, "[p]rivate citizens may haul off and dispose of leaves just like government employees, but government leaf haulers are afforded governmental immunity." *Id.* The Court, therefore, held that a "county-operated ambulance service is a governmental activity shielded from liability by governmental immunity." *Id.* at 588, 518 S.E.2d at 526.

The County argues, based on *McIver*, that the fact that the ACE program could be run by a private entity or individual does not mean it is automatically a proprietary function. The County contends that because the ACE program is intended to serve the public health and welfare, a traditionally governmental purpose, the ACE program is a governmental function. *See id.* at 586, 518 S.E.2d at 525 ("Since the responsibility for preserving the health and welfare of citizens is a traditional function of government, it follows that the county may operate government functions that ensure the health and welfare of its citizens. An ambulance service does just this. It is also noteworthy that the legislature granted counties the power to operate ambulance services in all or part of their respective jurisdictions. The focus is therefore on the nature of the service itself, not the provider of the service." (internal citations omitted)).

In *Evans*, 359 N.C. at 54, 602 S.E.2d at 671, however, while noting "[t]he difficulties of applying [the *Britt*] principle[,]" the Supreme Court did not adopt the approach advocated by the County in this case and used by this Court in *McIver* and did not in any way modify the categorical language of the rule expressed in *Britt*. Nevertheless, the Supreme Court's application of *Evans* suggests that the rule cannot be as absolute as *Britt* indicates.

In *Fisher v. Hous. Auth. of City of Kinston*, 155 N.C. App. 189, 192, 573 S.E.2d 678, 681 (2002), this Court held that a "Housing Authority's activities in owning, operating, and maintaining the low-income housing . . . is [sic] a proprietary function." The Court reasoned:

> Managing low-income housing is not an enterprise in which only governmental entities can engage. Any individual or corporation can—and, in fact, often does—own and operate low-income housing. Providing rental housing does not traditionally fall within the government's purview.

Id. That decision was reversed by the Supreme Court based solely on *Evans. Fisher v. Hous. Auth. of City of Kinston*, 359 N.C. 59, 59, 602 S.E.2d 359, 360 (2004) (per curiam). Implicit in that reversal is an acknowledgment by the Supreme Court that the mere fact that a function could be performed by non-governmental entities does not necessarily require the conclusion that the function is proprietary. Because of the difficulty this Court has experienced in reconciling the *Britt* rule with other precedent, guidance from the Supreme Court is needed as to the appropriate test for determining whether a function is governmental or proprietary.

Nonetheless, when grappling with these issues, both this Court and the Supreme Court have looked to prior cases involving similar functions to determine whether an activity is governmental or proprietary. Historically, our courts have concluded that when municipalities engage in activities to clean up the municipality or to collect trash, junk, or other waste, they are engaging in governmental functions. For example, in *Hines v. City of Rocky Mount*, 162 N.C. 409, 411, 78 S.E. 510, 511 (1913), the Supreme Court held that a city-organized general cleanup of the city was a governmental function for which immunity was available. The Court reasoned that because the city's Board of Aldermen had the "power to make proper regulations for the conservation of the public health," the acts of the city in cleaning up the trash around the city "were chiefly in the exercise or attempted exercise of the powers there conferred, and should be considered governmental in character." *Id.*, 78 S.E. at 510-11. *See also Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 323-24, 420 S.E.2d 432, 435-36 (1992) (holding that city was immune with respect to plaintiff's collision with city garbage truck because garbage collection is governmental function); *Stephenson v. City of Raleigh*, 232 N.C. 42, 46, 59 S.E.2d 195, 198-99 (1950) (barring claim by plaintiff who crashed scooter into back of city's truck when employees were collecting and removing prunings from shrubbery and trees from citizens' homes because city's pruning collection was governmental function); *Broome v. City of Charlotte*, 208 N.C. 729, 731, 182 S.E. 325, 326-27 (1935) (finding city immune from suit arising from plaintiff's death after being hit by trash truck because trash collection is governmental function); *James v. City of Charlotte*, 183 N.C. 630, 632-33, 112 S.E. 423, 424 (1922) (determining that city employee removing and transporting garbage from private property was engaged in governmental function).

The ACE program was primarily a trash and junk collection service. The stated goals of the ACE Program were to "improve the appearance of Brunswick County, protect and maintain property values and eliminate any potential public health and/or environmental nuisances." In his affidavit, J. Leslie Bell, Director of Planning and Community Development for the County, explained that the ACE Program provided the "free removal services as part of the program's efforts to eliminate public health nuisances and protect public safety and welfare."

In light of the nature and stated purposes of the ACE program, we do not believe that it can be meaningfully distinguished from the foregoing cases, and, therefore, hold that the County was engaged in a governmental function when conducting the program. The County, consequently, is entitled to governmental immunity in this action. We, therefore, reverse and remand for the entry of summary judgment in the County's favor.

Reversed and remanded.

Judges McGEE and BEASLEY concur.

LASTER v. FRANCIS

[199 N.C. App. 572 (2009)]

VERILY LASTER, PATTIE PAGE MIMS, DOROTHY PAGE THORPE, WHITNEY RICH, JESSICA RICH, EVELYN PAGE ROSS, YVONNE PAGE DEWAR, NORMAN DAVIS, GWENDOLYN DAVIS, LISA DAVIS, GLORIA ANN CLAY, JOHNNIE DAY CLAY, JAMES RAY CLAY, JR., MICHELLE CLAY WARD, CYNTHIA CLAY, ELSIE PAGE CLAY, AND BOBBY LAMBERTH, TERRANCE LAMBERTH, AARON LAMBERTH, WELLINGTON LAMBERTH, SHAWN TUCKER, KEVIN TUCKER, ROBERT TUCKER, MICHAEL TUCKER, MICHAEL T. BULLOCK, CRYSTAL BULLOCK, MARK TUCKER, DEBRA BURCH, RONALD MITCHELL LAMBERTH, ERNEST BURCH, MABEL BURCH, KELAN PENNINGTON, DEANNA TRICE, CHARLENE BULLOCK, LISA BURCH CAMPBELL, IVA SHIRLEY LAMBERTH WILSON JONES, CORA LAMBERTH JOHNSON BENSON, ALBERTA LAMBERTH JONES WILLIS, JOYCE LAMBERTH LEGETTE, KENNETH VERNON LAMBERTH, SR., GERALDINE LAMBERTH CAMPBELL, AND OTHERS TO BE NAMED WHO ARE LIVING DESCENDANTS OF THE DAUGHTERS OF JAMES ERNEST PAGE AND JESSIE MCLAMB PAGE, PLAINTIFFS v. CHARLES T. FRANCIS IN HIS REPRESENTATIVE CAPACITY AS AGENT FOR THE "SERIES A NOTEHOLDER", EVERETTE NOLAND IN HIS REPRESENTATIVE CAPACITY AS AGENT FOR THE "SERIES B NOTEHOLDERS", CHARLES T. FRANCIS IN HIS REPRESENTATIVE CAPACITY AS AGENT FOR THE "SERIES C NOTEHOLDERS", SHIRLEY B. PAGE, TOYNETTE MICHELLE PAGE OGDEN, INGRID P. WATSON, JOEL CHRISTOPHER PAGE, NANNIE VELMA PAGE, DAVID ALLEN PAGE, SHARON V. PAGE, DEBRA PAGE EVANS, BEVERLY PAGE RAMOS, MARJORIE DAVIS ADAMSON, VERA DAVIS BENNETT, VIRLIE MAE DAVIS MCKAY, GAIL ALLEN HUNTER, LAVERNE ALLEN VILLAGONDA, EDEAN STURDIVANT, MICHAEL ALLEN, RUDDIE ALLEN, DEIDRE ALLEN, DEMETRIUS ALLEN, AND ROBIN EDEAN DAVIS, DEFENDANTS

No. COA08-1230

(Filed 1 September 2009)

Trusts— repudiation of family trust—statute of limitations expired

A *de novo* review revealed the trial court did not err in an action seeking to recover a portion of the proceeds from the sale of property that was part of an alleged family trust by granting defendants' motions to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) based upon the expiration of the statute of limitations applicable to trust estates.

Appeal by plaintiffs from order entered 20 March 2008 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 6 April 2009.

David S. Crump, for plaintiff-appellants.

The Francis Law Firm, PLLC, by Charles T. Francis, for defendant-appellees Shirley B. Page, Toynette Michelle Page Ogden, Ingrid P. Watson, and Joel Christopher Page.

Smith Moore Leatherwood LLP, by Mark A. Finkelstein and Kelly T. Ensslin for defendant-appellees Nanny Velma Page, David Allen Page, Beverly Page Ramos, Debra Page Evans, and Sharon V. Page.

STEELMAN, Judge.

Because plaintiffs' action was filed more than twenty years after David Edison Page repudiated or disavowed any purported family trust, the action was barred by the statute of limitations and the trial court properly granted defendants' motions to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

I. Factual and Procedural Background

On 1 December 2006, plaintiffs filed a complaint against defendants alleging that a seventy-three acre tract of real property located in Wake County, North Carolina was part of an alleged family trust and that the proceeds from the sale of a portion of this property had not been distributed among family members. The complaint alleged that David Edison Page acquired this property[1] "primarily for the use and benefit of James Ernest Page and Jessie McLamb Page [David's parents], for use as a family home place and farm." The property was titled solely in David Edison Page's name because he had served in the military and was eligible for a VA loan. The complaint alleged that during the lives of James Ernest Page and Jessie McLamb Page, their fourteen children had all "worked the farm, contributed labor to the building of [a] home place, or contributed money to James Ernest Page [and] Jessie McLamb Page . . . ." David Edison Page was alleged to have held the property as trustee for the "Page family."

In 1985, David Edison Page died and devised the property

> to [his] three brothers, Daylene Page, Joseph Page and Allen Page, as joint tenants with right of survivorship. This property represents the homeplace. If the property [was] to be sold after [his] decease[,] it [was] to be sold with the consent of all of the joint owners surviving and no joint owner shall bring a special proceeding for partition.

Lottie Bell Page, David's wife, dissented from his will and in 1988 filed a special proceeding to partition the property. That same year,

1. The record before this Court does not disclose when the property was acquired by David Edison Page.

Daylene Page, Allen Page, and Joseph Page conveyed a portion[2] of the property to Lottie Bell Page by quitclaim deed and paid her $75,000.00 to settle the special proceeding. In 2001, the State of North Carolina brought an action to condemn an easement over a portion of the property. This action was settled and a consent judgment entered. The interests recorded in the consent judgment "were calculated as though David Edison Page, Daylene Page, Joseph Page and Allen Page had been fee simple owners of the land . . . ."

Joseph and Allen Page predeceased Daylene Page. Daylene Page died on 1 September 2003. The complaint alleged that on 29 March 2004, Shirley Page, Daylene Page's estranged wife, was "appointed the Administratrix of the Estate[.]" In his will, Daylene Page left all of the "Page land" to his daughter, Ingrid P. Watson. However, Ingrid "allegedly renounced her inheritance, and Shirley Page administered the Estate of Daylene Page as though Daylene Page had died intestate." By deed dated 30 November 2004 and recorded on 9 February 2005, Shirley Page and the other defendants sold "major portions" of the property to Apex Town Square, LLC. The proceeds of the sale were distributed as if in 1985 David Edison Page had devised the property to his surviving three brothers in fee simple, with no trust obligations to members of the Page family. Plaintiffs' complaint alleged that the proceeds from this sale unjustly enriched defendants at the expense of plaintiffs.

Plaintiffs' complaint prayed that the trial court: (1) "declare that the property in question is the Page family trust and that the trust attaches to the Page land[;]" (2) declare and determine the terms of the Page family trust; and (3) declare a resulting trust on the proceeds of the sale of the lands to Apex Town Square, LLC and require defendants to pay into the court all the proceeds from the sale to be distributed to the beneficiaries of the Page family trust according to their respective interests. On 4 September 2007, plaintiffs voluntarily dismissed with prejudice all of their claims against Majorie Davis, Vera Davis, Virlie Mae Davis, Gail Allen Hunter, Laverne Allen Villagonda, Edean Sturdivant, Marc Davis, Ruddie Allen, Diedre Allen, Gail Allen, and Demetrius Allen. On 18 October 2007, the above-named former defendants filed a motion to intervene as named plaintiffs (intervenor-plaintiffs) pursuant to Rule 24 of the North Carolina Rules of Civil Procedure and a motion to join several individuals as party

2. The complaints do not specify the acreage of the property conveyed to Lottie Bell Page. However, the complaints recite that the conveyance is recorded in Book 4409, Page 687 and re-recorded in Book 4415, Page 536, of the Wake County Registry.

defendants pursuant to Rule 19(a). By order dated 30 October 2007, intervenor-plaintiffs' motions were granted. Intervenor-plaintiffs filed a complaint, which contained virtually identical allegations and claims as plaintiffs' original complaint.

The remaining defendants filed a motion to dismiss plaintiffs' original complaint and intervenor-plaintiffs' complaint pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. On 28 January 2008, plaintiffs and intervenor-plaintiffs voluntarily dismissed all claims against Charles T. Francis and Everette Noland. By order entered 20 March 2008, the trial court granted defendants' Rule 12(b)(6) motion based upon the statute of limitations. Plaintiffs and intervenor-plaintiffs appeal.

II. Standard of Review

A motion to dismiss pursuant to Rule 12(b)(6) is the usual and proper method of testing the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). "On a motion to dismiss . . . the standard of review is whether as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (quotation omitted). Dismissal is proper when: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). We review a trial court's ruling on a Rule 12(b)(6) motion to dismiss *de novo*. *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006).

III. Statute of Limitations

In their only argument, plaintiffs contend the trial court erred by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) based upon the expiration of the statute of limitations applicable to trust estates. We disagree.

At the outset, we note that it is not precisely clear what type of trust plaintiffs attempted to assert as to the real property at issue. Plaintiffs' original complaint prayed the trial court declare: (1) a "family trust" attached to the property; (2) the terms of such trust; and (3) a resulting trust on the proceeds of the sale of the portion of the property to Apex Town Square, LLC. Intervenor-plaintiffs more

specifically prayed for the trial court to declare an express parol trust, a resulting trust, or a constructive trust. A determination of which type of trust plaintiffs have asserted would usually be paramount to the inquiry of whether the statute of limitations barred plaintiffs' action since claims involving express trusts are governed by a three-year statute of limitations, and resulting and constructive trusts are governed by a ten-year statute of limitations. *See* N.C. Gen. Stat. §§ 1-52, -56 (2005). Moreover, where there is an express trust, the statute of limitations does not begin to run until a repudiation or disavowal of the trust occurs, while in instances of a resulting or constructive trust, the statute runs from the time the tortious or wrongful act is committed. *Teachey v. Gurley*, 214 N.C. 288, 293, 199 S.E. 83, 87 (1938). However, based upon the facts affirmatively disclosed by the complaints in this matter, plaintiffs' claims are barred regardless of the type of trust involved.

The statute of limitations may be raised as a defense by a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the plaintiff's action. *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (citations omitted), *reh'g denied*, 338 N.C. 672, 453 S.E.2d 177 (1994). It is well-established that once a defendant raises the affirmative defense of the statute of limitations, the burden shifts to the plaintiffs to show their action was filed within the prescribed period. *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996). Plaintiffs point to the following allegations as being sufficient to survive defendants' motions to dismiss:

> 4. . . . The said lands were acquired by David Edison Page primarily for the use and benefit of James Ernest Page and Jessie McLamb Page, for use as a family home place and farm.
>
> . . . .
>
> 9. The land, in truth and in fact, was held by David Edison Page as trustee for the Page family, and the land . . . of the Page family. The land was titled to David Edison Page because he had served in the military and was eligible for a VA loan to acquire the land. At the time that the first several tracts of land were acquired, he was the only member of the Page family who would have been eligible for VA financing.
>
> 10. David Edison Page died in 1985. In his will (Wake County file number 85 E 75) he left the land . . . [sic] to my three

> brothers, Daylene Page, Joseph Page and Allen Page, as joint tenants with right of survivorship. This property represents the homeplace. If the property is to be sold after my decease it is to be sold with the consent of all of the joint owners surviving and no joint owner shall bring a special proceeding for partition.
>
> 11. David Edison Page left the land to Daylene Page, Joseph Page and Allen Page as successor trustees. David Edison Page had held the land as trustee during his lifetime and could leave no better estate to his brothers than he had. [His] three brothers were deemed most suitable and capable of acting as trustees and of holding and managing the land for the benefit of the Page family trust.

Plaintiffs argue that "the allegation that when David Edison Page died his will left the land to three of his brothers 'as successor trustees' should be sufficient, standing alone, to survive the motion to dismiss." This is not correct.

"When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion without converting it into a motion for summary judgment." *Schlieper v. Johnson*, 195 N.C. App. 257, 261, 672 S.E.2d 548, 551 (2009) (citing *Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007)). Although it is true that the allegations of plaintiffs complaint are liberally construed and generally treated as true, the trial court can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint. *See id.* at 265, 672 S.E.2d at 553 (holding that on a 12(b)(6) motion to dismiss, "[t]he trial court may reject allegations that are contradicted by documents attached to the complaint." (citing *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001)). Furthermore, the trial court is "not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (quotation omitted).

In the instant case, plaintiffs' allegation number 10 specifically references David Edison Page's will and the estate file number in Wake County. In its order, the trial court stated that its ruling was based upon "the complaints, briefs and *public record material of record* as well as the arguments of counsel[.]" (Emphasis supplied).

Although the will was not attached to the complaint, a review of the plain language cited therein directly contradicts plaintiffs' allegation that David Edison Page devised the property to Daylene Page, Joseph Page, and Allen Page as successor trustees: "to my three brothers, Daylene Page, Joseph Page and Allen Page, *as joint tenants with right of survivorship*."

In *Sandlin v. Weaver*, 240 N.C. 703, 83 S.E.2d 806 (1954), our Supreme Court held that "[w]hen a trustee by devise disposes of trust property in fee simple, free from and in contradiction of the terms of the trust, this is a repudiation or disavowal of the trust." *Id.* at 709, 83 S.E.2d at 810 (citations omitted). Further, when the will of the trustee is probated, the beneficiaries are put on constructive notice of the provisions of the trustee's will. *Id.* (citation omitted). Once a trustee repudiates or disavows a trust by clear or unequivocal acts or words and the beneficiaries are put on notice of such a repudiation or disavowal, the statute of limitations will begin to run at that time.[3] *Teachey*, 214 N.C. at 293, 199 S.E. at 87.

Based upon the holding in *Sandlin*, the trial court correctly concluded that David Edison Page repudiated any purported "Page family trust" in 1985, when he devised the property to his three brothers in fee simple. Because David Edison Page died testate and allegation number 10 shows his estate was administered in file number 85 E 75, his will put the remaining members of the Page family on constructive notice of such a repudiation. Therefore, the statute of limitations for plaintiffs' action began to run at that time. Because plaintiffs' complaint and intervenor-plaintiffs' complaint were filed in 2006 and 2007, more than twenty years after David Edison Page's death, the trial court properly dismissed plaintiffs' and intervenor-plaintiffs' complaints pursuant to Rule 12(b)(6) of the Rules of Civil Procedure based upon the expiration of the statute of limitations.

Plaintiffs' argument is without merit.

AFFIRMED.

Chief Judge MARTIN and Judge CALABRIA concur.

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3. The same analysis would apply here under the theory of a resulting or constructive trust as the statute of limitations would start to run at the time of "the original wrongful or tortious act of the person holding title," *Teachey*, 214 N.C. at 293, 199 S.E. at 87, or when David Edison Page breached any purported fiduciary duties by devising the property to his three brothers in fee simple, without any trust obligations to the remaining members of the Page family.

TONTER INVESTMENTS, INC., PLAINTIFF v. PASQUOTANK COUNTY, DEFENDANT

No. COA08-1057

(Filed 1 September 2009)

Zoning— tracts greater than ten acres—exempt from subdivision ordinances—subject to zoning power

Defendant county's amendments to ordinances were valid exercises of the zoning power granted to the county by the General Assembly and were not *ultra vires*. Plaintiff argued that the amendments violated a statute that does not allow counties to adopt subdivision ordinances where the lots are greater than ten acres in size, but the fact that those lots are exempted from subdivision regulations does not mean that they are not subject to a county's zoning power.

Appeal by plaintiff from order entered 16 June 2008 by Judge W. Russell Duke, Jr., in Pasquotank County Superior Court. Heard in the Court of Appeals 11 February 2009.

The Brough Law Firm, by Michael B. Brough, for plaintiff.

Poyner Spruill LLP, by Robin Tatum Currin and R. Michael Cox, for defendant.

James B. Blackburn, III, for amicus curiae North Carolina Association of County Commissioners.

ELMORE, Judge.

This case concerns three separate tracts of land in Pasquotank County (defendant) that were purchased by Tonter Investments, Inc. (plaintiff), in March and July 2007. Soon thereafter, defendant passed several ordinances that resulted in plaintiff not being able to build residences on any of the lots. Defendant argues that this particular application of defendant's zoning power is an attempt to circumvent certain exemptions given by the State Legislature to tracts of land that exceed ten acres, and, as such, defendant's ordinances are *ultra vires* and not valid. The trial court issued summary judgment in favor of defendant, finding that the ordinances were within defendant's zoning power. We affirm the trial court's decision.

FACTS

In March 2007, plaintiff purchased a 136-acre tract of land (Tract 1) that has approximately 1,665 feet of frontage along a state-maintained highway known as Sandy Road. Later that same month, plaintiff purchased a 75.7 acre tract of land (Tract 2) that has approximately 2,751 feet of frontage on Sandy Road. Plaintiff also owns a 26-acre tract of land (Tract 3) with approximately 800 feet of frontage on Sandy Road. All three tracts are located in Pasquotank County.

Tracts 1 and 2 are zoned by defendant as A-2, Agricultural District, which permitted residential structures at the time that plaintiff purchased the tracts. However, on 6 August 2007, defendant passed an ordinance (the August Amendment) prohibiting all residential uses for A-2 districts, thus preventing plaintiff from turning Tracts 1 and 2 into subdivided residential developments as planned. Meanwhile, Tract 3 is zoned as A-1, Agricultural, a designation which has permitted residential structures since the time of plaintiff's purchase. However, defendant passed another ordinance on 4 September 2007 (the September Amendment) requiring that, unless an exception is granted by defendant,

> [n]o building or structure shall be established on a lot recorded in the Pasquotank County Registry after September 4, 2007[,] which does not meet the following requirements:
>
> > (A) Lots shall contain a minimum of 25 feet of frontage on a state maintained road or a road that has been approved in accordance with the Pasquotank County Subdivision Ordinance; and
> >
> > (B) Lots shall be located within 1,000 feet of a public water supply.

All three tracts have proper amounts of road frontage, but none of the three tracts is located within 1,000 feet of a public water supply, meaning that plaintiff cannot build any structures on the tracts without an exception granted by defendant. On 28 September 2007, plaintiff filed a complaint alleging that the August and September Amendments were beyond defendant's zoning power. On 10 March 2008, defendant rejected plaintiff's request for an exception to the August and September Amendments. The case was then heard before the Honorable W. Russell Duke, Jr., on 9 June 2008 at the Pasquotank County Superior Court. On 19 June 2008, Judge Duke granted defendant's motion for summary judgment, effectively ruling that the August

and September Amendments were within defendant's zoning power. Plaintiff appeals to this Court.

ARGUMENT

Plaintiff argues that the August and September Amendments are *ultra vires* and thus void as applied to lots in excess of ten acres. We disagree.

At trial, Judge Duke granted summary judgment in favor of defendant.

> Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. . . . The standard of review for summary judgment is de novo.

Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (quotations and citations omitted). However, both parties concede that there is no real dispute as to the facts. The case is entirely one of statutory interpretation.

It is well established that "[c]ounties are creatures of the General Assembly and have no inherent legislative powers. They are instrumentalities of state government and possess only those powers the General Assembly has conferred upon them." *Craig v. County of Chatham*, 356 N.C. 40, 44, 565 S.E.2d 172, 175 (2002). The General Assembly has authorized counties to adopt ordinances regulating land subdivisions, which is defined to include "all divisions of a tract or parcel into two or more lots, building sites, or other divisions when any one or more of those divisions are created for the purpose of sale or building development[.]" N.C. Gen. Stat. § 153A-335(a) (2007). However, counties are not authorized to regulate all types of subdivisions. N.C. Gen. Stat. § 153A-335(a) specifically exempts "division of land into parcels greater than 10 acres" from "regulations enacted pursuant to [section 153A-335]." N.C. Gen. Stat. § 153A-335(a)(2) (2007). That is, counties cannot adopt subdivision ordinances where the lots are greater than ten acres in size. Both parties to the present litigation agree that plaintiff had already subdivided some of the tracts—and had plans to subdivide the remaining tracts—into lots that were all at least ten acres in size. As such, defendant clearly has

no ability to impose subdivision regulations on plaintiff's lots greater than ten acres.

However, the August and September Amendments were both passed by defendant as zoning ordinances, not subdivision ordinances. With respect to counties' authority to create zoning regulations, the General Assembly has provided:

> For the purpose of promoting health, safety, morals, or the general welfare, a county may adopt zoning and development regulation ordinances. These ordinances may be adopted as part of a unified development ordinance or as a separate ordinance. A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

N.C. Gen. Stat. § 153A-340(a) (2007). Plaintiff argues that defendant passed the August and September Amendments under the guise of zoning ordinances because defendant knew that it could not use subdivision ordinances to regulate plaintiff's large lots. As such, plaintiff argues, the August and September Amendments are *ultra vires* and designed to circumvent the General Assembly's intent to exempt lots greater than ten acres from regulation by counties. As such, plaintiff's argument is that lots greater than ten acres in size are exempt from all county zoning regulations, not just subdivision regulations.

To support its position, plaintiff relies on *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 480 S.E.2d 681 (1997). In *Three Guys*, a developer submitted a proposed division of 231.37 acres into twenty-three parcels, each in excess of ten acres, but Harnett County refused to certify the plat because doing so would have meant that Harnett County had no subdivision regulation over the lots. *Id.* at 470-71, 480 S.E.2d at 682-83. Our Supreme Court found that Harnett County was not permitted to

> invalidate the specific exemption clearly stated in N.C.G.S. § 153A-335(2). The language of N.C.G.S. § 153A-335(2) itself is not ambiguous, and plaintiff's division of land falls, without question, under this exception. No other construction can reasonably be accomplished without doing violence to the legislative language.

Id. at 473-74, 480 S.E.2d at 684.

SEPTEMBER AMENDMENT

In the present case, plaintiff argues that the September Amendment, which prohibits any structure from being built in Pasquotank County unless the lot has at least twenty-five feet of road frontage and is within 1,000 feet of a public water source, is analogous to Harnett County's refusal to certify in *Three Guys*, in that it restricts the creation of lots greater than ten acres. However, there is no evidence that the General Assembly intended for ten acre lots to enjoy unfettered exemption from all county regulations, including zoning ordinances. Additionally, the September Amendment deals precisely with the zoning authority granted to counties by section 153A-340(a), in that the September Amendment "regulate[s] and restrict[s] . . . the size of yards, courts and other open spaces . . . and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes." N.C. Gen. Stat. § 153A-340(a) (2007). *Three Guys* dealt with a county that was stubbornly preventing a developer from dividing his property into lots greater than ten acres; in the present case, the September Amendment does not prohibit such division, and defendant admits that plaintiff is still free to subdivide its property into lots greater than ten acres. As such, the September Amendment is not analogous to Harnett County's stonewalling in *Three Guys*, and the September Amendment does not contradict the General Assembly's intent to prevent lots larger than ten acres from facing subdivision regulation.

Therefore, the September Amendment is properly considered to be a zoning ordinance.

> A zoning ordinance will be declared invalid only where the record demonstrates that it has no foundation in reason and bears no substantial relation to the public health, the public morals, the public safety[,] or the public welfare in its proper sense. It is not required that an amendment to the zoning ordinance in question accomplish or contribute specifically to the accomplishment of all of the purposes specified in the enabling act. It is sufficient that the legislative body of the city had reasonable grounds upon which to conclude that one or more of those purposes would be accomplished or aided by the amending ordinance. The legislative body is charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare. When the action of the legislative body is reviewed by the courts, the latter are not free to substitute their opinion for that of the legislative body so long

> as there is some plausible basis for the conclusion reached by that body.

Graham v. Raleigh, 55 N.C. App. 107, 110, 284 S.E.2d 742, 744 (1981) (citations omitted). The September Amendment was passed with the goal of ensuring that all new structures in Pasquotank County will have adequate access to drinking water, as well as roads that can handle traffic and emergency vehicles, goals that clearly fit within the interests described by *Graham* above. Also, unlike the situation in *Three Guys*, where the developer had no course but to seek litigation to remedy the County's stonewalling, plaintiff in the present litigation can satisfy the September Amendment by constructing roads and water pipes to the tracts. In other words, the September Amendment does not prohibit plaintiff from building on the ten acre lots, but rather requires plaintiff to provide adequate roads and water service to the lots before structures may be built.

As such, the September Amendment was within defendant's statutorily granted zoning power, and defendant had reasonable grounds to believe that it would aid the public health, welfare, and safety. Therefore, the September was a valid exercise of defendant's zoning power, and plaintiff's arguments to the contrary are overruled.

AUGUST AMENDMENT

Plaintiff then argues that the August Amendment, which prohibits any residential structures from being built on lots zoned "A-2, Agricultural," is also *ultra vires* because it is inconsistent with the General Assembly's exemption of ten-acre lots from regulatory control. In particular, plaintiff argues that the General Assembly never intended to allow a county to completely prevent single-family homes from being constructed on lots greater than ten acres.

At the hearing for the August Amendment, Planning Director Shelley Cox stated:

> the purpose [of the August Amendment] is to prevent future residential development in this area. She said there has been some interest in dividing ten-acre parcels in the Sandy Road area and plats have been brought to her office that contain 31 ten-acre lots that have been cut up in this area. Ms. Cox stated that the county is very concerned about this[.]

Plaintiff interprets this language to mean that defendant's sole purpose in enacting the August Amendment was to prevent plaintiff

from developing ten-acre lots near Sandy Road. However, the August Amendment applies to all lots zoned A-2, not just ten-acre lots. Additionally, the General Assembly has provided that a county may divide its jurisdiction into "districts of any number, shape, and area that it may consider best suited to carry out the purposes of [zoning]," and within each district, the county is authorized to regulate and restrict the "use of buildings, structures, or land." N.C. Gen. Stat. § 153A-342 (2007). Plaintiff has not cited any authority tending to show that counties must allow residences in all zoning districts. *See* Owens, David W., Land Use Law in North Carolina (UNC School of Government 2006) 34 (stating that counties frequently do not allow residences in certain districts).

Additionally, as stated above, a zoning regulation will be struck down only if it has no foundation in reason and bears no substantial relation to the public health, morals, safety, or welfare. *Graham*, 55 N.C. App. at 110, 284 S.E.2d at 744. According to Rodney Bunch, the Assistant County Manager, the August Amendment was passed based on: (1) the remote nature and lack of improved roads within most of the A-2 district, (2) the potential strain on the County's ability to provide essential public services to residents in this district, (3) the fact that only five residences currently exist in the entire A-2 district, and (4) the aerial application of pesticides within a large part of the district. As such, there was a clear relationship between preventing residences from being built in the A-2 zone and public health and safety; the County would be unable to provide essential public services to the new residences, and the residences would also be subject to safety concerns from aerial pesticide spraying. Plaintiff is not deprived of all uses of the land, since the August Amendment prohibits only residences in zone A-2, leaving intact the other uses of the land approved by defendant.

The Amendment had a rational basis founded on a relationship to protect the public safety in zone A-2; as such, it was within defendant's zoning power, and plaintiff's argument is overruled.

CONCLUSION

The August and September Amendments both had rational bases for their creation, namely that their requirements had a strong relationship to public safety and health. Additionally, the fact that lots greater than ten acres are exempted from subdivision regulations imposed by a county does not mean that the lots are not still subject to a county's zoning power. To hold otherwise would fly in the

face of zoning authority specifically granted to counties by the General Assembly for the purpose of promoting public health by regulating the location and use of structures and land. As such, we hold that defendant's August and September Amendments were both valid exercises of defendant's zoning power granted to it by the General Assembly and were not *ultra vires*. Plaintiff's arguments are overruled.

Affirmed.

Judges CALABRIA and GEER concur.

MICHAEL J. PRESSLER, PLAINTIFF-APPELLEE v. DUKE UNIVERSITY AND JOHN F. BURNESS, DEFENDANTS-APPELLANTS

No. COA08-859

(Filed 1 September 2009)

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

An order denying arbitration is immediately appealable because it involves a substantial right which may be lost if appeal is delayed.

2. Arbitration and Mediation— motion to stay proceedings denied—rescission—mutual release

The trial court did not err by denying defendants' motion to stay proceedings against defendants for slander and libel pending arbitration because the parties had stated in a release agreement their mutual intent that the release fully and finally resolved their disputes and that all earlier agreements be cancelled. Under either a theory of rescission or mutual release, plaintiff was not bound to resolve his dispute by arbitration with defendants.

Appeal by defendants from order entered 23 April 2008 by Judge Howard E. Manning, Jr., in Durham County Superior Court. Heard in the Court of Appeals 14 January 2009.

Twiggs, Beskind, Strickland & Rabenau, P.A., by Jerome P. Trehy, Jr., Donald R. Strickland, and Jesse H. Rigsby, IV, for plaintiff-appellee.

Fulbright & Jaworski L.L.P., by John M. Simpson, and Cranfill, Sumner & Hartzog, L.L.P., by Dan M. Hartzog, for defendants-appellants.

CALABRIA, Judge.

Duke University ("Duke") and John F. Burness ("Burness"), Senior Vice President for Public Affairs and Governmental Relations at Duke (collectively "defendants"), appeal the trial court's order denying their motion to stay proceedings pending arbitration. The trial court ruled that Michael J. Pressler's ("plaintiff") obligation to arbitrate his claims against defendants for slander and libel was voided by the mutual release and settlement agreement which was signed by both parties prior to commencement of the litigation. We affirm the trial court.

In 1990, Duke hired plaintiff as head coach of Duke's men's lacrosse team ("Duke lacrosse team") and, by annual renewal of his contract with Duke, he was continuously employed as head coach until 2006. In June 2005, plaintiff renewed his employment contract with Duke for a period of three years, from 1 June 2005 to 30 June 2008. The contract stated that his employment was "subject to the policies and regulations of Duke University as may exist from time to time." This provision incorporated by reference the Duke Dispute Resolution Policy ("the policy"), which provided that all disputes that arose from plaintiff's employment would be subject to arbitration.

The policy states:

> Any claim arising out of or relating to employment policies shall be settled in accordance with this procedure. The arbitration step of this procedure shall be governed by the United States Arbitration Act. Both the staff member and Duke are required to utilize this procedure to resolve disagreements falling within the scope of this procedure.

The provision of the policy entitled "Scope" establishes that the policy "applies to any application, meaning or interpretation of personnel policies or procedures as they affect work activities. Any claim based in whole or in part on federal, state or local laws whether statutory or common law shall be addressed through this procedure."

The policy further states, in relevant part, as follows:

> The provisions of this dispute resolution procedure shall be deemed to be the entire agreement to arbitrate between the parties and shall supersede and void any other agreement or rules, which are materially inconsistent. Neither the arbitrator nor the American Arbitration Association shall have the authority to add to, subtract from, or otherwise modify Duke policy, including but not limited to, this Dispute Resolution Procedure.

In March 2006, the Duke lacrosse team was the subject of widely publicized allegations. At Duke's request, plaintiff resigned from his position as head coach of the Duke lacrosse team. After a series of negotiations, the parties resolved their dispute regarding the termination of plaintiff's employment by entry of a settlement. On 21 March 2007, the parties entered into a "Mutual Release and Settlement Agreement" ("the mutual release"), which states, in relevant part:

> This agreement is entered into . . . for the purpose of clarifying the conditions of Pressler's separation from employment . . . and in order to finally, fully, and amicably resolve all issues and controversies arising out of the termination of said employment such that the parties may put all such matters behind them for their mutual benefit.
>
> . . .
>
> Whereas,. . . Pressler and Duke wish to cancel all earlier agreements and reach a final settlement and resolution of all matters regarding Pressler's separation from employment with Duke . . .;
>
> NOW, THEREFORE, Pressler and Duke agree as follows:
>
> 1. Any obligations of the parties arising from the 2005 Employment Contract, and/or the previous agreements of the parties regarding separation of employment that are remaining and unfulfilled as of the execution of this Agreement are extinguished, cancelled and declared void.
>
> . . .
>
> 4. Duke and Pressler agree that neither they nor their agents, principals or representatives will make disparaging or defamatory comments regarding the other party, it being the intent of the parties that both Duke and Pressler will comment where

possible, favorably one upon the other and if inquiry is made, each shall indicate that after difficult circumstances the parties were able to amicably resolve the circumstances of separation.

. . .

8. Duke and Pressler agree that this Mutual Release and Settlement Agreement is the final agreement between them as to his employment with Duke, his separation from employment with Duke, and any other issue arising there from or relating thereto.

9. Duke and Pressler acknowledge that they enter into this agreement voluntarily and with the full opportunity for the advice of counsel.

None of the terms in the mutual release provided for arbitration of any claims that arose after the effective date of the mutual release.

On 23 January 2008, plaintiff filed a complaint against defendants alleging slander and libel. The allegations contained in the complaint were that Burness, as Senior Vice President for Public Affairs and Government Relations at Duke, "knowingly made false, defamatory and slanderous statements about [plaintiff] to a reporter, statements that were then published to the public on 9 April 2007 in Newsday and later posted on a website, www.newsday.com." Plaintiff also alleged defendants made a false, defamatory and slanderous statement about plaintiffs employment to The Associated Press on 7 June 2007.

On 11 March 2008, defendants moved to stay proceedings pending arbitration or, alternatively, to dismiss for lack of subject matter jurisdiction or improper venue. Defendants contend plaintiffs claims are subject to the arbitration agreement contained in the policy.

On 23 April 2008, the trial court denied defendants motion to stay proceedings pending arbitration on the basis that "any obligation of Plaintiff to arbitrate any claims alleged against the defendants in this lawsuit is extinguished, cancelled and voided by the Mutual Release and Settlement Agreement . . ." Defendants appeal.

I. Interlocutory Appeal

[1] Defendants appeal an interlocutory order. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57S.E.2d 377, 381 (1950).

Appeal of an interlocutory order is appropriate under two circumstances:

> First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. N.C.G.S. 1A-1, Rule 54(b) [2007]. Second, a party may appeal an interlocutory order that affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.

Dep't of Transp. v. Rowe, 351 N.C. 172, 174-75, 521 S.E.2d 707, 709 (1999) (quoting *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381). This Court has previously held that "an order denying arbitration is immediately appealable because it involves a substantial right, the right to arbitrate claims, which might be lost if appeal is delayed." *Martin v. Vance*, 133 N.C. App. 116, 119, 514 S.E.2d 306, 308 (1999). Pursuant to *Martin*, we review defendants interlocutory appeal.

II. Standard of Review for Motion for Stay of Arbitration

In *Raspet v. Buck*, this Court established the standard of review for arbitration cases as follows:

> The question of whether a dispute is subject to arbitration is an issue for judicial determination. A trial courts conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court. [The determination of] [w]hether a dispute is subject to arbitration involves a two pronged analysis; the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether "the specific dispute falls within the substantive scope of that agreement."

147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001)(internal citations and quotations omitted).

> The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. Accordingly, upon appellate review, we must determine whether there is evidence in the record supporting the trial courts findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate.

Sciolino v. TD Waterhouse Investor Servs., Inc., 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002).

III. Arbitration Agreement and Mutual Release

[2] Defendants argue the policy constitutes a valid and enforceable arbitration agreement which survived both plaintiff's separation from employment and the execution of the mutual release. Plaintiff does not contest that the policy contains a valid and enforceable arbitration agreement, but argues any agreement contained in the policy was extinguished by the mutual release. It must therefore be determined whether the mutual release extinguished any prior agreements which provided for arbitration. "Before a dispute can be settled by arbitration, there must first exist a valid agreement to arbitrate. As the moving party, defendants bear the burden of demonstrating that the parties mutually agreed to arbitrate their dispute." *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002) (internal citations omitted). Thus, defendants have the burden of showing that there remains a mutual agreement to arbitrate the dispute, even after entry of the mutual release.

Defendants argue that

> Pressler and Duke are parties to a valid and enforceable arbitration agreement that survives Pressler's separation from employment and that survives the execution of the Mutual Release and Settlement Agreement. The subject matter of Pressler's defamation claims are about Pressler's employment at Duke. The arbitration agreement covers Pressler's defamation claims against Duke and Burness because those statement[s] are about his employment. The Mutual Release and Settlement Agreement did not express any intent to avoid the requirement to arbitrate claims arising out of Pressler's employment, and there is no evidence of the parties' intent to do so.

Defendants argue at length regarding the applicability of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (2006), to the parties' prior arbitration agreements. According to defendants, if the FAA applies, "[f]ederal policy favors arbitration agreements." As to interpretation of the parties' agreement, defendants argue that "[t]he United States Supreme Court has explained that under the FAA, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation o waiver, delay, or a like defense to arbitrability.' " *Moses H. Cone Mem'l Hosp. v.*

Mercury Constr. Corp., 460 U.S. 1,24-25, 74 L. Ed. 2d 765, 785 (1983). "To that end, the 'heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.' " *Am. Recovery Corp.v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996) (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989).

Defendants also note that many prior cases in "federal and state courts in North Carolina have upheld the validity and enforce ability of arbitration agreements between Duke and its exempt and nonexempt employees." However, the question here is not whether Duke and Pressler ever had a valid, enforceable arbitration agreement. There is no dispute that prior to the mutual release, they did have such an agreement. The issue is whether the mutual release rescinded the arbitration agreement.

Despite the policy of construing any doubts regarding an arbitration agreement in favor of arbitration, here there is no doubt or question regarding the language of the mutual release. The parties clearly stated their mutual intent that the mutual release fully and finally resolve their disputes and that "*all earlier agreements*" be cancelled (emphasis added). Defendants essentially argue that when the mutual release referred to "all earlier agreements," this did not really mean *all* earlier agreements, as the mutual release did not specifically mention the Dispute Resolution Policy, but addressed only "[a]ny obligations of the parties arising from the 2005 Employment Contract, and/or the previous agreements of the parties regarding separation of employment." Defendants contend that "Pressler's obligation to arbitrate does not arise from the 2005 Employment Agreement or any previous agreements of the parties regarding Pressler's separation of employment. Rather, Pressler's obligation to arbitrate arises from the [policy]." According to defendants, the policy constitutes "the entire agreement to arbitrate between the parties" with respect to the subject of arbitration. However, plaintiff would not have been subject to the policy but for the 2005 Employment Contract, in which plaintiff agreed his employment was subject to the policy. The mutual release addresses "all earlier agreements," and whether the policy was a part of the 2005 Employment Contract or not, surely it was an "earlier agreement" between the parties which would be encompassed by the term "all."

In effect, this was an agreement of rescission under which each party agreed to discharge all of the other party's remaining

duties under the existing contracts, including the duty to arbitrate. It could also be characterized as a mutual release, consistent with the title of the document, "Mutual Release and Settlement Agreement." There was no term in the mutual release that provided for arbitration of any claims that arose after the effective date of the mutual release; thus, the parties abandoned arbitration as a means of future dispute resolution. *See Bokunewicz v. Purolator Prods., Inc.*, 907 F.2d 1396, 1400 (3d Cir. 1990). Finally, since the parties declared the prior agreements, which incorporated by implication the mutual release to arbitrate, "void," the mutual release to arbitrate was of no legal effect.

Plaintiff's claims against defendants arose from alleged defamatory and libelous actions by defendants in June 2007, after the execution of the mutual release. Therefore, under either a theory of agreement of rescission or a theory of mutual release, plaintiff is not bound to resolve his dispute by arbitration with defendants. Plaintiff's proceedings in litigation are not subject to a stay. We affirm the trial court's interlocutory order denying defendants' motion to stay proceedings pending arbitration.

Affirmed.

Judges ELMORE and STROUD concur.

ANGELA MONIQUE WELCH, PLAINTIFF v. CORRIE LUMPKIN, INTERSTATE COMPANY POLICE, INCORPORATED RONNIE L. DELAPP, RCD PRODUCTIONS, LLC, DEFENDANTS

No. COA08-1424

(Filed 1 September 2009)

1. Costs— timeliness of payment—Rules 6(b) and 41(d) not read in conjunction to extend time period

N.C.G.S. § 1A-1, Rule 6(b) may not be read in conjunction with Rule 41(d) to allow parties to stipulate to an extension of the 30-day time period to pay costs. The trial court did not err by holding that plaintiff did not comply with an order to pay costs to the insurance company within the 30-day time period set forth in N.C.G.S. § 1A-1, Rule 41(d).

2. Appeal and Error— appealability—improper stipulation as a matter of law

Although plaintiff contends the trial court erred by denying defendant's motion to dismiss under the doctrines of equitable estoppel and estoppel by benefit, these assignments of error are without merit because any stipulation by the parties to extend the time period set forth in N.C.G.S. § 1A-1, Rule 41(d) was invalid as a matter of law.

3. Appeal and Error— appealability—error of law in judgment—denial of motion for relief—abuse of discretion standard

The trial court did not abuse its discretion by denying plaintiff's motion for relief under N.C.G.S. § 1A-1, Rules 60(b) and 54(b). The trial court's order did not reflect a ruling regarding Rule 54(b) and our courts have long held that Rule 60(b) provides no relief from errors of law which can only be rectified by an appellate court. On proceedings properly taken in the action in which the judgment was rendered, absent a void judgment, parties are bound by the rulings of the court until the judgment has been properly corrected.

Appeal by plaintiff from order entered 26 June 2008 by Judge Albert Diaz in Superior Court, Mecklenburg County. Heard in the Court of Appeals 7 April 2009.

Richard L. Robertson & Associates, P.A., by Richard L. Robertson, for defendants-appellees.

Everage Law Firm PLLC, by Charles Ali Everage, for plaintiff-appellant.

WYNN, Judge.

Rule 6(b)[1] "was not intended to have the effect of giving the court the discretion to amend a final order entered under the mandatory directive of statute."[2] Here, Plaintiff argues that the parties' stipulation, pursuant to Rule 6(b), extended the time for Plaintiff's payment of Rule 41(d) costs associated with a prior voluntary dismissal under Rule 41(a).[3] Because Rule 6(b) may not be read in conjunction with

1. N.C. Gen. Stat. § 1A-1, Rule 6(b) (2007).

2. *Cheshire v. Aircraft Corp.*, 17 N.C. App. 74, 80, 193 S.E.2d 362, 365 (1972).

3. N.C. Gen. Stat. § 1A-1, Rule 41(a) and (d) (2007).

Rule 41(d) to allow parties to stipulate to an extension of the time period to pay costs, we affirm the dismissal of Plaintiff's action.

On 6 June 2006, Plaintiff Angela Monique Welch filed suit against Defendants Corrie Lumpkin, Interstate Company Police, Inc. ("ICP"), Ronnie L. DeLapp, and RCD Productions, LLC, alleging assault and battery, false imprisonment, intentional infliction of emotional distress, abuse of process, malicious prosecution, negligence, and violations under 42 U.S.C. § § 1981 and 1983. On 27 November 2006, Welch voluntarily dismissed her action without prejudice under Rule 41(a). She refiled the action on 20 November 2007, asserting all of the claims from the previous action except the 42 U.S.C. § 1983 claim.

On 14 January 2008, Northfield Insurance Company ("Northfield")[4] filed two motions seeking to intervene as carrier for ICP and Lumpkin, and payment of costs incurred as a result of the original action pursuant to § 1A-1, Rule 41(d). On 23 January 2008, the trial court granted both motions and ordered Welch to pay within 30 days Northfield's costs in the amount of $2,005.56 "with interest accruing at the legal rate until paid in full." On 25 February 2008, Welch tendered payment to Northfield in the amount of $2,005.56.

On 16 April and 30 April 2008, Defendants filed motions to dismiss. Thereafter, Welch filed a motion for relief pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 60(b) (2007). The trial court entered an order on 26 June 2008, denying Welch's motion for relief and granting Defendants' motions to dismiss.

Welch appeals, arguing that the trial court erred by: (I) finding she failed to comply with the order to pay costs pursuant to Rule 41(d); (II) concluding that the doctrines of equitable estoppel and estoppel by benefit did not apply; and (III) denying her motion for relief pursuant to Rule 60(b). We find no error.

I.

[1] Welch first argues that the trial court erred by holding that she did not comply with the 23 January 2008 order to pay costs to Northfield. Welch contends that it was reversible error not to consider valid the parties' stipulation, pursuant to N.C. R. Civ. P. 6(b), to extend the time period for Plaintiff's payment of costs set forth in

4. Defendant Northfield is the only remaining defendant in the present action. Welch reached a settlement agreement with defendant's DeLapp and RCD Productions, Inc., prior to filing the record on appeal.

N.C. R. Civ. P. 41(d). § 1A-1, Rule 6(b). Further, Welch argues that the 30-day deadline imposed by the order only applied to the amount of costs due ($2,005.56) and not to amounts of interest accrued. Thus, Welch argues that her $2,005.56 payment to Northfield on 25 February 2008 indicates compliance with the order.

Under Rule 41(a), a plaintiff may voluntarily dismiss an action by filing notice with the court any time prior to resting his case, and "a new action based on the same claim may be commenced within one year after such dismissal[,]" if the original action commenced within the time prescribed. § 1A-1, Rule 41(a). Additionally, plaintiff "shall be taxed with the costs of the [voluntarily dismissed] action unless the action was brought in forma pauperis." § 1A-1, Rule 41(d). Where a plaintiff brings a new action before paying costs, the court shall, on motion by the defendant, "make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order." *Id.* "If the plaintiff does not comply with the order, the court *shall dismiss* the action." *Id.* (emphasis added). However, Rule 6(b) of the N.C. Rules of Civil Procedure provides:

> [P]arties may enter into binding stipulations without approval of the court enlarging the time, not to exceed in the aggregate 30 days, within which an act is required or allowed to be done under these rules, provided, however, that neither the court nor the parties may extend the time for taking any action under Rules 50(b), 52, 59(b), (d), (e), 60(b), except to the extent and under the conditions stated in them.

§ 1A-1, Rule 6(b).

In its 26 June 2008 order, granting Defendants' motions to dismiss, the trial court found that Welch's counsel "spoke with counsel for Northfield, who told Plaintiff's counsel that he would not move to dismiss the action if the costs were paid by 25 February 2008." However, the trial court ultimately rejected Welch's claim that the parties could stipulate to extend the deadline past 23 February, concluding that "it is not at all clear that Rule 6(b) may be used to extend by stipulation the time for complying with orders to pay costs entered pursuant to Rule 41(d)." On review, we uphold the trial court's determination that Rule 6(b) may not be read in conjunction with Rule 41(d) to allow parties to stipulate to an extension of the 30-day time period to pay costs.

This Court has previously held that Rule 41(d) constitutes a "mandatory directive" and should not be read in conjunction with Rule 6(b) to allow the extension of time by a court order. *Cheshire*, 17 N.C. App. at 80, 193 S.E.2d at 365 ; *see also Sanford v. Starlite Disco, Inc.*, 66 N.C. App. 470, 471, 311 S.E.2d 67, 68 (1984); *cf. Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (holding that Rule 6(b) gives courts the discretion to extend the time provided under Rule 4(c) for serving a dormant summons). In *Sanford*, this Court rejected the plaintiff's contention that the 30-day provision in Rule 41(d) should be read in conjunction with Rule 6(b), and upheld the dismissal of the action for failure to pay costs within 30 days. *Sanford*, 66 N.C. App. at 471-72, 311 S.E.2d at 68 (concluding "[t]he language of the rule [Rule 41(d)] directing that the court '*shall* dismiss the action' (emphasis added) if the costs assessed have not been paid remains the same, thus the rule as amended [to include a 30-day grace period] still constitutes a mandatory directive"). In *Cheshire*, this Court concluded that Rule 6(b) "was not intended to have the effect of giving the court the discretion to amend a final order entered under the mandatory directive of statute." *Cheshire*, 17 N.C. App. at 80, 193 S.E.2d at 365-66 (noting that Rule 6(b) prohibits court and parties from extending the time "within which a motion can be made for action which would affect a judgment entered or findings of fact in a judgment entered").

It follows that if Rule 6(b) fails to give the court discretion to amend an order to pay costs, 6(b) also fails to give the parties discretion to amend an order to pay costs, as the parties purported to do here. Not giving the court or the parties the discretion to amend an order to pay costs following a voluntary dismissal is in keeping with the object of Rule 41(d), which "is clearly to provide superior and district courts with authority for the efficient collection of costs in cases in which voluntary dismissals are taken." *Ward v. Taylor*, 68 N.C. App. 74, 79, 314 S.E.2d 814, 819, *disc. review denied*, 311 N.C. 769, 321 S.E.2d 157 (1984).

Indeed, the object of efficiency in Rule 41(d) would be undermined if the parties were allowed to stipulate to an extension of time beyond the 30-day grace period set forth in Rule 41(d), as the extension would result in a delay of the collection of costs and delay of the re-filed proceedings. If the parties were able to stipulate to an extension of the 30-day period in which plaintiff must pay costs of the original action, not only would the collection of costs necessarily be delayed, the action would also be delayed *beyond*

the one year period for re-filing plus 30 days from the order of payment under the "mandatory directive" set forth in Rule 41(d). *See* N.C. Gen. Stat. § 1A-1, Rule 41(d).

Accordingly, we find no error in the determination of the trial court that Welch failed to comply with the order to pay costs within the 30-day time period set forth in Rule 41(d).

II.

[2] Next, Welch argues that the trial court erred by denying Defendant's motion to dismiss under the doctrines of equitable estoppel and estoppel by benefit. She argues that she relied to her detriment on counsel for Defendant Northfield's representation that he would accept her payment on 25 February without moving to enforce the order. She also contends that by accepting payment on 25 February, Northfield ratified the transaction. Having found that any stipulation by the parties to extend the time period set out under Rule 41(d) is invalid as a matter of law, we hold these assignments of error to be without merit.

III.

[3] Finally, Welch argues that the trial court abused its discretion in denying her motion for relief under Rules 60(b) and 54(b) of the N.C. Rules of Civil Procedure in its order entered 26 June 2008.[5] N.C. Gen. Stat. § 1A-1, Rules 60(b), 54(b) (2007).

On 7 May 2008, Welch filed a "Motion for Relief from Order" pursuant to Rule 60. However, at the hearing on the motion, Welch requested relief pursuant to Rule 54(b), noting "I think I improperly styled this as a Rule 60 motion" and asking "that this order be rescinded and that a proper order be issued." The trial court concluded that Welch was not entitled to relief pursuant to Rule 60, stating, "The law is clear, however, that 'erroneous judgments may be corrected only by appeal and Rule 60(b) motions cannot be used as a substitute for appeal.' " (internal citation omitted). The trial court's order did not reflect a ruling regarding Rule 54(b). Finding no abuse of discretion, we uphold the trial court's denial of relief.

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5. Welch also argues that the trial court erred by denying her motion for reconsideration in its order entered 15 July 2008. However, because Welch failed to assign error to the trial court's 15 July 2008 order, the only issue properly before this Court is whether the trial court abused its discretion in its ruling on the motion for relief. N.C. R. App. P 10(c)(1) (2008).

The appropriate procedural posture for attacking a judgment or order depends largely on the defect asserted. *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 677, 360 S.E.2d 772, 777 (1987). Our courts have long held that Rule 60(b) provides no relief for errors of law. *See Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988) (finding no error in the trial court's decision to deny the defendant's Rule 60(b) motion to set the judgment on an error of law). " 'Errors in law can only be rectified by an appellate court on proceedings properly taken in the action in which the judgment was rendered.' " *Daniels*, 320 N.C. at 677, 360 S.E.2d at 777 (quoting *Lumber Co. v. West*, 247 N.C. 699, 701, 102 S.E.2d 248, 249 (1958)). Further, " '[a]n erroneous or irregular judgment binds the parties thereto until corrected in a proper manner.' " *Id.* Accordingly, absent a void judgment, parties are bound by the rulings of the court until the judgment has been properly corrected. Thus, the inquiry on appeal is whether the trial court abused its discretion in declining to certify this issue for immediate appeal pursuant to Rule 54(b).

Welch contends that the trial court's 23 January 2008 order erroneously ordered her to pay costs *plus* interest pursuant to Rule 41(d). Importantly, Welch's argument on appeal is not that the 23 January 2008 order was void *ab initio*, but rather that the order contained an error of law. Because erroneous judgments remain binding until corrected, Welch was obligated to comply with the terms of the order until corrected. *Daniels*, 320 N.C. at 677, 360 S.E.2d at 777.

As discussed *supra*, Welch failed to remit the costs awarded by the 23 January order within the 30-day time period prescribed by the order. Further, she failed to raise an objection to the interest award until 7 May 2008, more than 10 days *after* the awarded amounts were to be paid to Defendants. Based on these deficiencies, we hold that it was within the trial court's discretion to deny her motion for relief.

Affirmed.

Judges JACKSON and HUNTER, JR. concur.

IN RE B.O.

[199 N.C. App. 600 (2009)]

IN RE: B.O., MINOR CHILD

No. COA09-400

(Filed 1 September 2009)

Termination of Parental Rights— standing—custodian not equated to guardian

The trial court's order terminating parental rights was vacated for lack of subject matter jurisdiction where petitioners did not fall within the statutory categories for standing to file a petition. A "custodian" does not have the powers of a parent or guardian.

Appeal by Respondent from order entered 19 December 2008 by Judge Gary S. Cash in District Court, Buncombe County. Heard in the Court of Appeals 10 August 2009.

Jennifer W. Moore for Petitioners-Appellees. Robert W. Ewing for Respondent-Appellant.

Jason Gast for Guardian ad Litem.

McGEE, Judge.

Respondent, the mother of B.O., appeals from an order terminating her parental rights to B.O. Because we find Petitioners lacked standing to file a petition to terminate Respondent's parental rights, we vacate the trial court's order.

The Buncombe County Department of Social Services (DSS) received a report in March 2005 that B.O., and B.O.'s younger half-sister, lived in unsanitary conditions in Respondent's home. A DSS social worker visited Respondent's home on three occasions and found that the conditions in the home did not meet minimum standards for safety.

DSS filed a petition on 1 April 2005 alleging that B.O. was neglected. Both Respondent and B.O. were appointed their own individual guardian ad litem. In an adjudication judgment and dispositional order entered 30 June 2005, the trial court found: (1) that DSS had substantiated previous reports of neglect in 2000 and 2003, (2) that Respondent had not made any significant progress in correcting the conditions in her home, and (3) that Respondent had "behaved in a strange and paranoid manner" during a March 2005 home assessment.

In its order, the trial court found B.O. to be a neglected juvenile, and approved a kinship placement of B.O. with Mr. and Mrs. M.

A review hearing was held in August 2005 and the trial court granted custody of B.O. to DSS. Subsequently, DSS placed B.O. in the care of W.H. and S.H. The trial court entered a permanency planning order on 10 February 2006, concluding that it was not possible to return B.O. to Respondent's home within the next six months due to Respondent's "chronic mental health problems" and "inconsistent compliance . . . with court-ordered services[.]" The trial court changed the permanent plan of B.O. from reunification with Respondent to guardianship with a court-approved caretaker. In an order entered 30 August 2006, the trial court granted guardianship of B.O. to T.C.W., the father of B.O.'s half-sister, and inactivated the juvenile file. Respondent appealed from the trial court's order. In an unpublished opinion filed 5 June 2007, our Court affirmed the trial court's order. *In re B.O.*, 183 N.C. App. 489, 645 S.E.2d 229 (2007) (unpublished).

T.C.W. granted temporary guardianship of B.O. to T.T. and B.T. (Petitioners) in an agreement for temporary guardianship. Both T.C.W. and Petitioners signed the agreement granting Petitioners temporary guardianship from 20 April 2007 through 20 October 2007. In February 2008, T.C.W. was indicted on two felony counts of taking indecent liberties with B.O. The guardian ad litem for B.O. filed a motion to reactivate and review the juvenile file on 15 February 2008. The trial court held a hearing on 3 March 2008. In an order entered 28 March 2008 and amended 26 June 2008, the trial court dissolved the appointment of T.C.W. as guardian of B.O. and granted placement of B.O. with Petitioners. The juvenile file was again inactivated.

Petitioners filed the underlying petition to terminate Respondent's parental rights on 17 June 2008. After hearings on 30 and 31 October and 20 November 2008, the trial court entered an order on 19 December 2008 terminating Respondent's parental rights to B.O. The trial court found grounds existed to terminate Respondent's parental rights in that Respondent had (1) neglected B.O., (2) had willfully left B.O. in a placement outside the home for more than twelve months without making "reasonable progress under the circumstances . . . to correct those conditions which led to the removal of [B.O.]," and (3) that Respondent was "incapable of providing for the proper care and supervision of [B.O.]." Respondent appeals.

Respondent argues the trial court lacked jurisdiction over the termination proceeding because Petitioners did not have standing to file a petition to terminate Respondent's parental rights to B.O. "'Standing is jurisdictional in nature and "[c]onsequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved." ' " *In re T.M.*, 182 N.C. App. 566, 570, 643 S.E.2d 471, 474 (quoting *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004)), *aff'd*, 361 N.C. 683, 651 S.E.2d 884 (2007). The North Carolina Juvenile Code (the Code) provides that the following have standing to file a petition to terminate parental rights:

(1) Either parent seeking termination of the right of the other parent.

(2) Any person who has been judicially appointed as the guardian of the person of the juvenile.

(3) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction.

(4) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to which the juvenile has been surrendered for adoption by one of the parents or by the guardian of the person of the juvenile, pursuant to G.S. 48-3-701.

(5) Any person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion.

(6) Any guardian ad litem appointed to represent the minor juvenile pursuant to G.S. 7B-601 who has not been relieved of this responsibility.

(7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes.

N.C. Gen. Stat. § 7B-1103(a) (2007).

In the case before us, Petitioners are not (1) the parents of B.O.; (2) the guardian ad litem of B.O.; (3) a county department of social services, a consolidated county human services agency, or a licensed child-placing agency. Thus, to have standing under N.C. Gen. Stat. § 7B-1103(a) to file a termination petition, Petitioners must

have: (1) been judicially appointed as the guardian of the person of B.O., (2) filed a petition for adoption of B.O., or (3) B.O. must have resided with Petitioners for a continuous period of two years or more next preceding the filing of the petition or motion.

The trial court awarded Petitioners temporary custody of B.O. in an order dated 4 February 2008, and found that B.O. had been in the physical care of Petitioners since April of 2007. About four and one-half months later, Petitioners filed their termination of parental rights petition on 17 June 2008. Petitioners alleged in their petition that they were "custodians" of B.O. and that B.O. had lived with them since 20 April 2007 which, at the time of the filing of their petition, was only about fifteen months. Thus, Petitioners were not persons "with whom [B.O.] ha[d] resided for a continuous period of two years or more next preceding the filing of the petition[.]" Additionally, there is no indication in the record before our Court that Petitioners had filed a petition for adoption of B.O. Petitioners, in fact, averred in their termination petition that, should the petition be granted, Petitioners intended to pursue adoption of B.O.

Furthermore, Petitioners claim they were the temporary guardians of B.O. through the agreement for temporary guardianship entered into between them and T.C.W. on 20 April 2007. However, Petitioners were not "judicially appointed as the guardian of the person of [B.O.]" and the agreement expired on its face on 20 October 2007.

Petitioners argue that their status as "custodians" of B.O. grants them the same status as "guardians" of B.O. and, therefore, they had standing to file for termination of Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1103(a)(2) ("Any person who has been judicially appointed as the guardian of the person of the juvenile" has standing to file a petition to terminate parental rights.). We do not find Petitioners' argument persuasive. "[W]ords of a statute are not to be deemed useless or redundant and amendments are presumed not to be without purpose." *Town of Pine Knoll Shores v. Evans*, 331 N.C. 361, 366, 416 S.E.2d 4, 7 (1992) (citations omitted). N.C. Gen. Stat. § 7B-1103 refers to *both* custody and guardianship. We cannot hold that the words "custody" and "judicially appointed . . . guardian" as used in N.C. Gen. Stat. § 7B-1103 were not intended to have specific, distinct meanings.

"Custodian" is defined in relevant part by statute as: "The person or agency that has been awarded legal custody of a juvenile by a court

or a person, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court." N.C. Gen. Stat. § 7B-101(8) (2007). N.C. Gen. Stat. § 7B-101(8) clearly indicates that a "custodian" is not the same as a "parent or legal guardian," and we cannot infer that a "custodian" has the same powers granted by the Code as a parent or guardian. The Code recognizes a distinction between "custodian" and "guardian." *See also In re A.P. & S.P.*, 165 N.C. App. 841, 843, 600 S.E.2d 9, 11 (2004) ("Under N.C. Gen. Stat. § 7B-1002, '[a]n appeal[1] may be taken by the guardian ad litem or juvenile, the juvenile's parent, *guardian*, or *custodian*, the State or county agency.' ") (emphasis added).

A "guardian may relinquish all . . . guardianship powers, including the right to consent to adoption [of the child], to an agency." N.C. Gen. Stat. § 48-3-701 (2007); *see also* N.C. Gen. Stat. § 7B-1103(a). By Petitioners' argument, once Petitioners were granted temporary custody of B.O., they had the power to give B.O. up for adoption. The General Assembly could not have intended for Petitioners, as B.O.'s temporary custodians, to have this power to determine B.O.'s future. Under the Code, "guardians" clearly have far greater powers over their wards than do "custodians." These terms are not synonymous under the statute, and N.C. Gen. Stat. § 7B-1103 includes no provision granting "custodians" standing to petition for termination of another's parental rights.

Because Petitioners do not fall within any of the categories of persons or organizations which have standing to file a petition to terminate parental rights under N.C.G.S. § 7B-1103(a), we conclude the trial court did not have subject matter jurisdiction over the termination proceedings. We must vacate the trial court's order terminating Respondent's parental rights to B.O. Because we vacate the trial court's order for lack of subject matter jurisdiction, we need not address Respondent's remaining assignments of error.

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1. Were we to interpret the terms "guardian" and "custodian" as synonymous, we would render one of the terms "useless or redundant" contrary to the rules of statutory construction as stated in *Evans*, 331 N.C. at 366, 416 S.E.2d at 7. Further, as the Code grants custodians, along with guardians, the right to appeal from appealable orders affecting their rights over their wards, but the Code limits the right to initiate termination proceedings to guardians, and does not mention individual custodians, we must interpret this exclusion of custodians from N.C. Gen. Stat. § 7B-1103 to have been intentional. *See Dunn v. N.C. Dept. of Human Resources*, 124 N.C. App. 158, 161, 476 S.E.2d 383, 385 (1996).

Vacated.

Judges CALABRIA and JACKSON concur.

IN THE MATTER OF J.L., JUVENILE

No. COA08-1306

(Filed 1 September 2009)

1. Juveniles— delinquency—access to DSS files and mental health records

The trial court abused its discretion in a juvenile delinquency case by not allowing the juvenile's counsel full access to review DSS files or his mental health records, and the case was reversed and remanded for a new disposition hearing with instructions to the trial court to permit the juvenile access to his records under N.C.G.S. § 7B-2901(b).

2. Juveniles— delinquency—motion to continue hearing improperly denied

The trial court abused its discretion by denying a juvenile's motion to continue the disposition hearing where the juvenile had a right under N.C.G.S. § 7B-2901(b) to access additional records and gather evidence for the hearing.

Appeal by Juvenile from judgment entered 25 February 2008 by Judge Hugh B. Lewis in Mecklenburg County District Court. Heard in the Court of Appeals 8 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Jane L. Oliver, for the State.

Richard E. Jester, for Juvenile-Appellant.

BEASLEY, Judge.

J.L. (Juvenile) appeals the order of Mecklenburg County District Court which adjudicated him delinquent of first-degree burglary and robbery with a dangerous weapon. For the reasons stated below, we reverse and remand.

On 12 December 2007, a petition was filed alleging that Juvenile committed first-degree burglary under N.C. Gen. Stat. § 14-51 on 11

December 2007. On 14 January 2008, additional petitions were filed alleging that Juvenile committed robbery with a dangerous weapon, second-degree kidnapping, failure to stop for an emergency vehicle, speeding to elude arrest, operating a motor vehicle without a license, and reckless driving on the same date of 11 December 2007.

At the adjudicatory hearing on 25 February 2008, Juvenile admitted to the allegations of first-degree burglary and robbery with a dangerous weapon.

The trial court made findings of fact consistent with the State's summary of facts. The trial court adjudicated Juvenile as delinquent on the charges of first-degree burglary and robbery with a dangerous weapon on 25 February 2008.

Following adjudication, Juvenile's counsel made a motion to continue the disposition hearing to allow him to review Juvenile's predisposition report. Juvenile's counsel argued that the Department of Juvenile Justice and Delinquency Prevention had not distributed the predisposition report within the required time period. The trial court denied Juvenile's motion to continue and scheduled the disposition hearing on 3 March 2008.

On 28 February 2008, Juvenile's counsel served subpoenas on the Guardian ad Litem (GAL) for Juvenile, requesting Juvenile's records "including but not limited to court reports and volunteer notes." On 29 February 2008, the GAL filed a motion to quash on the grounds that the subpoena failed "to allow reasonable time for compliance." The GAL also stated that:

> [g]iven the short period of time that the GAL had the case, the fact that the case was not assigned to a volunteer, and the fact that any critical information about the case would be included in reports filed with the Court, the subpoena is unreasonable and creates an undue burden.

At the 4 March 2008 disposition hearing, representatives from Area Mental Health and Mecklenburg County Department of Social Services (DSS) produced some of Juvenile's records. The trial court reviewed these documents and ruled that the DSS court summary dated November 2006 was admissible. However, the trial court found that the other documents provided by Area Mental Health, which were from 2000 and 2001, were either cumulative or would "create a potential of disclosure of evidence that is not relevant" to the disposition of Juvenile. When the trial court ordered that the irrelevant

documents be sealed for appeal, Juvenile's counsel objected to the trial court's ruling which denied complete access to Juvenile's DSS and Area Mental Health's records.

Also during the 4 March 2008 hearing, the trial court granted the GAL's motion to quash, finding that the GAL was not given sufficient time to gather the requested information. The trial court denied Juvenile's motion to continue stating that it did not:

> see or hear anything that would create any better understanding that [sic] what I have now or the facts of the situation or seriousness of the offense made to hold the juvenile accountable and importance of protecting public safety, degree of culpability indicated by the circumstances of the particular case or rehabilitative or treatment needs of the juvenile.

The trial court found that Juvenile was a Level 3 for disposition, sending him to "training school without a recommendation for community release for a period of six months or until his 19th birthday." From this order, Juvenile appeals.

REVIEWING JUVENILE'S RECORD

[1] Juvenile argues that the trial court erred when it did not permit his counsel full access to review DSS files or his mental health records. Juvenile argues that his counsel had an absolute right to review his records in order to search for possible mitigating evidence. We agree.

At the Juvenile's hearing on 3 March 2008, Juvenile's counsel informed the trial court that representatives from DSS and Area Mental Health were present with the Juvenile's records. The following was exchanged:

> JUVENILE'S COUNSEL: Your Honor, I would prefer that they be delivered to me as they are my client's records. However, if Your Honor feels that it's necessary to review these records in camera before releasing them to me we would not have an objection to that.
>
> . . . .
>
> THE COURT: Okay, I'll accept the records. . . . We will recess . . . while I review these records to see if they have any pertinent information that is relevant.
>
> . . . .

> THE COURT: We had [sic] began our dispositional hearing yesterday when the Court was presented subpoenaed documents from YFS and—that is, DSS and Area Mental Health. The Court has reviewed those in chambers yesterday. . . . Having reviewed those documents, the Court will note that the Area Mental Health documents are from the years 2000 and 2001. And that the court summary that was handed out yesterday of November 27th, 2006 is an appropriate, relevant history of this child's development with [DSS.] The Court finds that the Area Mental Health documents have no relevance in this disposition and that the other documents . . . are cumulative or irrelevant or would create a potential of disclosure of evidence that is not relevant to this matter. . . . The other documents are sealed for appeal.

Under N.C. Gen. Stat. § 7B-2901(b) (2007),

> The Director of the Department of Social Services shall maintain a record of the cases of juveniles . . . which shall include family background information; reports of social, medical, psychiatric, or psychological information concerning a juvenile . . . . The records maintained pursuant to this subsection may be examined only by order of the court except that the guardian ad litem, or juvenile, shall have the right to examine them.

Therefore, N.C. Gen. Stat. § 7B-2901(b) gives Juvenile the right to examine his DSS files and mental health records.

In the present case, the trial court judge deemed which portions of Juvenile's record were irrelevant or cumulative and ordered those portions sealed. The trial court abused its discretion by denying Juvenile the right to examine his records under N.C. Gen. Stat. § 7B-2901(b). Accordingly, we reverse and remand for a new disposition hearing with instructions to the trial court to permit Juvenile access to his records which are maintained by DSS pursuant to N.C. Gen. Stat. § 7B-2901(b).

MOTION TO CONTINUE

[2] Juvenile contends that the trial court erred in denying his motion to continue the disposition in order to allow additional time for his counsel to prepare for the disposition hearing. We agree.

"When reviewing a denial of a motion to continue, this Court must determine whether the trial court abused its discretion." *In re D.A.S.*, 183 N.C. App. 107, 110, 643 S.E.2d 660, 662 (2007). "An abuse

of discretion occurs 'where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Fuller*, 176 N.C. App. 104, 108, 626 S.E.2d 655, 657-58 (2006) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

In his 25 February 2008 motion to continue the disposition hearing, Juvenile argued that because his counsel had not had the opportunity to review his predisposition report, Juvenile could not "effectively prepare to offer evidence in rebuttal" at the disposition hearing. The dispositional hearing was scheduled for 3 March 2008. After hearing arguments from both the State and Juvenile, the trial court denied the motion to continue for these reasons:

> (1) this Court has reviewed the juvenile's Area Mental Health and Department of Social Services records and has provided to all parties the document which the Court believes to be the only relevant, reliable and necessary document from those records to determine the needs of the juvenile and the most appropriate disposition, according to North Carolina General Statute section 7B-2501 (a), (2) a continuance would not promote the purposes of disposition, in North Carolina General Statute section 7B-2500, (3) issues related to mental health can be requested to be incorporated into the dispositional order at the dispositional hearing and (4) juvenile court requires timeliness.

Based on our holding above, we conclude that the trial court abused its discretion by denying Juvenile's motion to continue. Under N.C. Gen. Stat. § 7B-2501(b) (2007) "[t]he juvenile . . . shall have an opportunity to present evidence, that they may advise the court concerning the disposition they believe to be in the best interests of the juvenile." Because Juvenile had a right under N.C. Gen. Stat. § 7B-2901(b) to access additional records, the trial court should have granted Juvenile's motion to continue in order to give him an opportunity to gather evidence for his disposition hearing.

We do not reach Juvenile's remaining arguments because a new disposition hearing is required.

For the foregoing reasons, we

Reverse and Remand.

Judge McGEE and HUNTER, Robert C. concur.

STATE OF NORTH CAROLINA v. MAHAMED ABDILAHI MOHAMUD

No. COA08-1111

(Filed 1 September 2009)

Drugs— instructions—khat as Schedule I substance—plain error

There was plain error entitling defendant to a new trial for possession with intent to sell and deliver a Schedule I controlled substance where the jury was instructed that khat is a Schedule I controlled substance; the Schedule I substance is actually cathinone, which only exists in khat for 48 hours after harvest; and the State introduced evidence of three different quantities of khat, only one of which was tested and found to contain cathinone. Based on the erroneous instruction, the jurors could have found defendant guilty based on possession of the untested quantities even if they did not believe that those quantities contained cathinone.

Appeal by defendant from judgment entered 4 April 2008 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 March 2009.

Attorney General Roy Cooper, *by Assistant Attorney General Michael D. Youth*, *for the State.*

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

BRYANT, Judge.

Mahamed Abdilahi Mohamud (defendant) appeals from a judgment entered upon a jury verdict finding him guilty of possession with intent to sell or deliver a Schedule I controlled substance. As discussed below, we grant defendant a new trial.

Facts

Cathinone is a Schedule I controlled substance. Cathinone is found in khat, a plant grown in African and Middle Eastern countries. Khat is present while the plant is growing and within forty-eight hours after harvest. Khat is often transported in frozen form to the United States via the United Kingdom and thaws during transit. After the khat has been harvested, the cathinone begins breaking down into cathine, a less potent Schedule IV substance.

On 21 July 2006, Charlotte-Mecklenburg Police Department officers intercepted two packages at a Federal Express facility in Charlotte that had been shipped overnight from London. The packages were heavily taped and damp to the touch. A drug-sniffing dog indicated the boxes contained narcotics. The boxes were addressed to "F. Rosi" at 3119 Central Avenue, Room G, Charlotte, North Carolina. The officers seized the boxes, and after obtaining a warrant, opened them and found bundles of khat. Several bundles of khat were removed from each box and stored in a freezer to be tested later. The remaining bundles were repackaged and used in a controlled delivery.

Prior to 21 July 2006, Federal Express driver David Laing had delivered packages to defendant on six occasions. Laing was suspicious of the packages because they were heavily taped, damp to the touch, and originated in the United Kingdom. Each time Laing delivered the packages, defendant would approach Laing's truck outside an apartment building on Central Avenue in Charlotte, North Carolina.

Around lunchtime on 21 July, defendant approached Laing at an auto parts store approximately two blocks from the apartment. Defendant asked for the intercepted packages and provided a name, address, and tracking number. Laing told defendant the packages were not on the truck, and defendant then asked that they be delivered to apartment F, rather than apartment G.

Shortly afterwards, Officer Daniel Phillips, disguised as a Federal Express driver, attempted to deliver the packages to 3119 Central Avenue, apartment G. Two individuals in the apartment at that time indicated they were not expecting a package and asked the officer to deliver it to apartment F. Phillips attempted to deliver the package to apartment F twice within approximately thirty minutes, but no one answered the door. Phillips left a failed delivery tag listing his cell number on the door. A few minutes later, Phillips received a call from Benjamin Kemp's cell phone asking for the packages to be delivered to apartment F. When Phillips returned, Kemp answered the door, signed for the packages, and took them from Phillips. Kemp was arrested immediately. When questioned regarding the contents of the packages, Kemp denied knowing their contents, and claimed he had accepted delivery under an ongoing arrangement with defendant. Kemp stated that he signed for deliveries and then gave the packages to defendant in exchange for forty dollars. After his arrest, Kemp tried to have defendant retrieve the packages, but his attempt failed.

Officers went to defendant's apartment and requested permission to enter and search for narcotics. Defendant granted permission and officers found khat wrappings and a small plastic bag containing dried khat in his kitchen.

Defendant was indicted for possession with intent to sell or deliver cathinone, a Schedule I controlled substance. Upon a jury verdict of guilty, defendant was sentenced as a Level I offender to a prison term of six to eight months, suspended, with thirty days active time and 36 months supervised probation. Defendant appeals.

On appeal, defendant argues the trial court: (I) erred by denying defendant's motion to dismiss; (II) committed plain error by instructing the jury that khat is a Schedule I controlled substance; (III) committed plain error by allowing a witness to testify to an improper legal conclusion regarding defendant's guilt; (IV) committed plain error by allowing expert opinion testimony that the amount of khat seized "would have to be for distribution"; and (V) erred when giving a definition of delivery to the jury. Because we grant defendant a new trial based on plain error in the jury instruction on khat (argument II), we do not address his other arguments.

Analysis

Defendant argues the trial court committed plain error entitling him to a new trial when it instructed the jury that khat is a Schedule I controlled substance. We agree and hold that defendant is entitled to a new trial.

Defendant did not object to the relevant instruction at trial, and thus we review for plain error. *State v. Gaines*, 345 N.C. 647, 678, 483 S.E.2d 396, 415, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). To prevail under this standard of review, defendant must show that "the error in the trial court's jury instructions [is] 'so fundamental as to amount to a miscarriage of justice or [is one] which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)). This standard is rarely met when a criminal defendant fails to object to an improper instruction at trial. *Gaines*, 345 N.C. at 678, 483 S.E.2d at 415. In its brief to this Court, the State concedes that the instruction was erroneous, but contends it did not rise to the level of plain error.

Defendant was indicted on a charge of possessing cathinone, a Schedule I controlled substance, with the intent to sell or deliver it. N.C. Gen. Stat. § 90-95(a)(1) (2007). Khat is not listed as a controlled substance in the General Statutes of North Carolina. N.C. Gen. Stat. § 90-89 (2007). The trial court instructed the jury, in pertinent part:

> The Defendant has been charged with possessing *khat* with the intent to sell or deliver it. For you to find the Defendant guilty of this offense, the State must prove two things beyond a reasonable doubt: First, that the Defendant knowingly possessed *khat*, and *I instruct you that khat is a Schedule I controlled substance*. . . . The second element is that the Defendant intended to sell or deliver *khat*. . . .

(Emphasis added.) The trial court went on to refer to khat throughout the instruction rather than cathinone.

Here, the State introduced evidence about three different quantities of khat: a sample taken from the Federal Express boxes between 8 a.m. and 10 a.m. prior to their delivery to Kemp, the remaining khat which was eventually delivered to Kemp, and khat seized from the kitchen of apartment G. Only the sample was frozen, tested and found to contain cathinone; the other two quantities of khat were never tested. The evidence also shows that the delivery to Kemp occurred at some time at least thirty minutes after the officers began to break for lunch, presumably after noon. Further, the State presented evidence about the nature of khat, specifically that while cathinone is present in living khat, it begins breaking down into cathine, a Schedule IV controlled substance within forty-eight hours after harvest. Thus, the jury was aware that one may possess khat without possessing cathinone, and the two terms should not be used interchangeably. The jury also knew that the only khat tested and found to contain cathinone was sampled hours before it was delivered to Kemp.

After careful review of the record, we conclude that based on the trial court's erroneous instruction the jurors could have found defendant guilty if they believed he possessed the khat in the kitchen of apartment G or the khat delivered to Kemp, even if they did not believe either of those quantities contained cathinone. Indeed, the trial court specifically instructed them that they could do so. Because the khat actually delivered to Kemp allegedly on defendant's behalf was never tested and found to contain cathinone, we conclude that it is probable that the jury would have acquitted defendant of possess-

ing cathinone, even though they found that he possessed khat. The State itself emphasizes the possibility for confusion between the terms in its brief when it points out that a law enforcement officer qualified as an expert in this case at one point referred to khat rather than cathinone as a Schedule I controlled substance.

Given such confusion in the testimony of at least one expert witness for the State and the trial court's erroneous instruction to the jury, we hold that defendant has shown plain error. *Collins*, 334 N.C. at 62, 431 S.E.2d at 193. Because the trial court committed plain error in instructing the jury that khat is a Schedule I controlled substance, defendant is entitled to a new trial. We need not address defendant's additional assignments of error.

NEW TRIAL.

Judges ELMORE and STEELMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 SEPTEMBER 2009)

BEACH v. HUGHES No. 08-1192	Mecklenburg (07CVD10223)	Affirmed
BELVISO v. ROSENKE No. 08-1107	Pasquotank (07CVS24)	Affirmed in part, reversed in part
CAROLINA DIGESTIVE v. N.C. DEP'T OF HEALTH No. 08-952	Dept. of Health & Human Services (07DHR1415)	Affirmed
CARROLL v. TRIANGLE GRADING No. 08-1412	Indus. Comm. (IC501837)	Affirmed in part, remanded in part
DUFFY v. HANESBRANDS, INC. No. 08-1247	Indus. Comm. (IC593617)	Affirmed
IN RE A.M.G. No. 09-594	Randolph (06JT230)	Affirmed
IN RE C.P., A.S., J.P. No. 09-444	Chatham (07JT15) (07JT16) (07JT14)	Affirmed
IN RE C.R. AND M.A.R. No. 09-390	Chatham (07JT71) (07JT50)	Reversed and Remanded
IN RE D.B. No. 09-293	Pasquotank (08JT62)	Affirmed
IN RE D.J.R. No. 09-334	Wayne (08JT50)	Affirmed
IN RE I.B. No. 09-348	Guilford (07JA686) (07JA687) (07JA685) (07JA697)	Dismissed
IN RE K.N.C. No. 09-489	Catawba (07JT85)	Affirmed
IN RE P.C.L.P. No. 09-379	Gaston (04JT202)	Affirmed
IN RE R.A.L.R. No. 09-534	Catawba (07JT72)	Affirmed
IN RE T.B. No. 09-97	Durham (03JB127)	No error in part and remanded for a new disposition hearing

IN RE WILL OF TURNER No. 08-1564	Haywood (02E320)	Affirmed
McDONALD v. BILTMORE HOMES, LLC No. 08-1575	Durham (07CVS5085)	Affirmed
MILLER v. PROGRESSIVE AM. INS. CO. No. 08-1207	Wake (03CVD9167)	Affirmed
STATE v. BANDON No. 08-1428	Caldwell (06CRS3365) (06CRS3364)	No Error
STATE v. BREWINGTON No. 08-980	Lee (05CRS6683) (05CRS6684) (05CRS6682) (05CRS6685)	Affirmed
STATE v. CROCKETT No. 08-1161	Forsyth (07CRS37530) (07CRS58861)	No Error
STATE v. FONVILLE No. 09-195	Onslow (06CRS56956)	Affirmed
STATE v. GRIFFIN No. 09-387	Guilford (05CRS23128) (05CRS23067)	No Error
STATE v. LALIBERTE No. 08-1354	Camden (07CRS432)	No Error
STATE v. LEE No. 09-98	Mecklenburg (05CRS57052) (05CRS57050)	No Error
STATE v. LIEBERMAN No. 08-1596	Alamance (07CRS55692) (07CRS55690)	No Error
STATE v. LONG No. 08-1267	Onslow (05CRS59297) (05CRS59296)	No error in part, dismissed in part
STATE v. McCLURE No. 09-8	Union (04CRS56731) (05CRS12254) (04CRS56730)	Dismissed in part; vacated in part
STATE v. MILLER No. 09-16	Union (07CRS51851)	Dismissed

STATE v. PINEDA-BENTACOURT No. 08-1528	Wake (05CRS16408) (05CRS16409) (05CRS16407)	Affirmed
STATE v. SPANN No. 09-32	Burke (06CRS1614) (06CRS1617) (06CRS1615) (06CRS1613) (06CRS1616)	No prejudicial error
STATE v. TAYLOR No. 09-324	Buncombe (08CRS57260) (08CRS57261) (08CRS57259) (08CRS57262)	No Error
VOLLER REALTY & CONST. v. D.V. HOLDINGS No. 08-1271	Chatham (06CVS538)	Affirmed in part and remanded in part
WATTS v. WINFORD No. 08-1343	Mecklenburg (06CVD24151) (04CVD20351)	Dismissed
WILLIAMSON v. BLOUNTS BAY LAND CO., LLC No. 08-1105	Beaufort (06CVS1505)	Affirmed in part, Remanded in part
WORTHINGTON v. WALTER POOLE REALTY No. 08-1390	Lenoir (08CVS387)	Dismissed
YARBROUGH TRANSFER CO. v. BEATTY No. 08-1438	Forsyth (07CVS7845)	Affirmed

W.D. GOLDSTON, JR., JAMES E. HARRINGTON, AND CITIZENS, TAXPAYERS, AND BONDHOLDERS SIMILARLY SITUATED, PLAINTIFFS v. STATE OF NORTH CAROLINA AND MICHAEL F. EASLEY, GOVERNOR, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA08-754

(Filed 15 September 2009)

1. Appeal and Error— appealability—de novo review of summary judgment—stipulation—handling of public trust funds

Where review was *de novo*, there was no need to address plaintiffs' arguments concerning the trial court's rulings on its authority, its alleged inappropriate use of collateral estoppel, its findings of fact, or its conclusions of law. An argument concerning the exclusion of materials was without merit since the parties stipulated to the facts.

2. Appeal and Error— appealability—de novo review of summary judgment—stipulation—handling of public trust funds

In a declaratory judgment action arising from the transfer of money from the North Carolina Highway Trust Fund to the State's General Fund, plaintiffs' contention that fundamental principals of expending public money were violated was rejected. The Trust Fund lacked the indicia of a trust, the language creating the Trust Fund was ambiguous on whether it was intended to be a true trust, the Trust Fund was not entitled to the same level of constitutional protection that state employees' retirement funds enjoy, plaintiffs' interpretation would allow one General Assembly to bind future legislatures, and the General Assembly had determined that one of the uses of the Trust Fund is to supplement the General Fund.

3. Legislature— transfer of money from Highway Trust Fund to General Fund—waiver—mootness

Plaintiffs' argument that the General Assembly violated article V, section 5 of the North Carolina Constitution by diverting $125,000 from the North Carolina Highway Trust Fund to the General Fund was moot because the General Assembly reimbursed the Trust Fund the entire amount diverted.

4. Governor— improper transfer of money from Highway Trust Fund to General Fund—failure to wait for appropriate legislative authority

The trial court erred in a declaratory judgment action by concluding that the transfer of $80,000 from the North Carolina Highway Trust Fund to the General Fund was not in violation of article III, section 5 of the North Carolina Constitution because the Governor may not transfer appropriated Trust Fund monies without appropriate legislative authority.

Judge McGEE concurring in result in part and dissenting in part.

Appeal by plaintiffs from judgment and order entered 27 March 2008 by Judge Joseph R. John, Sr., in Wake County Superior Court. Heard in the Court of Appeals 28 January 2009.

Boyce & Isley, PLLC, by G. Eugene Boyce, R. Daniel Boyce and Philip R. Isley, for plaintiff appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell and Assistant Solicitor General John F. Maddrey, for defendant appellees.

HUNTER, JR., Robert N., Judge.

Plaintiffs request a declaratory judgment asking whether the transfer to the General Fund of $80,000,000 by the Governor and $125,000,000 by statute from funds appropriated in 2001 to the North Carolina Highway Trust Fund ("Trust Fund") were contrary to provisions of the North Carolina Constitution dealing with public funds, specifically N.C. Const. art. III, § 5(3) and N.C. Const. art. V, § 5. On cross motions for summary judgment, the trial court held both transfers to be lawful. We affirm in part the trial court with regard to the statutory transfer of $125,000,000 but reverse with regard to the Governor's transfer of $80,000,000. As to the other matters raised in the appeal, we affirm the trial court, as discussed herein.

I.

A. Legislative History[1]

The General Assembly created the North Carolina Highway Trust Fund ("Trust Fund") in 1989, establishing a special account within the State Treasury to provide multi-year funding for highway construction and maintenance. 1989 N.C. Sess. Laws ch. 1933-97. The Trust Fund receives monies flowing from several revenue streams, including motor vehicle title and registration fees; motor fuels excise taxes; alternative fuels excise taxes; motor vehicle use taxes; and interest and income earned by the Trust Fund. As originally enacted, Trust Fund revenues were to be used only for specified projects of the Intrastate Highway System, for specific urban loop highways, and to provide supplemental appropriations for specific secondary roads and for city streets, with a small portion of the Trust Fund allotted for administrative expenses.

In addition, the 1989 statute creating the Trust Fund directed that a portion of the funds be transferred each year from the Trust Fund to the State's General Fund. *Id.* at 1982-83. As originally enacted, N.C. Gen. Stat. § 105-187.9 (2007) stated: "In each fiscal year the State Treasurer shall transfer the sum of . . . ($170,000,000) of the taxes deposited in the Trust Fund to the General Fund[.]"[2] This transfer has been made in each succeeding fiscal year, though the amount transferred each year varied in accordance with fluctuations in motor vehicle use tax collections as required by N.C. Gen. Stat. § 105-187.9(b)(2) and in response to loans made from and payments made to the Trust Fund by the Legislature. In 1989, $279,400,000 was transferred to the General Fund. 1989 N.C. Sess. Laws ch. 1983-84.

On 21 September 2001, in the 2001 N.C. Sess. Laws ch. 424, the "Current Operations and Capital Improvements Appropriations Act of

1. The facts and procedural history are substantially the same as cited by the Supreme Court in *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006) but have been supplemented to add facts relevant to the consideration of issues broader than "standing."

2. N.C. Gen. Stat. § 105-187.9, states:

(2) In addition to the amount transferred under subdivision (1) [the $170,000,000] of this subsection, the sum of one million seven hundred thousand dollars ($1,700,000) shall be transferred in the 2001-2002 fiscal year. The amount distributed under this subdivision shall increase in the 2002-2003 fiscal year to the sum of two million four hundred thousand dollars ($2,400,000). In each fiscal year thereafter, the sum transferred under this subdivision shall be the amount distributed in the previous fiscal year plus or minus a percentage of this sum equal to the percentage by which tax collections under this Article increased or decreased for the most recent 12-month period for which data are available.

2001" ("Appropriations Act of 2001", or "Act") was read three times in the General Assembly and ratified. 2001 N.C. Sess. Laws ch. 424. Subsequently, the Act was signed into law by Governor Easley at 11:15 a.m. on 26 September 2001. *Id.* The Act set spending for the 2001-2003 biennial fiscal years. The Act amended section 105-187.9 so as to continue the yearly transfer of $170,000,000 from the Trust Fund to the General Fund: in the 2001-2002 fiscal year, the sum of $1,700,000; in the 2002-2003 fiscal year, the sum of $2,400,000.

> In each fiscal year thereafter, the sum transferred under this subdivision shall be the amount distributed in the previous fiscal year plus or minus a percentage of this sum equal to the percentage by which tax collections under this article increased or decreased for the most recent 12-month period for which data are available.

N.C. Gen. Stat. § 105-187.9(b)(2).

Approximately four months after the passage of the Act, on 5 February 2002, the Governor issued Executive Order 19 ("Executive Order 19" or "Order"). The Order recites that a " 'deficit' is defined as having been incurred when total expenditures for the fiscal period of the budget exceed the total of receipts during the period, plus the surplus remaining in the State Treasury at the beginning of the period." Exec. Order No. 19, 16 N.C. Reg. 1866 (Mar. 1, 2002). The fiscal period began 1 July 2001. *Id.*

The Order includes nine sections affecting the expenditure of funds collected by the State. Section 5 and section 9 are relevant to our analysis. Section 5 of Executive Order 19 states, "[The Office of State Budget and Management] may transfer, as necessary, funds from the Highway Trust Fund Account for support of General Fund appropriation expenditures." Exec. Order No. 19, 16 N.C. Reg. 1866 (Mar. 1, 2002). Accordingly, on 8 February 2002, the State Budget Officer directed that $80,000,000 be debited from the Trust Fund and credited to the General Fund.

Section 9 of Executive Order 19 reads as follows:

> The Office of the State Controller, as advised by the State Budget Officer, is directed to receive the local government reimbursement funds and to escrow such funds in a special reserve as established by [the Office of State Budget Management]. Return of all such receipts shall be made to the local government reim-

> bursement funds, if possible, after determination that such funds are not necessary to address the deficit.

Exec. Order No. 19, 16 N.C. Reg. 1866 (Mar. 1, 2002).

Subsequent to Executive Order 19, the General Assembly convened in Extra Session on 14 May 2002 and convened for the continuing Regular Session on 28 May 2002. An examination of the Session Laws passed by the General Assembly during these sessions reveals that the Legislature modified two provisions of the Act which concerned provisions of the Order. In the 2001 Regular Session, the Legislature abolished local government reimbursement statutes effective as of 1 July 2003. 2001 N.C. Sess. Laws chs. 2105-06. At the 14 May 2002 Session, the Legislature changed the effective date for repealing the local government reimbursement statutes from 1 July 2003 to 1 July 2002. 2002 N.C. Sess. Laws ch 503. The General Assembly also made appropriations from the Trust Fund for road construction; however, unlike the local reimbursement act appropriation, the Governor's transfer of $80,000,000 from the Trust Fund to the General Fund was not addressed by the Legislature. 2002 N.C. Sess. Laws ch. 302.

Because the State budget deficit continued for the 2002-2003 fiscal year, the General Assembly transferred $125,000,000 from the Trust Fund to the General Fund, effective 1 July 2002, in addition to the previously appropriated $170,000,000. 2002 N.C. Sess. Laws chs. 298-99. The General Assembly treated this transfer as a loan from the Trust Fund to the General Fund, committing to return the $125,000,000, including interest, to the Trust Fund during fiscal years 2004-2005 through 2008-2009. *Id.* at 298-99, 457. Subsequently, in fiscal year 2004-2005, the General Assembly reduced the yearly transfer of funds from the Trust Fund to the General Fund by $10,000,000 as a payment on this loan, *see* 2002 N.C. Sess. Laws ch. 457, and forgave the remainder of the loan in fiscal year 2005-2006. 2005 N.C. Sess. Laws ch. 674. In fiscal year 2006-2007, however, the General Assembly paid the remainder of the loan by again reducing the yearly transfer of funds from the Trust Fund to the General Fund by $115,000,000. 2006 N.C. Sess. Laws ch. 1523.

B. Procedural History

On 14 November 2002, plaintiffs Goldston and Harrington, as North Carolina citizens and taxpayers, brought suit against the State and Governor. Plaintiffs alleged the transfers of $80,000,000 by the Governor and $125,000,000 by the General Assembly from the

Trust Fund to the General Fund were unlawful diversions of Trust Fund assets because disbursement of those funds is not allowed for any projects other than those specified by statute. The pertinent statute states that the "special objects" of the Trust Fund are the intrastate highways, urban loops, city streets, secondary roads, debt service, and Department of Transportation administrative expenses. N.C. Gen. Stat. § 136-176(b) (2007). Plaintiffs also contended these transfers violated the North Carolina Constitution, which mandates that "[e]very act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose." N.C. Const. art. V, § 5. Plaintiffs asserted that the statutorily defined "special objects" of the Trust Fund preclude use of Trust Fund assets for General Fund expenditures. Finally, plaintiffs alleged the Governor exceeded his constitutional authority under article III, section 5(3). This provision requires the Governor to administer the budget and "[t]o insure that the State does not incur a deficit for any fiscal period," but does not, plaintiffs contended, authorize the Governor to order transfers from the Trust Fund to the General Fund because the Trust Fund is separate from the General Fund and the annual budget process. N.C. Const. art. III, § 5(3).

Filing suit both as individual taxpayers and on behalf of other citizens similarly situated, plaintiffs alleged they were injured because they had paid motor fuel taxes, title and registration fees, and other highway taxes, which by law were collected expressly for application to the Trust Fund but had been diverted for other uses. They argued defendants' actions constituted both a current and future threat of illegal and unconstitutional depletion of Trust Fund assets.

Plaintiffs requested injunctive and declaratory relief, seeking both a declaration that defendants' actions were illegal and unconstitutional, and an immediate return of the monies at issue to the Trust Fund. Plaintiffs later abandoned their prayer for relief in the nature of mandamus through which they had requested return of the funds, but they continued to maintain that they faced the threat of future illegal and unconstitutional disbursements from the Trust Fund. In response, the State and the Governor filed a motion to dismiss, arguing that plaintiffs lacked standing "in that they have failed to allege the necessary facts to bring this suit: based on their status as citizens or taxpayers or bondholders; based on any alleged contractual or impairment claim; or on any other basis establishing their right to bring such claim against defendants." Defendants also claimed that

plaintiffs failed to state a claim for relief. Plaintiffs and defendants both filed motions for summary judgment.

In an order entered 29 January 2004, the trial court granted summary judgment in defendants' favor. Plaintiffs appealed to this Court which held the "dispositive" issue in the appeal was "whether the plaintiffs have standing." This Court initially held plaintiffs lacked standing to bring this action and so holding determined it was "unnecessary . . . to address the remaining issues briefed by the parties." *Goldston v. State*, 173 N.C. App. 416, 422, 618 S.E.2d 785, 790 (2005) (*Goldston I*). Subsequently, the Supreme Court reversed the decision of this Court, held plaintiffs had standing, and remanded the case to the Court of Appeals for further remand to the trial court. *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006) (*Goldston I)*.

Upon remand, plaintiffs and defendants both renewed their cross motions for summary judgment. By order filed 27 March 2008, the trial court "reaffirmed" its prior grant of summary judgment to defendants and held that "[a]s a matter of law, Defendants did not violate the provisions of the North Carolina Constitution or act unlawfully in any way complained of by the Plaintiffs." The trial court furthermore held: "Plaintiffs are not entitled to re-litigate the previously entered Judgment for Defendants that was on the merits and that has never been vacated, [or] reversed" by an appellate court. From this decision, plaintiffs timely appeal.

C. Jurisdiction

In *Goldston I*, only the issue of plaintiffs' standing was resolved by the Supreme Court. In that case, plaintiffs sought review of all the issues raised in their subsequent appeal, *i.e.*, the present appeal. In North Carolina courts, the law of the case applies only to issues that were decided in the former proceeding, whether explicitly or by necessary implication, but not to questions which might have been decided but were not. "[T]he doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case." *Hayes v. Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 682 (1956). Therefore, this Court has jurisdiction to address the issues not resolved but presented in plaintiffs' initial appeal.

D. Standard of Review

In their briefs, both parties agree that the issues to be determined are matters of law. Both parties also agree that the standard of review

for these matters is de novo. "It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated." *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

II.

[1] Because we review questions of law de novo, we give no deference to the trial court's rulings on its own limits of judicial authority, its alleged inappropriate use of collateral estoppel, its findings of fact, or its conclusions of law. Our de novo review is to determine " 'whether, on the basis of the materials presented to the trial court, (1) there is a genuine issue of material fact and, (2) whether the movant is entitled to judgment as a matter of law.' " *21st Mortage Corp. v. Douglas Home Ctr., Inc.*, 187 N.C. App. 770, 773, 655 S.E.2d 423, 425 (2007) (citation omitted). Therefore there is no need to address plaintiffs' first, second, third, and seventh arguments.

Our review of "materials presented to the court" necessarily involves a review of matters plaintiffs submitted for judicial notice, which includes documents published by the North Carolina Legislature's Fiscal Research Division and certain newspaper articles. These are materials the trial court failed to consider on remand. Under N.C. Gen. Stat. § 8C-1, Rule 201(f) (2007), judicial notice may be taken at any stage of the proceedings. Section (c) allows a court to take judicial notice whether requested or not. N.C.G.S. § 8C-1, Rule 201(c). To the extent these materials submitted to the trial court contain adjudicated facts and refer to statutes, we have considered these materials in our review. Since the parties stipulated to the facts, however, and the issues under review are jointly recognized to be matters of law, it is unclear that plaintiffs were prejudiced by the exclusion of the materials sought to be included at the trial court level. Therefore, we conclude plaintiffs' sixth argument appealing the exclusion of these materials is without merit.

[2] Plaintiffs' fifth argument concerns handling of public "trust" funds. Plaintiffs contend that "[d]efendants violated fundamental principles of expenditures of public money held in [the] trust fund." Plaintiffs argue that because the Trust Fund is labeled a "trust fund," North Carolina law prohibits use of money held in this trust fund for any purposes other than those authorized when the trust was formed. Plaintiffs state: "[T]here can be no doubt that North Carolina's General Assembly meant to protect highway use taxes collected for

specific purposes from being diverted to expenditures other than those specified by the Highway Trust Fund Act." Specifically, according to plaintiffs, these funds are restricted by trust for the sole purpose of funding the "intrastate highway system, urban loops around seven major North Carolina cities, city streets and secondary roads." Plaintiffs add: "There is no doubt that the legislature, by labeling this 'account' a 'trust fund' had every intention of protecting the money from 'raids' or 'diversions' " for other purposes.

In addition plaintiffs, by analogy, argue that the "special object" language of article V, section 5 of the N.C. Constitution would protect appropriations of Trust Funds in the same manner that article V, section 6(2) protects Teachers' and State Employees' Retirement System Trust Funds. These arguments are not persuasive on several grounds.

First, the Trust Fund lacks the indicia of a trust. In creating a trust, a settlor deposits funds "in trust" to a trustee for the benefit of a third party, the beneficiary. The trustee is granted limited discretionary powers over the spending of the funds and is subject to an accounting and fiduciary duties. The legal relationships here lack these elements.

Second, the language creating the Trust Fund is ambiguous concerning whether the Trust Fund was intended to be a "true" trust fund. N.C. Gen. Stat. § 136-176 (2007) states: "Creation, revenue sources, and purpose of North Carolina Highway Trust Fund[:] (a) A special account, designated the North Carolina Highway Trust Fund, is created within the State treasury." This language merely states that a "special account . . . is created within the State treasury[,]" not a trust fund.

Third, the Trust Fund is not constitutionally protected in the same manner as the Teachers' and State Employees' Retirement System. The State is correct that article V, section 6(2) is explicit in its protection of retirement funds in that such funds cannot be used for any other purpose or be applied, diverted, loaned to, or used, by the State or any of its officers or agencies. As the State correctly notes, this Court in *Stone v. State*, 191 N.C. App. 402, 664 S.E.2d 32 (2008), held that the Governor was not able under article III, section 5 to escrow the Retirement System employer contributions to meet budget shortfall projections. Clearly, other sections of the Constitution governing specific procedures in the handling of public funds bind the Governor's powers under article III, section 5. The Trust

Fund is not entitled to this same explicit level of constitutional protection that State employees' retirement funds enjoy. Plaintiffs' analogy is not persuasive.

Fourth, the interpretation plaintiffs urge would allow one General Assembly to bind future Legislatures' handling of revenues. One General Assembly traditionally cannot bind another. *Kornegay v. Goldsboro*, 180 N.C. 441, 451, 105 S.E. 187, 192 (1920); *R. R. v. Oates*, 164 N.C. 167, 170, 80 S.E. 398, 399 (1913). Section 105-187.9 evinces the intention of the General Assembly to use part of the Trust Fund money to supplement the General Fund. Similar legislation mandating the transfer of certain Trust Fund money to the General Fund was enacted in the same session that created the Trust Fund. 1989 N.C. Sess. Laws chs. 1934-41, 1979-83. Like all appropriation statutes, the shifting of funds from one year to the next may be changed by the Legislature.

Even assuming *arguendo* that the Trust Fund is a true "trust fund," the General Assembly has determined that one of the "objects" of the Trust Fund is to supplement the General Fund. Use of the Trust Fund monies for this purpose thus cannot be viewed as a "raid" of the Trust Fund for purposes not previously sanctioned by the General Assembly. Consequently, we deny plaintiffs' appeal on its "trust fund" argument.

III.

[3] Plaintiffs allege in their complaint that the General Assembly violated article V, section 5 of our Constitution by diverting $125,000,000 from the Trust Fund to the General Fund on 1 July 2002. Statutorily this is an accurate statement. An examination of the appropriations statutes following this "diversion," however, reveals that the General Assembly has reimbursed or paid back to the Trust Fund the $125,000,000 diverted in 2001. Plaintiffs attempted to illustrate this payment history or "forgiveness" in their motions for judicial notice, which included material from the Legislative Research Division containing statutory citations to appropriations acts. An examination of these and subsequent statutes shows that after the balance of the $125,000,000 loan was "forgiven" in fiscal year 2005-2006, 2005 N.C. Sess. Laws ch. 674, the Legislature repaid the balance of the loan in full in fiscal year 2006-2007, 2006 N.C. Sess. Laws ch. 1523.

This payment history in all probability led plaintiffs not to specifically reference the General Assembly in any of their assignments of error. Plaintiffs do not argue in their brief to this Court that the

General Assembly violated any provisions of the North Carolina Constitution. Plaintiffs have thus failed to preserve this argument for appellate review. N.C. R. App. P. 28(a)-(b)(6) ("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."); *Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 602, 534 S.E.2d 233, 237-38, *disc. review denied*, 353 N.C. 265, 546 S.E.2d 100 (2000). Because the funds have been repaid, and the claim is moot, we affirm the trial court's summary judgment order as to the $125,000,000. There is no need for remand, and we do not further address this claim.

IV.

[4] The dispositive issue in this appeal is determining the meaning of the phrase "effect the necessary economies" as contained in N.C. Const. art. III, § 5(3), and how this end was accomplished by the transfer of $80,000,000 from the Trust Fund to the General Fund.

Article III, section 5 requires that the Governor "shall effect the necessary economies in State expenditures." In order for the Governor to exercise his powers to "effect the necessary economies," he must survey revenue collections to avoid a deficit in the State budget which occurs whenever he "determines that receipts during the fiscal period, when added to any surplus remaining in the State Treasury at the beginning of the period, will not be sufficient to meet budgeted expenditures." N.C. Const. art. III, § 5(3). The deficit which the Governor is to prevent is also defined in article III, section 5(3) as being present when "[t]he *total expenditures* for the State for the fiscal period covered by the budget shall not exceed the *total of receipts* during that fiscal period and the surplus remaining in the State Treasury at the beginning of the period." *Id.* (emphasis added).

Article III, section 5(3) has been the subject of two prior opinions of this Court and one advisory opinion of the Supreme Court. *Stone*, —— N.C. App. at ——, 664 S.E.2d at 32; *County of Cabarrus v. Tolson*, 169 N.C. App. 636, 610 S.E.2d 443 (2005); *Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 295 S.E.2d 589 (1982). These decisions necessarily inform our decision in this case on the meaning of the phrase "effect the necessary economies."

In *In re Separation of Powers*, the North Carolina Supreme Court explained the constitutional process by which public funds are handled:

> Our Constitution mandates a three-step process with respect to the State's budget. (1) Article III, Section 5(3) directs that the "Governor shall prepare and recommend to the General Assembly a comprehensive budget . . . for the ensuing fiscal period." (2) Article II vests in the General Assembly the power to enact a budget [one recommended by the Governor or one of its own making]. (3) After the General Assembly *enacts* a budget, Article III, Section 5(3) then provides that the Governor shall administer the budget "as enacted by the General Assembly."

305 N.C. at 776, 295 S.E.2d at 594 (quoting N.C. Const. art. III, § 5(3)).

The Governor's duty to administer the budget "as enacted by the General Assembly" under article III, section 5 equates with article V, section 7 and article III, section 5(4) of this State's Constitution. Article III, section 5(4) requires that the Governor take care that the laws be faithfully executed. The Governor as head of the executive department is charged with the duty of seeing that legislative acts are carried into effect. *Winslow v. Morton*, 118 N.C. 486, 489-90, 24 S.E. 417, 418 (1896). Article V, section 7 requires that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law[.]" Subsection 1 of this section means that there must be legislative authority in order for money to be validly drawn from the treasury. In other words, the legislative power is supreme over the public purse. *White v. Hill*, 125 N.C. 194, 200, 34 S.E. 432, 433 (1899) (citing *Garner v. Worth*, 122 N.C. 250, 252, 29 S.E. 364, 365 (1898)) (decided under former article XIV, section 3); *accord State v. Davis*, 270 N.C. 1, 14, 153 S.E.2d 749, 758, *cert. denied*, 389 U.S. 828, 19 L. Ed. 24, 84 (1967).

These supporting cases were decided at a time in our history before enactment of present article III, section 5; however, they inform our decision here because they represent settled law as to the understanding of the legislative power under this State's Constitution with regard to its power to appropriate and the duty of the Governor to execute the laws. N.C. Const. art. III, § 5.

The construction of the term "effect the necessary economies" is an ambiguous term, requiring judicial construction. *Young v. Whitehall Co.*, 229 N.C. 360, 367, 49 S.E.2d 797, 801 (1948); *Milk Commission v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967) ("[I]ntent must be found from the language of the act, its legislative history, and the circumstances surrounding its adoption[.]"); *Ingram v. Johnson, Comr. of Revenue*, 260 N.C. 697, 699, 133 S.E.2d

662, 664 (1963) ("[I]t is proper to look to legislative history, judicial interpretation of prior statutes dealing with the question, and the changes, if any, made following a particular interpretation."). When "interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere." *State, ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478-79 (1989). Additionally, the Supreme Court emphasized that "[a]ll power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *Id.* at 448-49, 385 S.E.2d at 478 (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961)).

Prior to 1925, when the State enacted the Executive Budget Act, N.C. Gen. Stat. §§ 143-1 through -34.9, the General Assembly prepared and adopted the State budget, which the Governor and agencies administered. STEPHENS N. DENNIS, RECENT CHANGES IN THE APPROPRIATIONS PROCESS, POPULAR GOVERNMENT, Institute of Government (1975). Subsequently, in 1968 in rewriting article III, section 5(3), the Governor's budgetary duties were given "constitutional status. The Governor's 'present' statutory duty for preparing and recommending the state budget to the General Assembly and then for administering it after enactment became a constitutional responsibility[.]" N.C. STATE CONST. STUDY COMM'N, REPORT OF THE N.C. STATE CONST. STUDY COMM'N 31 (1968). The present language of article III, section 5 was adopted in 1977. Article III, section 5 of the North Carolina Constitution, "Duties of Governor[,]" in relevant part states:

> Budget. The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor.
>
> The total expenditures of the State for the fiscal period covered by the budget shall not exceed the total of receipts during that fiscal period and the surplus remaining in the State Treasury at the beginning of the period. To insure that the State does not incur a deficit for any fiscal period, the Governor shall continually survey the collection of the revenue and *shall effect the necessary economies in State expenditures*, after first making adequate provision for the prompt payment of the principal of

> and interest on bonds and notes of the State according to their terms, whenever he determines that receipts during the fiscal period, when added to any surplus remaining in the State Treasury at the beginning of the period, will not be sufficient to meet budgeted expenditures.

N.C. Const. art. III, § 5(3) (emphasis added).

This language requires the Governor to recommend a "comprehensive" budget, although the Legislature is not required to adopt the budget as recommended. The Governor has a continuing duty, however, to administer whatever budget is adopted by the Legislature; this is a specific application of the Governor's duty to execute the laws. JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION WITH HISTORY AND COMMENTARY 96 (University of North Carolina Press 1995).

During the time the 1977 amendment was adopted and until the passage of the Separation of Powers Act in 1983, the determinations of budget reductions and transfers between budgets were handled jointly by the Governor and the "Advisory Budget Commission" ("ABC"). 1983 N.C. Sess. Laws chs. 735-46. This joint "executive-legislative" administration of the budget was altered legislatively following the decisions in *Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982) and *In re Separation of Powers*, 305 N.C. 767, 295 S.E.2d 589.

This brief period both before and after enactment of the 1977 constitutional amendment informs our consideration of what acts the drafters of the amendment considered to be "effect[ing] the necessary economies." Because prior budget acts were jointly administered by the Legislative and Executive branches, one cannot conclude that the Legislature, in enacting the 1977 amendments, intended to give the Governor appropriation power to redirect spending absent some explicit legislative concurrence. Had the Legislature intended to allow the Governor to redraw the Appropriations Acts wholesale, the Legislature would have provided an explicit provision for such a change.

Viewing the Constitution textually, this interpretation makes functional and operational sense because it separates the powers of appropriation between two of the branches of government. The Governor may veto budgetary acts thereby stopping spending that he or she disapproves. Constitutional limitations on expenditures of

public funds by either branch require due process of law as set forth in constitutional provisions read as a whole.

It is unlikely that the phrase "effect the necessary economies" could be plainly read to mean that the Legislature, in proposing the amendment to this article, or the People in ratifying the amendment, could have construed the plain meaning of these words to grant the Governor the unfettered power to transfer funds without specific legislative authority.

The alternative interpretation would allow a Governor the "broad" power to remake the budget allocations without legislative concurrence. One cannot deny that a Governor acting alone is more efficient and practical in addressing a deficit or any problem. Our constitutional history in government, however, has chosen to employ separate, divided powers to address governance—including the allocation of tax revenue through the budget. Although divided government is a less efficient and more impractical method of governing, our history and experience with authority cautions us against entrusting unbridled expenditure authority in any one person. Article I, section 35 of this State's Constitution states that "a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." In our Constitution, the authority to appropriate funds is jointly exercised by the Legislature through the power to make laws and the Governor through the veto.[3] Once a budget is enacted, it is textually unsupportable to contend that the Governor then holds the power to unilaterally amend the budget in violation of statute.

Article III, section 5, requires the Governor to prevent a deficit giving consideration to total expenditures and total revenues. Temporary halts in expenditures, escrowing of funds awaiting legislative action, furloughs and other similar actions are constitutional because these actions reduce "total expenditures." Diverting the Highway Trust Fund to the General Fund and expending the money does not reduce the "total expenditure" of state government but merely transfers money contrary to the budget appropriation statute. A transfer of this nature does not avoid the deficit but merely continues the status quo, which the phrase "necessary economies" under article III, section 5 is required to alter. Furthermore the trans-

3. Since the passage of article III, section 5, the Legislature has met every year, in part to revise the state budget. In addition to these annual first and second sessions, the Legislature has met for extra sessions 26 times since 1977 at the call of the Governor to address issues requiring immediate legislative action.

fer of these funds, designated by the budget statute for one purpose and transferred by the Governor to another does not fulfill the Executive's duty to administer the budget enacted by the Legislature, nor does it assure that the laws are faithfully executed.

With this framework of constitutional authority and the persuasive authority of *In Re Separation of Powers*, we examine prior decisions of this Court. In *Tolson*, 169 N.C. App. 636, 610 S.E.2d 443, this Court affirmed the trial court's determination that the provisions of Executive Order 19 that escrowed local government tax reimbursements and local government tax-sharing funds to a reserve where they would await a determination that they would be necessary to address the budget are within the authority granted to the Governor under article III, section 5(3). Executive Order 19 states that the funds would be returned to "local government reimbursement funds, if possible, after determination that such funds are not necessary to address the deficit." Exec. Order No. 19, sec. 9, 16 N.C. Reg. 1866 (Mar. 1, 2002). Neither the Executive Order nor the *Tolson* Court addressed which branch or branches of government would make the determination, after escrow, as to whether such funds would be necessary to address the budgetary deficit.

Subsequent statutory history demonstrates this determination was made by the Legislative and Executive branches jointly as each of the statutory provisions establishing local government tax reimbursements was repealed by the General Assembly pursuant to Session Law 2001-424, § 34.15(a) as amended by Session Law ch. 2002-126, § 30A.1, effective 1 July 2002. 2001 N.C. Sess. Laws ch. 2105-06; 2002 N.C. Sess. Laws ch. 503. By the time this Court heard *Tolson* in 2005, the statute directing the expenditures had been repealed, and the money reallocated by the Legislature in its 2002 sessions. The funds for reimbursement of the local government therefore were extinguished by the Governor and the Legislature acting jointly to balance the budget.

Unlike plaintiffs herein, the *Tolson* plaintiffs did not assert or claim to represent citizen interests in the Trust Fund. While the *Tolson* Court addressed the withholding of local government tax reimbursements and tax-sharing funds, plaintiffs herein raise issues with the transfer of Trust Fund monies as directed by section 5. *See Tolson*, 169 N.C. App. 637, 610 S.E.2d 445; Exec. Order 19, secs. 7, 9, 16 N.C. Reg. 1866 (March 1, 2002). Indeed, the *Tolson* Court did not address any of the other sections of Executive Order 19, and none, except Section 5 dealing with the Trust Fund, appear

to divert funds in a manner which excluded participation by the General Assembly.

Tolson holds that the phrase "effect the necessary economies" does allow the Governor to escrow funds appropriated by the Legislature. Stopping spending or escrowing funds has an obvious nexus with the purpose of the power conferred to prevent a deficit by stopping expenditures for which there is no revenue, until such time as the co-equal branch of government can meet and the Governor and Legislature can remedy the deficit by either reducing expenditures or increasing revenue. By escrowing the funds the Governor halts the total expenditures of the government as they relate to total revenue, preventing a deficit.

The *Tolson* plaintiffs, however, did raise the same issue as plaintiffs herein with regard to article V, section 5 of the North Carolina Constitution. Here, *Tolson* is binding. N.C. Const. art. V, § 5 states: "Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose." The plaintiffs in *Tolson* argued that the funds withheld by the Governor were funds that the General Assembly allocated to local governments. *Tolson*, 169 N.C. App. at 639, 610 S.E.2d at 446. By holding those funds in escrow, the plaintiffs claimed the Governor applied those funds to an "object" and "purpose" not specified by the General Assembly. Finding that the Governor's actions did not violate the Constitution, the Court held: "[N]othing about Article V, Section 5 of the Constitution suggests that it is directed at the Governor and his duty to 'effect the necessary economies in State expenditures.' N.C. Const. art. III, § 5(3). Rather, the special objects language is directed at the General Assembly." *Id.* The *Tolson* Court further held that the Governor's withholding of the funds was not a violation of the separation of powers doctrine. *Id.* at 639, 610 S.E.2d at 446. In *Tolson*, the Governor exercised powers that were constitutionally committed to his office without invasion on the legislative branch's power. *Id.*

In *Stone*, 191 N.C. App. 418, 664 S.E.2d 32 (2008), this Court affirmed the trial court's injunction which held that the Governor's powers under article III, section 5(3) to "effect the necessary economies" were limited by article V, section 6(2) of the North Carolina Constitution. The State employee plaintiffs in *Stone* argued that Executive Order No. 3 was unlawful, because it directed the State Controller to receive the employer portions of retirement contributions for all State employees and to place them in a special

escrow fund, pending a "determination that such funds were not necessary to address the deficit." *Stone*, 191 N.C. App. at 404, 664 S.E.2d at 34. This language is identical to that portion of Executive Order No. 19 at issue in *Tolson*. The Court also held that placing the funds in temporary escrow was an impermissible "diversion" in violation of the State Constitution and contractual guarantees to State retirees.

Stone and *Tolson* both involved the escrow of funds. While the *Tolson* Court held that article III, section 5(3) permitted the Governor to transfer the funds in question to a temporary escrow account, thereby withholding them from local governments, the *Stone* Court held that placing the retirement contribution funds in a temporary escrow account was an impermissible "diversion" in violation of the explicit language of article V, section 6(2) and contractual guarantees to State retirees. *Tolson*, 169 N.C. App. at 640, 610 S.E.2d at 446 (determining that Executive Order 19 was a constitutional exercise of the Governor's authority); *Stone*, 191 N.C. App. at ——, 664 S.E.2d at 43-44. *Stone*, while not addressing *Tolson's* holding, is instructive in that it illustrates that the Governor's powers under article III, section 5 are not constitutionally unlimited. *Stone* holds that other sections of the State Constitution, specifically article V, section 6(2), do provide a limitation on the Governor's abilities to "effect the necessary economies." *Stone*, 191 N.C. App. at 418, 664 S.E.2d at 37.

The case *sub judice* is factually distinct from *Tolson* because this case does not just involve escrowing money in a reserve account but also involves transferring funds, which the General Assembly has allocated for highway purposes to the General Fund, in violation of the statute, the "Appropriations Act of 2001." Because the Governor has a duty to "faithfully execute the laws," article V, section 5(4), a limit on the ability to "effect the necessary economies" would be the appropriation statutes enacted as a result of the constitutionally based procedures for expenditures contained in N.C. Const. art. II, §§ 22(6), 23. Likewise, article V, section 7 limits the Governor's abilities to draw public money from the State Treasury, but "in consequence of appropriations made by law." The record is clear from which statutory appropriation the $80,000,000 was transferred, but it is unclear to which statutory appropriation these funds went. Since the 2001-2002 appropriation act was never amended to authorize or ratify the transfer, the original appropriations act was the only constitutional enactment upon which the expenditure of these funds could have been drawn. It is obvious that the appropriation statute was not followed in the transferring of the $80,000,000. We hold that

while the Governor may "escrow" the Highway Trust Fund monies to prevent a deficit, he or she may not transfer appropriated Highway Trust Fund monies without awaiting appropriate legislative authority from the General Assembly.

What further distinguishes this case from *Tolson* is that the action of the Governor in transferring $80,000,000 of Trust Fund monies directly into the General Fund without awaiting legislative action is that the transfer does not effect an economy, to wit: it does not reduce spending or diminish the deficit. Section 5 of Executive Order 19 reads as follows: "[The Office of State Budget and Management] may transfer, as necessary, funds from the Highway Trust Fund Account for support of General Fund appropriation expenditures." Exec. Order No. 19, 16 N.C. Reg. 1866 (Mar 1, 2002). This Order and the action of Secretary Tolson in transferring $80,000,000 fails to effect any economy. In fact, this action was the very antithesis of effecting an economy as it was explicitly intended to support General Fund appropriation expenditures. Ratification for the transfer was not subsequently adopted by the General Assembly. The appropriation statute effecting the spending of Trust Fund monies was not amended for the year 2001-2002.

As previously discussed, all other provisions of Executive Order 19 stop spending temporarily awaiting some unnamed power to make budgetary adjustments. Because we presume the Executive Order would follow a constitutional procedure, we read the Executive Order to refer to the General Assembly and the Governor in these proclamations as the appropriate bodies to make these adjustments. This action would be consistent with the text of the Constitution with regard to the manner in which public money is spent; the enacted appropriation statute; the historical practice which led up to the adoption of article III, section 5; the history of legislative action in both *Tolson* and *Stone*; and legislative history of the $125,000,000 involved in this appeal.

IV.

We therefore reverse in part the trial court's order denying plaintiffs' Motion for Summary Judgment and granting defendants' Motion for Summary Judgment. We hold that the Constitution of North Carolina article III, section 5 is a grant of authority to the Governor, which is limited to escrowing or reducing budgeted expenditures and does not create a power to transfer and spend funds appropriated for one purpose to another purpose without statutory authority. We further declare the transfer of $80,000,000 from the Highway Trust Fund

to the General Fund in fiscal year 2001-2002 by the Governor exceeded his constitutional authority under N.C. Const. art. III, § 5. We affirm the decision of the trial court with regard to the $125,000,000 statutory transfer for reasons expressed above. Except as reversed herein, the trial court's order is otherwise affirmed.

Reversed in part; affirmed in part.

Judge JACKSON concurs.

Judge McGEE concurring in the result in part and dissenting in part with separate opinion.

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

I.

I respectfully dissent from Section IV of the majority opinion. I believe the Governor acted within the Governor's constitutional authority in allocating monies from the Trust Fund to be used for General Fund expenditures in order to avoid a budget deficit. I concur in the result for the remainder of the majority opinion. I would fully affirm the ruling of the trial court.

> Questions of constitutional construction are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments, and "the fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it[.]" The heart of the law is the intention of the lawmaking body. And in arriving at the intent, we are not required to accord the language used an unnecessarily literal meaning. Greater regard is to be given to the dominant purpose than to the use of any particular words, for "the letter of the law is its body; the spirit, its soul; and the construction of the former should never be so rigid and technical as to destroy the latter." "The letter killeth, but the spirit giveth life."

Perry v. Stancil, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953) (internal citations omitted). The intent of the General Assembly, when drafting a constitutional amendment, unlike drafting a statute, is but a part of the intent analysis. We must also consider the intent of the voters of North Carolina who ratified the amendment. *State ex rel. Martin v.*

Preston, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989); *Stancil*, 237 N.C. at 444, 75 S.E.2d at 514.

> The will of the people as expressed in the Constitution is the supreme law of the land. In searching for this will or intent all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument. The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected.

Preston, 325 N.C. at 449, 385 S.E.2d at 478 (quoting *State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944)). "[R]econciliation is a fundamental goal . . . in constitutional . . . interpretation[.]" *Sessions v. Columbus County*, 214 N.C. 634, 638, 200 S.E. 418, 420 (1939).

The majority contends that " 'effect the necessary economies' is an ambiguous term, requiring judicial construction" and the "dispositive issue . . . is determining the meaning of the phrase 'effect the necessary economies' as contained in N.C. Const. art. III, § 5(3), and how this was accomplished by the transfer of $80,000,000 from the Trust Fund to the General Fund." However, I disagree that when Article III, Section (5)(3) is read as a whole, and *in pari materia* with the other provisions of our Constitution, *Preston*, 325 N.C. at 449, 385 S.E.2d at 478, the meaning of "effect the necessary economies" is ambiguous. Additionally, the ultimate intent and purpose behind the amendment to Article III, Section 5(3) is more important in construing that constitutional provision than interpreting its precise wording. *Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514. Article III, Section 5(3) states in relevant part:

> The total expenditures of the State for the fiscal period covered by the budget shall not exceed the total of receipts during that fiscal period and the surplus remaining in the State Treasury at the beginning of the period. To insure that the State does not incur a deficit for any fiscal period, the Governor shall continually survey the collection of the revenue and shall effect the necessary economies in State expenditures, after first making adequate provision for the prompt payment of the principal of and interest on bonds and notes of the State according to their terms, whenever he determines that receipts during the fiscal period, when added to any surplus remaining in the State Treasury at the beginning of the period, will not be sufficient to meet budgeted expenditures.

N.C. Const. art. III, § 5(3). I would hold that the clear intent of the amendment to Article III, Section 5(3) is to grant the Governor broad discretion and powers to ensure that a budget, as enacted by the General Assembly, will not lead the State into a deficit. Because Article III, Section 5(3) mandates that the Governor has responsibility for: (1) executing the budget, (2) continually monitoring the budget to identify potential budgetary shortfalls, and (3) effecting the necessary economies in order to prevent a deficit, the Governor has the authority and duty to reallocate funds within the current budget, without the consent or approval of the General Assembly, in order to prevent any projected deficit.

The majority argues: "In order for the Governor to exercise his powers to 'effect the necessary economies,' he must survey revenue collections to avoid a deficit in the State Budget[.]" The relevancy of focusing on the definition of "deficit" in the majority opinion is unclear, as there has been no argument made on appeal that the State was not facing a deficit. However, from the language of Article III, Section 5(3), the Governor must, in a practical sense, predict whether the "receipts during the fiscal period, when added to any surplus remaining in the State Treasury at the beginning of the period, will not be sufficient to meet budgetary expenditures." Article III, Section 5(3) vests the power and the duty to make this determination with the Governor. It is the Governor's *determination* that the State is *facing* a potential budget deficit that triggers the Governor's authority to "effect the necessary economies" to avoid the anticipated deficit.

Were the Governor to wait until after the State incurred a deficit, which would be a certain means of identifying an actual budget crisis, the Governor would violate the mandate of Article III, Section 5(3)—the *prevention* of a deficit, not the correction of an existing deficit.[4]

II.

The majority seems to determine that the Governor, by directing the transfer of $80,000,000.00 from the Trust Fund to the General Fund, violated the separation of powers doctrine because the sole power to direct transfer of funds from the Trust Fund to the General Fund lies with the General Assembly. While I agree that the determi-

4. The majority states that the actions of the Governor did "not effect an economy, to wit: [they did] not reduce spending or *diminish the deficit*." (Emphasis added). Again, Article III, Section 5(3) mandates proactive steps from the Governor to prevent a deficit, not reactive steps to diminish an existing deficit. By providing this mandate in broad and general language, Article III, Section 5(3) grants the Governor discretion in the manner in which the Governor acts to prevent a budget deficit.

nation of this issue is inextricably intertwined with the separation of powers doctrine, my review of the case law, legislative history, and constitutional history cited by the majority leads me to reach a different result.

As our Supreme Court stated in *Advisory Opinion In Re Separation of Powers*, 305 N.C. 767, 773, 295 S.E.2d 589, 592 (1982): " '*Separation of Powers*. The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.' " *In Re Separation of Powers*, 305 N.C. at 773, 295 S.E.2d at 592 (citing N.C. Const. art. I, § 6). "[E]ach of our constitutions [has] explicitly embraced the doctrine of separation of powers." *State ex rel. Wallace v. Bone*, 304 N.C. 591, 595, 286 S.E.2d 79, 81 (1982) (footnote omitted).

The majority correctly states that the powers of the Governor in relation to the state budget are " 'preparing and recommending the state budget to the General Assembly and then for administering it after enactment[.]' " (Citation omitted). In relation to the state budget, the constitutional power of the General Assembly is to *enact* the state budget. "[O]ur Constitution vests in the General Assembly the power to *enact* a budget—to appropriate funds—but after that is done, Article III, Section 5(3) explicitly provides that 'the Governor shall administer the budget as enacted by the General Assembly.' " *In re Separation of Powers*, 305 N.C. at 780, 295 S.E.2d at 596. "It is clear that the framers of our Constitution followed the instructions given to them that our government 'shall be divided into three branches distinct from each other, viz:

> The power of making laws
> The power of executing laws and
> The power of Judging.' "

Id. at 774, 295 S.E.2d at 593 (citation omitted). Our Supreme Court quoted a portion of Article III, Section 5(3) to emphasize its point:

> The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. *The budget as enacted by the General Assembly shall be administered by the Governor.*

Id. (emphasis added by our Supreme Court). "Consistent with Section 5(3) of Article III of the Constitution, . . . G.S. 143-2 designates the

Governor as *ex officio* Director of the Budget." *Id.* at 776, 295 S.E.2d at 594.

In re Separation of Powers was an advisory opinion issued by our Supreme Court to determine whether certain statutes enacted by the General Assembly were constitutional. The first issue concerned a statute, N.C. Gen. Stat. § 143-23(b), which attempted to give the "Joint Legislative Commission on Governmental Operations" the power to veto certain transfers or changes "from a program line item" of the then current budget. The Joint Legislative Commission on Governmental Operations was comprised primarily of elected members of the General Assembly. *Id.*

> Obviously, the intended effect of G.S. 143-23(b) . . . is to give to a 13-member commission composed of 12 members of the House and Senate, and the President of the Senate who is usually the Lieutenant Governor, power to control major budget transfers proposed to be made by the Governor in his constitutional role as administrator of the budget.

Id. Our Supreme Court rendered its opinion that

> the power that G.S. 143-23(b) purports to vest in certain members of the legislative branch of our government exceeds that given to the legislative branch by Article II of the Constitution. The statute also constitutes an encroachment upon the duty and responsibility imposed upon the Governor by Article III, Section 5(3), and, thereby violates the principle of separation of governmental powers.

Id. at 776-77, 295 S.E.2d at 594. I do not find support in *In re Separation of Powers* for the majority's holding that the General Assembly must be a partner with the Governor when the Governor is administering the state budget as mandated by Article III, Section 5(3). Instead, *In re Separation of Powers* seems to hold the opposite. *In re separation of Powers* holds that N.C. Gen. Stat. § 143-23(b), which seeks to give "power to control major budget transfers proposed to be made by the Governor in his constitutional role as administrator of the budget" to a commission made up of members of the General Assembly, "constitutes an encroachment upon the duty and responsibility imposed upon the Governor by Article III, Section 5(3), and, thereby violates the principle of separation of governmental powers." *Id.*

III.

The majority further states that Article III, Section 5(3) "equates with article V, section 7 and article III, section 5(4) of this State's Constitution." As stated by the majority: "Article III, section 5(4) requires that the Governor take care that the laws be faithfully executed. The Governor as head of the executive department is charged with the duty of seeing that legislative acts are carried into effect." If we follow the logical implication of the majority in citing Article III, Section 5(4) in support of its holding, we would have to interpret Article III, Section 5(4) to mean that the Governor would have no discretion when it comes to state spending when the General Assembly, by enacting a budget, earmarks certain amounts for certain items. In other words, once the General Assembly has enacted a budget, the Governor would have no power to deviate from the amounts allocated for the items in that budget. This interpretation seriously weakens the mandate of Article III, Section 5(3), the provision immediately preceding, which charges the Governor with "effect[ing] the necessary economies" in order to prevent a deficit. We must, if at all possible, reconcile the different provisions of our Constitution so that all provisions have meaning and effect. *Sessions*, 214 N.C. at 638, 200 S.E. at 420.

If the General Assembly enacts a budget and the Governor determines that the budget, as enacted, will lead to a deficit, but the Governor has no authority to modify the allocation of funds within the budget or even to make budgetary cuts—as that would not be ensuring that the "legislative acts are carried into effect" *exactly* as passed—then the Governor is without power to effect the constitutional duty imposed upon the Governor by Article III, Section 5(3). This interpretation of the powers granted to the Governor pursuant to Article III, Section 5(3) is undercut by *In re Separation of Powers*, *supra*, and this Court's decision in *County of Cabarrus v. Tolson*, 169 N.C. App. 636, 637, 610 S.E.2d 443, 445 (2005); *see also Preston*, 325 N.C. at 449, 385 S.E.2d at 478.

The plaintiffs in *Tolson* specifically "alleged that the Secretary [of Revenue] was required to distribute [funds allocated by statute] to local governments pursuant to chapter 105 of the North Carolina General Statutes." *Id.* at 637, 610 S.E.2d at 445. The *Tolson* Court held that the Governor acted pursuant to his duties under Article III, Section 5(3) in transferring funds allocated by the General Assembly for the purpose of funding local government for use in funding other budgetary items, in order to prevent a deficit. *Id.* at 638-39, 610 S.E.2d

443, 446. This holding contradicts the majority's suggestion that Article III, Section 5(4) mandates that the Governor must always execute the budgetary laws exactly as the General Assembly has enacted them, even when acting pursuant to the powers granted by Article III, Section 5(3).

If, in drafting Article III, Section 5, the General Assembly intended for itself to have the actual power to make budgetary changes to prevent a deficit, then the General Assembly could certainly have done so by enacting new budgetary legislation to remedy the problem, thereby placing the burden of preventing a deficit on the General Assembly. As set out in more detail below, using legislation as the only tool for addressing an impending deficit would be both inefficient and impractical. I believe the intent of the General Assembly in drafting Article III, Section 5(3) was to provide the Governor with the necessary discretion and authority to immediately address a predicted deficit by using appropriate means, including budget cuts or reallocation of funds, so long as the Governor limits these actions to items included within the current budget.

The majority further states: "Article V, section 7 requires that '[n]o money be drawn from the State treasury but in consequence of appropriations made by law[.]' [This] means that there must be legislative authority in order for money to be validly drawn from the treasury." I do not disagree with the majority's interpretation as a general principle. However, there is no evidence in the record, nor argument made on appeal, that any of the $80,000,000.00 withdrawn from the Trust Fund was spent on any item not included in the relevant budget passed by the General Assembly. As the majority states "it is unclear to which statutory appropriation [the $80,000,000.00] went."

If Article V, Section 7 can be construed in any manner to support the majority holding, it would have to be interpreted as giving the General Assembly broad and continuing powers over a budget *after* it has been passed, which would, according to *In re Separation of Powers*, violate the separation of powers doctrine. *In re Separation of Powers*, 305 N.C. at 776-77, 295 S.E.2d at 594. Such an interpretation would serve to exceed the powers granted the General Assembly by Article II, and infringe upon the rights and duties of the Governor as established in Article III, Section 5(3).

IV.

The majority cites two opinions from our Court, *Tolson* and *Stone v. State*, 191 N.C. App. ——, 664 S.E.2d 32 (2008), that it finds relevant

to this case. First, I would distinguish *Stone* as it is not relevant on the facts before us. The majority states: "The [*Stone*] Court . . . held that placing the funds in temporary escrow was an impermissible 'diversion' in violation of the state constitution[.]" The majority further states that the holding in *Stone* "is instructive in that it illustrates that the Governor's powers under article III, section 5 are not constitutionally unlimited." There has been no argument made, and I would reject any such argument, that Article III, Section 5 grants the Governor *unlimited* powers in carrying out his or her constitutional duties pursuant to Article III, Section 5(3).[5] *Stone*, however, is clearly limited in its holding. In *Stone*, the Governor attempted to divert funds from a retirement fund for State employees. Our Court held that the Governor's action was impermissible because "Article V, section 6(2) of the North Carolina Constitution not only precludes retirement system funds from being 'applied,' 'loaned to,' or 'used by' the State, but also precludes those funds from being 'diverted' by the State." *Stone*, 191 N.C. App. at ——, 664 S.E.2d at 37. Article V, Section 6(2) of our Constitution *expressly* prohibits use of State employee retirement funds for any purpose other than funding retirement benefits and necessary expenses for former State employees.

> Neither the General Assembly nor any public officer, employee, or agency shall use or authorize to be used any part of the funds of the Teachers' and State Employees' Retirement System or the Local Governmental Employees' Retirement System for any purpose other than retirement system benefits and purposes, administrative expenses, and refunds[.]

N.C. Const. art. V, § 6. There is no equivalent constitutional provision expressly preventing the use or diversion for other purposes of the funds at issue in this case. *Stone* illuminates no issue in this appeal.

The majority conducts a more extensive analysis of *Tolson*, an opinion construing part of Executive Order 19, the same executive order at issue in this case, in an attempt to distinguish it from the facts of this case. The plaintiffs in *Tolson*, a group of North Carolina counties, cities and towns, argued *inter alia* that Executive Order 19

5. The majority also states "our history and experience with authority cautions us against entrusting unbridled expenditure authority in any one person." Nothing in this dissent suggests the Governor has "unbridled expenditure authority." The Governor's actions in "effecting the necessary economies" are limited by Article III, Section 5(3) to situations where there is a projected deficit. The Governor may only operate within the budget passed by the General Assembly. The Governor may not authorize expenditures for items not included within the current budget.

violated our constitution because it took "funds allocated for local governments and [used] them for other purposes that the General Assembly did not authorize." *Tolson*, 169 N.C. App. at 639, 610 S.E.2d at 446. Our Court is clearly bound by *Tolson*, *In Re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989), and *Tolson* is not distinguishable from the relevant analysis of the appeal before us.

The majority first states "the *Tolson* Court held that article III, section 5(3) permitted the Governor to *transfer* the funds in question to a temporary escrow account[.]" (Emphasis added). The majority further states: "The case *sub judice* is factually distinct from *Tolson* because this case does not just involve escrowing money in a reserve account but *also involves transferring funds*, which the General Assembly has allocated for highway purposes to the General Fund, in violation of statute, the 'Appropriations Act of 2001'." (Emphasis added). The majority then holds that "while the Governor may 'escrow' the Highway Trust Fund monies to prevent a deficit, *he or she may not* transfer *appropriated Highway Trust Fund monies without awaiting appropriate legislative authority from the General Assembly.*" (Emphasis added). The majority's holding appears to contradict its stated understanding of the *Tolson* holding. The majority states that, pursuant to the *Tolson* holding, "article III, section 5(3) [*did permit*] the Governor to *transfer* the funds in question to a temporary escrow account[.]" (Emphasis added). The *Tolson* Court stated that Article III, Section 5(3) "clearly places a duty upon the Governor to balance the budget and prevent a deficit." *Tolson*, 169 N.C. App. at 638, 610 S.E.2d at 445.

> [W]e interpret expenditures to be payments, disbursements, allocations or otherwise, that are budgeted to be paid out of State receipts within a fiscal period. It is these expenditures that the Governor must effect to balance the budget against the expected or anticipated receipts within that same period.
>
> Under the circumstances in this case, the Governor issued Executive Order 19 in order to prevent expenditures from unbalancing the state budget. A failure to exercise his duty under the Constitution via Executive Order 19 would have resulted in a deficit, a state of budgetary crisis that is precisely what Article III, Section 5(3) of the North Carolina Constitution prohibits.
>
> Furthermore, Executive Order 19 did not violate the separation of powers doctrine, as plaintiffs suggest. A violation of the separation of powers doctrine occurs when one branch of state gov-

> ernment exercises powers that are reserved for another branch of state government. *Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 631, 577 S.E.2d 650, 652 (2003). *Implicit in the duty to prevent deficits is the ability of the Governor to affect the budget he must administer. See, e.g., Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 295 S.E.2d 589 (1982) (noting that *the Governor's constitutional duty to balance the budget was* paramount *to the General Assembly's desire to control major budget transfers*). In this case, the Governor exercised powers that were constitutionally committed to his office without invasion on the legislative branch's power.

Id. at 638-39, 610 S.E.2d at 445-46 (emphasis added).

The majority in the case before us next adds:

> What further distinguishes this case from *Tolson* is that the action of the Governor in transferring $80,000,000 of Trust Fund monies directly into the General Fund without awaiting legislative action is that the transfer does not effect an economy, to wit: it does not reduce spending or diminish the deficit.

However, by transferring money from the Trust Account, it is fair, or at a minimum possible, to infer that spending on transportation-related items was diminished (*i.e.*, spending on certain approved projects was reduced or withheld altogether). That this money might have then been spent on different items included in the budget does not mean that the reallocation of the money did not serve to prevent a deficit.

By definition, a projected deficit occurs when revenue is projected to fall short of what was predicted, spending is projected to exceed what was predicted, or a combination thereof is projected. Therefore, it is not always necessary to reduce overall spending to prevent a deficit; it is only necessary to ensure that overall spending does not outpace overall revenue (plus monies already held by the State Treasury) for the relevant fiscal period.

For example, it is possible for the Trust Fund to have a projected surplus, but for the General Fund to have a projected deficit larger than the projected Trust Fund surplus, thereby creating an overall projected deficit. The Governor must then determine how to allocate funds to prevent the projected deficit. The Governor might cut funding for multiple items paid out of the General Fund, but make a determination that further cuts were not possible because all that re-

mained were items vital to the continued functioning of State government. The Governor could then cut spending of Trust Fund monies, and potentially reduce spending in this way to a point where projected spending did not outpace projected revenue. However, vital government agencies and programs would still be underfunded, resulting in the inability of our government to function effectively, or respond to crises. As an alternative, by reallocating monies from the Trust Fund rather than simply cutting spending within the Trust Fund, the Governor would be able to fund those items vital to the effective functioning of State government, *and* also prevent a deficit, meeting the intent of Article III, Section 5(3).

This scenario and the facts of the case before us are indistinguishable in any meaningful manner from those in *Tolson*. In *Tolson*, Executive Order 19 required certain funds slated for payment to local governments to be suspended, and those monies held for reallocation to help prevent a projected deficit. Restated, in order to prevent a projected deficit, that portion of Executive Order 19 transferred monies that were budgeted for one purpose—funding local governments—from one fund to another. It reallocated the monies to purposes for which they were not originally budgeted by the General Assembly. In this case, the only difference is that the monies were transferred from a different source—monies budgeted for transportation-related projects instead of monies budgeted for local governments. As the majority affirms,

> the General Assembly has determined that one of the 'objects' of the Trust Fund is to supplement the General Fund. Use of the Trust Fund monies for [supplementing the General Fund] thus cannot be viewed as a 'raid' of the Trust Fund for purposes not previously sanctioned by the General Assembly.

Additionally, the holding of the majority appears internally inconsistent with its analysis. The ultimate effect of the majority opinion is a requirement that the General Assembly pass legislation for any expenditure changes in a current budget. The majority attempts to make a distinction between "escrowing" and "reducing," and "transferring" and "spending." If the General Assembly has passed a budget stating that a certain amount of funds shall be expended for a certain item, pursuant to the reasoning of the majority, the Governor would be violating the separation of powers if the Governor "reduced" spending on that item just as surely as if the Governor "transferred" funds away from that item to be spent on another item in the current

budget. This is so because the Governor, in refusing to fund an item in the amount stated in the current budget, would be acting without legislative authority in a budgetary action that had not been approved by the General Assembly, and in direct conflict with the provisions of the approved budget.

However, even pursuant to the interpretation of the majority, our Court in *Tolson* has expressly held that transferring funds from one budgetary item to an escrow account set up for the potential funding of another budgetary item is constitutional pursuant to the powers and duties of the Governor under Article III, Section 5(3). I see no way to reconcile the majority holding with our Court's holding in *Tolson*.

The majority also states: "Executive Order 19 states that the [transferred] funds [initially budgeted for local government] would be returned to 'local government reimbursement funds, if possible, after determination that such funds are not necessary to address the deficit.' " The majority then reasons: "Neither the Executive Order nor the *Tolson* Court addressed which branch or branches of government would make the determination as to whether such funds would be necessary to address the budgetary deficit." I believe this issue was not addressed in either Executive Order 19 or the *Tolson* opinion because there *was* no issue or question concerning this matter. Article III, Section 5(3) mandates that the Governor

> shall continually survey the collection of the revenue and shall effect the necessary economies in State expenditures, . . . whenever he determines that receipts during the fiscal period, when added to any surplus remaining in the State Treasury at the beginning of the period, will not be sufficient to meet budgeted expenditures.

N.C. Const. art. III, § 5(3). In *Tolson*, the determination as to whether the funds would be necessary to address the budgetary deficit was, by constitutional mandate, the Governor's determination to make. Any attempt by the General Assembly to exercise the powers and duties mandated in Article III, Section 5(3) would constitute a violation of the separation of powers doctrine.

I do not agree with the majority's argument that the subsequent actions of the General Assembly demonstrate "this determination was made by the Legislative and Executive branches jointly" simply because the General Assembly eventually repealed the statutes establishing local government tax reimbursements. Any argument that

Executive Order 19 and the repeal of these statutes are connected is mere speculation. There is less support for the majority's blanket statement that none of the sections included in Executive Order 19, other than the one dealing with the Trust Fund, "appear to divert funds in a manner which excluded participation by the General Assembly." *Tolson* does not suggest any of the sections of Executive Order 19 required legislative authority for the executive actions proposed. The *Tolson* opinion does not hold, nor, in my opinion, anywhere infer, that the Governor, or other executive officials, could not act upon Executive Order 19 "until such time as the co-equal branch[es] of government [could] meet and the Governor and Legislature [could] remedy the deficit by either reducing expenditures or increasing revenue[,]" as the majority states.

The *Tolson* Court held that "nothing about Article V, Section 5 of the Constitution suggests that it is directed at the Governor and his duty to 'effect the necessary economies in State expenditures.' N.C. Const. art. III, § 5(3). Rather, the special objects language is directed at the General Assembly." *Tolson*, 169 N.C. App. at 639, 610 S.E.2d at 446. Article V, Section 5, which this Court held in *Tolson* only applies to the General Assembly, states: "Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose." N.C. Const. art. V, § 5; *Tolson*, 169 N.C. App. at 639, 610 S.E.2d at 446.

In rejecting the *Tolson* plaintiffs' argument that Article V, Section 5 applied to the Governor and prevented him from using funds for some purpose other than "the special object to which [they were] to be applied," our Court sanctioned the actions of the Governor in doing exactly that—using revenue collected and approved by the General Assembly for a "special object" in the budget for other purposes—pursuant to the authority granted him under Article III, Section 5(3). *Tolson*, 169 N.C. App. at 640, 610 S.E.2d at 446. If the *Tolson* Court's holding intended that the Governor must act together with the General Assembly in carrying out the directives of Executive Order 19, then Article V, Section 5 *would have applied*, as *Tolson* holds that section is *directed to the General Assembly*. By holding that Article V, Section 5 did not apply in *Tolson*, our Court was necessarily holding that the executive branch *alone* was responsible for carrying out the directives of Executive Order 19. *Id.*

Furthermore, even if the Governor requested that the General Assembly repeal the relevant statutes, and the General Assembly then decided it was in the best interest of the State to do so, this kind of

"working together" is consistent with the separation of powers doctrine. What would be inconsistent with the separation of powers doctrine is a *requirement* that the General Assembly approve acts the Governor decides to take in "effecting the necessary economies" to avoid a budget deficit pursuant to Article III, Section 5(3). The acts of the General Assembly cited by the majority do not suggest that the General Assembly was in any manner giving "necessary approval" for the portions of Executive Order 19 addressed in *Tolson*. In fact, there is nothing cited by the majority upon which to base any assumption that these separate executive and legislative actions were in any manner directly related. The *Tolson* Court simply held that the Governor was acting pursuant to the mandate of Article III, Section 5(3) when he issued Executive Order 19. *Tolson*, 169 N.C. App. at 640, 610 S.E.2d at 446 ("we determine that Executive Order 19 was a constitutional exercise of the Governor's authority"). *Tolson* further held that Executive Order 19 did not violate the separation of powers doctrine, stating:

> Implicit in the duty to prevent deficits is the ability of the Governor to affect the budget he must administer. *See, e.g.*, *Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 295 S.E.2d 589 (1982) (noting that *the Governor's constitutional duty to balance the budget was paramount to the General Assembly's desire to control major budget transfers*). In this case, the Governor exercised powers that were constitutionally committed to his office without invasion on the legislative branch's power.

Id. at 639, 610 S.E.2d at 446 (emphasis added). The *Tolson* opinion does not support the majority's determination that the Governor could carry out the directives of Executive Order 19 only if he received approval from the General Assembly, whether in the form of legislation or through some other means. Instead, *Tolson* strongly suggests just the opposite—that both issuing Executive Order 19 and carrying out its provisions were the *sole* province of the executive branch. *Tolson* is in line with prior opinions of our Supreme Court suggesting that to determine otherwise would be to violate the separation of powers doctrine. *See Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 631-32, 577 S.E.2d 650, 652-53 (2003). As noted above, this does not mean the Governor *may* not seek action from the General Assembly, only that the Governor is not *required* to do so. Furthermore, contrary to the majority's inference, this dissent does not "contend that the Governor alone holds the power to amend the budget wholesale in violation of statute." The General Assembly

is always free to exercise its constitutional power to enact legislation, including budgets and budgetary amendments. Constitutionally, what the General Assembly does not do, however, is administer the budget or any amendments thereto.

V.

The majority, in attempting to determine the intent of the General Assembly in order to interpret the meaning of "effecting the necessary economies," states that after the passage of Article III, Section 5(3), and before the passage of the Separation of Powers Act of 1982, "the determinations of budget reductions and transfers between budgets were handled jointly by the Governor and the 'Advisory Budget Commission' ('ABC')." The ABC was made up of both executive and legislative branch employees. As noted in the majority opinion, these joint executive and legislative actions ceased after our Supreme Court issued its opinion in *State ex rel. Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982), following which our General Assembly enacted the Separation of Powers Act of 1982. 1981 N.C. Sess. Laws (Reg. Sess. 1982), Ch. 1191.

Our Supreme Court stated in *Wallace*: "There should be no doubt that the principle of separation of powers is a cornerstone of our state and federal governments." *Wallace*, 304 N.C. at 601, 286 S.E.2d at 84. Relying on this premise, and after analyzing multiple opinions from other states, our Supreme Court held that the separation of powers doctrine was violated by the enactment of N.C. Gen. Stat. § 143B-282 *et seq.*, which provided for an "Environmental Management Commission" (EMC), including members of the General Assembly, to exercise executive functions (for example, "supervision over the maintenance and operation of dams"[6]). *Id.* at 607, 286 S.E.2d at 88. The *Wallace* Court stated:

> It is crystal clear to us that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, *which is to make laws*. . . . [T]he legislature cannot constitutionally create a special instrumentality of government to implement specific legislation *and then retain some control over the process of implementation*[.]

Id. at 608, 286 S.E.2d at 88 (emphasis added). " '*[N]o person shall be capable of acting in the exercise of any more than one of [the three*

6. This power would necessarily include making funding decisions.

branches of government] at the same time lest they should fail of being the proper checks on each other and by their united influence become dangerous[.]' " Id. at 597-98, 286 S.E.2d at 83 (quoting instructions given to the Orange County delegation working on our State's first Constitution, which was adopted 18 December 1776) (emphasis added by the *Wallace* Court).

> [V]iolations [of the separation of powers doctrine] have occurred several times in the history of our state. *See State ex rel. Wallace v. Bone* and *Barkalow v. Harrington*, 304 N.C. 591, 286 S.E.2d 79 (1982) (holding that members of the General Assembly could not concurrently hold membership on the Environmental Management Commission, an executive branch agency, without violating the separate power of executive branch); *State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981) (allowing the General Assembly to make rules of practice and procedure for the state's appellate courts would violate the separation of powers, because those powers were reserved for the Supreme Court by Art.IV, § 13(2) of the Constitution of North Carolina); and *Person v. Watts*, 184 N.C. 499, 115 S.E. 336 (1922) (granting a taxpayer's request that the judiciary force the collection of taxes on stockholder income would violate the legislature's constitutional control over the power of taxation). Each of these cases dealt with the exercise of a power by one branch of government when the power was specifically outlined by the state constitution as belonging to another branch.

Ivarsson, 156 N.C. App. at 631-32, 577 S.E.2d at 652-53. Our Supreme Court decisions leading up to the Separation of Powers Act of 1982 hold that when the General Assembly exercises authority beyond the enactment of laws, and participates in the execution of those laws, it violates constitutional provisions defining and separating the powers of the three branches of government.

The General Assembly passed the Separation of Powers Act of 1982; and in response to the *Wallace* opinion, the General Assembly specifically re-wrote the relevant statute to ensure that members of the General Assembly could not serve on the EMC. 1981 N.C. Sess. Laws (Reg. Sess. 1982), Ch. 1191. §§ 2 and 19. The Separation of Powers Act of 1982 listed 32 specific boards and commissions on which members of the General Assembly could not serve, in recognition of the executive functions of those boards and committees. 1981 N.C. Sess. Laws (Reg. Sess. 1982), Ch. 1191. § 2. In effect, the General Assembly, in enacting the Separation of Powers Act of 1982, codified

the prior separation of powers holdings from our Supreme Court by re-writing multiple statutes in an attempt to ensure members of the General Assembly did not serve on any board or commission it believed acted in an executive or judicial capacity.

The General Assembly further ensured that boards or commissions which included members of the General Assembly were restricted to making recommendations to the executive and judicial branches of government, or advising the General Assembly on potential future legislation. For example, the statute involving the Economic Development Board was "rewritten to read: 'There is created within the Department of Commerce an Economic Development Board. The Board shall *advise* the Secretary of Commerce on: [specified duties, including] . . . the formulation of a budget[.]' " 1981 N.C. Sess. Laws (Reg. Sess. 1982), Ch. 1191. § 18 (emphasis added). The Separation of Powers Act of 1982 was entirely focused on *limiting* powers of the General Assembly in an attempt to avoid violation of the separation of powers doctrine.

The General Assembly subsequently curtailed the limits of its authority even further by enacting the Separation of Powers Act of 1985. 1985 N.C. Sess. Laws, Ch. 122. The Separation of Powers Act of 1985 revised numerous statutes to amend provisions requiring *approval* from the ABC (as noted by the majority, a joint executive-legislative commission) for executive acts, mandating instead that the Governor and certain executive agencies *consult* with the ABC before performing certain acts. 1985 N.C. Sess. Laws, Ch. 122. §§ 1-7 (*e.g.* "Sec. 3. G.S. 143B-426.11(7) is amended by deleting 'the approval of [the ABC]' and substituting 'consultation with [the ABC]' ".).

The following year, the General Assembly enacted "An Act to Further Provide for the Separation of Powers," referred to as the Separation of Powers Act of 1986. 1985 N.C. Sess. Laws (Reg. Sess. 1986), Ch. 955. In this act, the General Assembly removed language from the General Statutes that *required* the Governor or executive agencies to even *consult* with the ABC prior to taking executive action. All of the statutes amended in the Separation of Powers Act of 1985, along with many additional statutes, were further amended to this purpose. For example, N.C. Gen. Stat. § 108A-33(d) was amended "by deleting 'and consultation with the [ABC,]' and adding: 'Prior to taking any action under this subsection, the Director of the Budget [*i.e.* the Governor] *may* consult with the [ABC].' " 1985 N.C. Sess. Laws (Reg. Sess. 1986), Ch. 955. §§ 11-12 (emphasis added). N.C. Gen. Stat. § 143B-426.11(5) was amended

from: "At no time may the total outstanding indebtedness of the Agency, excluding bond indebtedness, exceed five hundred thousand dollars ($500,000) unless the Agency has consulted with the [ABC,]" to: "At no time may the total outstanding indebtedness of the Agency, excluding bond indebtedness, exceed five hundred thousand dollars ($500,000) unless the Agency has consulted with the Director of the Budget."[7] 1985 N.C. Sess. Laws (Reg. Sess. 1986), Ch. 955. § 99. N.C. Gen. Stat. § 143B-426.11(7) was amended from: "Subject to consultation with the [ABC] and under such conditions as the Board may deem appropriate to the accomplishment of the purposes of this Part, [the North Carolina Agency for Public Telecommunications] may distribute in the form of grants, gifts, or loans any of the revenues and earnings received by the Agency from its operations[,]" to: "Under such conditions as the Board may deem appropriate to the accomplishment of the purposes of this Part, [the Agency] may distribute in the form of grants, gifts, or loans any of the revenues and earnings received by the Agency from its operations[.]" 1985 N.C. Sess. Laws (Reg. Sess. 1986), Ch. 955. § 100. N.C. Gen. Stat. § 143B-426.11 was further amended by adding at the end of the statute: "Prior to taking any action under subdivisions (5) or (7) of this section, the Board *may* consult with the [ABC]." 1985 N.C. Sess. Laws (Reg. Sess. 1986), Ch. 955. § 101 (emphasis added). The language stating that the "Board may consult with the ABC" was ultimately deleted from N.C. Gen. Stat. § 143B-426.11 entirely. 2005 N.C. Sess. Laws (Reg. Sess. 2006), Ch. 203. § 107. These examples are but a fraction of the extended and continual revisions by the General Assembly, following opinions of our Supreme Court, codifying limitations of the General Assembly's constitutional powers in relation to the other two branches of state government.

This extensive legislative history concerning the separation of powers doctrine demonstrates increasing attention by the General Assembly to ensure it was not encroaching upon the powers and duties granted to the executive branch by Article III, Section 5(3), nor exceeding the powers granted to it by Article II. The actions of the General Assembly and the opinions of our appellate courts lead to the conclusion that the General Assembly may not interfere with the Governor's constitutional duties pursuant to Article III, Section 5(3) to prevent a deficit by effecting the necessary economies related to a budget the General Assembly has already enacted. Once a budget has been passed, it is solely the duty of the Governor to administer that

7. *I.e.*, the Governor.

budget. The General Assembly's check on the budgetary powers of the Governor may be exercised in the form of new legislation, not in requiring the Governor to obtain approval from the General Assembly for administrative budgetary decisions.

VI.

The majority's suggestion that Executive Order 19 can be construed as constitutional only if it is assumed that none of the funds "escrowed" by the order may be utilized by the Governor in order to prevent a budget deficit without legislative action, is contrary to both the General Assembly's understanding of its role and authority in administering the budget, as evidenced by the Separation of Powers Acts and other legislation, and the decisions of our appellate courts. The General Assembly has recognized that active participation in *administering* the budget exceeds the authority granted it under Article II.

Informatively, the issue of separation of powers was directly addressed in a memorandum dated 20 May 1977 from Joe Ferrell (Ferrell) of the Institute of Government, to Dr. John R. Gamble (Chairman Gamble), then the Chairman of the House of Representatives Committee on Constitutional Amendments (the Committee) and sponsor of the bill to amend Article III, Section 5(3). Ferrell, who was closely involved in drafting the amendment of Article III, Section 5(3), responded to concerns raised by then director of the Institute of Government John Sanders (Sanders) that "the amendment should be neutral on the issue of whether and to what extent the General Assembly may constitutionally direct the manner in which the Governor administers the budget." Ferrell informed Chairman Gamble that he believed Sanders' point was a "good one," and further stated to Chairman Gamble:

> I assume the General Assembly will continue to hold to the position that it had taken since 1925 that it had constitutional power to prescribe the way that the budget will be administered. This has not been challenged for fifty years and is not likely to be challenged soon I would think. I conceded [Sanders'] point by omitting the language "in such manner as the General Assembly may prescribe." I do not believe leaving it out will change the present constitutional situation, and putting it in would add weight to one side of the argument."

Five days later, the Committee substitute for the amendment was adopted, excluding the language "in such manner as the General

Assembly may prescribe." This memorandum serves to refute the majority assertion that "supporting cases" decided prior to the "enactment of present article III, section 5 . . . inform our decision here because they represent *settled law* as to the understanding of the legislative power under this State's Constitution with regard to [the General Assembly's] power to appropriate and the duty of the Governor to execute the laws." (Emphasis added).

The proposed amendment ultimately adopted by the General Assembly and ratified by the voters was purposefully left noncommittal on the question of the General Assembly's authority to participate in the administration of budgets it had enacted. Ferrell's assumption that the issue would remain unchallenged proved to be incorrect, however, as our Supreme Court in *Wallace* and other opinions did address this question shortly after the ratification of the amendment of Article III, Section 5(3), which began both the judicial and legislative process of more clearly defining the role of the General Assembly with respect to powers granted by our Constitution to the executive branch. *See Ivarsson*, 156 N.C. App. at 631-32, 577 S.E.2d at 652-53.

Whatever the intent of the General Assembly in drafting and approving the language to the amendment of Article III, Section 5(3), the General Assembly did continue to directly participate in varying degrees with the administration of the budgets it had enacted, which participation was later deemed *unconstitutional* by our Supreme Court. *Wallace*, 304 N.C. at 608-09, 286 S.E.2d at 89; *In re Separation of Powers*, 305 N.C. at 776-77, 295 S.E.2d at 594; *see also Ivarsson*, 156 N.C. App. at 631-32, 577 S.E.2d at 652-53. Our Court should not conduct an analysis of the General Assembly's intent in drafting the amendment of Article III, Section 5(3) based upon this erroneous understanding of the powers of the legislative branch, and acts by the General Assembly later held to be unconstitutional.

> At the threshold of our consideration of the questions here presented we note the well-recognized rule that where a statute or ordinance is susceptible to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality. *State v. Frinks*, 284 N.C. 472, 201 S.E.2d 858 (1974); *Randleman v. Hinshaw*, 267 N.C. 136, 147 S.E.2d 902 (1966); *Finance Co. v. Leonard*, 263 N.C. 167, 139 S.E.2d 356 (1964).

Smith v. Keator, 285 N.C. 530, 534, 206 S.E.2d 203, 206 (1974).

Even assuming *arguendo* that the intent of the General Assembly and the people of North Carolina in proposing and ratifying the amendment to Article III, Section 5(3) in the manner suggested by the majority could be determined, because I believe the majority's interpretation would lead to an unconstitutional violation of the separation of powers doctrine, we must interpret this amendment in a manner not violative of our Constitution if such an interpretation is possible. *Id.* Such an interpretation is possible and, in fact, more in line with the clear intent behind the amendment when read as a whole, and *in pari materia* with the other provisions of our Constitution. *Preston*, 325 N.C. at 449, 385 S.E.2d at 478.

VII.

It is clear from the plain language of Article III, Section 5(3) that the purpose of the amendment is to grant the Governor the power to administer the budget to prevent a budgetary deficit. Budgetary crises may present themselves in a myriad of forms. If the Governor believes a deficit is pending but is not immediate, the Governor may decide that working with the General Assembly (*i.e.* proposing budgetary legislation for the General Assembly to debate and potentially enact) is the best option. When, however, the Governor anticipates an immediate budget crisis and deficit, the restrictions on executive action as mandated by the majority are inefficient, impractical, and likely to thwart the Governor in the Governor's constitutional duty to prevent a deficit.

Our Supreme Court has held unconstitutional any system where the Governor must obtain the permission of the General Assembly (or members thereof) in carrying out the Governor's executive duties. Therefore, a result of the majority opinion may be to compel the Governor to ask the General Assembly to enact legislation to authorize reallocation of funds within a current budget. The General Assembly may refuse to act, or may disagree with the recommendation of the Governor, and pass legislation in an attempt to prevent a deficit that is wholly unrelated to the Governor's determination of what is the best path to avoid the anticipated deficit. The General Assembly may fully agree with the recommendations of the Governor, but the legislative process may take too long, and the State may incur a deficit despite the best intentions of the Governor and the General Assembly to work together. The Governor would then, even if the Governor had acted with the utmost expediency, good faith and diligence, be in violation of the constitutional mandate of Article

III, Section 5(3)—without power to perform the Governor's constitutional duties in this regard.

Under the majority opinion, the true power to "effect the necessary economies" to prevent a deficit will lie with the General Assembly pursuant to an incorrect interpretation of Article III, Section 5(3). The majority opinion would remove the Governor's ability to act quickly in a crisis to perform the Governor's constitutional duty to "effect the necessary economies" in order to prevent a deficit. It would remove the Governor's ability to make discretionary determinations in a budget crisis and then act upon them. I believe the majority's interpretation of Article III, Section 5(3) runs contrary to the plain language of that amendment, its "dominant purpose" and "spirit" when read *in pari materia* with other relevant constitutional provisions, *Stancil*, 237 N.C. at 444, 75 S.E.2d at 514; *see also Preston*, 325 N.C. at 449, 385 S.E.2d at 478, and will result in severe limitations on the Governor's authority and power to "effect the necessary economies" to fulfil the Governor's constitutional duty to prevent a deficit.

IN THE MATTER OF: S.C.H., MINOR CHILD

No. COA09-363

(Filed 15 September 2009)

1. Termination of Parental Rights— willfully leaving child— parents' cognitive limitations

A termination of parental rights on the grounds of willfully leaving the child in placement outside the home for more than twelve months without reasonable progress was affirmed. Despite respondents' cognitive limitations, there was a sufficient showing of willfulness in their failure to provide personal items, cards or letters, and especially in their cessation of the services required for reunification.

2. Termination of Parental Rights— child's best interest— findings—bond between mother and child

The trial court did not abuse its discretion by finding that a termination of parental rights was in the child's best interest. The trial court considered the factors required by N.C.G.S.

§ 7B-1110(a) even though it did not make a specific finding regarding the bond between the mother and child.

Judge ELMORE dissenting.

Appeal by respondents from orders entered 31 December 2008 by Judge Thomas V. Aldridge, Jr. in Brunswick County District Court. Heard in the Court of Appeals 29 June 2009.

Elva L. Jess for petitioner-appellee Brunswick County Department of Social Services.

Mary McCullers Reece for respondent-appellant mother. Sofie W. Hosford for respondent-appellant father. Pamela Newell Williams for guardian ad litem.

HUNTER, Robert C., Judge.

Respondent-mother and respondent-father appeal the trial court's orders terminating their parental rights with respect to their child, S.C.H. Respondents primarily contend that the trial court erred in determining that grounds for terminating their rights existed. Because, however, the trial court's unchallenged findings of fact support it's conclusion that at least one basis for termination of parental rights exists, we affirm.

Facts

On 11 October 2004, the Brunswick County Department of Social Services ("DSS") filed a petition alleging that S.C.H. was a neglected and dependent juvenile. DSS alleged that it had received a referral stating that S.C.H. had tested positive for cocaine at birth. The petition stated that S.C.H. had been on a heart monitor since birth due to low birth weight and for observation. DSS alleged that both respondents had a long history of unaddressed drug abuse, and that respondent-mother had admitted to using illegal and prescription drugs. Respondents were also living in a home with a known drug user. Respondent-mother stated that she was "unable to care for the child financially," and DSS alleged that it could not assure the child's safety if released into respondents' care. DSS further asserted that there was no alternative child care arrangements available. The trial court granted DSS non-secure custody of S.C.H. On 2 June 2006, S.C.H. was adjudicated neglected by consent order, and custody was continued with DSS. The court ordered respondents to enter into a case plan and to comply with all of its recommendations.

A permanency planning review hearing was held on 20 September 2005. The trial court found that respondents had made "reasonable progress toward eliminating and alleviating many of the conditions that led to the removal of the juvenile from their care." The court continued custody with DSS, but authorized DSS to place the juvenile with respondents in accordance with a visitation schedule.

On 21 March 2006, the trial court held another review hearing. The trial court found: (1) respondent-mother had left S.C.H. in his bedroom, with the door closed, on at least two occasions, even though respondent-mother had been advised against this practice; (2) S.C.H., while in the care of respondent-mother, was found more than once with a wet diaper that was saturated, and it appeared that his diaper had not been changed regularly; (3) S.C.H. was found in his crib with dried vomit on his clothing; (4) despite being advised to not leave S.C.H. alone in his crib with a bottle due to concern of choking, respondent-mother continued this practice; (5) respondents had moved from their home without notifying DSS or the guardian ad litem; and (6) respondents' new residence contained numerous safety issues, which were not addressed until brought to respondents' attention by the guardian ad litem. The trial court determined that respondent-mother's conduct demonstrated that she "did not fully learn from the in-home services that were previously provided and that additional services were necessary in order to safely provide for the child." The trial court continued custody with DSS and ordered that new services be put in place and that a new case plan be developed. The trial court further ordered that once services were in place, DSS was authorized to place S.C.H. with respondents, subject to strict monitoring by DSS and the guardian ad litem.

Subsequently, in a court summary prepared by DSS, it stated that: (1) respondent-mother had violated her probation by not paying her probation fees; (2) respondents had been evicted from their residence and moved out of the county; (3) respondents had tried to take the child out of daycare without permission; (4) respondents had failed to pass a parenting test and did not re-enroll in any parenting program; (5) respondent-father was not employed, and there was no indication he was seeking employment; and (6) respondents were not participating in any reunification services. DSS stated that it had provided services to respondents for twenty-four months and that these services had been "futile." Accordingly, DSS recommended that it be relieved of reunification efforts.

On 18 September 2007, DSS filed a petition to terminate respondents' parental rights. DSS alleged four grounds for termination: (1) S.C.H. was neglected within the definition of N.C. Gen. Stat. § 7B-101(15) (2007); (2) respondents had willfully left S.C.H. in foster care for more than twelve months without showing reasonable progress under the circumstances had been made in correcting those conditions that led to the child's removal; (3) respondents, for a continuous period of six months immediately preceding the filing of the petition, had failed to pay a reasonable portion of the cost of care for S.C.H. although physically and financially able to do so; and (4) respondents willfully abandoned S.C.H. for at least six consecutive months immediately preceding the filing of the petition.

Hearings were held on the petition to terminate respondents' parental rights on 9-10 December 2008 and 16 December 2008. The trial court determined that the first three grounds for terminating respondents' parental rights existed. The court further concluded that it was in S.C.H.'s best interests that respondents' parental rights be terminated. Respondents timely appealed from the orders terminating their parental rights with respect to S.C.H.

Discussion

[1] Respondents first argue that the trial court erred in determining that grounds existed to terminate their parental rights. N.C. Gen. Stat. § 7B-1111 (2007) sets out the grounds for terminating parental rights. A finding of any one of the enumerated grounds is sufficient to support termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D., D.M.D., S.J.D. & J.M.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005).

In this case, the trial court concluded that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), which provides for termination of parental rights where:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. . . .

To find grounds to terminate parental rights under N.C. Gen. Stat. § 7B-1111(a)(2), the trial court must perform a two-part analysis:

> The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

In re O.C. & O.B., 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (internal citations omitted), *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

Here, in support of its conclusion of law that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) to terminate respondents' parental rights, the trial court found as fact:

> 28. Neither [respondent] provided any funds to [DSS] or the foster parents during the 2008 calendar year. The last time they provided any personal items for the child's benefit was in December 2007 when they delivered Christmas presents to him at a visit. They have not provided any cards or letters to him, although they know the address for [DSS].
>
> . . . .
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> 46. The [respondents] were to participate in parenting classes. Both [respondents] attended the parenting sessions, but neither was able to pass the test at the end of the program. The [respondents] were asked to retake the test and the administrator, one Caroline Moore, was contacted by Diana Setaro who asked her to modify the test so that the questions could be asked orally, but neither [respondent] made arrangements to do so. Ms. Setaro advised both [respondents] to make contact with Ms. Moore.
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> . . . .
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> 50. The child was placed in the home for extended periods. On two occasions, after in home therapeutic services were in place, [DSS] had to remove the child from the home for safety concerns. At the time reunification was ceased by the Court, the child was not in the home full time.
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> . . . .

56. [DSS] required the [respondents] to secure random drug screens, which were obtained from the [respondents] periodically. The December 10, 2004 drug screen came back positive for Benzodiazepines. The [respondents] were both being prescribed several medications that cause sedation, namely Percocet, Valium and Xanax.

57. At the Court ordered review held on March 22, 2005, the respondent father had not conformed to the requirements of the case plan regarding random substance abuse testing . . . .

58. . . . The Respondent parents were directed by the Wilmington Treatment Center to drug test on March 4, 2005 and failed to do so. . . .

. . . .

60. At the September 20, 2005 Permanency Planning Review Hearing, the juvenile had been regularly going for day visits. There were safety issues at the residence of the paternal grandmother regarding the location of a b.b. gun within reach of the juvenile. . . . At the time of the review, the parenting classes had neither been started nor completed. The crib which had been provided by an outside agency had been given back and the Respondent mother had also given away baby food.

. . . .

65. The child was removed [from Respondents' care] on February 9, 2006 for the following reasons: The Respondent mother had refused help from Learning Perspectives. The child was left unsupervised in his crib awake with a bottle in a back bedroom with the door shut while the [respondent] mother was asleep. This occurr[ed] two days in a row. The child was in the crib with a dirty soiled diaper[] and had thrown up on himself. The Respondent father had lost another job and had started a new job. The Respondent mother had not seen her tutor since December 2, 2005 and would not allow the tutor to return. [Respondent-father] was not following up with screens at Southeastern Mental Health. . . . The [respondents] tested positive for Valium. The [respondents] moved into a new residence without first having [DSS] approve the residence which had many safety hazards at the time they moved in. The Respondent mother had not maintained contact with Mr. Berthiume who was providing therapy services in home and that she did not advise him of the move. The

[respondents] did not have their own transportation. [Respondent-father] had not actively participated in any in home services that were provided to the family.

66. On March 21, 2006, a review hearing was held. Between January 2006 and this review, the minor child ha[d] been found in the care of [respondent-mother] on more than one occasion with saturated wet diapers which did not appear to be regularly changed. He was found in his crib in his bedroom with vomit on his clothing that had dried and had not been changed. The Respondent mother was continually leaving the child alone in his crib with a bottle even after being advised of the risk of choking. The [respondents] had moved from their residence without notifying [DSS] or the Guardian Ad Litem. As noticed above, once their home was located there were numerous safety issues associated with this residence. . . .

. . . .

68. On February 28, 2006 the Guardian Ad Litem had observed the Respondent mother and the child at [DSS]. The Respondent mother had the juvenile for an unsupervised visit and at the time the Respondent mother and the juvenile were at [DSS] the juvenile's diaper was so full of fluid that it was leaking out on to his clothes.

69. On March 9, 2006 [respondent-mother] was observed at the residence between 10:30 and 11:00 a.m. and it appeared that she had been sleeping. She was very slow to answer the door after several knocks and she appeared to be unsteady on her feet and her speech was not clear. During the visit the juvenile was observed sitting in a crib in a bedroom with the door closed and the blinds drawn. He had a soiled diaper that smelled very strong and a bib that was covered with dried red chunky material. There was a bottle of milk laying in the crib. After several promptings by the Guardian Ad Litem the Respondent mother finally changed the child's diaper and put on clean clothes. As a result of this, the child was removed from the home and returned to foster care.

. . . .

72. In August . . . without notice to [DSS] or other service providers, [respondents] relocated and notified [DSS] [that] following their move that they could not participate in any services, nor was their home suitable for visitation, as it was only temporary.

> In that the Respondent mother has not been involved in treatment since August 30, 2006 and presented many challenges and struggles parenting the juvenile even with support in place.
>
> . . . .
>
> 74. Although [respondents] had taken the parenting class, they did not pass the final test in the parenting class. However, the intensive in home services with regard to parenting skills had been provided by Mr. Berthiume and the [respondents] had either discontinued that service and had not retained any of [the] skills that had been provided during the time that Mr. Berthiume was providing in home services.
>
> 75. The Respondent parents ha[d] moved out of the county without permission to a location not approved by [DSS]. It appeared that [respondent-father] has not secured the mental health evaluation which was required on his case plan. At the review in November 2006, the parents were not participating in any of the services that were to be provided to bring about reunification[.]

In addition to these findings, the trial court found that respondent-father was required to cease using alcohol. The court found, however, that respondent-father "occasionally drinks a cold beer. When he wants one, he'll buy it." Respondents do not challenge these findings, and, therefore, they are binding on appeal. *See In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404-05 (2005) (concluding findings of fact not assigned as error or challenged in appellant's brief deemed binding on appeal); N.C.R. App. P. 28(b)(6).

Respondent-mother contends that the trial court failed to consider respondents' cognitive limitations with respect to its finding of willfulness. *Compare In re Matherly*, 149 N.C. App. 452, 454-55, 562 S.E.2d 15, 17-18 (2002) (holding trial court failed to consider age-related limitations as to willfulness). Despite respondents' cognitive limitations, their failure to provide personal items, cards or letters to the juvenile, and especially their cessation of services required for reunification, were sufficient to show willfulness. *See In re Oghenekevebe*, 123 N.C. App. 434, 440, 473 S.E.2d 393, 398 (1996) (finding respondent willfully left child in foster care where she did not take advantage of DSS assistance with services such as counseling and parenting classes to improve her situation); *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995) (holding parent's refusal to obtain treatment for alcoholism constituted willful failure

to correct conditions that had led to removal of child from home). Accordingly, sufficient grounds existed for termination of respondents' parental rights under N.C. Gen. Stat. § 7B-1111(a)(2). As grounds exist pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) to support the trial court's order, the remaining grounds found by the trial court to support termination need not be reviewed. *Taylor*, 97 N.C. App. at 64, 387 S.E.2d at 233-34.

We additionally note that the dissent maintains that the trial court failed to "address any of the plentiful evidence of [respondents'] cognitive difficulties[,]" suggesting that the trial court should have determined whether they were incapable of providing S.C.H. with necessary care. *See* N.C. Gen. Stat. § 7B-1111(a)(6). However, the petition to terminate respondents' parental rights did not contain any allegations that respondents were incapable of providing proper care and supervision for the juvenile. Thus, it would have been improper for the trial court to terminate respondents' parental rights on this basis. *See In re C.W. & J.W.*, 182 N.C. App. 214, 228-29, 641 S.E.2d 725, 735 (2007) (holding trial court erred by terminating respondent's parental rights based on abandonment, which had not been alleged in petition).

[2] Respondents next contend that the trial court erred in concluding that termination of their parental rights is in S.C.H.'s best interest. On finding the existence of a ground to terminate a parent's rights, a court must then decide whether termination is in the best interest of the child. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). This 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).

The Juvenile Code sets out several factors the trial court must consider in determining whether termination of parental rights is in the best interest of the child:

(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)(1)-(6) (2007). The trial court is directed to take action "which is in the best interests of the juvenile" when "the interests of the juvenile and those of the juvenile's parents or other persons are in conflict." N.C. Gen. Stat. § 7B-1100(3) (2007).

In this case, the trial court's dispositional order indicates that the court considered the factors required by N.C. Gen. Stat. § 7B-1110(a). First, the trial court made a specific finding referencing S.C.H.'s date of birth, and noted that his foster mother had "interacted with [S.C.H.] since his birth." The trial court additionally found:

4. [The foster parents] have two other children in their home, an eighteen year old son, and a three year old daughter, whom they recently adopted. [S.C.H.] has developed a warm, loving relationship with both of these children. When the [foster family] decided to become foster parents, their older son participated in the MAPP classes and has openly accepted the younger children in the home. [S.C.H.] and [the three-year-old daughter] treat each other as normal siblings—they fight together, they color together, they go fishing with their foster father, they use play doh to create things and they ride their bikes.

5. [The foster father] takes the children fishing.

6. When [the foster father] works in the yard, [S.C.H.] will help him.

7. [The foster mother] plays the violin and the children have taken an interest in playing as well. [The foster mother] has purchased violins for [the daughter] and [S.C.H.] for Christmas and paid for lessons for them beginning in January 2009.

8. [S.C.H.] has been observed by the Guardian ad litem on a number of occasions in the [foster family's] household. His interaction with [the daughter] and the foster parents is warm and affectionate.

. . . .

> 11. [S.C.H.] receives occupational therapy and speech therapy. [The foster mother] has worked with the therapist to learn how to assist him in the home to improve his skills and to make modifications to help him. The child is currently in a pre-kindergarten program and is doing well in school.
>
> 12. That the juvenile is doing well in his placement and the environment has been appropriate and nurturing for the child. By all accounts, the child is progressing well in this home, considers the family 'his' family and the other children in the home to be 'his' siblings.
>
> 13. [The foster parents] are committed to the child and desire to adopt him.
>
> 14. That it is in the best interest of the minor child that the parental rights of [respondents] be terminated in order for the permanent plan of adoption to proceed.

Respondent-mother argues that the trial court made no findings as to the bond between herself and S.C.H. The dissent concludes that without a finding on this factor, it cannot be determined whether the court considered that factor as mandated by N.C. Gen. Stat. § 7B-1110(a)(4). The dissent would, therefore, remand the matter for further findings.

Although the trial court may have not made a specific finding addressing N.C. Gen. Stat. § 7B-1110(a)(4), the trial court made multiple findings regarding the other enumerated factors. The trial court made findings as to the bond between S.C.H. and his prospective adoptive parents; the substantial progress made by S.C.H. while in foster care; the foster parents' plan to adopt S.C.H.; and that termination of respondents' parental rights would allow adoption to proceed.

Moreover, in light of the trial court's findings in its adjudication order that respondents last provided gifts to S.C.H. in December 2007; that they have not given any cards or letters to S.C.H.; and that they canceled two of the five visits granted by the trial court in October 2007, it is apparent that the trial court did consider the bond between respondents and S.C.H. We, therefore, conclude that the trial court's findings are not so deficient as to warrant a conclusion that its determination is manifestly unsupported by reason. *See In re R.B.B.*, 187 N.C. App. 639, 648, 654 S.E.2d 514, 521 (2007) (holding trial court did not abuse discretion in terminating parental rights although there was not "[s]pecific[]" finding regarding bond between parent and child),

disc. review denied, 362 N.C. 235, 659 S.E.2d 738 (2008); *In re T.M.*, 182 N.C. App. 566, 577, 643 S.E.2d 471, 478 (2007) (finding no abuse of discretion based primarily on finding relating to likelihood of adoption by foster parents; no indication that trial court considered bond between parent and child), *aff'd per curiam*, 361 N.C. 231, 641 S.E.2d 302 (2007). Consequently, we affirm.

Affirmed.

Chief Judge MARTIN concurs.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

For the reasons stated below, I respectfully dissent from the majority's opinion and would, instead, reverse the trial court's order terminating respondents' parental rights and remand for further proceedings.

Background

The record paints a portrait of a couple who, despite considerable effort, cannot seem to pull things together enough to properly tend to their child. Both parents have histories of drug abuse and DSS initially removed S.C.H. because he tested positive for cocaine at birth. Afterwards, both parents made reasonable progress towards accomplishing the goals set out in their first family services agreement. Respondent mother, in particular, formed a close bond with S.C.H. and tried very hard to comply with her case plan and master the skills necessary to care for the infant. She attended and completed the required drug treatment program, completed her mental health assessment, kept a clean home stocked with items appropriate for S.C.H.'s extended home visits, worked with a literacy tutor, voluntarily subjected herself to unannounced visits by her parenting skills instructors, attended all visitations except when she could not obtain transportation, and attended all court hearings. She appeared to be the primary caregiver and was observed to be very engaged in the parenting process.

Respondent parents' principal problems, from the perspective of social workers and the guardian *ad litem* (GAL), were their cognitive impairments, their inability to obtain and maintain a single residence, their inability to obtain reliable transportation, and respond-

ent father's inability to obtain permanent employment. Respondent mother has been on disability social security income since she was sixteen years old and receives a monthly payment of $637.00. She does some seasonal work cleaning houses during the summer and earned approximately $350.00 per month during June, July, and August of 2008. Respondent father earns an average monthly income of $302.00. Not surprisingly, they have had difficulty maintaining independent housing on this budget, although, as of the date of the termination order, they were current on all of their obligations except respondent father's probation fees, which totaled $630.00.[1]

Respondent mother has consistently tested in the mild mental retardation range, and various case workers have speculated that respondent father is similarly impaired, although he has not submitted to testing. Respondent father has a battery of health conditions, including diabetes, which he has treated on an emergency—rather than ongoing—basis, apparently because he cannot afford regular preventive care. Both parents suffer from a "nerve disorder" or "anxiety," although there are no medical records in the record on appeal; both are prescribed Valium to treat the condition. These mental and physical limitations are likely contributing to the couple's low income, which, in turn, is responsible for their inconsistent housing and transportation.

Facts and Procedural History

The following facts are undisputed: S.C.H. was adjudicated a neglected juvenile on 1 November 2004 when the parents "acknowledged and admitted that [he] was in substantial risk of serious injury by other than accidental means as he tested positive for cocaine at birth." Respondent parents participated in review hearings, permanency planning hearings, and permanency planning review hearings while S.C.H. was in the custody of the Brunswick County Department of Social Services (DSS). They signed an Out of Home Family Services Agreement on 5 November 2004, with a goal of reunification. The 2004 agreement required respondent parents to secure substance abuse assessments, participate in random drug tests, participate in AA and NA meetings, and complete a Home Again Services program. The district court found as fact that respondent parents secured substance abuse assessments and completed the Home Again Services program. A 10 December 2004 drug screen came back positive for benzodiazepines, although both parents had valid prescriptions for

1. Respondent father received probation for driving with a revoked license.

Percocet, Valium, and Xanax. Respondent parents failed to appear for a drug test on 4 March 2005. At this point, respondent mother "had completed most of what had been required in her case plan" and S.C.H. was having overnight visits in respondent parents' home on a regular basis. Following a 22 March 2005 review, the district court found that respondent father had not complied with the required random substance abuse testing, but that respondent mother was attending substance abuse meetings.

By the 28 June 2005 review, respondent parents had been evicted once and moved twice, but had resumed extended visits with S.C.H. Respondent father had begun drug treatment and respondent mother had completed her drug treatment and was cooperating with in-home services. The district court authorized DSS to place S.C.H. in respondent parents' home "so long as they continued to comply with the family services case plan, although legal and physical custody was to remain with" DSS. When the district court reviewed the permanency plan in September 2005, respondent parents were living with respondent father's mother and using her car for transportation. S.C.H. had been regularly visiting respondent parents and respondent father was continuing his drug treatment. However, he missed five or six appointments because of complications from his untreated diabetes. Both parents followed all of the recommendations of the substance abuse assessment except stopping their use of prescribed Valium.

At the 31 October 2005 review hearing, the trial court authorized DSS to place S.C.H. back in respondent parents' home so long as they continued to comply with the terms and conditions of their family services case plan because they "had made reasonable progress towards eliminating or alleviating conditions which had led to" S.C.H.'s removal from the home. S.C.H. "appeared to be safe and well cared for" and respondent mother was appropriate with him during the weekly in-home services provided by Jeff Berthiume. Respondents were being tutored by the literacy council and respondent father was working "off and on" for Lee Steel. However, respondents' transportation, lack of permanent residence, and lack of full-time permanent employment continued to be at issue.

In January 2006, respondents moved to a new rented trailer without first receiving permission from DSS. Social worker Setaro visited the home on 1 February 2006 and filled out a checklist of safety conditions to be corrected. Ms. Setaro determined that respondent mother had dismissed the literacy tutor in December 2005. Several

weeks later, DSS noted that respondents had addressed all of the safety conditions.

On 9 February 2006, DSS removed S.C.H. from respondent parents' home for the following reasons, as summarized by the trial court:

> The Respondent mother had refused help from Learning Perspectives. The child was left unsupervised in his crib awake with a bottle in a back bedroom with the door shut while the mother was asleep. This occurring two days in a row. The child was in the crib with a dirty soiled diapers [*sic*] and had thrown up on himself. The Respondent father had lost another job and had started a new job. The Respondent mother had not seen her tutor since December 2, 2005 and would not allow the tutor to return. [Respondent father] was not following up with screens at Southeastern Mental health. There was sufficient income at that time from the Respondent mothers [*sic*] S.S.I. check to cover expenses. The parents tested positive for Valium. The parents moved into a new residence without first having [DSS] approve the residence which had many safety hazards at the time they moved in. The Respondent mother had not maintained contact with Mr. Berthiume who was providing therapy services in home and that she did not advise him of the move. The parents did not have their own transportation. [Respondent father] had not actively participated in any in home services that were provided to the family.

Between S.C.H.'s removal and the 21 March 2006 review hearing, respondent mother visited S.C.H. at DSS and allowed his diaper to become so full of fluid that it leaked onto his clothes. The GAL visited respondent mother at home while S.C.H. was there and appeared to have been sleeping when the GAL arrived between 10:30 and 11:00 a.m. The district court further summarized,

> She was very slow to answer the door after several knocks and she appeared to be unsteady on her feet and her speech was not clear. During the visit the juvenile was observed sitting in a crib in a bedroom with the door closed and the blinds drawn. He had a soiled diaper that smelled very strong and a bib that was covered with dried red chunky material. There was a bottle of milk laying in the crib. After several promptings by the Guardian Ad Litem the Respondent mother finally changed the child's diaper and put on clean clothes.

As a result, DSS removed S.C.H. and returned him to foster care.

Respondent parents entered into a new Out of Home Family Services Agreement on 3 April 2006. The 2006 agreement required that respondent father complete a mental health screening, and that both parents attend NA and AA meetings, secure mental health evaluations, attend parenting classes, work with Jeff Berthiume—a provider of in-home services—and participate with Learning Perspectives, an in-home services program. Both parents completed the parenting classes, but neither was able to pass the test at the end of the course. They were asked to retake the test and their social worker, Diana Setaro, asked the administrator to modify the test so that the questions could be asked orally. Neither parent contacted the administrator to retake the test.

Following a May 2006 review, S.C.H. was placed in the home three days per week. During each of those three days, a Learning Perspectives employee was present in the home for five hours to provide assistance and guidance. As of the July 2006 hearing, respondent mother was cooperating with Mr. Berthiume's in-home services, but respondent father was not. Until 30 August 2006, respondent mother "was making some progress with the parenting skills being provided by Mr. Berthiume. She was exhibiting motivation to learn and retain parenting skills as well as being mindful of safety and nutritional issues for the juvenile."

However, after 30 August 2006, respondent parents moved to a new home without first notifying DSS. They had previously been living with respondent father's mother, but she passed away and ownership of her house vested in a bank. Respondents and DSS had previously discussed their eventual eviction after the grandmother became ill and DSS knew that respondents would have to leave the house immediately following the grandmother's death. Respondents informed DSS that their new home was temporary and not suitable for visitation, and that they could not participate in any services. By the 6 November 2006 hearing, neither respondent was participating in any of the services required for reunification with S.C.H. The trial court relieved DSS of any further reunification efforts. S.C.H. has been in foster care since then.

On 31 December 2008, in its adjudication order, the district court found that grounds existed for the termination of both respondents' parental rights pursuant to N.C. Gen. Stat. §7B-1111(a)(1), (a)(2), and (a)(3). In its disposition order, the district court concluded that it was in the best interest of the child to terminate respondent parents' parental rights. I address each respondent's appeal separately.

Respondent Mother's Appeal

A. N.C. Gen. Stat. § 7B-1111(a)(2).

As the majority notes, respondent mother first argues that the trial court erred by concluding as a matter of law that she willfully left her son in foster care for more than twelve months without making reasonable progress under the circumstances to alleviate the conditions which led to the child's removal. I would agree with respondent mother and hold that the trial court's conclusion was not adequately supported. To make a finding pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), the trial court must engage in a two-part analysis. First, it "must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months[.]" *In re O.C. & O.B.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (2005). Second, the court must determine whether, "as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child." *Id.* at 465, 615 S.E.2d at 396.

> A finding of willfulness does not require a showing of fault by the parent. Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort. A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children.

Id. (quotations and citations omitted). "The standard for appellate review of the trial court's conclusion that grounds exist for termination of parental rights is whether the trial judge's findings of fact are supported by clear, cogent, and convincing evidence, and whether these findings support its conclusions of law." *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 174 (2001).

Respondent mother does not dispute that S.C.H. was in foster care for more than twelve months; she disputes that she left him in foster care *willfully*. She argues that she failed to pass the parenting class test because of her cognitive impairment, as indicated by her low IQ score. As part of her determination of disability, the Department of Health and Human Services conducted a psychological evaluation of respondent mother in 2001. The evaluation concluded that respondent mother's general level of intelligence appeared to fall in the Mild Mental Retardation range. She was "func-

tioning overall in the Extremely Low Range of Intelligence with a Full Scale IQ of 65. Verbal IQ is 68, Performance IQ is 67, Verbal Comprehension Index is 72 and Perceptual Organization Index is 65." Her "grade equivalents were equal to the second grade." The evaluation included the following summary of the test results:

> The claimant's ability to understand and respond to directions falls in the Mild Mental Retardation range of ability. Memory, sustain [*sic*] concentration and persistence are impaired due to her cognitive deficits. She is able to perform routine, repetitive tasks such as those required and [*sic*] taking care of her personal hygiene and her infant. The test results indicate the claimant would not be able to manage her own benefits in her best interest due to her cognitive deficits. Current IQ scores are felt to be valid and should remain consistent without further development of psychological, emotional or medical problems. No premorbid level is felt to have existed. Test results are felt to be consistent with the claimant's education, vocational background and social adjustment.

A 21 February 2006 guardian *ad litem* report included the following two concerns for the court:

- I have spent much time with [respondent mother] and [father] and feel they both have tried to the best of their ability to care for [S.C.H.] They love the child and have done most of the things requested of them in order to keep the child with them.

- The Guardian's concern is that they do not have the mental ability to care for this child on their own. Therefore I can not recommend he be returned to their care.

Respondent mother underwent a mental evaluation on 12 October 2006 as part of her reunification plan. The evaluator noted that respondent mother's general knowledge was poor and that her "[c]ognitive abilities appear[ed] consistent with prior estimates of functioning in a range consistent with mental retardation." However, respondent mother "reported high motivation to perform well due to the circumstances of the testing. She exerted considerable effort." The evaluator believed that the results accurately reflected respondent mother's abilities. Respondent mother scored slightly higher on the 2006 IQ test than she did on the 2001 test, which the evaluator noted was "unusual." Her overall IQ of 74 placed her in the borderline mentally retarded range, and she received scores of 77 for verbal rea-

soning abilities, 80 for verbal comprehension, 75 for performance IQ, and 78 for perceptual organization index. The evaluator noted that respondent mother's adaptive functioning scores were also in the extremely low to borderline range.

The evaluator related the following impression of respondent mother, following the testing:

> [Respondent mother] expresses a significant desire to have her child returned to her custody. She states that she has been complying with the court and Social Services. She reports a willingness to continue to do so. Highly motivated individuals with cognitive and adaptive skills in the range in which [she] scored may parent children successfully with sufficient family or natural supports. [She] also has the additional challenge of coping with substance abuse and mental illness. Evenso [*sic*], highly motivated individuals with such challenges may parent children successfully with significant support. Given the multiple challenges [she] faces it is unclear how she will be able to safely and successfully parent a child independently.

Respondent mother specifically disagrees with the following two findings of fact from the disposition order, arguing that they are not supported by clear, cogent, and convincing evidence:

> 36. *There was no reason that the parents could not complete their parenting course and secure a passing test*. When requested to participate in a modified, oral test, they made no arrangements to do so.
>
> 73. . . . At the time of this hearing, the juvenile had been in foster care for two years and the parents continue to have struggles with concerns about learning effective communication skills, parenting, conflict resolution, applying behavior plans, making positive changes, learning proper nutrition and working with community support specialists. *The parents had exhibited no motivation to continue with any treatment or to provide a safe and stable home environment for the juvenile.*

(Emphases added.)

As respondent mother correctly points out, the trial court's order did not address any of the plentiful evidence of her cognitive difficulties. I agree with respondent mother that clear, cogent, and convincing evidence does not support the findings that there was no reason

that she could not pass the parenting test or that she had exhibited no motivation to continue with treatment or to provide a safe and stable home environment. This Court has previously explained that "one does not willfully fail to do something which it is not in his power to do. Evidence showing a parents' [*sic*] ability, or capacity to acquire the ability, to overcome factors which resulted in their children being placed in foster care must be apparent for willfulness to attach." *In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002) (quotations and citations omitted). Here, the evidence strongly suggests that respondent mother did not have the capacity to pass the parenting test or to fully comprehend and employ the parenting skills taught to her. The evidence shows that the guardian *ad litem*, social workers, and mental health professionals shared this concern. In addition, the evidence shows that respondent mother was highly motivated to become a good parent, but seemed to lack the practical skills and cognitive abilities to make good parenting decisions.

The majority leans on *In re Oghenekevebe* and *In re Nolen* to demonstrate that respondent mother's willfulness was established by her failure to send personal items to S.C.H. and her cessation of services required for unification. However, I do not find them persuasive. I do not agree with the majority's characterization of *Oghenekevebe* as "finding respondent willfully left child in foster care where she did not take advantage of DSS assistance with services such as counseling and parenting classes to improve her situation." It is clear from the opinion in *Oghenekevebe* that the respondent attended both parenting classes and therapy, but that her demonstration of parenting skills in the classroom was "inadequate" and that she did not "show any progress in her therapy until her parental rights were in jeopardy." *In re Oghenekevebe*, 123 N.C. App. 434, 437, 440, 473 S.E.2d 393, 397, 398 (1996). More importantly, the court in *Oghenekevebe* did not find that the respondent did not take advantage of DSS assistance, only that she "failed to positively respond to the diligent efforts of DSS to encourage the strengthening of her parental relationship with the child or to engage in constructive planning for the child" and failed to "show[] reasonable progress or a positive response toward the diligent efforts of DSS" *Id.* at 435, 440, 473 S.E.2d at 395, 398. The opinion does not specify whether those "efforts" included counseling or parental classes.

In *Nolen*, on the other hand, is very specific about the respondent's actions with respect to her case plan and her children. The respondent in *Nolen* had a drinking problem and DSS ordered her to

"enroll in and complete the STEP ONE program, to attend substance abuse counselling [*sic*], to attend AA meetings regularly and provide verification of her attendance, to attend parenting classes, and to abstain from the use of alcohol." *In re Nolen*, 117 N.C. App. 693, 698, 453 S.E.2d 220, 224 (1995). Over a three-and-a-half-year period, the respondent did not enroll in STEP ONE, attended counseling sporadically, did not regularly attend AA meetings, did not provide verification of her attendance at AA meetings, did not complete parenting classes, and did not abstain from using alcohol. *Id.* In fact, the respondent appeared at visitations with her children appearing intoxicated and smelling of alcohol. *Id.* One police officer testified that, during a two-year period, she had answered thirty to thirty-five disturbance calls at the respondent's residence and that, during each of those visits, the respondent appeared to be intoxicated. *Id.* The respondent countered that she had attended "several" AA meetings, had kept "irregular" contact with DSS, and had attended parenting classes and substance abuse treatment. *Id.* at 699, 453 S.E.2d at 224. The opinion does not elucidate whether the record supported these claims or if they were simply made in the brief. Regardless, respondent mother's situation is easily distinguished from that of the respondent in *Nolen*. Respondent mother here had participated in DSS services for years and had completed almost everything that was asked of her. At the time of the termination, respondent mother was supposed to be working with Mr. Berthiume and Learning Services, but had otherwise cooperated with the family services plan. Her failure to continue with Mr. Berthiume and Learning Services and her failure, as a semi-literate adult, to send cards to her child do not approach the massive failures exhibited by the respondent in *Nolen*. Although *Nolen* does stand for the proposition that "[a] finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children," *id.* (citation omitted), I do not believe that the rule should be extended to allow a finding of willfulness if a respondent does not make every effort to regain custody.

Accordingly, I would hold that the challenged findings of fact are not supported by clear, cogent, and convincing evidence and that the trial court erred by finding that respondent mother had willfully left S.C.H. in foster care for more than twelve months because the evidence does not support a finding of willfulness.

However, a trial court needs only one ground upon which to terminate parental rights. Here, the trial court found three; subsections 7B-1111(a)(1) and (a)(3) are still in play. I address each in turn.

B. N.C. Gen. Stat. § 7B-1111(a)(3).

Section 7B-1111(a)(3) provides a ground for termination of parental rights if the trial court finds:

> The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3) (2007). The trial court's finding of fact 82 states that "the juvenile has been in the custody of the Department of Social Services for a continuous period of six (6) months and the parents have willfully failed to pay a reasonable portion of the cost of care for the child although physically and financially able to do so." This finding of fact is more properly categorized as a conclusion of law, and must therefore be supported by the order's findings of fact. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (explaining that "[a]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law") (citations omitted). A finding of fact that is essentially a conclusion of law will be treated as a fully reviewable conclusion of law on appeal. *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004). Mislabeling of a finding of fact as a conclusion of law is inconsequential if the remaining findings of fact support the conclusion of law. *In re R.A.H.*, 182 N.C. App. 52, 60, 641 S.E.2d 404, 409 (2007).

Finding of fact 32, which both respondents challenge, states:

> The income of the parties and their expenses set froth [*sic*] through their testimony confirm their ability to pay funds for the support of the minora [*sic*] child in an amount in excess of zero. [Respondent father] pays for cigarettes and beer and these monies ($120.00 per month) could be provided for the monthly needs of the child. The monthly obligations of the parties total $600.00, leaving $37.00 from [respondent mother's] check that could be provided for the monthly needs of the child.

The court summarized respondents' monthly budget in finding of fact 21, which neither respondent challenged:

> [Respondent parents] have the following monthly bills: $58.00 rent; $17.00 cable; $50.00 car insurance; $80-100 electricity; $20-30 gasoline; $70-80 phone bill; $80.00 food (supplemented by $168.00 in food stamps); $25.00 clothing; $30-40 hygiene; $120.00 for cigarettes. That these expenses total $600.00 per month.

Because finding of fact 21 was not challenged, it is binding on appeal, despite the questionable amounts listed for rent and gasoline. *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003).

"A finding that a parent has ability to pay support is essential to termination for nonsupport" pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). *In re Ballard*, 311 N.C. 708, 716-17, 319 S.E.2d 227, 233 (1984).

> In determining what constitutes a "reasonable portion" of the cost of care for a child, the parent's ability to pay is the controlling characteristic.
>
> A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay. What is within a parent's "ability" to pay or what is within the "means" of a parent to pay is a difficult standard which requires great flexibility in its application.
>
> * * *
>
> Nevertheless, nonpayment constitutes a failure to pay a reasonable portion if and only if respondent [is] able to pay some amount greater than zero.

In re Clark, 151 N.C. App. 286, 288-89, 565 S.E.2d 245, 247 (2002) (citations omitted). Our Supreme Court has held that a father had failed to pay a reasonable portion of his four children's cost of care when he paid a total of $90.00 for a forty-five week period, during which he earned approximately $5,625.00 and invested $60.00 per week into a hog operation despite a $30.00 court-ordered weekly child support obligation. *In re Montgomery*, 311 N.C. 101, 114, 316 S.E.2d 246, 254 (1984). However, in *Montgomery*, the trial court had ordered a weekly child support obligation, whereas in the present case, neither the trial court nor DSS ordered either respondent to pay child support. Nevertheless, "[t]he absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs." *See In re T.D.P.*, 164 N.C. App. 287, 289, 595 S.E.2d 735, 737 (2004). Still, the calculation of what

constitutes reasonable costs remains. This Court does not typically make such calculations; instead we limit ourselves to approval or disapproval of the calculations made by lower courts. I find that the absence of the calculation in this case is, therefore, difficult from a procedural perspective.

The trial court found $37.00 that respondent mother could have sent to DSS, but I am troubled by the tight precision of the trial court's proposed budget. This appears to be a close case, and, given the seriousness of the consequences, I would err on the side of caution and hold that the evidence of respondents' income and expenses does not "confirm their ability to pay funds" in support of S.C.H. as found by the trial court in finding of fact 32. In support of this conclusion, one could look to our state's child support guidelines, which "include a self-support reserve that ensures that obligors have sufficient income to maintain a minimum standard of living based on the 2006 federal poverty level for one person ($816.00 per month)." Respondent mother's income falls well below the limit of that self-support reserve.

C. N.C. Gen. Stat. § 7B-1111(a)(1).

N.C. Gen. Stat. § 7B-1111(a)(1) provides a ground for terminating parental rights if the parent has abused or neglected the juvenile within the meaning of N.C. Gen. Stat. § 7B-101. Section 7B-101(15), in relevant part, defines a "neglected juvenile" as

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2007).

The trial court found the following findings of fact, which support a conclusion that S.C.H. was a neglected juvenile as defined in § 7B-101(15): Respondent mother refused to continue working with her literacy council tutor at the end of 2005, S.C.H. was twice left unsupervised in his crib with a bottle in a back bedroom with the door shut while respondent mother was sleeping, S.C.H. was found in his crib with dirty diapers and vomit on his person, S.C.H. was observed to have a diaper that was so full of fluid that it was leaking,

respondent mother appeared to have been sleeping between 10:30 and 11:00 a.m., respondent mother answered the door slowly and with unclear speech, respondent mother tested positive for prescribed Valium, alcohol was found in respondent mother's residence that belonged to a roommate, respondent mother did not advise DSS or Mr. Berthiume before moving residences, and respondent mother did not obtain DSS's approval before moving residences.

Although these findings are not positive marks upon respondent mother's parenting record and certainly reflect irresponsibility, they are also not typical of the types of findings that result in an adjudication of neglect. *See, e.g.*, *In re J.A.P.*, 189 N.C. App. 683, 691, 659 S.E.2d 14, 19-20 (2008) (finding that the children were "very dirty," but also that "the mother required the children to eat roach-infested food and sleep in roach-infested beds" and "[g]oats were found to be living inside the home and a dead and decaying chicken was observed in the bathroom."); *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 69, 623 S.E.2d 45, 47 (2005) (finding that the "children were dirty and unkempt and had not bathed recently," but also that the mother, rather than complying with any part of her court-ordered plan, "engaged in prostitution, drug use, and at one time, was admitted to Broughton Hospital for treatment for suicidal ideation"); *In re E.C.*, 174 N.C. App. 517, 524, 621 S.E.2d 647, 653 (2005) (finding that the mother "kept the child in a filthy room with clothes and dirty diapers strewn about," but also that she "would leave the home for several days at a time" and could not complete drug rehabilitation because she fought the other residents); *In re Castillo*, 73 N.C. App. 539, 540, 327 S.E.2d 38, 39 (1985) (finding that the child was "dirty, nearly filthy, in wet diapers smelling of urine, improperly clothed in the wintertime . . . in her home which had no heat" and that she had "not been fed regularly or properly"). I would hold that those findings of fact that were unchallenged or otherwise supported by the evidence are insufficient to support a finding of neglect.

It appears that a contributing source of respondent mother's questionable parenting is her limited cognitive ability. The GAL and social worker both commented on it and noted that parents with respondent mother's limited abilities *may* be fit parents if they have enough support, which it appears that respondent mother does not. With such copious evidence of respondent mother's mental shortcomings, it is striking that DSS did not pursue termination pursuant to N.C. Gen. Stat. § 7B-1111(6), which states that the trial court may terminate parental rights if it determines:

> That the parent is *incapable* of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, *mental retardation*, mental illness, organic brain syndrome, or any *other cause or condition* that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111(6) (2007) (emphases added).[2]

D. N.C. Gen. Stat. § 7B-1110.

Nevertheless, even if a valid ground for termination existed, I believe that the trial court erred by failing to consider S.C.H.'s relationship with her mother in its disposition order. N.C. Gen. Stat. § 7B-1110 states, in relevant part:

> (a) After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. In making this determination, the court *shall consider* the following:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) *The bond between the juvenile and the parent.*

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2. The trial court conducted a hearing to determine if respondent parents required their own guardian ad litem. The trial court concluded that, although respondent parents "may have some diminished capacity," they could "adequately act in their own behalf [*sic*] and in their own best interest." The trial court noted respondent mother's very low cognitive test results, but found as fact that respondent mother was "highly motivated toward performing well and has the cognitive and adaptive skills, which would permit her to successfully parent with sufficient family or natural support. *Although it is unclear how she would be able to safely and successfully parent a child independently.*" (Emphases added.) As the order suggests, finding that a parent can participate in court proceedings is distinct from finding that the parent can provide proper care for her child.

(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) (emphases added). Here, the trial court made no findings as to the bond between S.C.H. and respondent mother.[3] Without a finding to this effect, I do not believe that we should assume that the court considered that factor. The majority explicitly acknowledges that the trial court made no specific finding addressing 7B-1110(a)(4), but brushes off the omission because "the trial court made multiple findings regarding the other enumerated factors." I am not convinced that a multitude of findings addressing some factors obviates the need to address the remaining factors when the statute mandates that the trial court address all of the factors. In addition, I do not believe that the bond between a parent and a child is sufficiently addressed by ticking off the number of gifts the parent has sent or the number of visits a parent has attended.

Accordingly, I would remand this matter to the trial court for consideration of the bond between S.C.H. and respondent mother and findings of fact to that effect.

Respondent Father's Appeal

A. N.C. Gen. Stat. § 7B-1111(a)(3).

Respondent father first argues that the trial court erred by concluding that he willfully failed to pay the cost of care for S.C.H. although physically and financially able to do so, thus providing a ground for terminating respondent-father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(3) (2007). Respondent father argues that the findings of fact do not support this conclusion because they show "an impoverished family struggling to survive."

The trial court found that respondent father had the following sources of income, which it reported as averages during 2008: $160.00 per month from Lee Steel ($1,920.00 annually); $350.00 per month for house cleaning during June, July, and August ($1,050.00

3. Melody Smith from Home Again included the following observation about the bond between respondent mother and S.C.H. in her 24 June 2005 summary and recommendation to the trial court: "Of primary importance is the presence of a strong maternal bond between her and [S.C.H.] She is very attuned to his needs and nurtures him extremely well. It is clear that the baby has bonded with his mother. [Respondent mother] is very patient and loving toward her son."

annually); $130.00 per month for hauling junk during August and September ($260.00 annually); and $80.00 per month for cutting grass during the summer months ($400.00). According to the trial court's findings, then, respondent father had an annual income of approximately $3,630.00.

As explained above, "[i]n determining what constitutes a 'reasonable portion' of the cost of care for a child, the parent's ability to pay is the controlling characteristic." *In re Clark*, 151 N.C. App. 286, 288-89, 565 S.E.2d 245, 247 (2002). In its order, the trial court implicitly based finding of fact 32 on respondent mother's income, not respondent father's. Respondent father's annual income of $3,630.00 does not "confirm" his ability to pay an amount greater than zero for his child's support. I would hold that finding of fact 32 is not supported by clear, cogent, and convincing evidence with respect to respondent father. In turn, the trial court's conclusion of law that respondent father willfully failed to pay a reasonable amount towards the support of his minor son is also unsupported.

B. N.C. Gen. Stat. § 7B-1111(a)(1).

As recited above, 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-1111(a)(1) (2007).

> [E]vidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights. 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. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*.

In re Ballard, 311 N.C. at 715, 319 S.E.2d at 232 (citations omitted).

As respondent father points out in his brief, "[t]his was not a home where purposeful activity by the parents resulted in neglect of this child[.]" Indeed, respondent father had substantially completed the following activities, which were required by his 2004 out of home

family services agreement: substance abuse assessment, use of Home Again Services, complete a mental health evaluation, obtain and maintain employment, and complete a parenting class. He explained that he did not complete the mental health evaluation because he could not afford it; Medicaid covered respondent mother's, but he had no insurance to cover his.

Respondent father also accomplished nearly all of the activities required in his 2006 out of home service agreement: complete mental health evaluation, continue working with Mr. Berthiume, attend NA or AA meetings, attend parenting class at the Parenting Place from 27 April 2006 until 8 June 2006, and complete a diagnostic assessment by Learning Perspectives CBS Services.

Respondent father also now has a car and is employed. The adjudication order noted that he has a car and a GAL report described it as a Saturn. In its 9 December 2008 order denying respondent parents' petition for a guardian *ad litem*, the trial court found as fact that respondent father "is employed and has a side job cleaning beach houses. He works three to four days a week." Respondent parents had also moved into a suitable home nine months before the termination order was entered.

I would, therefore, hold that the findings of fact do not support the conclusion that respondent father has neglected S.C.H. and that the findings of fact are not supported by clear, competent, and convincing evidence.

C. N.C. Gen. Stat. § 7B-1111(a)(2).

I next address respondent father's contention that the trial court improperly concluded that he had willfully left S.C.H. in foster care without making reasonable progress in correcting the conditions that led to his removal. *See* N.C. Gen. Stat. § 7B-1111(a)(2) (2007) (allowing a court to terminate parental rights upon a finding that "[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. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.").

As explained above, it appears from the record that respondent father made reasonable progress in correcting the conditions that led to S.C.H.'s removal. Although respondent father did not complete the

cognitive assessment, it was known that he had difficulty writing and that respondent mother wrote for him, despite her own cognitive limitations. In addition, he completed the substance abuse assessment, completed the substance abuse treatment program, attended AA meetings, completed the home again services program, completed the parenting classes, moved into a clean and appropriate home, purchased a reliable car, and obtained a job. I would hold that the trial court's conclusion that termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) was not supported by the findings of fact, and the findings of fact were not supported by clear, cogent, and convincing evidence.

D. N.C. Gen. Stat. § 7B-1110

Even assuming *arguendo* that grounds for termination of respondent father's parental rights exist, I believe that the trial court improperly concluded that it was in S.C.H.'s best interest for respondent father's parental rights to be terminated. As explained above, the trial court's order did not address the bond between respondent father and S.C.H. as required.

Conclusion

As imperfect as these parents may be, I do not believe that the evidence supports the grounds for termination upon which the trial court based its adjudication. Moreover, the findings in the disposition order are not sufficient to support termination of parental rights. Placement with respondent parents may, in fact, not be in the child's best interest, but the order must reach that conclusion based upon clear, cogent, and convincing evidence.

ROBERT H. HARDIN, JR., PLAINTIFF v. KCS INTERNATIONAL, INC. D/B/A CRUISERS YACHTS, AND CAPE FEAR YACHT SALES OF NORTH CAROLINA, INC., DEFENDANTS

No. COA08-996

(Filed 15 September 2009)

1. Appeal and Error— record—not timely filed—substantial violation

Plaintiff's counsel was assessed the printing costs of an appeal where the record was not timely filed. Although the relatively brief delay in filing the record did not hinder review on the merits or impair the adversarial process in this case, failing to

comply with the deadlines in the Rules of Appellate Procedure is a substantial violation. Plaintiff's counsel did not attempt to rectify the error by filing a motion requesting an extension of time or that the record be deemed timely for good cause shown.

2. Compromise and Settlement— order to enforce settlement—standard of review—summary judgment

The summary judgment standard of review is applied to reviewing the trial court's order granting a motion to enforce a settlement agreement.

3. Compromise and Settlement— settlement before discovery—facts subsequently learned

The trial court did not err by dismissing claims of fraud in a settlement agreement where plaintiff chose to forego discovery, settle his claims, and enter into a general release. Plaintiff cannot now avoid the release by arguing that he subsequently learned facts that would have persuaded him not to sign the release when he has not demonstrated that defendant had any duty to disclose those facts.

4. Compromise and Settlement— failure of settlement—allegation of fraud—no evidence of intent at time of settlement

Plaintiff failed to forecast sufficient evidence of fraud to defeat summary judgment after the failure of a settlement agreement arising from alleged defects in a yacht and subsequent repairs. Plaintiff did not present evidence that the boat manufacturer (Cruisers) did not intend to perform the repairs properly at the time it entered into the settlement agreement.

5. Compromise and Settlement— failure of settlement—allegation of fraud—not sufficiently specific

Plaintiff presented insufficient evidence to warrant setting aside a settlement agreement based on fraud in an action arising from alleged defects in a boat. Although plaintiff contended that a marine surveyor was fraudulently misrepresented as being independent, he did not specifically identify the misrepresentations on which he relied.

6. Compromise and Settlement— consideration—repairs not completed—resolution of litigation

Plaintiff received the consideration for which he bargained in a settlement agreement in an action arising from alleged defects

in a boat even though the specified repairs were not completed. The settlement agreement was supported in part by consideration in the resolution of the litigation.

7. Compromise and Settlement— enforcement of agreement—rescission—terms of agreement

The terms of a settlement agreement defeated plaintiff's claim that he was entitled to rescission based on breach of the agreement. The contract gave plaintiff the right to seek enforcement of the settlement agreement's requirements or to seek damages for breach.

8. Compromise and Settlement— conditions precedent to dismissal—general release—enforcement of settlement not sought

The issue of whether plaintiff's obligation to dismiss his action under a settlement agreement was based on conditions precedent was argued for the first time on appeal and was not properly before the appellate court. Moreover, his contention did not address the general release that he signed which did not have a condition precedent and that released underlying claims he sought to resurrect.

Appeal by plaintiff from order entered 27 March 2008 by Judge John E. Nobles, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 24 February 2009.

Hodges & Coxe, P.C., by C. Wes Hodges, II, for plaintiff-appellant.

McGuireWoods LLP, by Henry L. Kitchin, Jr. and John H. Anderson, Jr., for defendant-appellee KCS International, Inc.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Scott Lewis, for defendant-appellee Cape Fear Yacht Sales of North Carolina, Inc.

GEER, Judge.

Plaintiff Robert H. Hardin, Jr. appeals from the trial court's order dismissing his complaint with prejudice and enforcing the settlement agreement between Hardin and defendants KCS International, Inc. doing business as Cruisers Yachts ("Cruisers") and Cape Fear Yacht Sales of North Carolina, Inc. ("Cape Fear"). Hardin primarily argues

on appeal that the trial court erred in enforcing the settlement agreement because it was induced by defendants' fraud. Hardin's evidence fails, however, to establish the necessary elements of a claim for fraud, and we therefore affirm the trial court's order.

Facts

On 15 December 2005, Hardin purchased a 2006 Cruisers 415 Yacht from Cape Fear for $452,705.00. Cruisers manufactured the boat. Almost immediately after the purchase, Hardin began experiencing problems with the boat. Specifically, Hardin was concerned that the boat did not perform to the manufacturer's specifications; it had repeated engine, fuel system, and generator failures; the boat's keypads and air conditioning malfunctioned; water leaked into the boat's interior; there were numerous defective fixtures and mechanisms; and the fiberglass hull had cracks in it. In March 2006, Hardin demanded either return of the purchase price or a new boat. Defendants refused to return Hardin's money or provide a new boat, maintaining that any defects or non-conforming conditions would be repaired in a timely fashion under the boat's warranties.

Hardin filed suit on 26 January 2007, asserting claims against defendants for breach of contract and breach of express and implied warranties. Hardin subsequently served his first request for production of documents on 15 February 2007. Defendants obtained an extension of their time to respond to the document request until 19 April 2007. The parties then engaged in settlement negotiations before any response was served.

On 26 March 2007, Hardin, defendants, and Volvo Penta of the Americas, Inc. (the manufacturer of the boat's engines) entered into a "Settlement Agreement and Release."[1] The settlement agreement provided that in consideration for defendants' replacing the engines and making specified repairs, Hardin would dismiss his cause of action with prejudice. Hardin was not, however, required to dismiss his action until "completion of the engine replacement and other repairs called for [in the settlement agreement], the independent survey of the Boat . . ., and any further repairs identified by the survey . . . ." The settlement agreement also included a general release:

> In consideration of the foregoing payments, and other valuable consideration, the receipt and sufficiency of which is hereby

1. Volvo Penta of the Americas, Inc. is not a party to this action or this appeal.

> acknowledged, HARDIN and his administrators, personal representatives, successors, heirs, and assigns, hereby release and forever discharge CRUISERS, CAPE FEAR, and VOLVO and their officers, directors, shareholders, employees, agents, servants, successors and assigns, from any and all claims in any way related to the dispute between them regarding the Boat to date. The effect of this Paragraph is intended to be a general release of all claims that HARDIN may have against CRUISERS, CAPE FEAR, and VOLVO as a result of their dealings to date, and specifically including but not limited to the subject matter of this Agreement and the Civil Action, although this release is *not* intended to release or bar any future claims based upon any new warranty issues arising under any pre-existing warranty that has not yet expired, failure of the repairs required herein, breach of the new engine warranty or extended protection plan provided hereunder, or an action to otherwise enforce the terms of this Agreement.

Cruisers took possession of the boat on 30 March 2007 in order to replace the engines and make the required repairs. Cruisers returned the boat to Hardin on 4 May 2007 and notified him that the repairs had been completed, that an inspection by Wayne Canning had been performed (as provided in the settlement agreement), and that everything was fine with the boat.

Upon return of the boat, Hardin identified various repairs that had not been done, including fixing a substantial leak around the forward salon windshield and the electronic keypad. In addition, Hardin was concerned about "rigged" repairs to the trim tabs, added propeller well extenders, and spliced wiring in the cockpit roof. Although Cruisers claimed that it had fixed the windshield, a representative of Cape Fear determined that the windshield, in fact, had not been repaired. According to Hardin, that leak resulted in additional damage to the boat, including damage to the boat's coring material.

On 26 June 2007, at Hardin's invitation, Canning performed a second inspection with Hardin and representatives of both defendants present. As a result of that inspection, Canning identified 14 additional repairs that needed to be made, including removing, rebedding, and recaulking the forward salon windows, as well as testing and repairing the boat's coring material in the areas of the leaks.

Following Canning's inspection, Hardin agreed to Cruisers' request to have its own technician inspect the boat. The technician

recommended doing repairs that were not as extensive as those indicated as necessary by Canning. In response, Hardin informed defendants that he "considered the Settlement Agreement to be null and void and that [he] intended to proceed with litigation."

After Hardin refused to dismiss his action, the case was referred to mediation. Roughly three weeks prior to the mediation conference, Cruisers produced documents in response to Hardin's earlier request for production of documents. These documents revealed that Hardin's boat, while being shipped from Cruisers' manufacturing facility in Wisconsin to North Carolina, had been involved in a collision with a tree.

Hardin subsequently moved to amend his complaint to include claims for fraud and negligent misrepresentation against Cape Fear for failing to disclose the facts surrounding the collision prior to Hardin's purchase of the boat. Cruisers filed an answer on 6 August 2007, generally denying Hardin's allegations and moving to dismiss for failure to state a claim for relief based on the settlement agreement. Cruisers later filed a motion on 16 November 2007 seeking enforcement of the settlement agreement and an order directing Hardin to voluntarily dismiss his complaint with prejudice. Cape Fear filed a similar motion on 26 November 2007.

In an order entered 27 March 2008, the trial court dismissed Hardin's complaint with prejudice. The court ruled: "[A]fter reviewing all matter of record, including the affidavits filed with the court, and after hearing from counsel for defendants in support of Defendants' Motions and from counsel for the plaintiff in opposition to Defendants' Motions as set out in Plaintiff's Response, and after considering the applicable law, . . . the Settlement Agreement is valid and enforceable, and the Defendants' Motions should be GRANTED[.]"

On 23 April 2008, Hardin filed a notice of appeal from the trial court's order enforcing the settlement agreement. On 28 May 2008, he served defendants with a proposed record on appeal. On 27 June 2008, defendants jointly filed their objections and amendments to Hardin's proposed record. Hardin served defendants with a second proposed record on 1 August 2008, but defendants refused to stipulate to the settling of the record as requested. Hardin filed the record on appeal with this Court on 19 August 2008. Cruisers filed a motion to dismiss Hardin's appeal on 26 September 2008.

Motion to Dismiss Appeal

[1] Cruisers moves to dismiss Hardin's appeal on the ground that "Plaintiff's failure to timely file the Record on Appeal within the period set forth in Rule 12(a) . . . mandates dismissal of Plaintiff's appeal because such a default is a jurisdictional default." Hardin acknowledges that there was a "minimal" delay in filing the record on appeal, but counters that under the Supreme Court's analysis in *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008), "the requirements of the current Rule 12(a) are not jurisdictional."

This Court, in *Copper v. Denlinger*, 193 N.C. App. 249, 259, 667 S.E.2d 470, 479-80 (2008), *appeal dismissed in part and disc. review allowed in part*, 363 N.C. 124, 672 S.E.2d 686 (2009), held that a violation of Rule 12 of the Rules of Appellate Procedure is nonjurisdictional. Our Supreme Court has stressed that "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Dogwood*, 362 N.C. at 198, 657 S.E.2d at 365. The Supreme Court, in *Dogwood*, *id.* at 199, 657 S.E.2d at 366, also explained that an appellate court should impose a sanction of any type only when a party's nonjurisdictional rules violations rise to the level of a "substantial failure" under N.C.R. App. P. 25 or a "gross violation" under N.C.R. App. P. 34. In the absence of a substantial or gross violation, the Court should not impose any sanction at all, but rather "the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent possible." *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366.

Cruisers makes no argument that the violation was substantial or gross. Nor has Hardin's relatively brief delay in filing the record on appeal hindered our review of the merits of the case or impaired the adversarial process. Nonetheless, failing to comply with the deadlines set forth in the Rules of Appellate Procedure is not a technical or insignificant violation of the rules, but rather is a substantial one. Moreover, Hardin's counsel did not attempt to rectify the error by filing a motion with this Court requesting either a retroactive extension of time pursuant to N.C.R. App. P. 27 or that the record be deemed timely filed for good cause shown under N.C.R. App. P. 25. Pursuant to Rule 34(b), we, therefore, order Hardin's counsel to pay the printing costs of this appeal. *See Copper*, 193 N.C. App. at 262, 667 S.E.2d at 480. We instruct the Clerk of this Court to enter an order accordingly.

Standard of Review

[2] On appeal, the parties disagree as to the standard of review applicable to the trial court's order granting defendants' motions to enforce the settlement agreement. Hardin points to the fact that in response to defendants' motions to enforce the settlement agreement, he submitted "affidavits, depositions, and other discovery materials, the traditional elements of a summary judgment hearing." He contends that the standard for reviewing a grant of summary judgment should, therefore, apply here. Defendants, on the other hand, maintain that they filed their motions pursuant to Rule 41 of the Rules of Civil Procedure, and thus the trial court's order should be reviewed under a "competent evidence" standard.

Defendants, in support of their contention, cite *Currituck Assocs.-Residential P'ship v. Hollowell*, 166 N.C. App. 17, 24, 601 S.E.2d 256, 262 (2004), *aff'd per curiam by an equally divided Court*, 360 N.C. 160, 622 S.E.2d 493 (2005), in which this Court held that the motion in that case to dismiss the plaintiffs' claims was made "pursuant to N.C. Gen. Stat. § 1A-1, Rule 41 (2003)." *Currituck*, however, was affirmed by an equally divided Supreme Court and thus this Court's decision "stands without precedential value." 360 N.C. at 160, 622 S.E.2d at 493. Although the opinion could still have persuasive value, we do not find *Currituck* persuasive on this issue.

We note that *Currituck* relied upon *State ex rel. Howes v. Ormond Oil & Gas Co.*, 128 N.C. App. 130, 493 S.E.2d 793 (1997). This Court in *Howes* held that "the general rule" is that a party "may enforce a settlement agreement by filing a voluntary dismissal of its original claim and then instituting another action on the contract, *or it may simply seek to enforce the settlement agreement by petition or motion in the original action*." *Id.* at 136, 493 S.E.2d at 797 (emphasis added) (internal quotation marks omitted). *See also Crawford v. Tucker*, 258 Ala. 658, 663, 64 So.2d 411, 415 (Ala. 1953) (addressing merits of erroneously labeled motion to enforce settlement agreement as "it is immaterial what it is called" and noting that motion's "purpose was for this court to give effect to the alleged [settlement] agreement and we have so treated it").

Other jurisdictions have treated motions to enforce settlement agreements as motions for summary judgment. *See, e.g.*, *Tiernan v. Devoe*, 923 F.2d 1024, 1031 (3d Cir. 1991) (applying summary judgment standard to motion for enforcement of settlement agreement because

"[t]he stakes in summary enforcement of a settlement agreement and summary judgment on the merits of a claim are roughly the same—both deprive a party of his right to be heard in the litigation"); *Parker-Hannifin Corp. v. Schlegel Elec. Materials, Inc.*, 589 F. Supp. 2d 457, 461 (D. Del. 2008) ("The standard of review for enforcement motions is similar to the standard applicable for motions for summary judgment."); *DeRossett Enters., Inc. v. Gen. Elec. Capital Corp.*, 275 Ga. App. 728, 728, 621 S.E.2d 755, 756 (2005) ("Because the issues raised are analogous to those in a motion for summary judgment, in order to succeed on a motion to enforce a settlement agreement, 'a party must show the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of the [appellant's] case.' " (quoting *Superglass Windshield Repair v. Mitchell*, 233 Ga. App. 200, 200, 504 S.E.2d 38, 39 (1998)); *Hays v. Monticello Ret. Estates, L.L.C.*, 192 P.3d 1279, 1281 (Okla. Civ. App. 2008) ("A motion to enforce a settlement agreement is treated as a motion for summary judgment.").

We find the reasoning of these cases persuasive and consistent with North Carolina practice and, therefore, apply the summary judgment standard of review. It is well-settled that the standard of review for an order granting a motion for summary judgment requires a two-part analysis of "whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). The moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. *Garner v. Rentenbach Constructors Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999). The evidence produced by the parties is viewed in the light most favorable to the non-moving party. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

Motion to Enforce Settlement Agreement

Hardin argues that the trial court erred in enforcing the settlement agreement because, he asserts, (1) it was procured by fraud, (2) there has been a failure of consideration to support the agreement, (3) material breaches of the agreement entitle him to rescission, and (4) his obligation to dismiss his complaint never arose due to the non-occurrence of certain conditions precedent. We address each contention in turn.

A. *Fraud*

[3] Hardin first contends that the trial court erred in dismissing his claims based on its determination that "the Settlement Agreement is valid and enforceable[.]" Hardin maintains that the settlement agreement is unenforceable due to fraud, arguing that "misrepresentations or concealment of material facts by [defendants] induced [him] to sign a contract that he would not have signed but for the deception."

The essential elements of fraud are: " '(1) False representation or concealment of a [past or existing] material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.' " *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 437, 617 S.E.2d 664, 670 (2005) (alteration original) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)). A claim for fraud may be based on an "affirmative misrepresentation of a material fact, or a failure to disclose a material fact relating to a transaction which the parties had a duty to disclose." *Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119 (internal citation omitted), *disc. review denied*, 317 N.C. 703, 347 S.E.2d 41 (1986).

Hardin primarily claims defendants failed to disclose a material fact, arguing that the settlement agreement should be set aside because defendants did not disclose that his boat had been damaged in transit before it was sold to him. Hardin asserts that he would not have entered into the settlement agreement had he known of the pre-sale shipping damage.

"A duty to disclose arises where: (1) 'a fiduciary relationship exists between the parties to the transaction'; (2) there is no fiduciary relationship and 'a party has taken affirmative steps to conceal material facts from the other'; and (3) there is no fiduciary relationship and 'one party has knowledge of a latent defect in the subject matter of the negotiations about which the other party is both ignorant and unable to discover through reasonable diligence.' " *Sidden v. Mailman*, 137 N.C. App. 669, 675, 529 S.E.2d 266, 270-71 (2000) (quoting *Harton*, 81 N.C. App. at 297-98, 344 S.E.2d at 119). Hardin relies only on the third circumstance: when one party has knowledge of a latent defect.

Hardin presented evidence and argues that defendants had knowledge of the latent defect—the pre-sale damage—and that Hardin was ignorant of the collision. Hardin's argument ignores,

however, the requirement that he be unable to discover the defect through reasonable diligence. This requirement is particularly important when, as here, the parties were engaging in arms-length negotiations. As our Supreme Court has stressed: " 'When the parties deal at arms length and [one party] has full opportunity to make inquiry but neglects to do so and the [other party] resorted to no artifice which was reasonably calculated to induce the purchaser to forego investigation action in deceit will not lie.' " *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 543, 356 S.E.2d 578, 583 (1987) (quoting *Calloway v. Wyatt*, 246 N.C. 129, 134, 97 S.E.2d 881, 885-86 (1957)).

In this case, it is particularly significant that any failure to disclose with respect to the settlement agreement arose in the course of on-going litigation. No negotiation could be more arms length. *See Lancaster v. Lancaster*, 138 N.C. App. 459, 463, 530 S.E.2d 82, 85 (2000) (holding that although a husband and wife generally share a confidential relationship entailing a duty to disclose, "this relationship ends when the parties become adversaries"). In this case, Hardin had served a request for production of documents that ultimately, when Hardin failed to dismiss his action, resulted in the production of documents informing him of the collision. Thus, if Hardin had waited until after preliminary discovery had taken place, he would have obtained the very information that he claims defendants had a duty to disclose to him during settlement negotiations. Hardin has not, therefore, shown that he lacked the ability to discover through due diligence—civil discovery procedures—the information that his boat was involved in a collision during shipping.

Hardin cites no authority—and we have found none—requiring opposing parties in litigation to disclose information adverse to their positions when engaged in settlement negotiations. Such a requirement would be contrary to encouraging settlements. One of the reasons that a party may choose to settle before discovery has been completed is to avoid the opposing party's learning of information that might adversely affect settlement negotiations. The opposing party assumes the risk that he or she does not know all of the facts favorable to his or her position when choosing to enter into a settlement prior to discovery. On the other hand, the opposing party may also have information it would prefer not to disclose prior to settlement.

Indeed, in *Piedmont Inst. of Pain Mgmt. v. Staton Found.*, 157 N.C. App. 577, 584, 581 S.E.2d 68, 73, *disc. review denied*, 357 N.C. 507, 587 S.E.2d 672 (2003), this Court explained that a party in the

"adversarial setting" of settlement negotiations does not "have an affirmative duty to disclose unfavorable facts." In *Piedmont Inst. of Pain Mgmt.*, *id.* at 585, 581 S.E.2d at 73-74, this Court held that because the parties seeking to avoid the settlement agreement had the opportunity to obtain the documents supporting their fraud claim from another party's counsel before executing the settlement agreement, they had "failed to exercise due diligence in uncovering the alleged fraud" for purposes of the statute of limitations.

That reasoning applies equally in this case. Hardin had the ability by virtue of the civil discovery rules to obtain from defendants—prior to entering into the settlement agreement—information about the pre-sale collision. Hardin, therefore, could have, through the exercise of due diligence, learned of the supposed latent defect. *See Sunset Beach Dev., LLC v. AMEC, Inc.*, 196 N.C. App. 202, 205, 675 S.E.2d 46, 53 (2009) (holding summary judgment on fraud claim was proper where evidence indicated that plaintiff had "unfettered access" and "ample opportunity to inspect" land that was subject of claim); *MacFadden v. Louf*, 182 N.C. App. 745, 749, 643 S.E.2d 432, 435 (2007) (concluding there was no reasonable reliance where home buyer, "[n]otwithstanding the recommendations of her own inspection report, . . . elected to forego any further inquiry [into the home] and consummated the contract" to purchase).

This Court's opinion in *Talton v. Mac Tools, Inc.*, 118 N.C. App. 87, 453 S.E.2d 563 (1995), provides further support for the trial court's entry of judgment enforcing the settlement agreement. The plaintiffs in *Talton* terminated a distributorship with the defendants, and the defendants sued. *Id.* at 88-89, 453 S.E.2d at 564. The parties then entered into a settlement agreement that contained a mutual release providing that " '[i]t is the specific intent of this Mutual Release to release and discharge any and all claims and causes of action of any kind or nature whatsoever which may exist, might be claimed to exist, or could have been claimed to exist by Mac Tools, Inc. against [plaintiffs] and by [plaintiffs] against Mac Tools, Inc. . . . .' " *Id.* at 89, 453 S.E.2d at 564. Subsequently, the plaintiffs sued the defendants, alleging that the defendants had breached the distributorship agreement and had fraudulently induced the plaintiffs to enter into the distributorship agreement. *Id.* The plaintiffs alleged in their complaint that they did not learn of the facts that supported their claims until after the mutual release had been signed. *Id.* The defendants moved for summary judgment based on the settlement agreement and release. *Id.* In response, the plaintiffs claimed, as Hardin does here,

that they would not have signed the mutual release if they had known of the misrepresentations relating to the distributorship agreement.

On appeal from the trial court's grant of summary judgment to the defendants, the plaintiffs in *Talton* argued that "a genuine issue of fact exists as to whether or not defendants fraudulently procured the release." *Id.* at 90, 453 S.E.2d at 565. This Court rejected the plaintiffs' fraud argument, holding:

> Plaintiffs agreed to release defendants "from any and all claims" which are "in any manner related to the transaction which is the operation by [the plaintiff] of a Mac Tools distributorship, . . . whether direct or contingent, liquidated or unliquidated, including but not limited to any stated or unstated claims." Since this language was broad enough to cover all possible causes of action, whether or not the possible claims are all known, plaintiffs cannot rely on their ignorance of facts giving rise to a claim for fraud as a basis for avoiding the release.

Id. at 90-91, 453 S.E.2d at 565. *See also Merrimon v. Postal Telegraph-Cable Co.*, 207 N.C. 101, 105-06, 176 S.E. 246, 248 (1934) (" 'The language in a release may be broad enough to cover all demands and rights to demand or possible causes of action, a complete discharge of liability from one to another, whether or not the various demands or claims have been discussed or mentioned, and whether or not the possible claims are all known.' " (quoting *Houston v. Trower*, 297 F. 558, 561 (8th Cir. 1924))).

In this case, Hardin entered into a "general release of all claims that HARDIN may have against CRUISERS, CAPE FEAR, and VOLVO as a result of their dealings to date, and specifically including but not limited to the subject matter of this Agreement and the Civil Action . . . ." " '[A] comprehensively phrased general release, in the absence of proof of contrary intent, is usually held to discharge all claims . . . between the parties.' " *Koch v. Bell, Lewis & Assocs., Inc.*, 176 N.C. App. 736, 741, 627 S.E.2d 636, 639 (2006) (quoting *Sykes v. Keiltex Indus., Inc.*, 123 N.C. App. 482, 473 S.E.2d 341 (1996)).

The general release at issue in this case, by its terms, encompasses *all claims* related to the subject matter of the underlying lawsuit—the boat—and, therefore, necessarily encompasses Hardin's claim that defendants fraudulently concealed the boat's collision with the tree. *See Sims v. Gernandt*, 341 N.C. 162, 165, 459 S.E.2d 258, 260 (1995) (holding that release of " 'any responsibility [of defendant]

whatsoever, of any kind' " for Honda-Civic released plaintiff's claim that defendant, prior to plaintiff's signing release, fraudulently concealed damage he had caused to car). The language of the release in this case is broad enough to encompass all known and unknown claims. *See Fin. Servs. of Raleigh, Inc. v. Barefoot*, 163 N.C. App. 387, 394-95, 594 S.E.2d 37, 42-43 (2004) (after noting "[o]ur courts have . . . long recognized that parties may release existing but unknown claims," court held that "when the parties stated that they were releasing 'all claims of any kind,' we must construe the release to mean precisely that: an intent to release all claims of any kind in existence").

Hardin chose to forego discovery, settle his claims, and enter into this general release. Like the plaintiffs in *Talton*, he cannot now avoid the release by arguing that subsequent to signing the release, he learned of facts that would have persuaded him to not sign the release when he has not demonstrated that defendants had any duty to disclose those facts.

[4] Hardin also contends that Cruisers failed to disclose during settlement negotiations information about how the future repairs would be performed.[2] In making this argument, however, Hardin does not point to any misrepresentation or concealment by Cruisers of a *past* or *existing* material fact—an essential element of fraud—but rather argues that Cruisers did not disclose that it would not properly perform the repairs.

As this Court has explained, "[n]ormally, a promissory misrepresentation will not support an allegation of fraud." *Leake v. Sunbelt Ltd. of Raleigh*, 93 N.C. App. 199, 204, 377 S.E.2d 285, 288-89, *disc. review denied*, 324 N.C. 578, 381 S.E.2d 774 (1989). When, however, "a promissory misrepresentation is made with an intent to deceive the purchaser and at the time of making the misrepresentation the defendant has no intention of performing his promise, fraud may be found." *Id.* at 204-05, 377 S.E.2d at 289. Nonetheless, mere proof that a party did not ultimately comply with the contract is not sufficient to establish that the party did not intend, at the time it entered into the contract, to perform under the contract. *Williams v. Williams*, 220 N.C. 806, 811, 18 S.E.2d 364, 367 (1942) (holding that plaintiff failed to present evidence warranting inference that defendant did not intend to perform her promise at time she made promise).

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2. This argument does not apply to defendant Cape Fear.

Here, Hardin has presented no evidence that Cruisers did not intend, at the time it entered into the settlement agreement, to properly perform the repairs other than evidence that Hardin was dissatisfied with the repairs as they were in fact performed. Without evidence of Cruisers' intent at the time it entered into the settlement agreement, Hardin has failed to forecast sufficient evidence of fraud to defeat summary judgment.

[5] Hardin next contends that he was induced to enter into the separation agreement by an affirmative misrepresentation. Hardin claims that Wayne Canning, the marine surveyor who was designated in the settlement agreement as the person who would inspect the boat after the repairs, was fraudulently misrepresented as being "independent" from Cruisers.[3] With respect to this misrepresentation, Hardin stated the following in his affidavit:

> 4. . . . [T]he Settlement Agreement called for an "independent surveyor" to ensure the required repairs were completed in a good and workmanlike manner. *Cruisers and its attorney represented* that Mr. Canning, who ultimately was identified in the Settlement Agreement, was an independent surveyor. Based on this representation, I agreed to Mr. Canning as the "independent surveyor."
>
> . . . .
>
> 7. In addition to representing that Wayne Canning was an "independent surveyor," *Cruisers represented to me* that Mr. Canning would ensure that all the repairs necessitated by the Settlement Agreement were completed in a good and workmanlike manner. I relied upon these representations in agreeing to the Settlement Agreement.
>
> . . . .
>
> 10. I reasonably relied upon *Cruisers' representations*—specifically, that Mr. Canning was an independent surveyor, and that Mr. Canning would be called upon to ensure, for me, that the specific repairs called for by the Settlement Agreement were completed in a proper manner—in entering into the Settlement Agreement. Had I known that Mr. Canning was not independent, and was Cruisers' in-house surveyor, and that all Cruisers intended to have Mr. Canning do was a general marine survey

3. Hardin does not assert that Cape Fear made any representations about Canning, and, therefore, this argument does not apply to Cape Fear.

> of the Boat that did not even address the specific issues and repairs set forth in the Settlement Agreement, I *never* would have entered into the Settlement Agreement. These misrepresentations by Cruisers induced me to enter into the Settlement Agreement.

(Emphasis added; 4th emphasis original.) Hardin presented no other information on this issue.

In his affidavit, Hardin failed to identify any specific statement made by anyone. Hardin did not identify which attorney or which person at Cruisers made a statement about Canning being an independent surveyor. He did not describe what specifically was said. And, he did not identify when any statements were made other than that the time frame was prior to execution of the settlement agreement. These omissions are fatal to Hardin's claim for fraud based on representations regarding Canning.

As our Supreme Court has held, "[t]here is a requirement of specificity as to the element of a representation made by the alleged defrauder[:] 'The representation must be definite and specific . . . .' " *Rowan County Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 659 (1992) (quoting *Johnson v. Owens*, 263 N.C. 754, 756, 140 S.E.2d 311, 313 (1965)). The Supreme Court in *Rowan County Board of Education* explained the purpose of this requirement: "Requiring proof of a specific representation facilitates courts in distinguishing mere puffing, guesses, or assertions of opinions from representations of material facts." *Id.*

Rule 9(b) of the Rules of Civil Procedure requires that "the circumstances constituting fraud . . . shall be stated with particularity" in the complaint. *See Coley v. N.C. Nat'l Bank*, 41 N.C. App. 121, 125, 254 S.E.2d 217, 220 (1979) (holding, in affirming dismissal of fraud claim, that "the pleader in such a situation must allege specifically the individuals who made the misrepresentations of material fact, the time the alleged misstatements were made, and the place or occasion at which they were made"). This Court has held that when a complaint against a corporation fails to allege, as required by Rule 9(b), the time and occasion of the misrepresentation and the individual who made the misrepresentation, then "summary judgment was proper" for failure to allege "the essential elements of fraud with particularity." *Trull v. Central Carolina Bank & Trust Co.*, 117 N.C. App. 220, 224, 450 S.E.2d 542, 545 (1994), *disc. review denied*, 339 N.C. 621, 454 S.E.2d 267 (1995). *See also Leake*, 93 N.C. App. at

205, 377 S.E.2d at 289 (affirming summary judgment on fraudulent misrepresentation claim when plaintiffs failed to allege defendants' intent at the time alleged fraudulent misrepresentations were made and thus failed to satisfy Rule 9(b)).

Thus, because Hardin failed to set forth evidence specifically identifying the misrepresentations upon which he relied, he failed to present sufficient evidence of fraud. Consequently, we hold that Hardin presented insufficient evidence to warrant setting aside the settlement agreement based on fraud.

B. *Failure of Consideration*

[6] Hardin next contends that because defendants failed to complete the repairs as specified by the settlement agreement, he did not receive the consideration for which he bargained. Although Hardin focuses on the boat's repairs as the consideration, our Supreme Court has explained that the resolution of litigation is the consideration supporting a settlement agreement:

> The rule is established that an agreement to compromise and settle disputed matters is valid and binding. The law favors the avoidance or adjustment of litigation, and a compromise made in good faith for such a purpose will be sustained as not only based upon a sufficient consideration but upon the highest consideration of public policy as well, and this, too, without any special regard to the special merits of the controversy or the character or validity of the claims of the respective parties. The real consideration which each party receives, in contemplation of law, under the settlement, is not to be found so much in the mutual sacrifice of any rights, as in the bare fact that they have settled their dispute, which is considered to be of interest and value to each one of them. They give and take, so to speak, not knowing precisely what will be the outcome if they should bring their controversy to the test of the law and subject it to the uncertainties of litigation. Under such circumstances, there is no good reason why the mutual concessions of the parties, resulting in a settlement of their dispute, should not be upheld.
>
> . . . [T]he prevention of litigation is a valid and adequate consideration, for the law favors the settlement of disputes, and on this ground a mutual compromise is sustained. It is not only a sufficient, but a highly favored consideration, and no investigation into the character or relative value of the different claims

> involved will be entered into for the purpose of setting aside a compromise, if, of course, the parties are engaged in a lawful transaction, it being enough if the parties to the agreement thought at the time that there was a question between them—an actual controversy—without regard to what may afterwards turn out to have been an inequality of consideration.

York v. Westall, 143 N.C. 276, 279-80, 55 S.E. 724, 725 (1906) (internal citation omitted). *See also Bohannon v. Trotman*, 214 N.C. 706, 720, 200 S.E. 852, 860 (1939) (" 'Courts should, so far as they can do so legally and properly, support agreements which have for their object the amicable settlement of doubtful rights of parties; the consideration of each agreement is not only valuable, but highly meritorious.' " (quoting *Armstrong v. Polakavetz*, 191 N.C. 731, 734-35, 133 S.E. 16, 18 (1926)). Thus, in this case, the settlement agreement between Hardin and defendants is supported in part by consideration in the form of the resolution of the litigation concerning the boat.

Citing Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971), and *Pool v. Pinehurst, Inc.*, 215 N.C. 667, 2 S.E.2d 871 (1939), Hardin contends that the failure of consideration in this case is a defense to enforcing the settlement agreement, entitling him to rescission. *See Gore*, 279 N.C. at 199, 182 S.E.2d at 393 ("Failure of consideration is a defense to an action brought upon a contract against the party who has not received the performance for which he bargained."); *Pool*, 215 N.C. at 668, 2 S.E.2d at 871-72 (holding that when a purchased article is so defective that it is not reasonably fit for its intended use, the buyer is entitled to recover from the seller for lack of consideration). Neither *Pool* nor *Gore* are apposite here; both cases involved contracts to purchase goods, rather than agreements to settle a legal controversy between the parties. *See Gore*, 279 N.C. at 200, 182 S.E.2d at 394 (holding delivery of incorrectly labeled seeds was breach of contract and not failure of consideration); *Pool*, 215 N.C. at 668, 2 S.E.2d at 872 (reversing trial court's grant of nonsuit where plaintiff presented sufficient evidence that laundry boiler purchased from defendant per contract was worthless and not fit for use). As *York* holds, agreements to compromise and settle disputes, such as the one in this case, are supported by "real consideration" in the form of "the bare fact that [the parties] have settled their dispute, which is considered to be of interest and value to each one of them." 143 N.C. at 279, 55 S.E. at 725.

C. *Rescission*

[7] Hardin next argues that he is entitled to have the settlement agreement rescinded, and thus not enforced, due to material and substantial breaches of the agreement by defendants. We note first that Hardin has made no argument on appeal that defendant Cape Fear failed to comply with the settlement agreement, and, therefore, this argument cannot form a basis for overturning the summary judgment order as to Cape Fear. With respect to Cruisers, Hardin contends that it breached the settlement agreement by "(1) failing to make required repairs; (2) failing to investigate and repair issues referenced in the Settlement Agreement . . . ; (3) making modifications to the Boat not called for by the Settlement Agreement; (4) failing to provide the alleged 'independent' marine surveyor with the information necessary for him to perform his task in a competent fashion; (5) influencing the results of the 'independent' surveyor's inspections; (6) otherwise intentionally manipulating the circumstances for the purpose of minimizing the repairs to the Boat; and (7) failing to pay [Hardin]'s relocation expenses."

In *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240, 242 (1964), the Supreme Court observed that "where there is a material breach of the contract going to the very heart of the instrument, the other party to the contract may elect to rescind and is not bound to seek relief at law by an award for damages." The Court explained further what constituted a material breach going to the heart of the contract: breach of a covenant that " 'is such an essential part of the bargain that the failure of it must be considered as destroying the entire contract; or where it is such an indispensable part of what both parties intended that the contract would not have been made with the covenant omitted.' " *Id.*, 134 S.E.2d at 242-43 (quoting *Steak House, Inc. v. Barnett*, 65 So. 2d 736, 738 (1953)). The Court held that " '[a] breach of such a covenant amounts to a breach of the entire contract; it gives to the injured party the right to sue at law for damages, or courts of equity may grant rescission in such instances *if the remedy at law will not be full and adequate*.' " *Id.*, 134 S.E.2d at 243 (emphasis added) (quoting *Steak House, Inc.*, 65 So. 2d at 738). In the absence of such a breach, "[t]he right to rescind does not exist . . . ." *Id. See also Childress v. C.W. Myers Trading Post, Inc.*, 247 N.C. 150, 156, 100 S.E.2d 391, 395 (1957) ("Not every breach of a contract justifies a cancellation and rescission. The breach must be so material as in effect to defeat the very terms of the contract.").

In this case, the terms of the settlement agreement itself defeat Hardin's claim that he is entitled to rescission based on Cruisers' breach of the settlement agreement. The agreement specifically provides for the exact scenario that occurred: "[T]his release provision is *not* intended to release or bar any future claims based upon any new warranty issues arising under any pre-existing warranty that has not yet expired, failure of the repairs required herein, breach of the new engine warranty or extended protection plan provided hereunder, or an action to otherwise enforce the terms of this Agreement." All of the breaches by Cruisers of the settlement agreement relied upon by Hardin to justify rescission fall within the scope of this provision authorizing Hardin to assert future claims, including through a new action to enforce the terms of the settlement agreement.

Because the agreement expressly anticipates further litigation arising out of disputes regarding compliance with the agreement, Hardin cannot show, as *Wilson* requires, 261 N.C. at 43, 134 S.E.2d at 242 (quoting *Steak House, Inc.*, 65 So. 2d at 738), that full satisfaction with the repairs was " 'such an indispensable part of what both parties intended' " that breach would amount to a breach of the entire contract warranting rescission. In light of this provision, we cannot conclude that the breaches asserted by Hardin are such " 'an essential part of the bargain that the failure . . . must be considered as destroying the entire contract . . . .' " *Id.* (quoting *Steak House, Inc.*, 65 So. 2d at 738).

As discussed above, the primary purpose of the settlement agreement—the heart of the agreement—was the resolution of the parties' litigation. This is not a case in which Cruisers refused to do any repairs on the boat after entering into the agreement. The evidence in the record indicates that defendants and Volvo did perform repairs, the boat was surveyed twice by Canning, and additional repairs were done. The parties' contract gave Hardin the right to seek enforcement of the settlement agreement's requirements or to seek damages for breach if he was not satisfied that Cruisers' efforts complied with the settlement agreement. As a result, Hardin was not entitled to rescission of the agreement. *See Reaves v. Hayes*, 174 N.C. App. 341, 344-45, 620 S.E.2d 726, 729 (2005) (holding that heart of contract was installation of a useable driveway and failure to comply with contract's terms regarding driveway's location and materials to be used did not "entirely deprive[]" party of what he bargained for); *McDaniel v. Bass-Smith Funeral Home, Inc.*, 80 N.C. App. 629, 635, 343 S.E.2d 228, 232 (1986) (although plaintiff presented evidence that

defendant sold her defective casket, because evidence was uncontradicted that defendant provided services under burial contract, including services in addition to providing casket, breach was not such essential part of bargain that entire contract was destroyed and, therefore, plaintiff could only seek damages and not rescission).[4]

D. *Condition Precedent*

[8] In purported response to Cruisers' reliance on the provision of the mutual release referencing enforcement of the settlement agreement, including for inadequate repairs, Hardin argued, in his reply brief, for the first time, that the trial court erred in dismissing his claims because his obligation to dismiss the action was dependent on fulfillment of conditions precedent of " 'completion' of the required repairs, the 'independent' survey, and any 'further repairs identified by the survey.' " This argument is not purely responsive to Cruisers' brief, but rather is an affirmative contention as to why Hardin was not required to file a voluntary dismissal with prejudice of his claims and why, therefore, this Court should reverse the trial court.

The record on appeal suggests that Hardin did not make this condition precedent argument in the trial court in opposition to defendants' motions. N.C.R. App. P. 10(b)(1) 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." As our Supreme Court has stressed, "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*, 362 N.C. at 195-96, 657 S.E.2d at 364.

In any event, in order to properly present the issue for appellate review, Hardin should have included the contention in his main brief. *See Oates v. N.C. Dep't of Corr.*, 114 N.C. App. 597, 600, 442 S.E.2d 542, 544 (1994) (holding that Court "will not entertain what amounts

4. We note further that "[w]here there is such a breach as permits a rescission, the parties are entitled to be placed in *status quo* . . . ." *Childress*, 247 N.C. at 156, 100 S.E.2d at 395. *See also Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 65, 344 S.E.2d 68, 74 (1986) (" '[A]s a general rule, a party is not allowed to rescind where he is not in a position to put the other in *status quo* by restoring the consideration passed.' " (quoting *Bolich v. Prudential Ins. Co.*, 206 N.C. 144, 156, 173 S.E. 320, 327 (1934)), *disc. review improvidently allowed*, 319 N.C. 222, 353 S.E.2d 400 (1987). Hardin has not, however, explained how he would restore Cruisers—which has performed significant repairs, including the installation by Volvo of new engines—to the position it held prior to the signing of the settlement agreement.

to a new argument presented in th[e] reply brief"); *Golden Rule Ins. Co. v. Long*, 113 N.C. App. 187, 199, 439 S.E.2d 599, 606 (concluding appellant's reply brief could not "resurrect" abandoned claim where appellant had not raised issue in initial brief and appellee's brief did not address issue), *appeal dismissed and disc. review denied*, 335 N.C. 555, 439 S.E.2d 145 (1993); *Animal Prot. Soc'y of Durham, Inc. v. State*, 95 N.C. App. 258, 269, 382 S.E.2d 801, 808 (1989) (declining to address constitutional argument first raised in reply brief because "[t]he reply brief [is] intended to be a vehicle for responding to matters raised in the appellees' brief; it was not intended to be—and may not serve as—a means for raising entirely new matters").

By raising his condition precedent argument for the first time in his reply brief, Hardin has frustrated the adversarial process by depriving defendants of the opportunity to respond to his argument. *See Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366-67 (identifying "frustrat[ion] [of] the adversarial process" as one factor for determining whether default under appellate rules is gross or substantial); *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (discouraging appellate courts from reviewing merits of appeal when review would leave appellee "without notice of the basis upon which an appellate court might rule"). This issue is not, therefore, properly before the Court.

We note, however, that while Hardin's condition precedent argument addresses whether he was required to dismiss his claims, it still does not address the general release that he signed—without any condition precedent—releasing the underlying claims that he has sought to resurrect. Hardin has not cited any authority suggesting that his refusal to voluntarily dismiss his action in any way negates the mutual general release.

By not dismissing the action, Hardin simply preserved his right to file a motion in the action to enforce the settlement agreement and obtain relief as to any breaches of the settlement agreement. As this Court has explained, a party has "two options in deciding how to specifically enforce the terms of the settlement agreement. [A party] could: (1) take a voluntary dismissal of his original action and then institute a new action on the contract, or (2) seek to enforce the settlement agreement by petition or motion in the *original* action." *Estate of Barber v. Guilford County Sheriff's Dep't*, 161 N.C. App. 658, 662, 589 S.E.2d 433, 436 (2003). " 'Even where a [party] is seeking to obtain some form of equitable relief, rather than a payment of money, he may obtain a judgment in accordance with the terms of a

compromise agreement and may thereby obtain whatever performance the [other party] agreed to in the compromise agreement.' " *Howes*, 128 N.C. App. at 136-37, 493 S.E.2d at 797 (alterations original) (quoting 15 Am. Jur. 2d, *Compromise and Settlement* § 38).

Thus, even if Hardin was not required to voluntarily dismiss this action, that fact did not resurrect the claims he had chosen to release, but rather only preserved Hardin's ability to enforce the settlement agreement in this action rather than filing a new lawsuit. Hardin did not, however, seek enforcement of the settlement agreement, but rather sought to avoid it. The trial court, therefore, did not err in determining that Hardin's claims were barred by the release and dismissing this action.

Conclusion

In response to defendants' motions, Hardin could have filed a cross-motion to enforce the settlement agreement, but chose not to do so. Instead, he pursued the claims that had been released in the settlement agreement. We hold that Hardin has failed to present sufficient evidence to raise an issue of fact regarding the enforceability of the settlement agreement and its release. The trial court, therefore, did not err in granting defendants' motions to enforce the agreement and dismissing Hardin's action. This ruling does not, however, preclude Hardin from filing a separate action regarding breach and enforcement of the settlement agreement.

Affirmed.

Judges McGEE and BEASLEY concur.

STATE OF NORTH CAROLINA v. LANCE DYLAN FLINT

No. COA08-1235

(Filed 15 September 2009)

1. Criminal Law— denial of continuance—discovery not requested

The trial court did not abuse its discretion in a prosecution for robbery and other charges by denying defendant's motion to continue based on not having received discovery within a rea-

sonable time before trial. Defendant did not move that the State make discovery available, and there was nothing in the record showing that additional time was necessary.

2. Witnesses— name misstated on witness list—allowed to testify

The trial court did not abuse its discretion by allowing Karen Holman to testify when her name had been misstated as "Karen Holbrook" on the witness list provided by the State. The record does not reveal any defense motion or written agreement for the State to provide a witness list; moreover, this witness's testimony was purely to authenticate documents and tapes.

3. Criminal Law— acceptance of guilty plea and habitual felon acknowledgment

The trial court had jurisdiction to accept a plea from defendant as to all of his pending charges and to his status as an habitual felon where the habitual felon law was, at the least, ancillary to the multiple felony indictments.

4. Criminal Law— guilty pleas and habitual felon acknowledgment—informed choice

The trial court did not err by accepting defendant's guilty pleas and admission to habitual felon status where defendant argued that his plea was not the product of his informed choice. The trial court complied with N.C.G.S. § 15A-1022(a) in determining that defendant's pleas were voluntarily given and a product of informed choice, and defendant's answers did not indicate any misunderstanding.

5. Criminal Law— arraignment—less than all charges—not prejudicial

There was no prejudicial error in not arraigning defendant on all charges contained in the plea where defendant did not object and did not claim that he was not properly informed of the charges.

6. Criminal Law— guilty pleas—factual basis—insufficient

There was an insufficient factual basis for guilty pleas to multiple felonies and an admission to having obtained habitual felon status. The record indicates that the trial court relied solely on a document presented by the State which did not address all of the charges.

7. Sentencing— prior record level—erroneous—stipulation

The trial court erred by sentencing defendant at a prior record level VI when he should have been sentenced at a prior record level V. While defendant's stipulation as to prior record level is sufficient evidence for sentencing, the trial court's assignment of a record level is a conclusion of law reviewed *de novo*.

Judge JACKSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 9 November 2007 by Judge D. Jack Hooks, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 5 May 2009.

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

Charlotte Gail Blake for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Lance Dylan Flint ("defendant") appeals from a judgment entered after a jury convicted defendant and following a subsequent plea agreement in which he pled guilty to sixty-eight felonies and four misdemeanors. Defendant's appeal is founded on five issues, including denial of a motion to continue; allowing testimony by an unlisted witness; proceeding to a trial on habitual felon status following his convictions; accepting his guilty plea without a proper evidentiary foundation and improper sentencing. For the reasons discussed herein, we find no error in defendant's trial and convictions; however, we vacate the judgment, set aside defendant's plea agreement, and remand for proceedings consistent with this opinion.

I. Background

Prior to 14 November 2005 defendant had over one hundred prior convictions, which included both felonies and misdemeanors. From 14 November 2005 to 22 May 2006, defendant was indicted for eighty-two felonies and eight misdemeanors, which occurred between 13 May 2005 and 10 April 2006 in New Hanover County. These indictments included charges for common law robbery, breaking and entering a motor vehicle, breaking and entering into a building, financial card fraud, obtaining property by false pretenses, forgery of instruments, uttering forged instruments, possession of stolen goods/property, financial identity fraud, misdemeanor larceny, felony larceny,

injury to personal property and eluding arrest. Defendant was also indicted for being an habitual felon on 28 November 2005.

Included in the 22 May 2006 indictments were three felony charges of obtaining property by false pretenses, two charges of felony financial card fraud, and one charge of misdemeanor financial card fraud, all of which allegedly occurred on 10 March 2006. At the 7 November 2007 Session of New Hanover County Criminal Superior Court, defendant was scheduled to be tried on the aforementioned six charges contained in the 22 May 2006 indictment. The other indictments were not scheduled for trial at that time. The Honorable D. Jack Hooks, Jr., presided at the trial.

Before trial, defendant made a motion to continue, arguing that "he [did not] feel comfortable proceeding to trial" because he did not receive discovery until 17 October 2007 and did not receive the surveillance tapes until approximately a week after that. The trial court denied defendant's motion.

At trial, the State presented evidence that Melvin Blackmon's credit cards were stolen in March 2006, and within hours were used to purchase items from a Harris Teeter Grocery Store and two Lowe's Home Improvement Stores. Upon being contacted by the Wrightsville Beach Police Department, Kathy Holman, the manager of the Harris Teeter, produced a copy of the credit card receipt and the surveillance video of the transaction. Ms. Holman's testimony authenticated the receipt and the copy of the surveillance video that was eventually played for the jury. However, defendant objected to Ms. Holman being allowed to testify because she was identified as "Kathy Holbrook" on the State's witness list, and therefore, he did not have the opportunity to question jury members about their knowledge of Kathy Holman. The trial court overruled defendant's objection and allowed Ms. Holman to testify.

Detective Christopher Schwartz of the Wrightsville Beach Police Department testified that during his investigation, he retrieved surveillance videos and receipts from Harris Teeter and Lowe's stores, and these videos and receipts were shown to the jury. Defendant exercised his right to remain silent and presented no evidence. On 9 November 2007, the jury convicted defendant on two felony counts of obtaining property by false pretenses and one count each of felony and misdemeanor financial card fraud. The jury acquitted defendant on the remaining two charges contained in the 22 May 2006 indictment.

Following the verdict, the trial court excused the jury temporarily to address an indictment for attaining the status of an habitual felon. Counsel conferred briefly with defendant and announced to the trial court that defendant agreed to enter a plea agreement admitting his habitual felon status and pleading guilty to multiple charges pending against him in New Hanover County. Defendant had been arraigned on some of the pending charges, but not all of them, which included some sixty-eight felony counts. Defendant was then arraigned on forty-eight charges including having obtained the status of an habitual felon. After defendant was arraigned, the court proceeded to take the transcript of plea, consisting of twelve pages and listing sixty-eight felonies and two misdemeanors plus the habitual felon charge.[1] The prosecutor then submitted a written factual basis for the plea listing forty-seven felonies to which defendant stipulated. The listed felony charges included five breaking and entering a motor vehicle offenses, one common law robbery offense, three breaking and entering offenses, one financial card fraud offense, eight forgery of instruments offenses, and twenty-nine obtaining property by false pretenses offenses. Absent from the factual basis document, but included in the transcript of plea, were three uttering forged instrument offenses, one possession of stolen goods offense, one financial card identity fraud offense, fifteen forgery offenses, and one felony eluding arrest offense.

After accepting defendant's plea, the trial court reviewed defendant's prior record worksheet. The prior record worksheet submitted to the trial judge showed that defendant had eight Class H or I felonies carrying two points each and three misdemeanor convictions carrying one point each giving him a total of nineteen points. Defendant's attorney signed a stipulation agreement on the prior record worksheet, and defendant himself stated in open court that he had reviewed the worksheet. Based on the prior record worksheet and pursuant to the plea agreement, defendant's convictions and plea were consolidated, and he was sentenced at prior record level VI to an active term in the Department of Corrections of 135 to 171 months.

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1. The transcript of plea actually lists a total of seventy-four felonies and three misdemeanors. However, three offenses, breaking and entering a motor vehicle and forgery of an instrument and misdemeanor larceny, contained in 05CRS65882 are marked through with a line and notation stating "VD 4/25/07," and four offenses, two breaking and entering a motor vehicle and one obtaining property by false pretense and one forgery, contained in 06CRS554865 and 06CRS54787 respectively are duplicates of felonies already listed on the transcript of plea. Therefore the correct total number of felonies listed on the transcript of plea is sixty-eight.

II. Issues

Defendant argues the trial court erred by (1) denying his motion to continue, (2) allowing Ms. Holman to testify, (3) proceeding to the habitual felon indictment after trial, (4) accepting his guilty plea to multiple felonies and attaining the status of an habitual felon, and (5) sentencing him at a prior record level VI.

III. Motion to Continue

[1] Defendant contends that the trial court abused its discretion by denying his motion to continue because he did not receive discovery at a reasonable time prior to his trial. We disagree.

This Court reviews a trial court's denial of motion to continue pursuant to an abuse of discretion standard. *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 221 (2002). A trial court abuses its discretion when the order is manifestly unsupported or when the order is so arbitrary that the decision could not have been the product of a reasoned decision. *State v. Hennis*, 323 N.C. 279, 285 372 S.E.2d 523, 527 (1988).

Defendant argues that he did not receive the discovery materials and videotapes in a reasonable time prior to trial, pursuant to N.C. Gen. Stat. § 15A-903(a)(1). The statute states in pertinent part that

> (a) [u]pon motion of the defendant, the court must order the State to:
>
> (1) [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.

N.C. Gen. Stat. § 15A-903(a)(1) (2007).

Defendant argued for his motion to continue before trial in the following manner:

> MR. HOSFORD ["Defense Counsel"]: Your Honor, may it please the Court, Mr. Flint would like me to bring to the Court's attention that we received discovery relating to this case on October 17, 2007. I met with Mr. Flint after that date, provided it to him. He is not comfortable with going forward with trial at this point in time with that amount of notice.
>
> The State provided the videotapes that they intend to introduce after that, approximately a week after that, after I met with

Mr. Flint, which is some 18 months after he was arrested. And he would like the Court to know that, and on his behalf he wants me to make a motion to continue it, as he doesn't feel comfortable proceeding at trial.

THE COURT: In the Court's discretion, that motion is denied.

N.C. Gen. Stat. § 15A-903(a) requires that the defendant make a motion in order for the court to order the State to make discovery available to defendant. In the case *sub judice*, defendant's trial began on 7 November 2007, and he did not receive discovery materials until 17 October 2007 and did not receive the videotapes until a week after. Under the cited statute, the defendant must make a motion in order for the State's obligation to provide discovery prior to trial. Neither the record on appeal nor the transcript contain a motion or written agreement to provide discovery. Without such documentation in the record, defendant has not shown that the State was under any obligation to provide discovery pursuant to N.C. Gen. Stat. § 15A-903(a)(1).

Furthermore, there is no basis in the record to show that additional time was necessary for the preparation of a defense. " 'To demonstrate that the time allowed [to prepare for trial] was inadequate, the defendant must show "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." ' " *State v. Williams*, 355 N.C. 501, 540-41, 565 S.E.2d 609, 632 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003) (citations omitted). There is no abuse of discretion where "defendant failed to provide any 'form of detailed proof indicating sufficient grounds for further delay.' " *State v. Beck*, 346 N.C. 750, 756-57, 487 S.E.2d 751, 756 (1997) (citation omitted). In this, the sole reason given by defense counsel for requesting the continuance was that defendant himself did not "feel comfortable" proceeding to trial, and therefore, he had directed his counsel to seek a continuance. Lacking an argument or evidence presented to the trial court that defendant would have needed additional time to prepare his defense or that he was materially prejudiced by the denial of his motion to continue, the trial court did not abuse its discretion in denying the motion.

IV. Ms. Holman's Testimony

[2] Defendant argues that the trial court erred in allowing Karen Holman, a Harris Teeter employee, to testify because her name had been misstated as "Karen Holbrook," on the list of witnesses provided

by the State. Defendant contends that allowing Ms. Holman to testify was an abuse of discretion because he was not afforded the opportunity to question the jury panel about its knowledge of her.

Defendant bases his argument on N.C. Gen. Stat. § 15A-903(a)(3), which states, in pertinent part that

> (a) [u]pon motion of the defendant, the court must order the State to:
>
> . . . .
>
> (3) [g]ive the defendant, at the beginning of jury selection, a written list of the names of all other witnesses whom the State reasonably expects to call during the trial.

N.C. Gen. Stat. § 15A-903(a)(3)(2007). Section 15A-903(a)(3) goes on to state that "[a]dditionally, in the interest of justice, the court may in its discretion permit any undisclosed witness to testify." *Id.*

In the case *sub judice*, the record does not reveal any defense motion or written agreement for the State to provide a witness list, nor does the record contain the State's witness list that was supposedly provided to defendant. However, the transcript indicates that defense counsel did object to Ms. Holman being allowed to testify and that the trial judge, in his discretion, had overruled the objection. The pertinent part of the transcript is as follows:

> [DEFENSE COUNSEL]: And I also objected to testimony of Ms. Holman, as she was not listed on the witness list, and the Court overruled the objection. There was reference by the prosecution that Ms. Holman was listed in the discovery. I'll let the Court know that Ms. Holman was listed as Karen Holbrook at Harris Teeter in the discovery, so Ms. Holman's—for the first time as Ms. Holman—and she testified, and we objected to her testimony.
>
> THE COURT: And I believe what you further referenced was that you hadn't had opportunity to make inquiry of the jury as to Ms. Holman as opposed to Ms. Holbrook; is that right?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: That's fine. The record will reflect that those objections were posed, and that the Court in its discretion overruled the same.

There are two issues with defendant's argument that the trial court abused its discretion by allowing Ms. Holman to testify. First, it is not clear from the record that defendant moved under N.C. Gen. Stat. § 15A-903(a)(3) to compel the State to produce a list of witnesses that it reasonably expected to call during the trial. Section 15A-903(a)(3) is clear that a motion by the defendant is required for the statute to be in effect. However, assuming *arguendo* that a motion was in fact made by defense counsel, N.C. Gen. Stat. § 15A-903(a)(3), nevertheless, provides that "in the interest of justice, the court may in its discretion permit *any* undisclosed witness to testify." N.C. Gen. Stat. § 15A-903(a)(3) (emphasis added).

Second, Ms. Holman's testimony in this case was only to authenticate the receipt and surveillance video taken the day of the alleged crime at the Harris Teeter. Ms. Holman explained that she received a call from Detective Schwartz of the Wrightsville Police Department asking her if she had video to show who had made a transaction with Melvin Blackmon's credit card on the morning of 10 March 2006. Ms. Holman then explained Harris Teeter's surveillance system to the jury, testified that the system was working properly on the morning of 10 March 2006, and explained what she did with the copy of the surveillance video before giving it to Detective Schwartz. Because Ms. Holman's testimony was purely to authenticate documents and tapes, the trial court was acting within its discretion to allow her testimony.

V. Proceeding to Habitual Felon Indictment

[3] Defendant argues that the trial court committed error by: (1) proceeding to the habitual felon part of the trial; and (2) in accepting his guilty plea to multiple felonies, because the habitual felon indictment was not ancillary to the charges on which he was tried, the trial court lacked jurisdiction to proceed on it, and his plea was not voluntary. We disagree.

In North Carolina, an habitual felon indictment must be ancillary to a substantive felony and cannot stand on its own. *State v. Allen*, 292 N.C. 431, 456, 233 S.E.2d 585, 589 (1977). In the case *sub judice*, the habitual felon indictment was returned on 28 November 2005. However, defendant was not indicted on charges for obtaining property by false pretenses and financial card fraud until 22 May 2006. Furthermore, these crimes did not even occur until 10 March 2006, over three months after the habitual felon indictment was returned. This Court has stated that an habitual felon indictment may be re-

turned before, after, or simultaneously with a substantive felony indictment. *State v. Blakney*, 156 N.C. App. 671, 675, 577 S.E.2d 387, 390, *disc. review denied*, 357 N.C. 252, 582 S.E.2d 611 (2003). It is difficult to see how the habitual felon indictment could attach as ancillary to felonies that had not yet occurred. Therefore, defendant correctly contends that the habitual felon indictment was not ancillary to the indictments for obtaining property by false pretenses and financial card fraud, which defendant was convicted of at the 7 November 2007 Criminal Session of New Hanover County Superior Court.

Defendant contends that without valid substantive indictments for the habitual felon indictment to attach to, the trial court lacked jurisdiction to proceed with a bifurcated proceeding regarding defendant's habitual status. However, (1) the trial court never proceeded to the habitual felon phase of the trial due to defendant's plea, and (2) there were substantive felonies to which the habitual felon indictment was ancillary.

First, the trial court never submitted to the jury for its determination the 28 November 2005 habitual felon indictment. After defendant was found guilty of two felony counts of obtaining property by false pretenses, and one felony and one misdemeanor count of financial card fraud, the transcript reads as follows:

> THE COURT: Has [defendant] at this point been arraigned as to the allegations contained in the habitual felon status file?
>
> MR. DAVID [Prosecutor]: Your Honor, it's my understanding he has been previously arraigned on that charge, and the State is ready to proceed at this time.
>
> DEFENSE COUNSEL: Your Honor, I don't know if he's been arraigned, actually, on that charge.
>
> THE COURT: We can arraign him at this time.
>
> [PROSECUTOR]: May I have a moment to confer with counsel?
>
> THE COURT: You sure can. (Counsel conferred.)
>
> THE COURT: Do you want a moment with your client?
>
> [DEFENSE COUNSEL]: Yes, your Honor.
>
> THE COURT: We'll stand at ease for about three minutes' time.

After the recess, defense counsel indicated that defendant was "going to dispose of all his cases with a plea." Therefore, due to defendant's plea, the habitual felon phase of the trial did not occur.

Second, the trial court had jurisdiction to accept defendant's plea because the habitual felon indictment was ancillary to prior pending substantive indictments. The habitual felon indictment was returned on 28 November 2005. Two weeks prior to the habitual felon indictment, on 14 November 2005, defendant was indicted: in 05CRS57605 for breaking and entering a motor vehicle on 13 May 2005; in 05CRS58997 for financial card fraud, forgery of an instrument, and uttering a forged instrument on 9 June 2009, and forgery of an instrument and uttering a forged instrument on 10 June 2005; and in 05CRS59853 for obtaining property by false pretenses. Additionally, on 12 December 2005, defendant was indicted in 05CRS58994 for common law robbery on 9 June 2005. Therefore, the habitual felon indictment was, at the least, ancillary to these multiple felony indictments, meaning the trial court had proper jurisdiction to accept a plea from defendant as to all his pending charges and to his status as an habitual felon.

[4] Finally, defendant argues that because he could not have been sentenced as an habitual felon for the charges on which the jury convicted him, his subsequent plea and admission to the status of an habitual felon were not the product of his informed choice and therefore invalid. In order for a plea of guilty to be valid, it must be made knowingly and voluntarily. *State v. Allen*, 164 N.C. App. 665, 669, 596 S.E.2d 261, 263 (2004). Defendant cites N.C. Gen. Stat. § 15A-1022(a) as grounds for this argument. Section 15A-1022(a), which governs the duties of a superior court judge when accepting a plea of guilty or no contest, provides in pertinent part:

> [A] superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:
>
> (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
>
> (2) Determining that he understands the nature of the charge;
>
> (3) Informing him that he has a right to plead not guilty;
>
> (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;

> (5) Determining that the defendant, if represented by counsel, is satisfied with his representation;
>
> (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge[.]

N.C. Gen. Stat. § 15A-1022(a) (2007). Because N.C.G.S. § 15A-1022 relates only to the duties of a trial judge prior to "accept[ing] a plea of guilty," we look only at the record relating to the court's examination of defendant prior to its approval of his tendered pleas of guilty. *See State v. Wynn*, 278 N.C. 513, 180 S.E.2d 135 (1971).

In the case *sub judice*, the trial judge complied with N.C. Gen. Stat. § 15A-1022(a) by addressing defendant personally. The pertinent part of the transcript includes:

> THE COURT: If you will have [defendant] sworn to the transcript, please.
>
> (The oath was administered to the defendant by the clerk.)
>
> THE COURT: You are . . . Lance Dylan Flint, age 35?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You are able to hear and understand me?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand that you have the right to remain silent, and that anything you say can be used against you?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have you completed the GED, read and write on the left [sic] of a high school graduate?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Are you now under the influence of alcohol, drugs, narcotics, medicines, or any other intoxicating or impairing substances?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: The transcript reflects that you last used or consumed such a substance two years ago; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Have the charges been explained to you by counsel, and do you understand the nature of these charges and every element of each charge?

THE DEFENDANT: Yes, sir.

THE COURT: Have you and your attorney discussed the possible defenses, if there are any, for these charges?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with his legal services?

THE DEFENDANT: Yes, sir.

. . . .

THE COURT: Do you understand that you have the right to plead not guilty and be tried by a jury, and at such a trial to cross-examine the witnesses against you?

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand that by pleading guilty you give up these and other valuable constitutional rights to a jury trial, including for sentencing matters?

THE DEFENDANT: Yes, sir.

THE COURT: You're a U.S. citizen?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you are entering pleas of guilty in the file 2005-CRS-20449 to the status of a habitual felon, which carries a Class C punishment? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And that the maximum possible punishment you could receive for that offense would be as much as—as 261 months?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. Now, otherwise, in the varying file numbers which you have heard called out and the charges within each file that Madam Prosecutor called out, do you un-

derstand that you are entering pleas of guilty as to each of those individual charges?

THE DEFENDANT: Yes, sir.

THE COURT: They are written on this transcript, and you have had the opportunity to see and read each of those, and, in fact, did so; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Do you understand that for these offenses, you face a total possible punishment of as much as 19,314 months plus 240 days?

THE DEFENDANT: Yes, sir.

. . . .

THE COURT: And the prosecutor and your lawyer have advised me that under this plea arrangement you will receive a maximum sentence of 135 months to 171 months. In other words, they're all going to be consolidated, and you would be sentenced as a habitual felon under class C to the minimum from the presumptive range for your appropriate class. Do you understand that?

THE DEFENDANT: Yes, sir. I do.

THE COURT: Do you now personally accept this plea arrangement.

THE DEFENDANT: I do.

THE COURT: And is this correct as being your full plea arrangement?

THE DEFENDANT: Yes, sir.

THE COURT: Other than this plea arrangement, has anyone promised you anything or threatened you in any way to cause you to enter these pleas against your wishes?

THE DEFENDANT: No, sir.

THE COURT: Do you enter these pleas of your own free will, fully understanding what you're doing?

THE DEFENDANT: Yes, sir. I do.

It is clear from the record that the court informed defendant of every right listed in N.C. Gen. Stat. § 15A-1022(a), the maximum possible sentence, and determined defendant understood the charges and was satisfied with his trial counsel. Defendant's responses to the court before it accepted his guilty pleas did not indicate any misunderstanding. Because the trial court complied with N.C. Gen. Stat. § 15A-1022(a) in determining that defendant's pleas were voluntarily given and a product of informed choice, and defendant's answers did not indicate any misunderstanding requiring further inquiry by the trial court, the trial court did not err in accepting defendant's guilty pleas.

VI. Accepting Plea Agreement

[5] Defendant asserts that his guilty pleas to multiple felonies and his admission to having attained the status of an habitual felon are invalid because the plea lacks an adequate factual basis. We agree.

Defendant challenges the validity of his guilty pleas in two ways. First, defendant argues that the failure of the trial court to do a formal arraignment on every charge was error. As this issue was not preserved by an assignment of error as required by Rule 10(a) of the Rules of Appellate Procedure, it is deemed to be waived. *See* N.C. R. App. P. Rule 10(a) (2009) ("Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal[.]"); *see also Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008) (holding "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").

Assuming *arguendo* that defendant properly assigned error to this issue, the trial court's failure to arraign on all charges contained in the plea is not error. " 'The failure to conduct a formal arraignment itself is not reversible error. The purpose of an arraignment is to allow a defendant to enter a plea and have the charges read or summarized to him and the failure to do so is not prejudicial error unless defendant objects and states that he is not properly informed of the charges.' " *State v. Artis*, 174 N.C. App. 668, 679, 622 S.E.2d 204, 211 (2005) (citations omitted), *disc. review denied*, 360 N.C. 365, 630 S.E.2d 188 (2006). Because defendant did not object nor did he claim that he was not properly informed of the charges contained in the plea, the trial court did not commit prejudicial error.

[6] Second, defendant argues that there was an insufficient factual basis for the plea. Preliminarily, we note that defendant has no appeal of right as to this issue. *See State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987) ("[A] 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 stated in his brief that "in the event this Court determines that [defendant] does not have an appeal as of right from his guilty plea . . . [defendant] requests that this Court accept this as a petition for certiorari[.]" Accordingly, we treat defendant's appeal as a petition for writ of certiorari on this issue, which we now allow. Therefore, we address the merits of defendant's argument.

Essentially, the question presented by defendant is whether the trial court complied with N.C. Gen. Stat. § 15A-1022(c) in determining there was a factual basis for defendant's guilty plea. Guilty pleas must be substantiated in fact as prescribed by the statute at issue in this case:

> The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.
>
> (2) A written statement of the defendant.
>
> (3) An examination of the presentence report.
>
> (4) Sworn testimony, which may include reliable hearsay.
>
> (5) A statement of facts by the defense counsel.

N.C. Gen. Stat. § 15A-1022(c).

The five sources listed in the statute are not exclusive, and therefore "[t]he trial judge may consider any information properly brought to his attention in determining whether there is a factual basis for a plea of guilty[.]" *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185-86 (1980). Nonetheless, such information "must appear in the record, so that an appellate court can determine whether the plea has been properly accepted." *State v. Sinclair*, 301 N.C. 193, 198, 270 S.E.2d 418, 421 (1980). Further, in enumerating these five sources, the statute "contemplate[s] that some substantive material independent of the plea itself appear of record which

tends to show that defendant is, in fact, guilty." *Id.* at 199, 270 S.E.2d at 421-22.

Here, the record before the trial court provides insufficient evidence to demonstrate that each guilty plea had a proper factual basis. There was neither a written statement by defendant nor a statement of the facts by defense counsel in the record. Additionally, there was no sworn testimony given with regard to the factual basis, nor was there any indication that an examination of the presentence report was conducted. Therefore, the record indicates that the trial court relied solely on the factual basis document presented by the State in determining the factual basis of defendant's guilty plea. The State's written factual basis document addresses 47 felony charges. However, the transcript of plea addresses 68 felony charges plus the habitual felon indictment. The transcript indicates that the trial court relied on the State's factual basis document as the factual basis for defendant's entire plea. The pertinent part is as follows:

> THE COURT: Do you agree that there are facts to support your pleas, and consent to a written summary of the factual basis regarding these matters?
>
> THE DEFENDANT: Yes, sir.
>
> . . . .
>
> THE COURT: Let's have the record reflect the finding of the matter of the factual basis for each of the matters to which he is pleading guilty, both the substantive charges and particularly the status of a habitual felon contained in file 2005-20449.
>
> . . . .
>
> THE COURT: . . . Madam Clerk, Lance Flint, this date pleading guilty pursuant to transcript to each of the items listed on that transcript, that is, six counts of breaking and entering a motor vehicle, one common law robbery, three counts of breaking and entering buildings, one financial card fraud offense, eight counts of forgeries of instruments, 29 counts of obtaining property by false pretenses; and just in case I did not earlier specifically say so, in file 2005-CRS-20449 to the class C status of a habitual felon. As to each of the above, [defendant] is found guilty.

Although the trial court stated that defendant was "pleading guilty pursuant to transcript to each of the items listed on that transcript," it is, nevertheless, clear that the trial court was solely relying

on the State's factual basis document during defendant's plea to provide the factual basis for the entire plea. The trial court listed only the felonies included on the State's factual basis document when announcing defendant's plea. A second indication is the trial court's mistake that defendant was pleading guilty to six breaking and entering a motor vehicle charges when he was only pleading guilty to five of those particular charges. On the State's factual basis document, the heading indicated "Six Break and Enter a Motor Vehicle Offenses." However, one of the breaking and entering a motor vehicle charges is marked out with several lines, indicating that defendant was actually only pleading to five of those charges. This mistake shows that the trial court was solely relying on the State's factual basis document as the factual basis for the entire plea. Finally, during the plea the trial court never mentioned by name or case number any other felony that was not contained in the factual basis document except for the habitual felon charge.

Furthermore, while it is true that the trial court had before it the transcript of plea, which listed all of the felonies defendant was pleading guilty to, the transcript itself cannot provide the factual basis for the plea in and of itself. *Sinclair*, 301 N.C. at 199, 270 S.E.2d at 421 (holding the transcript was insufficient for the trial court to determine the existence of a factual basis, reasoning that "[i]f the plea itself constituted its own factual basis, the statute requiring a factual basis to support the plea would be meaningless").

The State argues that the indictments for each of the charges provide the factual basis for the twenty-one felonies not found in the factual basis document. While it is true that the indictments are contained in the record on appeal, it is not clear if they were, in fact, before the trial court during defendant's plea. The trial court, in its factual basis determination, never mentions the indictments and only refers to the State's factual basis document. Therefore, the trial court erred in accepting defendant's guilty plea because there was nothing before the court to support an independent judicial determination factual basis for twenty-one of the felonies listed on the transcript of plea.

Despite the fact that forty-seven of the felonies that defendant pled guilty to are supported by an independent factual basis, we must, nevertheless, remand this matter to the trial court. In *State v. Stonestreet*, 243 N.C. 28, 89 S.E.2d 734 (1955), our Supreme Court stated:

> Where two or more indictments or counts are consolidated for the purpose of judgment, and a single judgment is pronounced thereon, even though the plea of guilty or conviction on one is sufficient to support the judgment and the trial thereon is free from error, the award of a new trial on the other indictment(s) or count(s) requires that the cause be remanded for proper judgment on the valid count.

Id. at 31, 89 S.E.2d at 737.

Thus, we vacate the trial court's judgment and remand to the trial court. Because defendant has requested that he be relieved of his plea agreement, we also set aside defendant's plea agreement due to failure of the State to provide a factual foundation. This case is remanded to the trial court where defendant may "withdraw his guilty plea and proceed to trial on the criminal charges . . . [or] attempt to negotiate another plea agreement[.]" *State v. Wall*, 348 N.C. 671, 676, 502 S.E.2d 585, 588 (1998).

VII. Prior Record Level

[7] Defendant asserts that the trial court erred in sentencing defendant at a prior record level VI because he should have been sentenced at prior record level V. We agree.

The State recognizes that the crimes specifically listed in the record do not total the points on the worksheet, but nevertheless argues that the trial court was entitled to rely on defendant's stipulation. We find this argument unpersuasive.

"Although defendant's stipulation as to prior record level is sufficient evidence for sentencing at that level . . . the trial court's assignment of level [VI] to defendant was an improper conclusion of law, which we review *de novo*." *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007). Additionally, "[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683, *appeal dismissed*, *disc. review denied*, 297 N.C. 179, 254 S.E.2d 38 (1979).

The prior record worksheet submitted to the trial court showed that defendant had eight Class H or I felonies, which carried two points each and three misdemeanor convictions, which carried one point each, giving defendant a total of nineteen points. Defendant contends the trial court erred in calculating the prior record level

points for the following convictions: (1) driving while license revoked on 13 January 1994, (2) trafficking in marijuana on 28 June 2002, and (3) the status of being an habitual felon on 10 November 2005 in Brunswick County.

First, defendant's driving while license revoked conviction on 13 January 1994 should not have been included on the prior record worksheet. Section 15A-1340.14(b)(5) provides that each misdemeanor conviction is worth one point. N.C. Gen. Stat. § 15A-1340.14(b)(5). However, for purposes of the subsection, a misdemeanor is defined as "any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving (G.S. 20-138.1), impaired driving in a commercial vehicle (G.S. 20-138.2), and misdemeanor death by vehicle (G.S. 20-141.4(a2)), but not any other misdemeanor traffic offense under Chapter 20 of the General Statutes." N.C.G.S. § 15A-1340.14(b)(5). Being that driving while license revoked is a misdemeanor traffic offense, which is not included in Section 15A-1340.14(b)(5), it is not a conviction that can be used in determining a defendant's prior record level. Defendant's only other conviction on 13 January 1994 is operating a vehicle with no insurance, which also cannot be used in determining a defendant's prior record level. Therefore, the trial court committed error by including one point for defendant's driving while license revoked conviction on his prior record worksheet.

Second, two points for defendant's trafficking in marijuana conviction on 28 June 2002 should not have been included on the prior record worksheet. Section 14-7.6 provides in pertinent part that "[i]n determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used." N.C. Gen. Stat. § 14-7.6 (2007). The 28 November 2005 indictment that alleged defendant to be an habitual felon listed the 28 June 2002 conviction for trafficking in marijuana as one of the offenses used to indict defendant as an habitual felon. Therefore, the trafficking in marijuana conviction should not have been included on the prior record worksheet as a Class H felony giving defendant two points. However, defendant does have a countable charge from 28 June 2002 for possession of drug paraphernalia, a Class 1 misdemeanor. Therefore, defendant should have received only one point for his misdemeanor conviction from 28 June 2002, and not two points for a Class H felony that was used in the habitual felon indictment.

Finally, defendant assigns error in including two points on the prior record worksheet for his habitual felon conviction from

Brunswick County on 10 November 2005. The habitual felon conviction is handwritten on the bottom of the last page of the prior record worksheet, and subsequently, the underlying felony is not listed on the worksheet. Only the points from the underlying felony can be counted in the prior record level, not points for the punishment enhancement. *State v. Vaughn*, 130 N.C. App. 456, 460, 503 S.E.2d 110, 113 (1998), *aff'd per curiam*, 350 N.C. 88, 511 S.E.2d 638 (1999). This is because being an habitual felon is not a felony in and of itself. *Id.* It is, rather, " 'a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime.' " *Id.* (citation omitted). While the record is clear that the underlying felony had to be a Class H or I carrying two points,[2] it is, nevertheless, unclear as to what the underlying felony actually is. However, defendant concedes in his brief that he should receive two points for the underlying felony for the prior habitual felon conviction. Therefore, defendant was properly given two points for the underlying felony of the prior habitual felon conviction.

Based on the errors detailed above, defendant's points for felony sentencing should have been seventeen. Section 15A-1340.14(c) provides that "[t]he prior record levels for felony sentencing are: (5) Level V—At least 15, but not more than 18 points [and] (6) Level VI—At least 19 points." N.C.G.S. § 15A-1340.14(c). Therefore, it appears that defendant was improperly sentenced at a level VI with 19 points, and should have been sentenced at a level V with a total of 17 points. According to the plea agreement, defendant should have been sentenced as a Class C, Level V at the minimum presumptive range, meaning defendant should have received a sentence of 121 to 151 months in the Department of Corrections instead of a sentence of 135 to 171 months.

VIII. Conclusion

For the foregoing reasons, we find no error in defendant's trial and uphold the jury's conviction of defendant on two felony counts of obtaining property by false pretenses and one felony and one misdemeanor count of financial card fraud. However, the trial court lacked a factual basis for some charges on defendant's plea agreement, and therefore, we vacate the judgment and set aside defendant's plea agreement. We remand this case for proceedings consistent with this opinion, including the resentencing of defendant.

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2. The prior record worksheet shows that the only felony convictions for defendant are for Class H and I felonies that carry 2 points.

No error in part; vacated in part; and remanded in part.

Judge WYNN concurs.

Judge JACKSON concurs in part and dissents in part in a separate opinion.

JACKSON, Judge, concurring in part, dissenting in part.

For the reasons stated below, I must respectfully dissent from the Court's decision to address defendant's claim that his guilty pleas were based on an insufficient factual basis. I concur, however, in the remaining four issues presented.

Because I believe that defendant did not petition the Court properly for writ of *certiorari*, I would deny defendant's petition. North Carolina General Statutes, section 15A-1444 provides that

> the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(e) (2007). However, petitions for writ of *certiorari* are constrained by our Rules of Appellate Procedure. N.C. Gen. Stat. § 15A-1444 cmt. (2007) ("[D]iscretionary review is necessarily controlled by the rules of the appellate division"). The Court's discretion to issue a writ of *certiorari* is limited to

> appropriate circumstances . . . when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

N.C. R. App. P. 21(a)(1) (2007). *See, e.g.*, *State v. Hadden*, 175 N.C. App. 492, 497, 624 S.E.2d 417, 420 (2006); *State v. Pimental*, 153 N.C. App. 69, 76-77, 568 S.E.2d 867, 872 (2002). The petition should be filed with the clerk of the Court of Appeals and must include

> a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition.

N.C. R. App. P. 21(c) (2007).

In the instant case, defendant simply noted in his brief that "in the event this Court determines that [defendant] does not have an appeal as of right from his guilty plea . . . [defendant] requests that this Court accept this as a petition for certiorari[.]" Furthermore, defendant's appeal does not conform to the requirements of Rule 21. As I would deny defendant's petition, I must dissent.

COMMERCIAL CREDIT GROUP, INC., PLAINTIFF v. LELAND BARBER, JR., INDIVIDUALLY AND D/B/A B.M.E. RECYCLING, DEFENDANT

No. COA09-42

(Filed 15 September 2009)

1. Uniform Commercial Code— resale of collateral—commercial reasonableness

The trial court did not err by concluding that the auction of a recycler was commercially unreasonable because the creditor was not entitled to a presumption of commercial reasonableness under N.C.G.S. § 25-9-626(a)(1) and the gross disparity between the second resale private price and the creditor's winning bid, which was a direct result of commercially unreasonable advertising methods, demonstrated that the auction price of the recycler was not reasonable.

2. Uniform Commercial Code— resale of collateral—deficiency judgment

The trial court did not err by failing to grant a deficiency judgment because the creditor failed to establish any amount that could have been obtained from a commercially reasonable sale of the collateral, and thus, the trial court properly concluded that the collateral was worth at least the amount of the debtor's debt.

3. Costs— taxed to creditor—jurisdiction

The trial court did not err by ordering the costs of the action be taxed to the creditor because judgment was entered in favor of the debtor and the trial court had jurisdiction to issue the order.

Appeal by plaintiff from judgment entered 24 September 2008 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 18 May 2009.

Robert G. Qulia for plaintiff-appellant.

Colombo, Kitchin, Dunn, Ball & Porter, LLP, by W. Walton Kitchin, for defendant-appellee.

HUNTER, JR., Robert N., Judge.

Plaintiff Commercial Credit Group, Inc. ("Creditor") appeals the trial court's findings and conclusions concerning a non-consumer secured transaction. We affirm.

I. BACKGROUND

In July 2007, defendant Leland Barber, Jr. d/b/a B.M.E. Recycling ("Debtor"), purchased a Peterson Pacific 5400 heavy duty waste recycler ("recycler") from Pioneer Machinery, LLC ("Pioneer") for $225,000. The recycler, powered by an 860-horsepower Caterpillar engine, grinds logs into wood chips for commercial use. The purchase included two warranties: an extended service agreement for 6,000 hours on the machine and a 5-year limited warranty on the engine. Debtor financed the transaction with a promissory note and security agreement to Creditor with the recycler serving as collateral. Subsection (c)(iii) of section 9 of the parties' security agreement provided:

> Any public sale will be deemed commercially reasonable if notice thereof shall be mailed to Debtor at least 10 days before such sale and advertised in at least one newspaper of general circulation in the area of the sale at least twice prior to the date of sale and if upon terms of 25% cash down with the balance payable in good funds within 24 hours[.]

The recycler ceased operating after six hours of use, and in September 2007, Debtor brought the inoperable recycler to the Pioneer dealership in Glen Allen, Virginia, for warranted repairs. The absence of the recycler eventually resulted in Debtor defaulting on his loan, because he could not generate revenue to make payments. Consequently, Debtor and Creditor both separately and repeatedly encouraged Pioneer to repair the recycler. Pioneer reportedly told Debtor and Creditor on numerous occasions that it would repair the recycler "within a number of weeks or no more than thirty days." In spite of these assurances, the inoperable recycler sat disassembled and unrepaired at Pioneer's dealership through December 2007.

Creditor notified Debtor of his payment default by letters dated 19 and 28 November 2007, and on 28 November 2007, Creditor con-

structively repossessed the recycler. Creditor then mailed Debtor notice on 17 December 2007 that it would conduct a public auction of the inoperable recycler at Pioneer's dealership in Glen Allen, Virginia, on Thursday, 27 December 2007. Debtor's attorney acknowledged receipt of notice by letter dated 20 December 2007.

Creditor placed identical advertisements for the auction of the recycler in two newspapers of general circulation—the Richmond Times-Dispatch of Richmond, Virginia, and The Daily Reflector of Greenville, North Carolina. The ads ran in both papers on Sunday, 23 December 2007, and Thursday, 26 December 2007. Although the recycler had active warranties, Creditor's ads indicated that the recycler would be sold "as-is" with no warranties. Creditor did not place any additional advertisements in advance of the auction in trade magazines or other newspapers, nor did it individually notify any prospective buyers of the recycler.

Creditor conducted the public auction for the recycler at 1 p.m. on Thursday, 27 December 2007. Only one other bidder was in attendance in addition to Creditor. Debtor did not attend the auction. Acting on behalf of Creditor, Commercial Credit Group's Senior Vice President, Mr. Mattocks, offered an opening bid of $100,000. No other bids were offered. As the high bidder, Creditor purchased the disassembled and inoperable recycler, and shipped it to a rental facility in Charlotte, North Carolina, where it was stored for approximately three months in like condition.

Mr. Mattocks testified at trial that Creditor calculated its $100,000 opening bid by determining a wholesale value for the recycler, deducting an estimated $65,000 engine repair cost from the wholesale value, and then deducting the cost of additional mechanical "unknowns" (*i.e.*, possible repairs). Mr. Mattocks stated that additional mechanical "unknowns" included the possibility that some other components of the machine may have been out of service. Creditor did not include the warranties on the recycler in its opening bid calculations.

Debtor owed Creditor approximately $227,017.63 as of the date of auction. After the auction, Creditor deducted the $100,000 net sale proceeds from Debtor's outstanding debt and found that Debtor's total outstanding balance was $128,168.09 as of 28 December 2007. Debtor made no further payments on the loan.

In January 2008, Creditor commenced action against Debtor in Pitt County Superior Court seeking a deficiency judgment against

Debtor in the amount of $128,168.09, plus accrued interest and attorneys' fees. In March of 2008, Creditor sold the still-inoperable recycler to an unrelated third party for $190,000.00 at a private sale.

The matter was heard by the trial court sitting without a jury. Following the trial, the court entered a judgment and order in which it concluded as a matter of law that: (1) Creditor held "a proper and valid security interest in the collateral," (2) Creditor constructively repossessed the recycler because Debtor was in default on the note, and (3) the sale of the recycler at the public auction was not commercially reasonable. As such, the trial court deemed that the price bid at the public auction was fairly worth the debt owed by Debtor, concluded that Creditor was not entitled to a deficiency judgment, and ordered that the costs of the action be taxed to Creditor.

II. ISSUES

Creditor now raises several issues on appeal, and contends that the trial court erred by: (IV) concluding as a matter of law that the sale of the recycler at the public auction was not commercially reasonable, (V) concluding as a matter of law that the auction value of the recycler was fairly worth the debt owed to Creditor by Debtor, and (VI) ordering the costs of the action be taxed to Creditor. For the reasons stated herein, we affirm.

III. STANDARD OF REVIEW

From a non-jury trial, " ' "the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." ' " *Willen v. Hewson*, 174 N.C. App. 714, 718, 622 S.E.2d 187, 190 (2005) (citations omitted), *disc. review denied*, 360 N.C. 491, 631 S.E.2d 520 (2006). The trial court's conclusions of law are reviewed *de novo*. *Id.* "When competent evidence supports the trial court's findings of fact and the findings of fact support its conclusions of law, the judgment should be affirmed in the absence of an error of law." *Resort Realty of the Outer Banks, Inc. v. Brandt*, 163 N.C. App. 114, 116, 593 S.E.2d 404, 408 (2004), *disc. review denied*, 358 N.C. 236, 595 S.E.2d 154 (2004).

IV.

[1] As to the issue of whether the auction of the recycler on 27 December 2007 was commercially reasonable, Creditor argues that: (A) Creditor was entitled to a rebuttable presumption of commercial

reasonableness under N.C. Gen. Stat. § 25-9-626(a)(1) (2007); (B) the trial court erred in finding that Creditor had not sent Debtor notification of the auction "ten (10) full days prior to the sale of the property"; (C) Creditor's pre-auction advertisements of the recycler were commercially reasonable, and that the trial court erred in finding that the recycler was purchased with an extended warranty; (D) the recycler's inoperable status had no relevance as to the commercial reasonableness of the auction; and (E) the recycler's auction price of $100,000 was an accurate valuation of the collateral, the recycler's being auctioned at a different time or under other conditions would not have changed the outcome of the auction, and Creditor's March 2008 resale of the recycler was not legally relevant. We will address each in turn.

A. Rebuttable Presumption

Creditor first argues that it was entitled to a rebuttable presumption of commercial reasonableness under N.C.G.S. § 25-9-626(a)(1). We do not agree.

If the amount of a deficiency after the sale of collateral is in question in a secured transaction, "[a] secured party need not prove compliance with the provisions of this Part relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue." N.C.G.S. § 25-9-626(a)(1). If this presumption applies, a secured party need not prove compliance with Part 6 as "part of its prima facie case" unless "the debtor or a secondary obligor raises the issue [of compliance.]" N.C. Gen. Stat. § 25-9-626 official cmt. 3 (2007). Where compliance becomes a matter in dispute, "the secured party bears the burden of proving [compliance with Part 6]." *Id.*

Debtor explicitly denied in its answer Creditor's claim of performing a commercially reasonable public auction, and the primary issue at trial was whether Creditor's auction was commercially reasonable. Thus, Creditor's compliance with Part 6 was clearly in issue, and the trial court properly declined to recognize a presumption of commercial reasonableness under G.S. § 25-9-626(a)(1) in Creditor's favor. This assignment of error is overruled.

B. Ten Full Days' Notice

Creditor next contends that the trial court erred in finding that it had not sent Debtor notification of the auction "ten (10) *full* days prior to the sale of the property." (Emphasis added.) We do not agree.

In a non-consumer transaction, "a notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition." N.C. Gen. Stat. § 25-9-612(b) (2007). This rule applies so long as notice is sent in a commercially reasonable manner. N.C. Gen. Stat. § 25-9-612 official cmt. 3 (2007). "[I]n computing the time for the performance of an act or event . . . one of the terminal days is included in the count and the other is excluded, unless there is something to an intention to count only 'clear' and 'entire' days." *Harris v. Latta*, 298 N.C. 555, 556, 259 S.E.2d 239, 240 (1979) (citations omitted).

Here, Creditor sent notification of the 27 December 2007 auction to Debtor on 17 December 2007, and the receipt of the letter was acknowledged by Debtor's attorney. Because there was no clear intent to include the entire tenth day in the language of the loan documents, it follows that Creditor properly sent notification of disposition ten days prior to an auction that took place on the tenth day of the period in question. Therefore, Creditor's notification is presumed reasonable by statute. N.C.G.S. § 25-9-612(b).

However, Creditor's statutory compliance with N.C.G.S. § 25-9-612(b) does not warrant a reversal of the trial court's finding. The fact remains that 17 December 2007 was the day the letter was sent. Had Creditor sent the letter on 16 December 2007, then 17 December would have been a full day of notice rather than a partial day to be included under this State's General Statutes. The trial court therefore was technically correct in finding that Creditor did not send notification ten "full" days prior to the date of sale.

This technicality aside, Creditor fails to cite any authority showing how this notification to Debtor relates to commercial reasonableness,[1] and declines to identify a specific conclusion of law to which this finding correlates. As a result, Creditor's argument as to this issue is abandoned. N.C. R. App. P. 28(b)(6) (2009). This assignment of error is overruled.

C. Advertisements and Warranties

Creditor claims that the pre-auction advertisements of the auction of the recycler were commercially reasonable. We do not agree.

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1. Creditor's heading of this argument in its brief purports to tie the trial court's finding to commercial reasonableness.

The Uniform Commercial Code does not define the term "commercially reasonable." *Hodges v. Norton*, 29 N.C. App. 193, 197, 223 S.E.2d 848, 851 (1976). However, N.C. Gen. Stat. § 25-9-627(b) (2007) provides that:

> A disposition of collateral is made in a commercially reasonable manner if the disposition is made:
>
> (1) In the usual manner on any recognized market;
>
> (2) At the price current in any recognized market at the time of the disposition; or
>
> (3) Otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

N.C. Gen. Stat. § 25-9-627(b)(1)-(3); *see Hodges*, 29 N.C. App. at 197, 223 S.E.2d at 851 (public sale of tractor found commercially unreasonable using same criteria under former N.C. Gen. Stat. § 25-9-507(2)).

This test for commercial reasonableness, however, is not exhaustive, and the U.C.C. further requires that "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." N.C. Gen. Stat. § 25-9-610(b) (2007). "When deciding if a sale of repossessed collateral meets the statute[,] the trier of fact must consider all the elements of the sale together." *Don Jenkins & Son v. Catlette*, 59 N.C. App. 482, 484, 297 S.E.2d 409, 411 (1982) (citation omitted). As a result, whether a sale is commercially reasonable is an issue of fact determined "in light of the relevant circumstances of each case." *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 722, 329 S.E.2d 728, 730 (1985).

Creditor makes no argument on appeal that the auction of the recycler satisfies the criteria for commercial reasonableness outlined in N.C.G.S. § 25-9-627(b). As a result, we examine the circumstances surrounding the auction in light of the broad requirements of the case law above, and conclude that the content, time, and manner of Creditor's advertising effort were not commercially reasonable.

Content of the Advertisements

"[P]arties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a

secured party under a rule stated in G.S. 25-9-602[2] if the standards are not manifestly unreasonable." N.C. Gen. Stat. § 25-9-603(a) (2007). Creditor contends that its advertisements were commercially reasonable because it complied with the term of the security agreement which required Creditor to advertise the auction "in at least one newspaper of general circulation in the area of the sale at least twice prior to the date of sale[.]"[3] While Creditor is correct in its assertion that its compliance with this section could demonstrate commercial reasonableness under N.C.G.S. § 25-9-603(a), Creditor may not now use this argument as a shield given that it failed to follow all the terms of the security agreement regarding the sale of the collateral.

Subsection (c)(iii) of section 9 of the security agreement, the same subsection cited by Creditor, provides that the recycler could only be sold to a buyer with "25% cash down with the balance payable in good funds within 24 hours." However, Creditor's advertisements stated that "[Creditor] . . . may in its *sole discretion* require payment in full or a larger percentage of the bid price at the time of the auction[.]" (Emphasis added.) Creditor's representative made the same statement at the opening of the auction.

The parties never agreed that it would be commercially reasonable for Creditor to have "sole discretion" to demand greater than 25% cash down upon sale, and Creditor was not entitled to add terms to the sale unilaterally. It is reasonable to conclude that this breach was far from immaterial, because there may have been buyers willing to bid if only a 25% down payment was required at sale rather than the entire bid price. Consequently, Creditor's breach of the security agreement on this term renders its compliance argument meritless.

Creditor also contends that an extended warranty on the recycler did not exist at the time of auction, and therefore, advertising the recycler "as-is, where-is, without any representations or warranties" was commercially reasonable. The record is clearly contrary.

Mr. Mattocks, Creditor's representative responsible for the ads, testified that he was aware of: (1) a 6,000 hour extended warranty on the recycler that was part of Debtor's purchase invoice, and

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2. Section 602 contains a list of sections within Article 9 that may not be waived or altered through agreement by the debtor or obligor. N.C. Gen. Stat. § 25-9-602 (2007). The content of an advertisement for a sale of collateral is not included within any of the listed sections. *See id.*

3. This requirement is contained in subsection (c)(iii) of section 9 of the security agreement.

(2) a 1,970 hour engine warranty that was identified in Debtor's credit application. Thus, Creditor's own witness supports the trial court's finding that the inoperable recycler was covered by at least one warranty.

In light of this testimony, we believe that it was misleading and unreasonable for Creditor to advertise a piece of expensive, inoperable machinery "as-is" when an extended warranty existed at the time of auction that could have defrayed some or all of the costs of repairing the machine. It is common sense that an inoperable piece of machinery with a warranty is more attractive to a potential bidder than an inoperable piece of machinery without one. Accordingly, Creditor's argument that the trial court erred in finding that the recycler was sold with a warranty also fails.

Time and Manner of the Advertisements

In addition to the insufficient content of the advertisements, Creditor's advertising effort was grossly inadequate and poorly timed.

Though not defined in Article 9, a public sale or disposition "is one at which the price is determined after the public has had a meaningful opportunity for *competitive bidding*." N.C. Gen. Stat. § 25-9-610 official cmt. 7 (emphasis added). " 'Meaningful opportunity' is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale[.]" *Id.* In addition to these general requirements, "the method, manner, time, place, and other terms [of a public sale of collateral] must be commercially reasonable." N.C.G.S. § 25-9-610(b).

The recycler at issue in this case has a narrow commercial use, and as a result, the pool of bidders potentially interested in this equipment was necessarily limited from the outset. This fact was then inexplicably exacerbated by Creditor's decision to run advertisements for the auction in two general circulation newspapers just two days before and one day after the Christmas holiday. Obviously, scheduling a public auction for a highly specialized and expensive piece of inoperable machinery just two days after Christmas would almost certainly not enhance "competitive bidding" under N.C.G.S. § 25-9-610. Perhaps the best evidence of the result of Creditor's decision was that only one other person in addition to Creditor attended the auction.

Creditor was not bound by law or agreement to hold the auction on such an inconvenient date. *See* N.C. Gen. Stat. § 25-9-610 official

cmt. 3 (2007) ("This article does not specify a period within which a secured party must dispose of collateral."). Given the esoteric nature of the recycler and the fact that it was inoperable, Creditor should have chosen a more appropriate date of sale, and tried considerably harder to market the recycler by targeting legitimate prospective buyers. *See, e.g.*, *United States v. Conrad Pub. Co.*, 589 F.2d 949, 954 (8th Cir. 1978) (advertising insufficient where: printing equipment was not promoted in national or regional trade publications; bidders not given enough time to travel; invitations to bid not sent to potential publisher-bidders; and "[o]nly two advertisements were placed in North Dakota newspapers"). Although marketing defective equipment may often be more difficult than marketing functioning equipment, this is still no excuse for putting forth clandestine advertisements that are misleading, obtuse, and targeted to no one during the busiest holiday season of the year.

Therefore, after examining "all the elements of the sale together" in "light of the relevant circumstances" of this case, we believe there is sufficient competent evidence in support of the trial court's findings of fact and conclusion of law that Creditor's auction was not commercially reasonable. *Don Jenkins & Son*, 59 N.C. App. at 484, 297 S.E.2d at 411; *Parks Chevrolet, Inc.*, 74 N.C. App. at 722, 329 S.E.2d at 730. These assignments of error are accordingly overruled.

D. Recycler's Inoperable Status

Creditor next argues that the recycler's inoperable status had no relevance as to the commercial reasonableness of the auction. However, Creditor failed to assign error to any part of the record as to this issue, and this argument is therefore abandoned. N.C. R. App. P. 28(b)(6).

E. Auction Price and Resale

Creditor contends that the recycler's auction price of $100,000 was an accurate valuation of the collateral. We do not agree.

We recognize "[t]he fact that a greater amount could have been obtained" by a disposition occurring "at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing" that the disposition "was made in a commercially reasonable manner." N.C.G.S. § 25-9-627(a). However, while this provision hinders "second-guessing" the secured party subsequent to a sale of collateral, "it

does not give him unbridled discretion." *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 118, 245 S.E.2d 566, 569 (1978) (applying former N.C.G.S. § 25-9-507(2)).

This Court has identified three factors to be considered in determining the commercial reasonableness of the resale price of collateral: "(1) the price reflected by price handbooks, (2) the fair market value of the collateral, and (3) the price received on a second resale.[4]" *Fritts v. Selvais*, 103 N.C. App. 149, 152, 404 S.E.2d 505, 507 (1991) (citations omitted). "While not itself sufficient to establish a violation[,] . . . a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable." N.C.G.S. § 25-9-627 official cmt. 2.

Since Creditor offered no evidence of the recycler's price as reflected by price handbooks or fair market value at trial, we are left only with Debtor's purchase price of $225,000 and the recycler's second resale price of $190,000 to gauge the commercial reasonableness of the recycler's resale price at auction. Assuming that Creditor's estimated $65,000 engine repair cost was accurate, deducting this amount from the initial purchase price of $225,000 brings the estimated value of the recycler down to $160,000.

At trial, Mr. Mattocks cited mechanical "unknowns" as a possible source for the $60,000 discrepancy between the $160,000 estimated value of the inoperable recycler and Creditor's actual opening bid. However, even if "unknown" repairs would have actually cost $60,000, those repairs were apparently not a factor in Creditor's private sale in March 2008 where the recycler sold for $190,000. Under careful scrutiny, the gross disparity between the second resale private price and Creditor's winning bid, which was a direct result of commercially unreasonable advertising methods discussed *supra*, demonstrates that the auction price of the recycler was not reasonable.[5] Therefore, there was competent evidence in support of the trial court's determination that the auction was commercially unreasonable. *Brandt*, 163 N.C. App. at 116, 593 S.E.2d at 408. These assignments of error are overruled.

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4. Because the third factor requires this Court to examine Creditor's second, private resale of the recycler, we will not address Creditor's argument that the March 2008 resale of the recycler is not legally relevant.

5. This conclusion also disposes of Creditor's argument that auctioning the recycler at a different time or under other conditions would not have changed the outcome of the auction.

V.

[2] Creditor next argues that the trial court erred by not granting a deficiency judgment. We do not agree.

When a secured party sues for a deficiency judgment and compliance with Part 6 is in issue, the secured party has the burden of proving that the disposition of the collateral was conducted in a commercially reasonable manner. *See* N.C.G.S. § 25-9-626(a)(2). We have already concluded that Creditor failed to meet this burden, and that the disposition of the recycler at auction was commercially unreasonable.

If a secured party does not prove the sale to be commercially reasonable, then

> a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of:
>
> a. The proceeds of the collection, enforcement, disposition, or acceptance; or
>
> b. The amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of this Part relating to collection, enforcement, disposition, or acceptance.

N.C.G.S. § 25-9-626(a)(3)(a)-(b). In other words, a presumption in favor of a debtor arises that a commercially reasonable disposition would have yielded a price equal to the debt plus expenses and attorney's fees, unless the creditor "proves that the amount is less than that sum." N.C.G.S. § 25-9-626(a)(4) official cmt. 3 ("[D]ebtor or obligor is to be credited with the greater of the actual proceeds of the disposition or the proceeds that would have been realized had the secured party complied with the relevant provisions."). "[A] secured party may not recover any deficiency unless it meets this burden." N.C.G.S. § 25-9-626 official cmt. 3.

Under N.C.G.S. § 25-9-626, Creditor had the burden of proving that a commercially reasonable sale would have yielded a smaller amount than Debtor's outstanding debt at trial, and Creditor failed to establish any amount that could have been obtained from a commercially reasonable sale. Accordingly, the trial court properly concluded that the collateral was worth at least the amount of Debtor's debt, and

that Creditor is entitled to no deficiency judgment. This assignment of error is overruled.

VI.

[3] Creditor lastly contends that the trial court erred in ordering the costs of the action be taxed to Creditor. We do not agree.

Section 6.1 of North Carolina's General Statutes "establishes the general rule that costs may be allowed to the party in favor of whom judgment has been awarded." *Cail v. Cerwin*, 185 N.C. App. 176, 187, 648 S.E.2d 510, 517 (2007) (citations omitted). Here, the trial court explicitly ordered that Creditor "have and recover nothing from [Debtor] . . . and that the costs of [the] action be taxed to [Creditor]." There is nothing to suggest that the trial court lacked jurisdiction to issue such an order, and we find no reason to disturb the trial court's judgment. This assignment of error is overruled.

Affirmed.

Chief Judge MARTIN and Judge STEPHENS concur.

SELF-HELP VENTURES FUND, PLAINTIFF v. CUSTOM FINISH, LLC, CLARENCE W. ADAMS, CURTHUE LOUIS JOHNSON, GLADYS L. ADAMS, AND IVESTA JOHNSON, DEFENDANTS

No. COA08-1482

(Filed 15 September 2009)

1. Uniform Commercial Code— assignment of note and guaranties—common law applies

The common law rather than the UCC applied to a case involving the assignment of a note and guaranties where there were no controlling provisions within the UCC.

2. Parties— transfer of note but not guaranties—construed with note

In a case involving the assignment of a note and guaranties, plaintiff was a party in interest even though a separate assignment of defendants' guaranties was not executed. Defendants' guarantees are contemporaneously executed written agreements to the note and are construed with the note; enforcing the guar-

anties fulfills the intent of the parties as expressed in the contract. Summary judgment was properly granted for plaintiff.

3. Appeal and Error— preservation of issues—ruling on one motion before another—no objection

The issue of whether the trial court erred by not ruling upon a motion to set aside entry of default before considering a motion for summary judgment was not preserved for appellate review where there was no objection at trial.

Judge WYNN dissenting.

Appeal by defendants Clarence W. Adams and Gladys L. Adams from an order entered 9 September 2008 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 21 April 2009.

Solomon & Mitchell, PLLC, by Laurel E. Solomon, for plaintiff-appellee.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for Clarence W. Adams and Gladys L. Adams, defendants-appellants.

JACKSON, Judge.

Clarence W. Adams and Gladys L. Adams ("defendants") appeal from the trial court's order granting summary judgment for Self-Help Ventures Fund ("plaintiff"). For the following reasons, we affirm in part and dismiss in part.

On 14 August 2002, plaintiff made a loan to Custom Finish, LLC ("Custom"), for a principal amount of $223,000.00. Custom executed a promissory note ("the Note"), not signed by defendants, to plaintiff. Defendants, with others who are not parties to this appeal, each separately executed and delivered unconditional guaranties ("Guaranties") for the Note to plaintiff. On 26 September 2002, plaintiff assigned and delivered both the Note and defendants' Guaranties to the United States Small Business Administration ("SBA").

On 3 March 2008, the SBA assigned and delivered the Note and a deed of trust to plaintiff. However, the SBA did not execute a separate reassignment of defendants' Guaranties to plaintiff.

The promisor, Custom, defaulted under the terms of the Note. When plaintiff sought payment from the Note's guarantors, defendants also defaulted.

On 2 April 2008, plaintiff accelerated the Note's outstanding balance and filed suit, seeking judgment against all defendants, jointly and severally, in the amount of $166,815.00, plus interest, attorneys' fees, and court costs. On 11 April 2008, summonses were served upon defendants. On 15 May 2008, an assistant clerk of Superior Court of Durham County entered default against defendants. On 20 May 2008, defendants, appearing *pro se*, filed an application for extension of time to file their answer dated 15 May 2008.

On 21 May 2008, the trial court entered an order denying defendants' application for an extension of time to file their answer. On 24 June 2008, defendants filed a motion to set aside the entry of default judgment. Defendants scheduled the hearing on their motion to set aside the default judgment for 9 September 2008. On 27 August 2008, plaintiff filed a motion for summary judgment against defendants and noticed the motion for hearing on 9 September 2008.

On 9 September 2008, the trial court conducted a hearing on plaintiff's motion for summary judgment and defendants' motion to set aside the default judgment. The trial court entered its order granting plaintiff's motion for summary judgment, declining to rule on defendants' motion to set aside the default judgment. Defendants appeal.

We review the trial court's order for summary judgment *de novo* to determine whether there is a genuine issue of material fact and whether either party is entitled to judgment as a matter of law. *See McDowell v. Randolph County*, 186 N.C. App. 17, 20, 649 S.E.2d 920, 923 (2007). In this appeal, there is no dispute as to any genuine issues of material fact; therefore, we need to determine only whether summary judgment was entered properly in plaintiff's favor or whether it should have been entered in defendants' favor. *See Geitner v. Mullins*, 182 N.C. App. 585, 589, 643 S.E.2d 435, 438, *disc. rev. denied*, 361 N.C. 692, 652 S.E.2d 263 (2007).

Defendants argue that the trial court erred in granting plaintiff's motion for summary judgment on the ground that plaintiff was not a party in interest. Defendants contend that because the SBA did not execute a separate assignment of defendants' Guaranties when assigning the Note back to plaintiff, those Guaranties did not

follow the Note, and therefore, the plaintiff was not a party in interest. We disagree.

[1] Initially, we note that the Uniform Commercial Code ("UCC") generally governs commercial transactions involving promissory notes. *See*, *e.g.*, N.C. Gen. Stat. § 25-1-101 through -1-310; § 25-3-101 through -3-605; § 25-9-101 through -9-710 (2007). Notwithstanding, the UCC also provides that "[u]nless displaced by the particular provisions of this Chapter, the principles of law and equity . . . supplement its provisions." N.C. Gen. Stat. § 25-1-103(b) (2007). The parties have not cited provisions within the UCC that control the case *sub judice*, and our research has revealed none. Accordingly, we apply the rules established at common law to resolve the questions presented in the instant case. Furthermore, although the dissent characterizes the issue presented on this appeal as one of first impression, we believe that principles already well-settled within our State, further informed by persuasive authority from our sister States, provide ample instruction so as to require our affirmation of the trial court's grant of summary judgment in plaintiff's favor.

[2] Rule 17(a) of the North Carolina Rules of Civil Procedure provides that

> [e]very claim shall be prosecuted in the name of the real party in interest; but . . . a party with whom or in whose name a contract has been made for the benefit of another . . . may sue in his own name without joining with him the party for whose benefit the action is brought[.]

N.C. Gen. Stat. § 1A-1, Rule 17 (2007). Plaintiff, as assignee of the Note in the instant case, represents the real party in interest.

Our Supreme Court has explained,

> [a] "guaranty" is a contract, obligation or liability arising out of contract, whereby the promisor, or guarantor, undertakes to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself in the first instance liable to such payment or performance.

Trust Co. v. Clifton, 203 N.C. 483, 485, 166 S.E. 334, 335 (1932) (citing *Chemical Co. v. Griffin*, 202 N.C. 812, 164 S.E. 577 (1932); *Cowan v. Roberts*, 134 N.C. 415, 46 S.E. 979 (1904); *Carpenter v. Wall*, 20 N.C. 279 (1838)).

"A guarantor's liability depends on the terms of the contract as construed by the general rules of contract construction." *Carolina*

Place Joint Venture v. Flamers Charburgers, Inc., 145 N.C. App. 696, 698, 551 S.E.2d 569, 571 (2001) (citing *Jennings Communications Corp. v. PCG of the Golden Strand, Inc.*, 126 N.C. App. 637, 641, 486 S.E.2d 229, 232 (1997)). "When the language of a contract is clear and unambiguous, construction of the contract is a matter for the court." *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987). "It is a well-settled principle of legal construction that '[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.' " *Id.* (quoting *Indemnity Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (citations omitted)). Moreover, "[a]ll contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken." *Yates v. Brown*, 275 N.C. 634, 640, 170 S.E.2d 477, 482 (1969) (citing *Combs v. Combs*, 273 N.C. 462, 160 S.E.2d 308 (1968); *Smith v. Smith*, 249 N.C. 669, 107 S.E.2d 530 (1959)).

In the instant case, the language of the guaranty contracts is clear and unambiguous; there is no genuine issue of material fact. Further, the Note and defendants' Guaranties were executed contemporaneously. Therefore, the Court presumes that defendants intended what the language of the Guaranties clearly expresses. Relevant provisions of the Note state:

> 1. PROMISE TO PAY:
>
> In return for the Loan, Borrower promises to pay to the order of [Certified Development Company ("CDC")] the amount of Two hundred twenty-three thousand and 00/100 Dollars, interest on the unpaid principal balance, the fees specified in the Servicing Agent Agreement, and all other amounts required by this Note.
>
> . . . .
>
> 6. CDC'S RIGHTS IF THERE IS A DEFAULT:
>
> . . . .
>
> B. Collect all amounts owing from any Borrower *or Guarantor*;
>
> . . . .
>
> 9. SUCCESSORS AND ASSIGNS:
>
> Under this Note, Borrower and Operating Company include the successors of each, and *CDC includes its successors and assigns*.

(Emphasis added). Relevant provisions of defendants' Guaranties state:

> 1. GUARANTEE:
>
> Guarantor unconditionally guarantees payment to Lender of all amounts owing under the Note. This Guarantee remains in effect until the Note is paid in full. Guarantor must pay all amounts due under the Note when Lender makes written demand upon Guarantor. Lender is not required to seek payment from any other source before demanding payment from Guarantor.
>
> . . . .
>
> 8. SUCCESSORS AND ASSIGNS:
>
> Under this Guarantee, Guarantor includes heirs and successors, *and Lender includes its successors and assigns.*

(Emphasis added).

> The well-settled rule in North Carolina is that
>
> a guaranty of payment is an absolute or unconditional promise to pay some particular debt, if not paid by the principal debtor at maturity, and *it is generally held that such a guaranty is assignable and enforceable by the same persons who are entitled to enforce the principal obligation, which it is given to secure.*

State v. Bank, 193 N.C. 524, 526, 137 S.E. 593, 594 (1927) (citations omitted) (emphasis added). Furthermore, "[a] guaranty is assignable with the obligation secured thereby, and *goes with the principal obligation.*" *Trust Co. v. Trust Co.*, 188 N.C. 766, 771, 125 S.E. 536, 538 (1924) (internal quotation marks omitted) (emphasis added).

> These rules accord with the general rule that
>
> a security interest is generally recognized as incidental to and passing with the title to property. This effect has been explained in American Jurisprudence, a treatise on assignments:
>
> > "The assignment of a debt ordinarily carries with it all liens and every remedy or security that is incidental to the subject matter of the assignment and that could have been used, or made available, by the assignor as a means of indemnity or payment, even though they are not specifically named in the instrument of assignment, and even though the assignee at the time was ignorant of their existence. *Such rights will*

> *pass notwithstanding the assignment is not by any instrument in writing*, or that the assignor retains possession of the collateral, his possession being considered in the nature of a trust for the benefit of the assignee of the debt."

General Electric Credit Corp. v. Allegretti, 515 N.E.2d 721, 725-26 (Ill. App. Ct. 1987) (quoting 6 Am. Jur. 2d *Assignments* § 121 (1964)) (emphasis added). Further, a transfer of a principal obligation operates as an assignment of an associated guaranty. *See Sinclair Marketing, Inc. v. Siepert*, 695 P.2d 385 (Idaho 1985). Similarly, a transfer of a promissory note also operates as an assignment of an associated guaranty, *Hazel v. Tharpe & Brooks*, 283 S.E.2d 653 (Ga. Ct. App. 1981), even without reference in the assignment of the note to the guaranty. *Metropolitan Casualty Ins. Co. v. Soucy et.*, 16 Ohio Law Abs. 538 (1934).

In keeping with these general principles and precedent established within North Carolina, our Supreme Court has held that

> rights under a special guaranty—that is, a guaranty addressed to a specific entity—are assignable unless: assignment is prohibited by statute, public policy, or the terms of the guaranty; assignment would materially alter the guarantor's risks, burdens, or duties; or the guarantor executed the contract because of personal confidence in the obligee. This rule is consistent with the common law of contracts, accommodates modern business practices, and fulfills the intent of parties to ordinary business agreements.

Kraft Foodservice, Inc. v. Hardee, 340 N.C. 344, 348, 457 S.E.2d 596, 598-99 (1995) (citations and internal quotation marks omitted).

In the case *sub judice*, defendants have not provided legal support for the contention that the Guaranties do not follow the Note. Notwithstanding their failure to provide support, defendants assert that the Guaranties were not automatically assigned along with the Note. However, there is no evidence in the record suggesting that the assignment of the Guaranties would (1) violate a statute, public policy, or the terms of the Guaranties; (2) materially alter defendants' risks, burdens, or duties; or (3) violate personal confidence defendants placed in the obligee. *See id.*

Rather, the record provides uncontested evidence of a default by the borrower and a subsequent assignment of the Note back to plaintiff by the SBA. When the Note was executed initially, plaintiff was designated as the CDC. Later, when the Note was assigned by the

SBA, plaintiff became the assignee. Because defendants' Guaranties are contemporaneously executed written agreements to the Note, they are construed together with the Note. *Yates*, 275 N.C. at 640, 170 S.E.2d at 482. Sections six and nine in the Note expressly provide that the CDC or assignees of the CDC may collect all amounts owing from Guarantors. Because plaintiff was the CDC when defendants executed their Guaranties, and because plaintiff was the CDC after the SBA's assignment of the Note, enforcing defendants' Guaranties fulfills the intent of the parties expressed within the contract.

Finally, because plaintiff is entitled to enforce the principal obligation, plaintiff also is entitled to enforce the guaranty notwithstanding the fact that the reassignment of the Note did not include an express reassignment of the guaranty. *Bank*, 193 N.C. at 526, 137 S.E. at 594; *Hazel*, 283 S.E.2d at 653. Therefore, upon the Note's assignment to plaintiff by the SBA, defendants unconditionally guaranteed payment to plaintiff, whereupon plaintiff became a party in interest, as set forth in Rule 17(a) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 17 (2007).

[3] Next, defendants argue that the trial court erred in not ruling upon defendants' motion to set aside entry of default before considering plaintiff's motion for summary judgment. We disagree.

In the instant case, the record contains no indication that defendants objected at trial to the trial court's ruling upon plaintiff's motion for summary judgment before considering defendants' motion to set aside entry of default. Accordingly, this issue has not been preserved for our review, and it is dismissed. *See* N.C. R. App. P. 10(b)(1) (2007); *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002); *Williams v. Walker*, 185 N.C. App. 393, 648 S.E.2d 536 (2007).

For the foregoing reasons, we affirm in part and dismiss in part.

Affirmed in part; Dismissed in part.

Judge HUNTER, Jr., Robert N. concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge, dissenting.

The issue on appeal is whether the SBA's assignment of the Note conferred on Plaintiff the right to enforce an unassigned guaranty to

the Note. Because the SBA did not assign the guaranty to the Note back to the Plaintiffs, I would hold that the Plaintiffs may not enforce that guaranty. Accordingly, I dissent.

From the outset, I observe that no North Carolina appellate court has previously had occasion to consider the issue presented in the somewhat more complex context of the federal 504 loan program.[1] To better understand the nature of the transactions in this matter, additional background is useful.

Plaintiff Self-Help Ventures Fund, a Certified Development Company or CDC, provided a twenty-year loan to Custom Finish, LLC through the Small Business Administration's (SBA) 504 loan program. *See generally* 13 C.F.R. § 120.800 (2009). Generally, financing of a 504 project involves the contribution by a small business in an amount of at least ten percent of the project costs; a loan made with the proceeds of a CDC debenture for up to forty percent of the project costs[2]; and a third party loan comprising the balance of the financing.[3] 13 C.F.R. §120.801 (2009). The CDC debenture is guaranteed one-hundred percent by the SBA with the full faith and credit of the United States, and it is sold to underwriters who form debenture pools. *Id.* Investors purchase interests in these debenture pools and receive certificates representing ownership of all or part of a debenture pool. *Id.* The proceeds of the CDC debenture are then used to fund the 504 loan. 13 C.F.R. § 120.802.

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1. As do the parties and the majority, I analyze the issue presented under North Carolina's common law of contracts. However, I note that this Court has held that a promissory note may qualify as a negotiable instrument governed by the UCC. *See* N.C. Gen. Stat. § 25-3-104 (2008); *First Commerce Bank v. Dockery*, 171 N.C. App. 297, 300, 615 S.E.2d 314, 316 (2005). *But see Barclays Bank v. Johnson*, 129 N.C. App. 370, 373, 499 S.E.2d 768, 770 (1998) (A promissory note was not a negotiable instrument where it did not state that it was payable on demand or at definite time). I note also that this guaranty would not be considered a negotiable instrument subject to the UCC's rules, since it is not payable on demand or at a definite time, but rather is conditioned on a default of the Note. *See* § 25-3-104; *see also Branch Banking & Trust Co. v. Creasy*, 301 N.C. 44, 51-52, 269 S.E.2d 117, 121-22 (1980). Moreover, there appears to be a lack of authority on whether a guaranty automatically follows a promissory note under the UCC. Nonetheless, this case presents no occasion to answer these questions because the issue has been presented and argued only in the context of common contract law.

2. This portion of the 504 project's financing is at issue in this case.

3. In late 2006, Custom Finish, LLC defaulted on the third party loan from First National Bank, which resulted in the foreclosure of the real estate and the loss of Plaintiff's second deed of trust as collateral. Around this time, Custom Finish, LLC also ceased operations.

On 14 August 2002, Plaintiff/CDC made a SBA 504 loan to Custom Finish in the amount of $223,000.00. Plaintiff obtained a promissory note ("the Note") on SBA letterhead executed on behalf of Custom Finish by Defendant Clarence W. Adams and other members of the LLC. Mr. Adams and the other members did not sign the Note in their individual capacities, and co-defendant Gladys L. Adams did not sign the Note at all. The Note states under the section "CDC's RIGHTS IF THERE IS A DEFAULT" that without notice or demand and without giving up any of its rights, the CDC may collect all amounts owing from any borrower or guarantor and that it may file suit and obtain judgment. Under the section "SUCCESSORS AND ASSIGNS," "the CDC" includes its successors and assigns under the Note. Under "GENERAL PROVISIONS" of the Note, the "[b]orrower also waives any defenses based upon any claim that CDC did not obtain any guarantee . . ." Although these conditions appear in the Note, it also contains a clause purporting to assign the Note to the SBA, and is signed by Margaretta L. Belin, Plaintiff's authorized officer and President. This assignment to the SBA was made in consideration of the SBA's guaranty of a debenture in the principal amount of $223,000.00. *See* 15 U.S.C. § 697a(2008); 13 C.F.R. § 120.801. An allonge[4] was attached to the Note to provide for the acknowledgment of a future advances deed of trust and for the signature of an SBA officer to be added to the Note; however, the allonge was not signed until March 3, 2008, after Custom Finish had already defaulted on its loan.

On the same day the Note was signed, "Unconditional Guarantee" forms on SBA letterhead in the Note's principal amount were signed and delivered to Plaintiff by defendants, Clarence W. and Gladys L. Adams, and two prior defendants to this case. In an attachment to each guarantor's "Unconditional Guarantee" form, Plaintiff, under corporate seal, assigned and transferred all of its interest in the guaranties to the SBA. This assignment possibly provided backing for the SBA's guaranty of the debenture funding the 504 loan.[5] *See* 13 C.F.R. § 120.801. On 26 September 2002, in a separate document

4. "A slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." *Black's Law Dictionary* 88 (9th ed. 2009).

5. However, assignment of loan instruments is required only upon the SBA's desire to litigate a 504 loan. 13 C.F.R. § 120.535(d)(2009) ("If SBA elects to service, liquidate and/or litigate a loan, it will notify the relevant Lender or CDC in writing, and, upon receiving such notice, the Lender or CDC must assign the Loan Instruments to SBA and provide any needed assistance to allow SBA to service, liquidate and/or litigate the loan. SBA will notify the Borrower of the change in servicing. SBA may use contractors to perform these actions.")

signed under corporate seal, Plaintiff again assigned to the SBA all of its right, title and interest in the Note and a future advances deed of trust.

In mid-2007, Custom Finish defaulted on its 504 loan. On 3 March 2008, the SBA, under signature of R. Wayne Reid, assigned all of its right, title, and interest in the Note dated 14 August 2002 in the original principal amount and the future advances deed of trust back to Plaintiff. A signed affidavit by Plaintiff's 504 Loan Servicing Officer states that "Defendants defaulted on their March, April and May 2007 payments under the Note, and on May 31, 2007 the SBA repurchased its debenture . . . the Note was reassigned by the SBA to the Plaintiff to pursue collection efforts against the Defendants, who remain liable for the loan pursuant to their Guarantees."

The Plaintiff's Complaint filed 2 April 2008 declared that the subject Note was in default because of Defendant Custom Finish, LLC's failure to pay despite Plaintiff's demand for payment. All other Defendants' obligations under their respective unconditional guaranties became due as a result. The default accelerated the balance due, and as of 18 March 2008, the owed amount was $174,620.78, with interest continuing to accrue at the rate of 5.173% per annum.

Like a note, a guaranty contract is a principal obligation. Although the two are related contractual agreements, they are nonetheless separate obligations. *See Credit Corp. v. Wilson*, 12 N.C. App. 481, 485, 183 S.E.2d 859, 862 (1971) ("North Carolina also recognizes that the obligation of the guarantor and that of the maker, while often coextensive are, nonetheless, separate and distinct."), *aff'd*, 281 N.C. 140, 187 S.E.2d 752 (1972). Furthermore, "[a]n assignment operates as a valid transfer of the title of a chose in action." *Gillespie v. DeWitt*, 53 N.C. App. 252, 262, 280 S.E.2d 736, 743 (1981) (citing *Lipe v. Bank*, 236 N.C. 328, 72 S.E.2d 759 (1952)). Thus, the assignee of a guaranty acquires the rights, title and interest to the guaranty that the assignor had and may take action upon it. *Id.* (citing *Holloway v. Bank*, 211 N.C. 227, 189 S.E. 789 (1937)) (citation omitted).

Here, Custom Finish, LLC, executed and delivered a Note to Plaintiff on 14 August 2002. Through the original Note and using a separate document on 26 September 2002 under corporate seal, Plaintiff assigned the Note to the SBA. Also on 14 August 2002, Clarence W. Adams, Gladys L. Adams, Curthue Louis Johnson, and Ivesta Johnson, executed and delivered separate guaranty contracts to Plaintiff. These guaranties were also assigned to the SBA by attach-

ments to the guaranty contracts on 14 August 2002. Thus, the SBA acquired the rights to enforce the Note and the individual guaranties when Plaintiff assigned each of those obligations to it in 2002. I do not agree, however, that Plaintiff reacquired the right to enforce the guaranties in 2008 when the SBA assigned the Note back to Plaintiff, but not the "separate and distinct" guaranty agreements.[6] *See Credit Corp.*, 12 N.C. App. At 485, 183 S.E.2d At 862.

I also observe a distinction between the relatively unique circumstances involved in the federal 504 loan program setting and North Carolina's leading cases bearing on this issue. In *Kraft Foodservice, Inc. v. Hardee*, 340 N.C. 344, 345-46, 457 S.E.2d 596, 597 (1995), for example, the plaintiff seeking to collect on the principal obligation and enforce its guaranty was the successor-entity of the original obligee. *See also Trust Co. v. Trust Co.*, 188 N.C. 766, 768, 125 S.E. 536, 536-37 (1924) (assignee bank, which "took over the assets of the [assignor bank], and continued its business" had the right to enforce guaranties in favor of the assignor bank). Here, Plaintiff and the SBA undoubtedly shared the same interest in repayment of the 504 loan; but, there can also be no doubt that Plaintiff and the SBA are separate entities. Accordingly, I would not rely on *Kraft Foodservice* and instead hold that the guaranties must have been separately reassigned to give Plaintiff the right to enforce them.[7]

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6. The weight of authority on this issue in this context appears to hold that the guaranty automatically follows the note. *See Sinclair Marketing, Inc. v. Siepert*, 695 P.2d 385 (Idaho 1985); *Hazel v. Tharpe & Brooks*, 283 S.E.2d 653 (Ga. Ct. App. 1981); *see also Sidney Indus. Corp. v. Lafler*, 1993 WL 302276 (Neb. Ct. App. 1993) (unpublished) (finding that a transfer of a principal obligation is held to operate as an assignment of the guaranty). However, as a matter of North Carolina contract law, which holds that the note and guaranty are "separate and distinct" obligations, of which the assignment of one does not necessarily confer on the assignee rights to enforce the other, I am compelled to conclude that the SBA must also have assigned the guaranties for Plaintiff to have a right to enforce them.

7. Considering that defense counsel argued the issue of the guaranties not having been assigned to Plaintiff during the hearing before the Superior Court, it is uncertain why prior to this appeal the guaranties were not assigned by the SBA to Plaintiff.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 SEPTEMBER 2009)

BRYANT v. NEWCON, INC. No. 08-1477	Indus. Comm. (IC529727) (IC560117) (IC488798)	Affirmed
IN RE A.Y. No. 09-531	Orange (08JA101)	Affirmed
IN RE C.S., F.C. No. 09-423	Randolph (05JT0104) (05JT0105) (05JT0103) (05JT0106)	Affirmed
IN RE I.L. No. 09-637	Pitt (08JT36)	Affirmed
IN RE: J.J. No. 09-577	Harnett (06J216)	Affirmed
IN RE: J.L. No. 09-374	Onslow (05J202)	Affirmed
IN RE M.C. AND A.H. No. 09-472	Wake (07JT111) (07JT110)	Affirmed
IN RE Z.T. No. 09-415	Wake (07JT405)	Affirmed
ONSLOW CNTY. v. WILLINGHAM No. 08-1120	Onslow (98CVD2657)	Affirmed
REYNOLDS v. RIGGS No. 08-1585	Pamlico (01CVS87)	Affirmed
SMITHEY v. NATIONWIDE MUT. INS. CO. No. 08-1221	Wilkes (08CVS206)	Affirmed
STATE v. CANNADY No. 08-1459	Franklin (07CRS50664)	No Error
STATE v. CHRISTIAN No. 09-210	Guilford (05CRS80312) (07CRS24679) (05CRS80311)	No Error
STATE v. CUMBEE No. 08-1366	Harnett (07CRS657)	No Error
STATE v. FLORES No. 09-272	Wake (07CRS72176)	No Error

STATE v. GROSHOLZ No. 08-1365	Brunswick (06CRS50026)	No Error
STATE v. HAIRSTON No. 08-1579	Forsyth (06CRS58294) (06CRS58293)	No Error
STATE v. HAWKINS No. 09-305	New Hanover (07CRS56715) (07CRS56716) (07CRS56714)	No error in part; dismissed without prejudice in part
STATE v. HILL No. 08-1347	Pitt (05CRS60746)	No Error
STATE v. HILL No. 08-1220	Haywood (08CRS50236) (08CRS50235)	Dismissed
STATE v. HINES No. 09-202	Union (07CRS50288) (07CRS50290) (07CRS50284)	No Error
TATE v. JACKSON No. 09-284	Mecklenburg (07CRS244217) (08CRS7607) (07CRS244215)	No Error
STATE v. JONES No. 08-1582	Wayne (07CRS51892) (07CRS52017) (07CRS52012) (07CRS3625) (07CRS52016)	No error in part; reversed and remanded in part
STATE v. JONES No. 09-252	Cabarrus (07CRS2760) (07CRS50160)	No Error
STATE v. LESKIW No. 08-1494	Pitt (05CRS52250)	Dismissed
STATE v. RIVERA No. 09-159	Forsyth (07CRS54078) (07CRS5031)	No Error
STATE v. SHEPARD No. 09-86	Martin (06CRS51060)	Affirmed
STATE v. SMITH No. 08-1581	Hoke (05CRS2458) (05CRS2459) (05CRS2457) (05CRS50199)	No Error

STATE v. SYKES No. 09-228	Stanly (07CRS53992)	No prejudicial error
STATE v. WALKER No. 08-1565	Caswell (08CRS328) (08CRS329) (08CRS327) (08CRS330)	Vacated in part; no error in part and remanded for a new habitual felon hearing and resentencing
STATE v. WORLEY No. 09-269	Catawba (04CRS50346)	Remanded for resentencing
TANNER v. COLUMBUS McKINNON CORP. No. 08-1552	Indus. Comm. (IC277961)	Reversed and Remanded
UNDERWOOD v. UNDERWOOD No. 08-1131	Catawba (97CVD2123)	Reversed and Remanded
YARBOROUGH v. PIERCE TRAILER SERV. No. 09-4	Indus. Comm. (IC448948)	Affirmed

CITE AS: COMMUNITY ACTIVITIES

FORMAL ADVISORY OPINION: 2007-01

February 9, 2007

Refer to 183 N.C. App. 497

QUESTION:

Judge sought Commission approval to participate as a member of an interview committee/board interviewing candidates for the position of city chief of police and making recommendations to the hiring authority.

COMMISSION CONCLUSION:

The Judicial Standards Commission approved the request for the judge to participate as a member of the interview committee/board as part of a panel to interview candidates for the position of city chief of police.

DISCUSSION:

This inquiry involves several provisions of the North Carolina Code of Judicial Conduct. Canon 4A and Canon 5B of the Code allow judges to participate in a variety of civic activities if such participation does not substantially interfere with the performance of the judge's judicial duties nor cast substantial doubt on the judge's impartiality. Similarly, Canon 2A of the Code requires that a judge "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Canon 3C(1) of the Code reads, "[O]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned . . ." Therefore should the new city chief of police appear as a substantive witness in a hearing or as a party to an action in a matter before the judge, it is advised that the judge disclose the information that he participated as a member of the interview committee/board that interviewed candidates for the city chief of police position. In addition, upon a motion to disqualify, the judge should disqualify if the judge's impartiality may "reasonably" be questioned or if the judge has an actual bias or prejudice against a party. In any event, a judge always has the option to disqualify himself/herself, should the judge deem such action proper pursuant to Canon 3D of the Code.

Reference:
North Carolina Code of Judicial Conduct
Canon 2A
Canon 3C & 3D
Canon 4A
Canon 5B

CITE AS: RECOMMENDATIONS/REFERENCES

FORMAL ADVISORY OPINION: 2007-02

August 10, 2007

Refer to 183 N.C. App. 494

QUESTION:

Under what circumstances may a judge send letters of recommendations? Initially this inquiry addressed a very specific circumstance regarding a judge's request to review a proposed letter of recommendation for a member of the bar nominated for a prestigious North Carolina Bar Association Award.

COMMISSION CONCLUSION:

The proposed letter of recommendation was reviewed by the Judicial Standards Commission and the Commission concluded that the letter could be submitted as written. The Commission advised that personal stationery rather than official letterhead should be used as the recommendation was not done in the course of official duties as a judge. The Commission further advised that should the attorney appear in a proceeding before the judge, it should be disclosed on the record that a letter of recommendation was written by said judge on behalf of the attorney.

DISCUSSION:

Canon 2B of the North Carolina Code of Judicial Conduct provides in part that "a judge should not lend the prestige of the judge's office to advance the private interests of others; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. A judge should not testify voluntarily as a character witness."

The purpose of this formal advisory opinion is to provide some guidance in the much more common context in which judges are asked to

write letters of recommendation. Typical examples of situations in which some judges may choose to send letters of recommendation include letters on behalf of people who are applying to college, or law school, seeking membership in a state bar, seeking employment opportunities or involved in a process such as qualifying to volunteer in a school or an adoption whereas in each situation the applicant requires the recommendation of friends and neighbors, or other similar situations.

The language included in the relevant portion of Canon 2B includes ". . . a judge may, based on personal knowledge serve as a personal reference or provide a letter of recommendation." This language allows for judges to decline any request for letters of recommendation. However, if a judge is considering writing such a letter or providing a personal reference, he or she must take reasonable steps to avoid lending the prestige of his or her office to advance another's private interest.

This basic principle should guide every aspect of a judge's consideration. Some common-sense guidelines follow, but are in no way exhaustive:

• Use personal stationery rather than official letterhead. Since a recommendation will usually be personal rather than official in nature, a judge should use personal stationery, not official court stationery or any facsimile thereof. Canon 2B of the Code provides that a judge "should not lend the prestige of the judge's office to advance the private interest of others." However, a judge may reference the judge's judicial office in the letter when it is necessary to explain the context of the judge's observations of the individual. Should a State of North Carolina Agency or official request a judge's input in an official capacity, then the judge may use official stationery as the request would come in the normal course of the judge's official duties.

• Be as specific as possible to whom you are sending the letter of recommendation, try to avoid addressing the letter to "whom it may concern".

• Consider requesting that the letter be treated confidential to the group or individual receiving a letter of recommendation.

• Consider the context of the request for a letter of recommendation. Is the purpose for which the letter is requested something with which the judge should associate?

• Avoid initiating telephone calls in order to make recommendations. The risk that the call may be perceived as lending the prestige of office is reduced if the judge makes a recommendation over the tele-

phone only in response to an inquiry by the decision maker. Be clear that the recommendation is personal and not an official act.

• Limit letters of recommendation or referrals to only those individuals of whom the judge has personal firsthand knowledge. Limit the substance of the letters of recommendation to information about the individual that the judge has personally observed or experienced.

When choosing to send letters of recommendation, judges should be mindful of the situation, manner of transmission, appearance and the substance of the letter of recommendation so as to avoid the appearance of lending the prestige of their judicial office to advance the private interests of others.

Reference:
North Carolina Code of Judicial Conduct
Canon 2B

CITE AS: RECOMMENDATIONS/REFERENCES

FORMAL ADVISORY OPINION: 2007-03

August 10, 2007

Refer to 183 N.C. App. 497

QUESTION:

May a judge, when asked to do so, complete the North Carolina Board of Law Examiner's Certificate of Moral Character for an applicant seeking admission to practice law in North Carolina?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined it would be appropriate for judges to complete the North Carolina Board of Law Examiner's Certificate of Moral Character on behalf of an applicant seeking admission to practice law in North Carolina.

DISCUSSION:

Canon 2B of the North Carolina Code of Judicial Conduct provides in part that "a judge should not lend the prestige of the judge's office to advance the private interests of others; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. A judge should not testify voluntarily as a character witness."

The language included in the relevant portion of Canon 2B includes ". . . a judge may, based on personal knowledge serve as a personal reference or provide a letter of recommendation." This language allows for judges to decline any request to serve as a personal reference or complete the North Carolina Bar Examiner's Certificate of Moral Character. However, if a judge does choose to complete the above mentioned Certificate of Moral Character he or she should do so for only those individuals that the judge has direct personal knowledge.

Canon 2B says in part that "a judge should not testify voluntarily as a character witness." The Commission acknowledged that the completion of the North Carolina Board of Law Examiner's Certificate of Moral Character would be similar to providing testimony as a character witness, however it specifically carved out an exception to this prohibition. The rationale given by the Commission was that the judiciary had a compelling interest in maintaining the integrity and moral character of those seeking admission to practice law in North Carolina.

Reference:
North Carolina Code of Judicial Conduct
Canon 2B

CITE AS: TEACHING

FORMAL ADVISORY OPINION: 2007-04

October 12, 2007

Refer to 183 N.C. App. 498

QUESTION:

May a judge accept a position, from a private consulting firm which administers contract seminars and judicial education on behalf of the U.S. State Department, to teach and lecture foreign judicial officials in their native country? The judge would be part of a team of lawyers and judges that would lecture and conduct seminars on judicial administration, the importance of rule of law in commercial transactions, and other similar topics.

The Commission understood that the trip would last 10 days and the team members' travel expenses would be paid by the private consulting firm. In addition the private consulting firm would pay compensation to the team members at the rate of $500 per day.

COMMISSION CONCLUSION:

The Judicial Standards Commission approved the request for the judge to accept a position, if offered, to teach and lecture foreign judicial officials in their native country.

DISCUSSION:

The inquiry involves several provisions of the North Carolina Code of Judicial Conduct. Canon 4 of the Code provides in part "A judge may participate in cultural or historical activities or engage in activities concerning the legal, economic, educational or governmental system, or the administration of justice." It further states "a judge, subject to the proper performance of the judge's judicial duties, may engage in the following quasi-judicial activities, if in doing so the judge does not cast substantial doubt on the judge's capacity to decide impartially any issue that may come before the judge: A judge may speak, write, lecture, teach, participate in cultural or historical activities, or otherwise engage in activities concerning the economic, educational, legal, or governmental system, or the administration of justice."

A similar requirement is found in Canon 2A of the Code, which requires that a judge "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

A basic inquiry is whether this extra-judicial activity casts any doubt on the judge's capacity to act impartially as a judge. The judge asserted that there was very little likelihood that he would hear any matters involving the foreign country in question pursuant to his regular judicial duties.

In the same vein Canon 5A of the Code provides a judge should regulate his or her extra-judicial activities to ensure that they do not prevent the judge from carrying out the judge's judicial duties. It in part states "a judge may write, lecture, teach and speak on legal or non-legal subjects, engage in the arts, sports, and other social and recreational activities, if such avocational activities do not substantially interfere with the performance of the judge's judicial duties."

The Commission determined that if the judge was offered the position to teach and lecture foreign judicial officials in their native country and with assurances from the judge that the judge's work schedule could easily accommodate the time required to travel and participate in the teaching seminar, then the judge's participation would not be a violation of Canon 5 of the Code.

In addition a judge who accepts compensation and/or travel reimbursement for quasi-judicial and extra-judicial activities must be mindful to comply with the requirements of Canon 6 of the Code.

Canon 6A of the Code requires any compensation to be reasonable. Canon 6B of the Code includes language to the effect that any expense reimbursement in excess of the actual cost of travel, food and lodging is considered compensation. Finally, Canon 6C of the Code requires regular reporting of compensation received by judges for quasi-judicial and extra-judicial activities.

Reference:
North Carolina Code of Judicial Conduct
Canon 4A
Canon 5A
Canon 6A, 6B and 6C

CITE AS: FINANCIAL ACTIVITIES—GIFTS

FORMAL ADVISORY OPINION: 2009-01

February 13, 2009

Refer to 189 N.C. App. 406

QUESTION:

May a newly installed judge maintain the position of manager of a Professional Limited Liability Company (PLLC)? Prior to being installed into judicial office, the judge worked as an attorney in private practice, as a solo practitioner, organized as a PLLC under N.C.G.S. §57C-2-01(c). As such, the attorney is required to serve as both a member and manager of the PLLC. The judge desired to place the PLLC in an inactive status so that in the event the judge is not re-elected in the future, the judge would not need to reorganize nor lose the use of the entity's name.

COMMISSION CONCLUSION:

The Judicial Standards Commission determined it would be inappropriate for judges to serve as an officer, director or manager of any business.

DISCUSSION:

Canon 5C(2) of the North Carolina Code of Judicial Conduct provides "[s]ubject to the requirements of subsection (1), a judge may hold and manage the judge's own personal investments or those of the judge's spouse, children, or parents, including real estate investments, and may engage in other remunerative activity not otherwise inconsistent with the provisions of this Code but should not serve as an officer, director or manager of any business."

The language included in the relevant portion of Canon 5C(2) includes ". . . but should not serve as an officer, director or manager of any business." This language precludes judges from serving in an official capacity for any business concern. The Code does not contain any exception for a wholly owned or closely held family business. Canon 4C of the Code allow judges to engage in certain quasi-judicial activities, including service as member, officer or director of an organization or governmental agency concerning cultural or historical activities and activities concerning the economic, educational, legal, or governmental system, or the administration of justice, and to participate in its management and investment decisions. Similarly, Canon 5B of the Code permits judges to engage is extra-judicial activities, specifically including serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, fraternal or civic organization.

The Commission observed the clear distinction in the Code between civic/charitable/cultural entities and business entities. The Commission also noted that service in any official capacity of a business entity has the potential to reflect adversely on impartiality, demean the judicial office, and interfere with the proper performance of judicial duties, without any counter balancing public benefit. Such service could also create an appearance of impropriety and lead to the misuse of the prestige of judicial office.

References:
North Carolina Code of Judicial Conduct
Canon 4C
Canon 5B
Canon 5C(2)

CITE AS: DISQUALIFICATION—PRE-BENCH EMPLOYMENT

FORMAL ADVISORY OPINION: 2009-02

June 11, 2009

Refer to 190 N.C. App. 677

QUESTION:

Is a newly installed judge required to disqualify from criminal cases prosecuted by the District Attorney's office where the judge was formerly employed?

Initially this inquiry addressed a very specific circumstance regarding a judge who was employed as an Assistant District Attorney (ADA) immediately prior to the judge's election to the District Court Bench.

Employment responsibilities during the final 18 to 24 months of employment as an ADA were essentially limited to prosecuting criminal cases in superior court. In the normal course of work, ADA's prosecuting in district court rarely, if ever, shared information about matters with ADA's prosecuting in superior court, unless a matter was appealed following a conviction in district court.

COMMISSION CONCLUSION:

The Judicial Standards Commission determined it to be appropriate for a judge who was formerly employed as an assistant district attorney to preside over criminal district court cases prosecuted by the District Attorney's office, provided the judge disqualifies from hearing any matter wherein the judge 1) was involved in the matter's investigation or prosecution, 2) has personal knowledge of disputed evidentiary facts, or 3) when the judge believes he/she cannot be impartial.

The Commission advises the best practice is for judges to follow a "Six Month Rule" whereby newly installed judges, for a minimum of 6 months after taking judicial office, refrain from presiding over any adjudicatory proceeding wherein an attorney associated with the judge's prior employer provides legal representation to a party in the proceeding. Specific circumstances may necessitate a deviation for the "Six Month Rule". However, judges should always disqualify in the three instances delineated above unless all counsel and pro se parties waive the potential disqualification pursuant to the remittal of disqualification procedures set out in Canon 3D of the Code of Judicial Conduct.

DISCUSSION:

Canon 3C(1) of the North Carolina Code of Judicial Conduct provides that, upon motion, judges should disqualify in proceedings in which their impartiality "may reasonably be questioned". Subparagraph (b) provides for disqualification of the judge when "[t]he judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter". However, the Commission considered relationships between attorneys working in the district attorney's office to be distinguishable from those between attorneys working together in a private law firm. Factors such as the division of duties between attorneys prosecuting in district and superior court, prosecuting attorneys being assigned to a particular county in a multicounty district, and the sheer volume of cases prosecuted in district criminal court impact the reasonableness standard by which a judge's impartiality must be considered.

References:
North Carolina Code of Judicial Conduct
Canon 3C(1)(b)
Canon 3D

CITE AS: EX PARTE COMMUNICATIONS

FORMAL ADVISORY OPINION: 2009-03

March 31, 2009

Refer to 194 N.C. App. 376

QUESTION:

May a judge utilize an internet listserv through which the judge could pose questions, discuss issues of general interest and seek/provide advice?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined that while a judge may make use of various internet applications, such as a listserv, for a variety of purposes, it would be inappropriate for a judge to utilize a listserv for the specific purpose of obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge.

DISCUSSION:

Canon 3A(4) of the North Carolina Code of Judicial Conduct provides "[a] judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider ex parte or other communications concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge." The language clearly conveys the understanding that judges may occasionally need assistance in understanding legal issues in matters before them. Such assistance is permissible so long as it is provided by a "disinterested expert on the law".

The language of Canon 1 or the Code directs judges to "uphold the integrity and independence of the judiciary" by establishing, maintaining, enforcing and personally "observing appropriate standards of conduct". A judge's decision should be reached indepen-

dent of influences outside of the facts of a particular case and applicable law.

The process of posting an issue on a listserv, thereby inviting open comment by all who may have access to the post provides opportunities for these principals to be abused. Every person who responds to a listserv posting may not be considered an expert on the law in question. Concerns arise over the actual or perceived lose of independence to group thought. Issues of the security and confidentiality of such inquiries arise due to the inability to immediately and positively identify those who post responses.

References:
North Carolina Code of Judicial Conduct
Canon 1
Canon 3A(4)

CITE AS: DISQUALIFICATION—NON-FAMILIAL RELATIONSHIP TO ATTORNEY, PARTY OR WITNESS

FORMAL ADVISORY OPINION: 2009-04

March 31, 2009

Refer to 194 N.C. App. 378

QUESTION:

May a judge preside over matters involving an attorney, while the judge's spouse is an employee of a title insurance agency owned by said attorney?

COMMISSION CONCLUSION:

The Judicial Standards Commission concluded that, in every matter in which the attorney appears before the judge, the judge should either disqualify, or disclose, on the record and in open court, the employment relationship between the judge's spouse and the attorney, and give the parties an opportunity to move for the judge's disqualification. Should any party move for the judge's disqualification, the judge should grant the motion. If all parties agree to waive the potential basis for the judge's disqualification, then the judge may preside. The remittal of disqualification procedures of Canon 3D of the Code of Judicial Conduct should be followed.

DISCUSSION:

Canon 3C(1) of the Code reads, *inter alia*, "[O]n motion of any party, a judge should disqualify himself/herself in a proceeding in

which the judge's impartiality may reasonably be questioned . . .". Clearly, one could reasonably question the impartially of a judge when a member of the judge's family is in and employee/employer relationship with an attorney, and said attorney appears in a contested matter before the judge.

Although such a situation reasonably calls the judge's impartially into question, all parties and their counsel may waive the basis for the judge's potential disqualification, and the judge may preside. Canon 3D of the Code reads:

> "Nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon his the judge's own initiative. Also, a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's potential disqualification. If, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree in writing that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all lawyers, shall be incorporated in the record of the proceeding. For purposes of this section, pro se parties shall be considered lawyers."

It should be noted in this situation, the title insurance agency was a small business. But for the efforts of the attorney, the agency and the accompanying employment opportunity would not exist. The judge's spouse and the attorney frequently interacted while conducting the business of the title insurance agency.

References:
North Carolina Code of Judicial Conduct
Canon 3C(1)
Canon 3D

CITE AS: POLITICAL ACTIVITY—RESIGN TO RUN RULE
FORMAL ADVISORY OPINION: 2009-05

April 3, 2009

Refer to 194 N.C. App. 380

QUESTION:

Is a sitting district court judge required to resign the judge's judicial office before becoming a candidate in a public primary or general election for the office of clerk of superior court?

COMMISSION CONCLUSION:

The Judicial Standards Commission concluded a judge is not required to resign the judge's judicial office before becoming a candidate in a public primary or general election for the office of clerk of superior court.

DISCUSSION:

Canon 7B(5) of the Code of Judicial Conduct provides a judge may "become a candidate either in a primary or in a general election for a judicial office provided that the judge should resign the judge's judicial office prior to becoming a candidate either in a party primary or in a general election for a non-judicial office".

The office of clerk of superior court is a judicial office of the General Court of Justice as set forth in N.C. Const. art. IV, § 9 (3) and N.C. Gen. Stat. §7A, Art. 12.

Reference:
North Carolina Constitution
Article 12, § 9 (3)
North Carolina General Statutes
§7A, Art. 12
North Carolina Code of Judicial Conduct
Canon 7B(5)

CITE AS: PERSONAL CONDUCT—ORGANIZATION MEMBERSHIP

FORMAL ADVISORY OPINION: 2009-06

June 12, 2009

Refer to 196 N.C. App. 381

QUESTION:

May a judge hold membership in the Charlotte-Mecklenburg Black Political Caucus?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined a judge may hold membership in the Charlotte-Mecklenburg Black Political Caucus.

DISCUSSION:

The Charlotte-Mecklenburg Black Political Caucus is an organization dedicated to promoting and enhancing the influence and welfare of the African American community in the areas of education, economics, political activity, and cultural, social and civic welfare.

Canon 2C of the Code of Judicial Conduct reads, "[a] judge should not hold membership in any organization that practices unlawful discrimination on the basis of race, gender, religion or national origin." There is no indication that the Caucus practices "unlawful discrimination", by arbitrarily excluding from membership, on the basis of race, religion, sex, or national origin those individuals who would otherwise be admitted to membership. Thus, on the understanding that the inquiry was directed solely to the practice of limiting membership to "African Americans of Black descent", the Commission did not perceive an ethical impediment to membership.

Reference:
North Carolina Code of Judicial Conduct
Canon 2C

CITE AS: DISQUALIFICATION—PRE-BENCH INVOLVEMENT

FORMAL ADVISORY OPINION: 2009-07

September 24, 2009

Refer to 194 N.C. App. 382

QUESTION:

While in private practice, a judge represented Mr. X in a criminal trial which resulted in a conviction of first-degree murder and the pronouncement of a sentence of death. Mr. X is now awaiting execution and is a party, along with four other inmates, to litigation pending before the Court, which involves the legality of the execution protocol. The proceeding in question is an appeal from an order dismissing the petitioners' petition for judicial review of the decision on the legality of the execution protocol.

The specific inquiry is whether the judge's prior representation of Mr. X requires the judge's disqualification in the present case, and, if so, whether such disqualification may be waived by the parties. In addition the judge inquired as to whether the judge would be able to participate in the decision as to the other four petitioners if they submitted briefs and arguments separately from Mr. X's brief and argument.

COMMISSION CONCLUSION:

The Judicial Standards Commission determined that, upon motion of a party pursuant to Canon 3C of the Code of Judicial Conduct or upon the judge's own motion pursuant to Canon 3D of the Code, the judge should disqualify from participating in the current matter before the Court.

As an alternative to disqualification on the judge's own motion pursuant to Canon 3D, the judge may disclose on the record the basis of the potential disqualification. If the parties and their attorneys, independent of any request or participation by the judge, agree in writing that the basis for the judge's potential disqualification is immaterial or insubstantial, the judge may participate in the matter.

Finally, because the issues involving each of the five petitioners appear to be identical and a decision as to any one of them would control the outcome of the appeals of each of the others, the severance of Mr. X's appeal from those of the remaining petitioners would have no effect on the judge's disqualification.

DISCUSSION:

The inquiry implicates the following provisions of the Code of Judicial Conduct: Canon 2B, "a judge shall not allow the judge's . . . relationships to influence the judge's judicial conduct or judgment . . ." and Canon 3C(1), "a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned . . ." particularly subsections (a) and (b). Initially, the Commission recognizes that the issues involved in the criminal matter in which the judge represented Mr. X, and those involved in the action currently before the Court, are not precisely the same. Regardless, the Commission is of the opinion that due to the former attorney-client relationship which existed between the judge and Mr. X, coupled with the nature of the prior representation, the judge's participation in the current proceeding before the Court could provide reasonable grounds to question the judge's impartiality and create the appearance of impropriety.

Reference:
North Carolina Code of Judicial Conduct
Canon 2B
Canon 3C(1)(a)
Canon 3C(1)(b)
Canon 3D

CITE AS: FINANCIAL ACTIVITIES—GIFTS

FORMAL ADVISORY OPINION: 2009-08

December 11, 2009

Refer to 194 N.C. App. 384

QUESTION:

May a judge accept the gift of a portrait of the judge from a local county bar association to recognize the judge's service following the judge's retirement? Following the judge's retirement, the judge accepted a commission and serves as an emergency judge. The county bar association is not a party in any matter pending before the court.

COMMISSION CONCLUSION:

The Judicial Standards Commission determined the judge may accept the gift of a portrait of the judge on the occasion of the judge's retirement. In the event the value of the portrait exceeds $500, the judge should report the gift as per Canons 5C(4)(c) and 6C of the Code of Judicial Conduct.

DISCUSSION:

The Code authorizes judges to accept gifts under circumstances where the gift is "incident to a public testimonial to the judge" (Canon 5C(4)(a)), "a wedding, engagement or other special occasion gift" (Canon 5C(4)(b)), and "any other gift only if the donor is not a party presently before the judge and, if its value exceeds $500, the judge reports it in the same manner as the judge reports compensation in Canon 6C" (Canon 5C(4)(c). The gift of a portrait from a local bar association falls within each of the three Code provisions cited.

Reference:
North Carolina Code of Judicial Conduct
Canon 5C(4)(a)
Canon 5C(4)(b)
Canon 5C(4)(c)

CITE AS: EX PARTE COMMUNICATIONS

FORMAL ADVISORY OPINION: 2010-01

January 8, 2010

Refer to 194 N.C. App. 385

QUESTION:

May a judge enter an *ex parte* order for an attorney to be admitted to practice *pro hac vice*?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined the judge may enter an *ex parte* order for an attorney to be admitted to practice *pro hac vice*, provided all parties receive notice of the motion as required by law and have an opportunity to object.

DISCUSSION:

Motions for attorneys to be admitted to practice *pro hac vice* are procedural issues which do not go to the merits of an action. The admission of counsel *pro hac vice* in North Carolina is not by right, but is rather a discretionary privilege, the determination of which is vested within the judgement of the court. Notice and an opportunity to object cure any potential objection to entering a *pro hac vice* order *ex parte*.

Reference:
North Carolina Code of Judicial Conduct
Canon 3A(4)

CITE AS: COMMUNITY ACTIVITIES

FORMAL ADVISORY OPINION: 2010-02

March 19, 2010

Refer to 195 N.C. App. 132

QUESTION:

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

COMMISSION CONCLUSION:

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

DISCUSSION:

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

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

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

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

CITE AS: QUASI-JUDICIAL ACTIVITIES

FORMAL ADVISORY OPINION: 2010-03

April 9, 2010

Refer to 196 N.C. App. 520

QUESTION:

1) May a judge consult in the writing of a federal grant application to request funding for the production of instructional materials explaining the procedure to establish problem-solving courts for child support disputes?

2) May a judge publish a book for retail sale, based on the judge's experience in child support court that will feature true life stories of parents, some of whom still have matters pending, and how they became involved in the court system?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined 1) the judge may consult in the writing of a federal grant to request funding for the production of instructional materials explaining the procedure to start a problem solving court for child support disputes. 2) During the judge's tenure in judicial office, the judge may not publish a book for personal profit that contains accounts of court proceedings involving parties that have appeared before the judge or currently have related matters pending before the court.

DISCUSSION:

A judge is prohibited from active assistance in raising funds for any cultural, educational, historical, religious, charitable, fraternal, civic, economic or legal organization or government agency by Canons 4C and 5B(2) of the Code of Judicial Conduct. In question 1) above, the judge's activities are not active assistance in raising funds. The grant request is not made in the name of nor is the grant signed by the judge.

Both Canons 4A and 5A of the Code allow a judge to engage in a variety of activities, specifically including writing, so long as the activities do not reflect adversely upon the judge's impartiality or interfere with the performance of the judge's judicial duties. In the course of these activities, Canon 3A(6) requires a judge to "abstain from public comment about the merits of any pending proceeding arising in North Carolina or addressing North Carolina law. However, a judge may discuss previously issued judicial decisions when teaching or lecturing as part of educational courses or programs." In addition, in financial and business dealings, a judge may not exploit the judge's judicial position nor use information acquired by the judge in the judge's official capacity for financial gain or any purpose unrelated to the judge's judicial duties. (Canons 5C(1) & 5C(7)).

In all things, a judge is required by Canons 1 and 2A of the Code to personally observe standards of conduct that both preserve and publicly promote confidence in the integrity and impartiality of the judiciary.

Thus, in question 2) above, while a judge may write on a variety of topics, a judge may not write about the personal travails of litigants, some of whom currently have matters pending before the court. Such conduct does not promote confidence in the integrity and impartiality of the judiciary, and no matter how well intentioned, appears to take advantage of the judge's judicial position. Such endeavors should be postponed until after one's judicial service has ended.

Reference:
North Carolina Code of Judicial Conduct
Canon 1
Canon 2A
Canon 3A(6)
Canon 4A
Canon 4C
Canon 5A
Canon 5B(2)
Canon 5C(1)
Canon 5C(7)

CITE AS: QUASI-JUDICIAL ACTIVITIES

FORMAL ADVISORY OPINION: 2010-04

May 14, 2010

Refer to 196 N.C. App. 522

QUESTION:

May an emergency or retired/recalled judge ethically accept an appointment to concurrently serve as a compensated appellate judge for a Native American tribal court?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined an emergency or retired/recalled state court judge may ethically accept an appointment to concurrently serve as an appellate judge for a Native American tribal court. Such dual service is conditional upon the impartial, independent and proper discharge of the judge's state court judicial duties.

DISCUSSION:

Service as an emergency or retired/recalled state court judge is part-time and compensated on a per diem basis. Emergency or retired/recalled judges are free to decline an offered commission to hold court. Therefore there is little likelihood the dual appointments would conflict. During the course of such dual service, the judge should be vigilant and disqualify from any matter in which his/her impartiality could reasonably be called into question. The public report provisions of Canon 6C will require the judge to report compensation in excess of $2,000.00 received for service as an appellate judge for a Native American tribal court.

Reference:
North Carolina Code of Judicial Conduct
Canon 1
Canon 2A
Canon 3C(1)
Canon 6

CITE AS: DISQUALIFICATION—FAMILIAL RELATIONSHIP TO ATTORNEY, PARTY, OR WITNESS

FORMAL ADVISORY OPINION: 2010-05

May 14, 2010

Refer to 196 N.C. App. 793

QUESTION:

Is a judge required to disqualify from matters involving the District Attorney or members of the District Attorney's staff when the judge's son/daughter is employed by the District Attorney as an assistant district attorney?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined that where a judge's relative, within the third degree of relationship, is employed as an assistant district attorney, the judge is not required to disqualify himself/herself from matters involving the District Attorney or other attorneys from the District Attorney's staff, so long as the judge's relative had no involvement in the matter and does not appear before the judge. The judge is required to disqualify from all matters in which the judge's relative was previously or is currently involved.

DISCUSSION:

Canon 3C(1)(d)(ii) of the Code of Judicial Conduct requires a judge to disqualify from matters wherein an individual within the third degree of relationship, or the spouse of such a person, is acting as a lawyer in a proceeding before the judge. A judge is required to conduct himself/herself in a such a manner as to ensure the preservation of the integrity and independence of the judiciary and to promote public confidence in its impartiality (Canons 1 and 2A). Canon 2B of the Code provides, inter alia, that a judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment. In addition Canon 2B requires that a judge not

convey nor allow others to convey the impression that they are in a special position to influence the judge.

The judge's son/daughter is employed in a multi-county judicial district and is not customarily involved in any cases outside of the one county to which he/she is assigned. The Commission advises as a best practice that the judge disclose the employment relationship on the record and inquire as to any involvement the judge's son/daughter may have had in the matter. Upon confirmation that the judge's son/daughter has not been involved in the matter, the judge's impartiality could not reasonably be questioned.

References:
North Carolina Code of Judicial Conduct
Canon 1
Canon 2A
Canon 2B
Canon 3C(1)(d)(ii)

CITE AS: COMMUNITY ACTIVITIES

FORMAL ADVISORY OPINION: 2010-06

July 9, 2010

Refer to 197 N.C. App. 234

QUESTION:

May a judge serve on the board of trustees of a not-for-profit hospital?

COMMISSION CONCLUSION:

The Judicial Standards Commission concluded that the North Carolina Code of Judicial Conduct does not allow a judge to serve as an officer, director, trustee or non-legal advisor of a hospital.

DISCUSSION:

The provisions of the Code of Judicial Conduct implicated by this inquiry are:

Canon 2A requires a judge to conduct himself/herself in a such a manner as to promote public confidence in the impartiality of the judiciary (Canon 2A).

Canon 5C(2) prohibits a judge from serving as an officer, director or manager of any business.

Canon 5B of the Code of Judicial Conduct allows a judge to participate in civic and charitable activities provided the activities do not call the judge's impartiality into question nor interfere with the performance of the judge's judicial duties. As part of these activities a "judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization subject to certain restrictions. Such service is not allowed if the organization is likely to be involved in legal proceedings that would usually come before the judge (Canon 5B(1)). A judge cannot actively assist the organization with fund-raising (Canon 5B(2)).

The Commission reasoned that a hospital, regardless of its tax status, is essentially a business. The activities associated with the operation of a hospital customarily involve the corporate entity, its administration, employees, staff and the physicians authorized to practice within its facilities, in legal proceedings. These proceedings, which range from payment collection actions appealed from small claims court to large medical malpractice suits, ordinarily come before district, superior and appellate court justices and judges. A judge's service as an officer, director, trustee or non-legal advisor of a hospital reasonably calls a judge's impartiality into question when matters involving the hospital come before the judge.

References:
North Carolina Code of Judicial Conduct
Canon 2A
Canon 5B(1) & (2)
Canon 5C(2)

CITE AS: COMMUNITY ACTIVITIES

FORMAL ADVISORY OPINION: 2010-07

July 9, 2010

Refer to 197 N.C. App. 236

QUESTION:

May a judge sponsor or consent to being listed as a sponsor of a fund raising event?

COMMISSION CONCLUSION:

The Judicial Standards Commission reasoned that a judge may not sponsor nor consent to being listed as a "sponsor" or "host" of a fund raising event for any organization or individual, other than the judge's own judicial election campaign or a joint judicial election campaign in which the judge participates.

DISCUSSION:

Canon 2B of the Code of Judicial Conduct prohibits a judge from lending the prestige of the judge's office to advance the private interests of others. Canons 4C and 5B(2) both prohibit a judge from active assistance in raising funds for quasi-judicial and non-judicial organizations, but allow a judge to be listed as a contributor on an invitation to a fund raising event. Canon 7C(1) of the Code prohibits a judge from soliciting funds for a political party, organization or individual seeking election to office, except as permitted by Canons 7B(2) and 7B(4) which allow for solicitation of donations for a judge's own judicial election campaign or a joint judicial election campaign in which the judge participates.

While a judge may make a donation to and attend a fund-raising event, the Commission considers "active assistance . . . in raising funds" to include being listed as a "sponsor" or "host" of an event. Although the terms "sponsor" and "host" may be titles assigned to contributors who donate within an arbitrary monetary range, the Commission is of the opinion that the use of the terms contain connotations of being something more than a mere contributor. Those who "sponsor" or "host" an event publicly associate themselves with and promote the event or cause in an effort to encourage others to do likewise, thereby rendering such conduct inappropriate for a judicial official.

References:
North Carolina Code of Judicial Conduct
Canon 2B
Canon 4C
Canon 5B(2)
Canon 7B(2)
Canon 7C(1)

CITE AS: EX PARTE COMMUNICATIONS

FORMAL ADVISORY OPINION: 2010-08

October 8, 2010

Refer to 198 N.C. App. 708

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 provides 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

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ADMINISTRATIVE LAW

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Judicial review of final agency decision—unethical conduct—loss of teacher's license—A whole record review revealed the trial court did not err by affirming the final agency decision of the State Board of Education denying petitioner teacher's request for reinstatement of his teaching license because a reasonable public school teacher of ordinary intelligence, utilizing common understanding, would know that sending threatening and obscene letters to his supervisor would place the teacher's professional position in jeopardy. **Richardson v. N.C. Dep't of Pub. Instruction Licensure Section, 219.**

Judicial review of final agency decision—whole record test—abuse of discretion standard—arbitrary and capricious standard—The trial court did not err by applying the whole record test and finding that defendant's adoption of the decision of the ALJ was not arbitrary, capricious, or an abuse of discretion because: (1) there was no evidence in the record that anything presented to or considered by the Ethics Committee panel or the superintendent was improper, irrelevant, or tainted by the decision-making process; and (2) petitioner did not carry his burden to show that the trial court erred in finding that the denial of the request for reinstatement was not arbitrary, capricious, or an abuse of discretion. **Richardson v. N.C. Dep't of Pub. Instruction Licensure Section, 219.**

ADOPTION

Custody—standard of proof—findings—An argument in a proceeding challenging an adoption that plaintiff had standing to pursue custody was not reached because other findings fully supported the court's custody award. Also, an argument concerning the standard of proof for determining custody failed because it rested on the contention that plaintiff was not a parent, which was rejected above. **Boseman v. Jarrell, 128.**

Same sex—not void—A party to a same-sex adoption decree could not question its validity except by showing that it was void *ab initio*. The decree was not void, even if erroneous; the adoption was not explicitly a same-sex adoption and was better characterized as a direct placement adoption with a waiver of the full terms of parental consent and legal obligations. The statutes make clear that a wide range of adoptions are permitted so long as they protect the minor and the specific nature of the parties' relationship was not relevant; the same result would have been reached for an unmarried heterosexual couple. **Boseman v. Jarrell, 128.**

APPEAL AND ERROR

Appealability—de novo review of summary judgment—stipulation—handling of public trust funds—In a declaratory judgment action arising from the transfer of money from the North Carolina Highway Trust Fund to the State's General Fund, plaintiffs' contention that fundamental principals of expending public money were violated was rejected. The Trust Fund lacked the indicia of a trust, the language creating the Trust Fund was ambiguous on whether it was intended to be a true trust, the Trust Fund was not entitled to the same level of constitutional protection that state employees' retirement funds enjoy, plaintiffs' interpretation would allow one General Assembly to bind future legislatures, and the General Assembly had determined that one of the uses of the Trust Fund is to supplement the General Fund. **Goldston v. State, 618.**

Appealability—de novo review of summary judgment—stipulation—handling of public trust funds—Where review was *de novo*, there was no need to address plaintiffs' arguments concerning the trial court's rulings on its authority, its alleged inappropriate use of collateral estoppel, its findings of fact, or its conclusions of law. An argument concerning the exclusion of materials was without merit since the parties stipulated to the facts. **Goldston v. State, 618.**

Appealability—error of law in judgment—denial of motion for relief—abuse of discretion standard—The trial court did not abuse its discretion by denying plaintiff's motion for relief under N.C.G.S. § 1A-1, Rules 60(b) and 54(b). The trial court's order did not reflect a ruling regarding Rule 54(b) and our courts have long held that Rule 60(b) provides no relief from errors of law which can only be rectified by an appellate court. On proceedings properly taken in the action in which the judgment was rendered, absent a void judgment, parties are bound by the rulings of the court until the judgment has been properly corrected. **Welch v. Lumpkin, 593.**

Appealability—improper materials—summary judgment motion—The Court of Appeals disregarded those materials cited by plaintiffs in a negligence case (such as unverified pleadings and unsupported factual allegations) that may not properly be considered on a motion for summary judgment. **Asheville Sports Properties, LLC v. City of Asheville, 341.**

Appealability—improper stipulation as a matter of law—Although plaintiff contends the trial court erred by denying defendant's motion to dismiss under the doctrines of equitable estoppel and estoppel by benefit, these assignments of error are without merit because any stipulation by the parties to extend the time period set forth in N.C.G.S. § 1A-1, Rule 41(d) was invalid as a matter of law. **Welch v. Lumpkin, 593.**

Appealability—interlocutory order—arbitration—substantial right—An order denying arbitration is immediately appealable because it involves a substantial right which may be lost if appeal is delayed. **Pressler v. Duke Univ., 586.**

Appealability—interlocutory order—substantial right—public official immunity—Public official immunity affects a substantial right and is immediately appealable. **Farrell v. Transylvania Cnty. Bd. of Educ., 173.**

Appealability—untimely appeal—writ of certiorari—DSS's motion to dismiss respondent mother's appeal in a child neglect case is granted because

APPEAL AND ERROR—Continued

respondent mother failed to note a timely appeal from the disposition order, and she was required by N.C.G.S. § 7B-1001(a)(3) to do so as a prerequisite for appealing issues arising from the adjudication order as a matter of right. However, the Court of Appeals exercised its discretion under N.C. R. App. P. 21 to allow respondent's petition for writ of *certiorari* in light of the facts of the case. **In re K.C. & C.C., 557.**

Assignment of error—not supported by authority—abandoned—An assignment of error to the exercise of subject matter jurisdiction for which no authority was cited was deemed abandoned. **Barloworld v. Fleet Leasing, LLC v. Palmetto Forest Prods., Inc. 228.**

Denial of motion to compel arbitration—interlocutory—substantial right affected—The trial court's denial of a motion to compel arbitration is an interlocutory order but is immediately appealable because a substantial right would otherwise be lost. **U.S. Trust Co., N.A. v. Stanford Grp. Co., 287.**

Denial of motion to compel arbitration–substantial right affected—immediately appealable—The denial of a motion to compel arbitration under an employment contract without findings affected a substantial right and was immediately appealable. **Griessel v. Temas Eye Ctr., P.C., 314.**

Denial of motion to dismiss—interlocutory—The trial court's denial of a Rule 12(b)(6) motion to dismiss did not affect a substantial right and the appeal was dismissed. **Griessel v. Temas Eye Ctr., P.C., 314.**

Denial of motion to return records—interlocutory—The denial of a motion to compel plaintiff to return records and confidential material was an interlocutory order, defendants did not argue that the denial affected a substantial right, and no substantial right was apparent to the appellate court. **Griessel v. Temas Eye Ctr., P.C., 314.**

Immunity—teacher—public official immunity—abuse of severely disabled child—A *de novo* review revealed the trial court did not err by denying defendant teacher's motion for summary judgment with respect to the State tort claims arising from the alleged abuse of a severely disabled child even though defendant contends she is entitled to public official immunity. **Farrell v. Transylvania Cnty. Bd. of Educ., 173.**

Immunity—§ 1983—teacher—qualified immunity—abuse of severely disabled child—A *de novo* review revealed the trial court did not err by denying defendant teacher's motion for summary judgment with respect to federal claims including a section 1983 claim for supervisory liability arising from the alleged abuse of a severely disabled child even though defendant contends she is entitled to qualified immunity to shield her from suit. **Farrell v. Transylvania Cnty. Bd. of Educ., 173.**

Law of the case—prior interlocutory appeal—The law of the case doctrine did not preclude a challenge to an order compelling arbitration where a prior appeal had been deemed interlocutory with no substantial right involved. That decision necessarily did not resolve the issue presented here: whether the trial court erred in compelling arbitration. **Jeffers v. D'Alessandro, 86.**

Preservation of issues—failure to argue—Although plaintiffs contend they are entitled to equitable relief even if they failed to prove the elements of negli-

APPEAL AND ERROR—Continued

gence, plaintiffs only brought a claim for negligence against the City and asserted no claim based on any equitable principle. The Court of Appeals declined to adopt a new rule imposing a duty on the City to exercise reasonable care. **Asheville Sports Properties, LLC v. City of Asheville, 341.**

Preservation of issues—failure to argue—Assignments of error that defendants failed to argue in their brief are deemed abandoned under N.C. R. App. P. 28(b)(6). **Nale v. Ethan Allen, 511.**

Preservation of issues—failure to plainly, concisely, and without argumentation raise question—Although respondent contends the trial court erred in a termination of parental rights case by failing to appoint a guardian *ad litem* for respondent, the merits of this argument are not considered and petitioner's motion to strike is allowed because neither of the assignments of error cited in support of this argument by respondent plainly, concisely, and without argumentation raise the question as required by N.C. R. App. P. 10 (c)(1). **In re J.D.L., 182.**

Preservation of issues—failure to raise constitutional issue at trial—An assignment of error in a child custody modification case is dismissed because defendant failed to raise this constitutional issue at trial and even assuming *arguendo* that defendant preserved a due process issue, the trial court did not violate the local rules or commit any misconduct in the scheduling and hearing of this matter. **Mitchell v. Mitchell, 392.**

Preservation of issues—public interest—dispositions available at recommitment hearing—Rule 2—The issue of whether a conditional release was a possible disposition at a recommitment hearing for an inmate involuntarily committed following an insanity verdict was addressed by the Court of Appeals the under Appellate Rule 2 despite not being properly preserved for review. The question will arise in every recommitment hearing of a person found not guilty by reason of insanity, and the question of dispositions available to the trial court is critical to the protection of the public's safety and the respondent's rights. **In re Hayes, 69.**

Preservation of issues—ruling on one motion before another—no objection—The issue of whether the trial court erred by not ruling upon a motion to set aside entry of default before considering a motion for summary judgment was not preserved for appellate review where there was no objection at trial. **Self-Help Ventures Fund v. Custom Finish, LLC, 743.**

Record—affidavit—filed on day of hearing and before entry of judgment—timely—An affidavit from a treating physician in a medical malpractice case should have been included in the record on appeal where defendants argued that the affidavit was not timely filed but the record did not support that contention. The affidavit was clearly filed on the day of the hearing and well before entry of judgment, and defendants have not argued that the affidavit was not timely served on them. **Morris v. Southeastern Orthopedics Sports Med. & Shoulder Ctr., 425.**

Record—documents excluded by trial court—Documents concerning plaintiff's treating physician should not have been excluded from the record on appeal in a medical malpractice action in which plaintiff's expert witness designation (PEWD) was in dispute. Under Appellate Rule 11(c), the trial court is not to

APPEAL AND ERROR—Continued

decide whether material desired in the record by either party is relevant; moreover, the doctor's deposition and affidavit go to the heart of the issues on appeal and are clearly relevant. **Morris v. Southeastern Orthopedics Sports Med. & Shoulder Ctr., 425.**

Record—index required—Sanctions were imposed upon appellate counsel for failure to include an index in the record on appeal. **State v. Brown, 253.**

Record—not timely filed—substantial violation—Plaintiff's counsel was assessed the printing costs of an appeal where the record was not timely filed. Although the relatively brief delay in filing the record did not hinder review on the merits or impair the adversarial process in this case, failing to comply with the deadlines in the Rules of Appellate Procedure is a substantial violation. Plaintiff's counsel did not attempt to rectify the error by filing a motion requesting an extension of time or that the record be deemed timely for good cause shown. **Hardin v. KCS Int'l, Inc., 687.**

Record—petition for certiorari—deposition—submitted to trial court—In a dispute over the settlement of an appellate record, *certiorari* was granted to include a deposition that defendant contended was not submitted to the trial court. The deposition was submitted because plaintiff filed a Notice of Filing and handed a copy to the court at the hearing. There was no prejudice because defense counsel attended the deposition and vigorously examined the doctor. **Morris v. Southeastern Orthopedics Sports Med. & Shoulder Ctr., 425.**

Record—petition for certiorari—expert witness designation—included—A petition for *certiorari* was granted to include plaintiff's expert witness designation in the record on appeal where defendant had asked to exclude it on the grounds that it was not considered by the trial court. Not being considered is not the same as not being submitted, which defendants do not dispute. **Morris v. Southeastern Orthopedics Sports Med. & Shoulder Ctr., 425.**

Sufficiency of findings of fact—mixed findings of fact and conclusions of law—Several of the trial court's findings of fact were improperly classified, at least in part, as findings of fact rather than conclusions of law, and those portions will not be considered when reviewing the sufficiency of the findings of fact. **Brown v. Meter, 50.**

Unpublished opinions—sanctions not imposed—Sanctions were not imposed for a violation of the appellate rules in citing an unpublished opinion, but counsel are admonished to use care in the citation of unpublished opinions. **Evans v. Conwood LLC, 480.**

ARBITRATION AND MEDIATION

Denial of motion to compel—remanded—findings insufficient—An order denying a motion to dismiss or to compel arbitration was remanded where the trial court did not specifically decide whether the parties had a valid agreement to arbitrate, did not set out the rationale underlying the denial, and there were several possible bases for the trial court's decision. Furthermore, the trial court should also determine on remand whether the Federal Arbitration Act or North Carolina law is applicable. **U.S. Trust Co., N.A. v. Stanford Grp. Co., 287.**

Denial of motion to compel—remanded—no findings—The denial of a motion to compel arbitration under an employment contract was remanded

ARBITRATION AND MEDIATION—Continued

where there was no finding as to the existence of a valid agreement to arbitrate. **Griessel v. Temas Eye Ctr., P.C., 314.**

Motion to stay proceedings denied—rescission—mutual release—The trial court did not err by denying defendants' motion to stay proceedings against defendants for slander and libel pending arbitration because the parties had stated in a release agreement their mutual intent that the release fully and finally resolved their disputes and that all earlier agreements be cancelled. Under either a theory of rescission or mutual release, plaintiff was not bound to resolve his dispute by arbitration with defendants. **Pressler v. Duke Univ., 586.**

Professional football player—medical treatment—collective bargaining agreement—The trial court properly granted a motion to compel arbitration of claims by a professional football player arising from medical treatment. The NFL's collective bargaining agreement provided for arbitration of any dispute involving the interpretation of, application of, or compliance with the agreement or contract; these claims concern the interpretation or application of the agreement's medical rights provisions, and are subject to arbitration. **Jeffers v. D'Alessandro, 86.**

ARREST

Probable cause—informant's corroborated information—surveillance information—Officers had probable cause to arrest defendant prior to an illegal entry into his apartment, and the trial court did not err by denying defendant's motion to suppress his statements to deputies and the fruits thereof. **State v. Brown, 253.**

ATTORNEYS

Legal malpractice—intentional wrongdoing—in pari delicto—The trial court did not err in a legal malpractice action by concluding that plaintiff's intentional wrongdoing barred any recovery from defendants for losses that may have resulted from defendants' misconduct under a theory of *in pari delicto*. **Whiteheart v. Waller, 281.**

CHILD ABUSE AND NEGLECT

Failure to adopt visitation plan—invited error—The trial court did not err in a child neglect case by failing to adopt an appropriate visitation plan in its disposition order as required by N.C.G.S. § 7B-905(c) where the unchallenged findings of fact revealed that respondent was generally unwilling to do anything to promote her reunification with the juveniles and was in no position to complain when the trial court did what respondent effectively asked it to do. **In re K.C. & C.C., 557.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Costs—attorney fees—retroactive child support—prospective child support—The trial court abused its discretion in a child support case by awarding plaintiff attorney fees for retroactive child support, but properly awarded attorney fees with regard to plaintiff's claim for prospective child support. The case is

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

remanded with instructions for the trial court to reevaluate the attorney fees award and make findings as to a reasonable award and order defendant to pay accordingly. **Carson v. Carson, 101.**

Custody modification—denial of motion for new trial—The trial court did not abuse its discretion in a child custody modification case by denying defendant's motion for a new trial under N.C.G.S. § 1A-1, Rule 59. **Mitchell v. Mitchell, 392.**

Custody modification—notice of hearing—A *de novo* review revealed the trial court did not err in entering an order modifying child custody even though defendant contends the hearing supporting the order was held without proper notice to defendant in violation of her state and federal constitutional rights and in violation of the county's local rules. **Mitchell v. Mitchell, 392.**

Custody modification—sufficiency of findings of fact—substantial change in circumstances—best interests of child—The trial court did not err by concluding that plaintiff met his burden of proof on his motion for modification of child custody and by granting the same even though defendant contends plaintiff failed to show a substantial change in circumstances since entry of the permanent custody order, a connection between his alleged changes and the welfare of the children, and that a change in custody would be in the best interests of the child. **Mitchell v. Mitchell, 392.**

Retroactive child support—unincorporated separation agreement—A *de novo* review revealed the trial court erred by applying the 2006 North Carolina Child Support Guidelines with regard to the retroactive child support awarded from September 2003 to 31 August 2006 because: (1) the Guidelines do not supercede case law which prohibits retroactive child support from being awarded, absent an emergency situation, where the parties have complied with the payment obligations specified in a valid unincorporated separation agreement; and (2) the terms of the agreement will control until the parent receiving support seeks a child support order from the court. However, having found that the terms of the agreement were not reasonable to meet the child's needs, the court was justified in awarding prospective child support. **Carson v. Carson, 101.**

Support—defendant's capacity to earn—findings not sufficient—The trial court erred in a child support action by considering defendant's capacity to earn in calculating his gross monthly income without the requisite findings of fact. The trial court appeared to rely solely on plaintiff's testimony as to what defendant purportedly earned on average from commercial fishing and towing and crushing cars over the entire course of the marriage rather than in one or two prior years, and made no findings or conclusions about its decision to halve the figures provided by plaintiff. **State ex rel. Midgett v. Midgett, 202.**

Unreimbursed medical expenses—unincorporated separation agreement—The trial court erred in a child support case by awarding plaintiff unreimbursed medical expenses in the amount of $2,549.25 because: (1) the trial court here was not justified in altering the terms of the Agreement with regard to the child's medical expenses and then applying the new terms retroactively since the trial court cannot alter the terms of a valid, unincorporated separation agreement retroactively absent an emergency situation; and (2) defendant was already responsible for one-hundred percent of the child's reasonable and necessary

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

medical expenses he was aware of, and there was no evidence that defendant had breached the terms of the agreement at any time. **Carson v. Carson, 101.**

CITIES AND TOWNS

Municipal liability for waterway maintenance—storm water drainage pipes—no duty to exercise reasonable care to inspect, maintain, and repair—The trial court did not err in a negligence case by granting the City's motion for summary judgment in an action seeking damages for two sinkholes that developed on plaintiffs' property as a result of the failure of storm water drainage pipes running under plaintiffs' parking lot. Although plaintiffs contend the City had an affirmative duty to exercise reasonable care to inspect, maintain, and repair the storm drain pipes buried under plaintiffs' property, plaintiffs admitted in their brief that no stormwater structures owned by the City were located on plaintiffs' property or on immediately adjoining properties, and it was undisputed that the pipes under plaintiffs' property were put in place by a previous owner of the property and were owned solely by plaintiffs. **Asheville Sports Properties, LLC v. City of Asheville, 341.**

CIVIL PROCEDURE

Motion to amend—timeliness—bad faith—undue prejudice—undue delay—The trial court did not abuse its discretion in a breach of contract case by denying plaintiff's motion to amend her complaint. **Williams v. Craft Dev., LLC, 500.**

Motion for judgment notwithstanding verdict—prior directed verdict motion—The trial court did not err in an action to quiet title by denying plaintiff's motion for judgment notwithstanding the verdict because there was more than a scintilla of evidence supporting defendants' claimed location of the boundary line. **Pardue v. Brinegar, 210.**

Rule 12(b)(6) motion to dismiss—matters outside pleadings—summary judgment—A Rule 12(6) motion to dismiss was converted to a motion for summary judgment where the court's order stated that the court reviewed the pleadings and considered the arguments and submissions of counsel, and took notice of portions of an estate file and a pending caveat. **Mileski v. McConville, 267.**

Rule 60—relief from adoption decree—failure to exercise discretion—The trial court failed to exercise its discretion when it denied defendant's Rule 60(b)(4) motion for relief from a decree of adoption on the grounds that it did not have jurisdiction to declare void the order of another district court judge. Rule 60(b) motions are an exception to the general rule that one judge may not overrule, modify, or change the judgment of another. **Boseman v. Jarrell, 128.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Legal malpractice—verdict indicated plaintiffs' intentional wrongdoing—A *de novo* review revealed the trial court did not err in a legal malpractice action by concluding that the verdicts against plaintiff in the Forsyth County cases established as a matter of law plaintiff's intentional wrongdoing. **Whiteheart v. Waller, 281.**

COMPROMISE AND SETTLEMENT

Conditions precedent to dismissal—general release—enforcement of settlement not sought—The issue of whether plaintiff's obligation to dismiss his action under a settlement agreement was based on conditions precedent was argued for the first time on appeal and was not properly before the appellate court. Moreover, his contention did not address the general release that he signed which did not have a condition precedent and that released underlying claims he sought to resurrect. **Hardin v. KCS Int'l, Inc., 687.**

Consideration—repairs not completed—resolution of litigation—Plaintiff received the consideration for which he bargained in a settlement agreement in an action arising from alleged defects in a boat even though the specified repairs were not completed. The settlement agreement was supported in part by consideration in the resolution of the litigation. **Hardin v. KCS Int'l, Inc., 687.**

Enforcement of agreement—rescission—terms of agreement—The terms of a settlement agreement defeated plaintiff's claim that he was entitled to rescission based on breach of the agreement. The contract gave plaintiff the right to seek enforcement of the settlement agreement's requirements or to seek damages for breach. **Hardin v. KCS Int'l, Inc., 687.**

Failure of settlement—allegation of fraud—no evidence of intent at time of settlement—Plaintiff failed to forecast sufficient evidence of fraud to defeat summary judgment after the failure of a settlement agreement arising from alleged defects in a yacht and subsequent repairs. Plaintiff did not present evidence that the boat manufacturer (Cruisers) did not intend to perform the repairs properly at the time it entered into the settlement agreement. **Hardin v. KCS Int'l, Inc., 687.**

Failure of settlement—allegation of fraud—not sufficiently specific—Plaintiff presented insufficient evidence to warrant setting aside a settlement agreement based on fraud in an action arising from alleged defects in a boat. Although plaintiff contended that a marine surveyor was fraudulently misrepresented as being independent, he did not specifically identify the misrepresentations on which he relied. **Hardin v. KCS Int'l, Inc., 687.**

Order to enforce settlement—standard of review—summary judgment—The summary judgment standard of review is applied to reviewing the trial court's order granting a motion to enforce a settlement agreement. **Hardin v. KCS Int'l, Inc., 687.**

Settlement before discovery—facts subsequently learned—The trial court did not err by dismissing claims of fraud in a settlement agreement where plaintiff chose to forego discovery, settle his claims, and enter into a general release. Plaintiff cannot now avoid the release by arguing that he subsequently learned facts that would have persuaded him not to sign the release when he has not demonstrated that defendant had any duty to disclose those facts. **Hardin v. KCS Int'l, Inc., 687.**

CONSTITUTIONAL LAW

Double jeopardy—kidnapping and robbery—no conviction of robbery—There was no double jeopardy issue in a prosecution for kidnapping to facilitate robbery where defendant was not convicted of the underlying offense. **State v. Cole, 151.**

CONSTITUTIONAL LAW—Continued

Double jeopardy—satellite monitoring—not criminal punishment—The failure of the attorney of an indecent liberties defendant to advance a double jeopardy argument against the imposition of satellite-based monitoring was not ineffective assistance of counsel. That claim is available only in criminal matters, and this was not a criminal matter. The claim of double jeopardy fails for the same reason. **State v. Wagoner**, **321.**

Ex post facto—satellite monitoring—not criminal punishment—The enrollment of an indecent liberties defendant in the satellite-based monitoring (SBM) system did not violate the constitutional *ex post facto* prohibition because the legislature did not intend SBM to be criminal punishment. **State v. Wagoner**, **321.**

Fruit of poisonous tree—traffic stop extended without reasonable and articulable suspicion—A weapon and cocaine seized from a vehicle were discovered as a direct result of an illegal search and should have been suppressed as fruit of the poisonous tree. The cocaine found in defendant's sock at the jail was also the direct result of the illegal vehicle search and should also have been suppressed. **State v. Jackson**, **236.**

Traffic stop—extended seizure and search—not consensual—The search of a vehicle was unconstitutional where the initial stop rose from a suspicion that the driver was without a valid license; the officer extended the stop beyond what was necessary to confirm or dispel that suspicion, asking if there was anything illegal in the vehicle and whether she could search the vehicle; there was no evidence which could have provided the officer with reasonable and articulable suspicion to justify the extension of the detention; and there was no evidence that the encounter became consensual after the officer's initial suspicion was dispelled because there was no evidence that the driver's documentation was returned. A reasonable person would not have believed he was free to leave without his driver's license and registration. **State v. Jackson**, **236.**

CONTRACTS

Breach of contract—summary judgment—The trial court did not err by granting defendants' motion for summary judgment on plaintiff's claim for breach of contract because the record was devoid of evidence that plaintiff argued her theory before the trial court. **Williams v. Craft Dev., LLC, 500.**

Breach of implied covenant of good faith and fair dealing—summary judgment improper—The trial court erred by granting defendants' motion for summary judgment on plaintiff's claim for breach of the implied covenant of good faith and fair dealing in a case arising from the sale of property with a perpetual life estate. There were issues of material fact and credibility. **Williams v. Craft Dev., LLC, 500.**

Collective bargaining—professional football—medical treatment—state claims preempted—The trial court did not err by determining that a professional football player's claims involving medical treatment were preempted by the Labor Management Relations Act (LMRA). Plaintiff's claims are substantially dependent upon analysis of the NFL Collective Bargaining Agreement and the player's contract, and those claims are therefore preempted by Section 301 of the LMRA. **Jeffers v. D'Alessandro**, **86.**

CONTRACTS—Continued

Specific performance—summary judgment—The trial court did not err by granting defendants' motion for summary judgment on plaintiff's claim for specific performance in an action involving the sale of land with a perpetual life estate. By plaintiff's own admission, she was not able to perform due to her misunderstanding of her interest in the property. **Williams v. Craft Dev., LLC, 500.**

COSTS

Taxed to creditor—jurisdiction—The trial court did not err by ordering the costs of the action be taxed to the creditor because judgment was entered in favor of the debtor and the trial court had jurisdiction to issue the order. **Commercial Credit Grp., Inc. v. Barber, 731.**

Timeliness of payment—Rules 6(b) and 41(d) not read in conjunction to extend time period—N.C.G.S. § 1A-1, Rule 6(b) may not be read in conjunction with Rule 41(d) to allow parties to stipulate to an extension of the 30-day time period to pay costs. The trial court did not err by holding that plaintiff did not comply with an order to pay costs to the insurance company within the 30-day time period set forth in N.C.G.S. § 1A-1, Rule 41(d). **Welch v. Lumpkin, 593.**

CRIMINAL LAW

Acceptance of guilty plea and habitual felon acknowledgment—The trial court had jurisdiction to accept a plea from defendant as to all of his pending charges and to his status as an habitual felon where the habitual felon law was, at the least, ancillary to the multiple felony indictments. **State v. Flint, 709.**

Arraignment—less than all charges—not prejudicial—There was no prejudicial error in not arraigning defendant on all charges contained in the plea where defendant did not object and did not claim that he was not properly informed of the charges. **State v. Flint, 709.**

Denial of continuance—discovery not requested—The trial court did not abuse its discretion in a prosecution for robbery and other charges by denying defendant's motion to continue based on not having received discovery within a reasonable time before trial. Defendant did not move that the State make discovery available, and there was nothing in the record showing that additional time was necessary. **State v. Flint, 709.**

Guilty pleas and habitual felon acknowledgment—informed choice—The trial court did not err by accepting defendant's guilty pleas and admission to habitual felon status where defendant argued that his plea was not the product of his informed choice. The trial court complied with N.C.G.S. § 15A-1022(a) in determining that defendant's pleas were voluntarily given and a product of informed choice, and defendant's answers did not indicate any misunderstanding. **State v. Flint, 709.**

Guilty pleas—factual basis—insufficient—There was an insufficient factual basis for guilty pleas to multiple felonies and an admission to having obtained habitual felon status. The record indicates that the trial court relied solely on a document presented by the State which did not address all of the charges. **State v. Flint, 709.**

CRIMINAL LAW—Continued

Instructions—kidnapping—two purposes—both supported by evidence— There was no plain error in instructing the jury on kidnapping to facilitate robbery or flight after robbery where defendant contended that there was no evidence of flight after robbery. **State v. Cole, 151.**

Plea bargain—subsequent satellite monitoring requirement—The imposition of a satellite-based monitoring system on an indecent liberties defendant did not violate his plea agreement. **State v. Wagoner, 321.**

Proffered instruction—credibility of witness—no precedential support— The trial court did not err by refusing a proffered jury instruction on the credibility of a witness who used drugs. There was no precedential support or reasoned argument for the contention that the Pattern Jury Instruction did not give the correct law and led to a different outcome. **State v. Cole, 151.**

DECLARATORY JUDGMENTS

Indexing adoption—moot—A declaratory judgment claim by defendant concerning the Department of Health and Human Services' alleged refusal to index a non-stepparent adoption decree was erroneously dismissed for lack of jurisdiction, but the matter was moot because the adoption decree was not void and cannot be challenged by defendant. Moreover, the court did not err by ruling that plaintiff is a legal parent of the child. **Boseman v. Jarrell, 128.**

DIVORCE

Equitable distribution—attorney fees—debt—The trial court did not err in an equitable distribution action in its consideration of defendant's attorney fees under N.C.G.S. § 50-20(c)(1) where the court included her attorney fees in her debt. The evidence indicated that a major liability for defendant is her attorney fees, and plaintiff has not challenged the finding of the amount of debt, including those fees, and plaintiff did not cite authority that a liability based on attorney fees should be treated differently from other liabilities. **Brackney v. Brackney, 375.**

Equitable distribution—distributional factors—future inheritance— North Carolina equitable distribution law does not permit the trial court to consider as a distributional factor a future inheritance through the will of someone not yet deceased, and the trial court here abused its discretion by basing a portion of its award on the possibility that defendant would inherit a house. **Petty v. Petty 192.**

Equitable distribution—divisible property—appreciation on house—passive—The trial court did not err in an equitable distribution action by classifying appreciation on a house as divisible property where plaintiff's actions preserved the marital estate's down payment and the right to purchase, but the subsequent appreciation was the result of market forces rather than any action by plaintiff. **Brackney v. Brackney, 375.**

Equitable distribution—equal division of property—plaintiff's preservation efforts—considered—The trial court did not err in an equitable distribution action by ordering an equal distribution of property. Plaintiff argued that the trial court ignored plaintiff's preservation efforts, but the findings showed that the court considered and weighed those efforts. **Brackney v. Brackney, 375.**

DIVORCE—Continued

Equitable distribution—findings—valuation of property—supported by evidence—Findings of fact in an equitable distribution action are conclusive if supported by evidence. The trial court did not err in the valuation and distribution of jewelry and income tax refunds, or by not assigning value to the alleged conversion of funds that were not deposited into a joint account. **Petty v. Petty, 192.**

Equitable distribution—illicit drug use—reduction in income—weight given to evidence—The trial court did not abuse its discretion in an equitable distribution case in the weight it gave to defendant's illicit drug use for her reduction in income where there were extensive findings about defendant's drug use and earnings. **Brackney v. Brackney, 375.**

Equitable distribution—marital property—house—source of funds rule—The trial court did not err in an equitable distribution action by classifying a house as marital property where marital funds were used for the down payment and for further equity; the parties had not closed on the house at the time of separation; plaintiff obtained a mortgage and closed on the house; and plaintiff did not present evidence of any amount of mortgage principal that he paid using his separate property after separation. **Brackney v. Brackney, 375.**

Equitable distribution—unequal distribution—considerations—supported by evidence—The trial court did not err in an equitable distribution action by considering plaintiff's age, health, contribution to the marital estate, and contribution to defendant's education where the findings were supported by the evidence. The trial court did not abuse its discretion in determining that these factors justified an unequal distribution of marital property. **Petty v. Petty, 192.**

Equitable distribution—unequal distribution—statutory factors—findings—The trial court in an equitable distribution action may consider all of the statutory factors and find that an equal division of property would not be equitable, but must make findings setting out its reasons. The decision will not be reversed absent an abuse of discretion. **Petty v. Petty**, **192.**

DRUGS

Instructions—khat as Schedule I substance—plain error—There was plain error entitling defendant to a new trial for possession with intent to sell and deliver a Schedule I controlled substance where the jury was instructed that khat is a Schedule I controlled substance; the Schedule I substance is actually cathinone, which only exists in khat for 48 hours after harvest; and the State introduced evidence of three different quantities of khat, only one of which was tested and found to contain cathinone. Based on the erroneous instruction, the jurors could have found defendant guilty based on possession of the untested quantities even if they did not believe that those quantities contained cathinone. **State v. Mohamud, 610.**

EMINENT DOMAIN

Condemnation—notice—sufficiency of steps—The trial court erred in a condemnation case by granting summary judgment as a matter of law in favor of defendants because although there was no genuine issue of material fact as to what steps defendants took in attempting to ascertain to whom they should send

EMINENT DOMAIN—Continued

notice, reasonable minds could differ as to whether the steps taken by defendants were sufficient. **Lawyer v. City of Elizabeth City N.C., 304.**

Inverse condemnation—replacement of sewer outfall—not solely a negligence claim—Homeowners asserting damage from the replacement of a sewer outfall were not limited to bringing a negligence claim and were allowed to bring an inverse condemnation claim. Plaintiffs asserted that the damages to their property were generalized, not repairable, and resulted in loss of value to their property. **Peach v. City of High Point, 359.**

ESTATES

Claim against estate—not timely—personal notice not required—There was no issue of fact that plaintiff failed to present his claim against an estate within the time specified by the general newspaper notice to creditors and the claim was barred by N.C.G.S. § 28A-19-3(a). Plaintiff did not set forth specific facts showing that a genuine issue of material fact existed as to whether his claim against the estate was reasonably ascertainable, and he was not entitled to personal notice. **Mileski v. McConville, 267.**

Claim against estate—properly determined by caveat—The trial court did not err by granting summary judgment in favor of defendants in their individual capacities in an estate claim where plaintiff's essential claim could properly be determined through a caveat proceeding. **Mileski v. McConville, 267.**

EVIDENCE

Demonstration—use of female mannequin's head and newly purchased couch—The trial court did not abuse its discretion in a first-degree murder case by failing to exclude a demonstration using a female mannequin's head and a newly purchased couch to refute defendant's version of the shooting. **State v. Witherspoon, 141.**

Prior crimes or bad acts—drug possession—prior incident ending in dismissal—no probative value—Under an N.C.G.S. § 8C-1, Rule 403 analysis, the probative value of an earlier incident in which defendant had in his possession prescription medicine depended upon a finding that defendant then possessed unlawful controlled substances. Since defendant was acquitted of the earlier offenses, the admission of evidence of the earlier incident was error. **State v. Ward, 1**

Prior crimes or bad acts—drug possession—prior incident—prejudicial as to similar drugs—not prejudicial for unrelated substances and charges—The erroneous admission of evidence that defendant possessed prescription medication on an earlier occasion would not have affected convictions in a current prosecution involving unrelated substances and paraphernalia not usually associated with prescription drugs. However, there is a reasonable possibility that the erroneous admission of the earlier seizure of prescription medications from defendant affected his chances for a more favorable outcome on current charges involving prescription drugs, as well as maintaining a dwelling and a vehicle for the purpose of keeping and selling drugs. **State v. Ward, 1.**

Prior crimes or bad acts—drug seizures—prior incident ending in dismissal—admissibility—Evidence of drug seizures in an earlier incident in

EVIDENCE—Continued

which the charges were subsequently dismissed for insufficient evidence was permissible in this case under N.C.G.S. § 8C-1, Rule 404(b) for the purpose of showing intent, knowledge, identity, and the existence of a common plan or scheme to sell drugs. The time between events was relatively short (February of 2005 to August of 2006) and the similarities substantial. **State v. Ward**, **1.**

Expert testimony—controlled substances—visual identification—The trial court erred in an unlawful drug prosecution by allowing an expert witness to identify controlled substances based on a visual examination rather than a chemical analysis. The visual procedure used did not provide adequate indices of reliability sufficient to support the admission of expert testimony. **State v. Ward**, **1.**

Testimony—sex offenses—witness vouching for children's credibility—The trial court committed plain error in a first-degree sex offense, indecent liberties with a child, and first-degree rape case by allowing a child protective services investigator to testify that her investigation had substantiated defendant as the perpetrator of the abuse alleged by the victims. **State v. Giddens, 115.**

GOVERNOR

Improper transfer of money from Highway Trust Fund to General Fund—failure to wait for appropriate legislative authority—The trial court erred in a declaratory judgment action by concluding that the transfer of $80,000 from the North Carolina Highway Trust Fund to the General Fund was not in violation of article III, section 5 of the North Carolina Constitution because the Governor may not transfer appropriated Trust Fund monies without appropriate legislative authority. **Goldston v. State, 618.**

HOMICIDE

First-degree murder—instruction—mutually exclusive offenses—accessory after the fact—The trial court committed plain error in a first-degree murder case by failing to instruct the jury that it could only convict defendant of first-degree murder or accessory after the fact to first-degree murder, but not both. **State v. Melvin, 469.**

First-degree murder—mutually exclusive offenses—new trial—Defendant is entitled to a new trial in a first-degree murder case where defendant was convicted of two mutually exclusive crimes that carried substantially different penalties and collateral consequences. The Court of Appeals cannot substitute its judgment for that of the jury and hold that the trial court should have arrested judgment on the murder conviction when the jury should be properly charged with determining which of the mutually exclusive crimes was committed by defendant. **State v. Melvin, 469.**

IMMUNITY

Governmental—voluntary program to remove junk—Defendant Brunswick County was entitled to governmental immunity and should have been granted summary judgment in an action arising from a free program to remove junk items from citizen's property on request, with the purpose of protecting and maintain-

IMMUNITY—Continued

ing property values, eliminating public health or environmental nuisances, and protecting public safety and welfare. Although plaintiffs argued that the program was proprietary because it was not an undertaking that could be performed only by the government, prior cases have held that cleaning up a municipality or collecting trash and junk were governmental functions. **Estate of Hewett v. Cnty. of Brunswick, 564.**

Teacher—public official immunity—abuse of severely disabled child—A *de novo* review revealed the trial court did not err by denying defendant teacher's motion for summary judgment with respect to the State tort claims arising from the alleged abuse of a severely disabled child even though defendant contends she is entitled to public official immunity. **Farrell v. Transylvania Cnty. Bd. of Educ., 173.**

§ 1983—teacher—qualified immunity—abuse of severely disabled child—A *de novo* review revealed the trial court did not err by denying defendant teacher's motion for summary judgment with respect to the federal claims including a section 1983 claim for supervisory liability arising from the alleged abuse of a severely disabled child even though defendant contends she is entitled to qualified immunity to shield her from suit. **Farrell v. Transylvania Cnty. Bd. of Educ., 173.**

INSURANCE

Preemption—negligent misrepresentation property not in special flood hazard areas—unfair and deceptive trade practices—fraud—In an action arising from the concealment of knowledge that property was in a flood zone, defendant cannot be held liable to plaintiffs under the National Flood Insurance Act but a legal duty of the type claimed by plaintiffs does exist under the North Carolina Mortgage Lending Act. **Guyton v. FM Lending Servs., Inc., 30.**

JUDGMENTS

Default—findings—The trial court erred in an action to quiet title by making findings in a default judgment that were contradictory and not supported by the evidentiary record and then making conclusions based on those findings. The evidence does not support the findings and the court did not articulate its rationale with specificity. **Jackson v. Culbreth, 531.**

Default—motion to reconsider—equity and justice—The trial court abused its discretion in a quiet title action by denying defendant's motion to reconsider where the underlying default judgment was based on erroneous findings and a misapplication of law. Equity and justice required the court to allow defendant to defend the claim on the merits. **Jackson v. Culbreth, 531.**

Default—quiet title—The trial court erred by entering a default judgment quieting title before all of defendant's claims to the property had been adjudicated. **Jackson v. Culbreth, 531.**

JURISDICTION

Personal—findings—supported by affidavit—Findings about personal jurisdiction over a South Carolina business were supported by an affidavit about two

JURISDICTION—Continued

equipment leases that was based on personal knowledge. The affidavit stated that defendants executed the leases and forwarded them to plaintiffs in North Carolina for acceptance; the leases were accepted by the affiant, which formed the contract; copies of the agreements showed plaintiff's physical address as being in North Carolina; and payments under the contracts were collected in North Carolina. **Barloworld v. Fleet Leasing, LLC v. Palmetto Forest Prods., Inc.**, **228.**

Personal—long-arm statute—general jurisdiction—due process—stream of commerce—The trial court did not err by exercising personal jurisdiction over defendants in an action seeking damages for the deaths of two thirteen-year-old soccer players resulting from a bus accident in Paris, France. The trial court's findings of fact were supported by competent evidence and the findings supported the conclusion of law that defendants purposefully injected their product into the stream of commerce without any indication that they desired to limit the area of distribution of their product so as to exclude North Carolina. **Brown v. Meter, 50.**

Personal—minimum contacts—satisfied—The minimum contacts requirement for personal jurisdiction in North Carolina over a South Carolina business was satisfied where equipment lease contracts were made in North Carolina and were to be performed in North Carolina, and the contracts and attendant regular payments were continuing obligations between defendants and a resident of North Carolina. Moreover, the lease contracts included a North Carolina choice of law provision. **Barloworld v. Fleet Leasing, LLC v. Palmetto Forest Prods., Inc., 228.**

Personal—South Carolina business—North Carolina's exercise of personal jurisdiction over a South Carolina business did not offend due process where defendants purposefully directed their activities toward the state of North Carolina and defendants did not present a compelling case that other considerations would render jurisdiction unreasonable. **Barloworld Fleet Leasing, LLC v. Palmetto Forest Prods., Inc., 228.**

JURY

Seemingly inconsistent verdicts—demonstration of lenity—The trial court did not err by accepting seemingly inconsistent verdicts of guilty of misdemeanor assault with a deadly weapon and not guilty of possession of a firearm by a felon. Inconsistent verdicts may be viewed as a demonstration of the jury's lenity and need not be set aside; it is simply too difficult to tell what the jury was thinking. **State v. Cole**, **151.**

JUVENILES

Delinquency—access to DSS files and mental health records—The trial court abused its discretion in a juvenile delinquency case by not allowing the juvenile's counsel full access to review DSS files or his mental health records, and the case was reversed and remanded for a new disposition hearing with instructions to the trial court to permit the juvenile access to his records under N.C.G.S. § 7B-2901(b). **In re J.L., 605.**

Delinquency—motion to continue hearing improperly denied—The trial court abused its discretion by denying a juvenile's motion to continue the dispo-

JUVENILES—Continued

sition hearing where the juvenile had a right under N.C.G.S. § 7B-2901(b) to access additional records and gather evidence for the hearing. **In re J.L., 605.**

Subject matter jurisdiction—sexual offenses—fatally defective petitions—failure to name victims—The trial court lacked subject matter jurisdiction in a first-degree sexual offense case based on fatally defective petitions, and the trial court's order is vacated because: (1) the State was required by N.C.G.S. § 15-144.2(b) to name the alleged victims in the juvenile petitions; (2) the State did not name the victim at all, and the petitions did not include the victim's initials or any other means of identifying the victim; and (3) the State's bare reference to "a child" violates N.C.G.S. § 15-144.2(b) and renders the petitions facially defective. Further, a challenge to the facial validity of a juvenile petition may be raised at any time. **In re M.S., 260.**

KIDNAPPING

Acquittal of underlying felony—kidnapping verdict accepted—The trial court did not err by accepting a verdict of guilty of kidnapping and not guilty of armed robbery. A defendant need not be convicted of the underlying felony in order to be convicted of kidnapping. **State v. Cole, 151.**

In furtherance of robbery—not guilty of robbery—evidence sufficient—There was sufficient evidence of kidnapping in furtherance of robbery even though defendant Kawamie Cole was found not guilty of robbery. The fact that the jury finds a defendant not guilty is irrelevant to a *de novo* review of whether substantial evidence was offered by the State, and the State is not required to prove the robbery in order to convict a person of kidnapping. **State v. Cole**, **151.**

Release in a safe place—victim fleeing—not a release—A kidnapping victim was not released where she escaped by running to a friend's car, notwithstanding defendant James Cole's threat to kill her. Defendant's failure to chase the victim or do any additional harm does not convert her escape into a release. **State v. Cole, 151.**

Restraint—inherent in robbery—The trial court erred by not dismissing a first-degree kidnapping charge where the restraint used against the victim was an inherent part of the robbery; while the duration of the restraint is relevant, the main question is whether the robber went beyond the requirements of the robbery. **State v. Cole**, **151.**

LEGISLATURE

Transfer of money from Highway Trust Fund to General Fund—waiver—mootness—Plaintiffs' argument that the General Assembly violated article V, section 5 of the North Carolina Constitution by diverting $125,000 from the North Carolina Highway Trust Fund to the General Fund was moot because the General Assembly reimbursed the Trust Fund the entire amount diverted. **Goldston v. State, 618.**

MEDICAL MALPRACTICE

Identification of expert—compliance with discovery order—timeliness—Dismissal of plaintiff's medical malpractice complaint was not an appropriate dis-

MEDICAL MALPRACTICE—Continued

covery sanction to the degree that the dismissal was based upon any failure of plaintiff to identify an expert witness in accordance with the Consent Discovery Scheduling Order (CDSO). **Morris v. Southeastern Orthopedics Sports Med. & Shoulder Ctr., 425.**

Identification of expert—retained for other purposes—A Rule 9(j) dismissal was improper where it was based on the treating physician's deposition testimony that the treatment given was below the standard of care and that he was willing to testify to that opinion before the suit was filed. Rule 9(j) does not require that the person who gives an opinion as to the standard of care prior to filing the complaint be an expert witness whom plaintiff has specifically retained for this purpose only. **Morris v. Southeastern Orthopedics Sports Med. & Shoulder Ctr., 425.**

MENTAL ILLNESS

Recommitment hearing—conditional release—available disposition—A trial court has authority following a hearing under N.C.G.S. §§122C-268.1 and 276.1 to order a conditional release of an insanity acquittee. In this case, it was apparent that the trial court's assumption that it had no authority to award a conditional release played a fundamental role in its decision, and the commitment order was reversed and remanded for a hearing *de novo*. **In re Hayes, 69.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure—subject matter jurisdiction—merger—equitable relief exceeds permissible scope of review—The trial court lacked subject matter jurisdiction in an action for foreclosure under power of sale under N.C.G.S. § 45-21.16 to consider the equitable defense of merger. **Mosler v. Druid Hills Land Co., 293.**

Violation of licensing statute—debt voidable but not void—weighing of equities—A trial court order declaring a Deed of Trust illegal and unenforceable due to the mortgage company's violation of the licensing statute was remanded where the court determined that the mortgage company had failed to prove the existence of a valid debt. The Note and Deed of Trust are subject to being declared unenforceable for public policy reasons, but the contract is not void as a matter of law. It is appropriate for the trial court on remand to consider that neither party has "clean hands" in this transaction. **In re Foreclosure of Bradburn, 549.**

NEGLIGENCE

Causation—directing unreasonable amount of storm water runoff into pipes—Although plaintiffs alternatively contend in a negligence case that the City's liability for plaintiffs' property damage arises from a duty to refrain from directing an unreasonable amount of storm water runoff into pipes that eventually flow into plaintiffs' pipes, there was insufficient evidence of causation to support this theory. **Asheville Sports Properties, LLC v. City of Asheville, 341.**

Misrepresentation—fraud—unfair and deceptive trade practices—motion to dismiss—sufficiency of evidence—While plaintiffs have ade-

NEGLIGENCE—Continued

quately stated claims for fraud and unfair and deceptive trade practices, plaintiffs' complaint does not state a claim for negligent misrepresentation sufficient to survive a dismissal motion under N.C.G.S. § 1A-1, Rule 12(b)(6). **Guyton v. FM Lending Servs., Inc., 30.**

PARTIES

Transfer of note but not guaranties—construed with note—In a case involving the assignment of a note and guaranties, plaintiff was a party in interest even though a separate assignment of defendants' guaranties was not executed. Defendants' guarantees are contemporaneously executed written agreements to the note and are construed with the note; enforcing the guaranties fulfills the intent of the parties as expressed in the contract. Summary judgment was properly granted for plaintiff. **Self-Help Ventures Fund v. Custom Finish, LLC, 743.**

PROBATION AND PAROLE

Modification—substantial change—notice of hearing—A probation modification was remanded where there was no evidence that defendant was notified of a hearing or that a hearing took place, and the modification was substantial. **State v. Willis, 309.**

Revocation—expiration of term before order—State unable to locate defendant—findings—A probation revocation was remanded for further findings (although defendant should not profit from his decision to abscond from his term of probation) where the probationary period had expired before the entry of the revocation order, and the unchallenged findings were that the probation officer was unable to locate defendant and unable to serve the warrant for defendant's arrest. The record, transcript, lack of objection, and absence of subsequent ruling or explanation impeded review. **State v. Savage, 299.**

QUANTUM MERUIT

Unlicensed individual and licensed company—contract only with individual—focus on subject matter rather than parties—In an opinion that supersedes a prior opinion in the same case, *Ron Medlin Constr. v. Harris*, 189 N.C. App. 363, the trial court's grant of summary judgment to defendants in a *quantum meruit* case involving an unlicensed contractor was affirmed. The contract was with Ron Medlin, while the license was held by Ron Medlin Construction. Although plaintiffs argued that Ron Medlin Construction could bring a *quantum meruit* claim against defendants because it was not a party to the contract, the focus in *quantum meruit* is on whether there is an express contract on the subject matter at issue and not on whether there was a contract between the parties. **Ron Medlin Constr. v. Harris, 491.**

REAL PROPERTY

Boundary line dispute—sufficiency of conclusions of law—The trial court did not err in a case arising out of a dispute regarding the location of a boundary line by its conclusions of law where the trial court properly concluded that existing monuments, custom, usage, courses, and distances all supported respon-

REAL PROPERTY—Continued

dents' line as representing the true boundary between the lots. **In re Boundary Dispute of Bost Estate, 522.**

Boundary line dispute—sufficiency of findings of fact—The trial court did not err in a case arising out of a dispute regarding the location of a boundary line by its findings of fact even though petitioner contends they were based upon mere hypothetical evidence or conjecture because the trial court properly used its authority as trier of fact to determine which evidence to find credible. **In re Boundary Dispute of Bost Estate, 522.**

Quiet title action—location of boundaries on ground—jury question—The trial court did not err in an action to quiet title by denying plaintiff's motion for directed verdict and submitting the issue of the boundary location to the jury because the location of a boundary on the ground is a factual question for the jury. **Pardue v. Brinegar, 210.**

ROBBERY

Victim first separated from property—evidence sufficient—The trial court did not err by denying defendant James Cole's motion to dismiss a robbery charge where the victim was separated from her property by threat of force and the property was then stolen. The fact that she did not know that the property had been taken is immaterial. **State v. Cole, 151.**

SCHOOLS AND EDUCATION

Judicial review of final agency decision—dismissal of career employee—teacher—The superior court did not err by failing to make findings of fact addressing petitioner teacher's argument that there was an error of law based on a failure to follow the administrative statutory procedures for dismissal of a career employee under N.C.G.S. § 115C-325(h)(2). **Richardson v. N.C. Dep't of Pub. Instruction Licensure Section, 219.**

Judicial review of final agency decision—unethical conduct—loss of teacher's license—A whole record review revealed the trial court did not err by affirming the final agency decision of the State Board of Education denying petitioner teacher's request for reinstatement of his teaching license because a reasonable public school teacher of ordinary intelligence, utilizing common understanding, would know that sending threatening and obscene letters to his supervisor would place the teacher's professional position in jeopardy. **Richardson v. N.C. Dep't of Pub. Instruction Licensure Section, 219.**

SEARCH AND SEIZURE

Traffic stop—extended—seizure continued—A passenger in a car that has been stopped by a law enforcement officer is still seized when the stop is extended; a passenger would not feel any freer to leave when the stop is lawfully or unlawfully extended, especially under circumstances such as those in this case where the officer was questioning the driver away from the vehicle while the passenger waited in the vehicle. A passenger subject to detention beyond the scope of the initial seizure is still seized under the Fourth Amendment and has standing to challenge the constitutionality of the extended detention. **State v. Jackson, 236.**

SENTENCING

Prior record level—erroneous—stipulation—The trial court erred by sentencing defendant at a prior record level VI when he should have been sentenced at a prior record level V. While defendant's stipulation as to prior record level is sufficient evidence for sentencing, the trial court's assignment of a record level is a conclusion of law reviewed *de novo*. **State v. Flint, 709.**

STATUTES OF LIMITATION AND REPOSE

Fraud—negligent misrepresentation—date upon which plaintiffs initially learned the facts necessary to establish a claim—Plaintiffs' claims were not barred by the statute of limitations for fraud and negligent misrepresentation in an action arising from the purchase of property in a flood hazard area. The validity of defendant's statute of limitations defense hinges on when plaintiffs initially learned the necessary facts. **Guyton v. FM Lending Servs., Inc., 30.**

Inverse condemnation—replacement of sewer outfall—time of taking—completion of project—Summary judgment based on the statute of limitations should not have been granted in an inverse condemnation action that arose from the replacement of a sewer outfall where there was a genuine issue of material fact as to when the project was completed. The forecast of evidence tends to show that the construction company (with whom plaintiffs settled) had returned to plaintiffs' residence to perform work which it had originally agreed to do but neglected to complete. **Peach v. City of High Point, 359.**

Inverse condemnation—replacement of sewer outfall—time of taking—opportunity to discover damage—The trial court erred by granting summary judgment based on the statute of limitations in an action alleging inverse condemnation where sewage backed up into the house and the yard after replacement of a sewer outfall and there were genuine issues of material fact as to when the taking occurred. Although defendant contended that the taking occurred when the old easement was acquired and the outfall installed on plaintiffs' property, there were issues as to when plaintiffs had an adequate opportunity to discover the damage to their property and whether the action was timely filed under N.C.G.S. § 40A-51(a). **Peach v. City of High Point, 359.**

Rule 41—timeliness—Plaintiffs' claims were not barred by N.C. Gen. Stat. § 1A-1, Rule 41(a) even though plaintiffs failed to refile their second complaint within one year after voluntarily dismissing their first complaint. **Guyton v. FM Lending Servs., Inc., 30.**

TAXATION

Gift taxes—contingent real estate transfer—highest appropriate amount—The trial court did not err by confirming the Department of Revenue's valuation of gift taxes due. The Secretary of Revenue did not abuse the statutory discretion to consider the acts and select the highest appropriate tax rate where respondent transferred land to his daughter with an option to defeat his daughter's interests in the land and convey it to charity or to his siblings. The Class B rate under N.C.G.S. § 105-188.1(f)(2) would apply if respondent conveyed the property to any of his siblings and would be the highest rate that could arise, as determined by the Secretary. **N.C. Dep't of Revenue v. von Nicolai, 274.**

TAXATION—Continued

Gift taxes—statute of limitations—Even if respondent had preserved the issue for appeal, the superior court did not err by finding that the Department of Revenue did not violate the statute of limitations when it imposed a gift tax. The original return was filed on 15 April 2003 and any assessment issued by petitioner on or before 15 April 2006 would fall within the three-year statute of limitations. The original assessment was issued on 2 February 2005, and any amendment was timely because the original assessment was within the statute of limitations. **N.C. Dep't of Revenue v. von Nicolai**, **274.**

Gift taxes—transfer of real property—reserved special power of appointment—The Secretary of Revenue had the power to impose gift taxes on the property transfers in this case, at the Secretary's discretion, where respondent transferred real property to his daughter, the reservation of a special power of appointment served as a condition or contingency, and the reserved power gave respondent the ability to defeat or abridge his daughter's interests in the real property. The conditions of N.C.G.S. § 105-195 were satisfied. **N.C. Dep't of Revenue v. von Nicolai**, **274.**

TERMINATION OF PARENTAL RIGHTS

Child's best interest—findings—bond between mother and child—The trial court did not abuse its discretion by finding that a termination of parental rights was in the child's best interest. The trial court considered the factors required by N.C.G.S. § 7B-1110(a) even though it did not make a specific finding regarding the bond between the mother and child. **In re S.C.H., 658.**

Standing—custodian not equated to guardian—The trial court's order terminating parental rights was vacated for lack of subject matter jurisdiction where petitioners did not fall within the statutory categories for standing to file a petition. A "custodian" does not have the powers of a parent or guardian. **In re B.O., 600.**

Subject matter jurisdiction—failure to issue summons—general appearance—The trial court had subject matter jurisdiction to terminate respondent's parental rights even though the summons in the underlying neglect and dependency petition was never served on her because lack of a summons in any juvenile action creates a defect only as to personal jurisdiction and respondent made a general appearance in the action before the trial court, thus waiving any defense as to personal jurisdiction. **In re J.D.L., 182.**

Sufficiency of evidence of dependency and abandonment—clear, cogent, and convincing evidence—best interests of child—The trial court did not abuse its discretion in a termination of parental rights case by finding dependency and abandonment as grounds to terminate respondent mother's parental rights, and by concluding that termination is in the minor child's best interests. **In re J.D.L., 182.**

Willfully leaving child—parents' cognitive limitations—A termination of parental rights on the grounds of willfully leaving the child in placement outside the home for more than twelve months without reasonable progress was affirmed. Despite respondents' cognitive limitations, there was a sufficient showing of willfulness in their failure to provide personal items, cards or letters, and especially in their cessation of the services required for reunification. **In re S.C.H., 658.**

TORT CLAIMS ACT

Teacher—public official immunity—abuse of severely disabled child—A *de novo* review revealed the trial court did not err by denying defendant teacher's motion for summary judgment with respect to the State tort claims arising from the alleged abuse of a severely disabled child even though defendant contends she is entitled to public official immunity. **Farrell v. Transylvania Cnty. Bd. of Educ., 173.**

§ 1983—teacher—qualified immunity—abuse of severely disabled child— A *de novo* review revealed the trial court did not err by denying defendant teacher's motion for summary judgment with respect to the federal claims including a section 1983 claim for supervisory liability arising from the alleged abuse of a severely disabled child even though defendant contends she is entitled to qualified immunity to shield her from suit. **Farrell v. Transylvania Cnty. Bd. of Educ., 173.**

TRIALS

Nonjury trial—failure to make specific findings of fact—failure to make separately stated conclusions of law—The trial court did not err in a nonjury trial by failing to make specific findings of fact and separately state its conclusions of law. The Court of Appeals was able to adequately evaluate the propriety of the trial court's order and plaintiffs were not entitled to a judgment in their favor under any view of the evidence. **Bauman v. Woodlake Partners, LLC, 441.**

TRUSTS

Repudiation of family trust—statute of limitations expired—A *de novo* review revealed the trial court did not err in an action seeking to recover a portion of the proceeds from the sale of property that was part of an alleged family trust by granting defendants' motions to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) based upon the expiration of the statute of limitations applicable to trust estates. **Laster v. Francis, 572.**

UNFAIR TRADE PRACTICES

Lack of standing—failure to demonstrate conduct amounting to inequitable assertion of power or actions with capacity or tendency to deceive—The trial court did not err by granting defendants' motions to dismiss plaintiffs' claims for unfair and deceptive trade practices (UDTP) under N.C.G.S. § 75-1.1 arising from defendants' sale and service of the equivalent of 58 beers during a five-hour period to plaintiff patrons and the subsequent failure to undertake reasonable measures to prevent the patrons from leaving the restaurant. **Noble v. Hooters of Greenville (NC), LLC, 163.**

UNIFORM COMMERCIAL CODE

Assignment of note and guaranties—common law applies—The common law rather than the UCC applied to a case involving the assignment of a note and guaranties where there were no controlling provisions within the UCC. **Self-Help Ventures Fund v. Custom Finish, LLC, 743.**

UNIFORM COMMERCIAL CODE—Continued

Resale of collateral—commercial reasonableness—The trial court did not err by concluding that the auction of a recycler was commercially unreasonable because the creditor was not entitled to a presumption of commercial reasonableness under N.C.G.S. § 25-9-626(a)(1) and the gross disparity between the second resale private price and the creditor's winning bid, which was a direct result of commercially unreasonable advertising methods, demonstrated that the auction price of the recycler was not reasonable. **Commercial Credit Grp., Inc. v. Barber, 731.**

Resale of collateral—deficiency judgment—The trial court did not err by failing to grant a deficiency judgment because the creditor failed to establish any amount that could have been obtained from a commercially reasonable sale of the collateral, and thus, the trial court properly concluded that the collateral was worth at least the amount of the debtor's debt. **Commercial Credit Grp., Inc. v. Barber, 731.**

UTILITIES

Collection of public utility fee—no duty to maintain privately owned pipes—Plaintiffs in a negligence case have not shown that the City's duty to maintain its own pipes by virtue of a public utility fee should create a duty to maintain plaintiffs' privately owned pipes, nor have plaintiffs cited any authority suggesting that the City's collection of storm water utility fees gave rise to an affirmative duty to inspect, maintain, and repair a privately owned drainage pipe on private property. **Asheville Sports Properties, LLC v. City of Asheville, 341.**

VOCATIONAL REHABILITATION SERVICES

Justification for failure to cooperate—The Industrial Commission erred in a workers' compensation case by concluding that defendants had sufficient opportunity to offer vocational rehabilitation services to plaintiff and that plaintiff's failure to cooperate with vocational rehabilitation services was justified. Defendants could not have offered vocational rehabilitation services to plaintiff since plaintiff was not under the care of an authorized physician and there was no authorized treating physician to oversee plaintiff's rehabilitation. **Sykes v. Moss Trucking Co., Inc., 540.**

WATERS AND ADJOINING LANDS

Navigable waterway—public trust doctrine—The trial court did not err by failing to determine that Crane's Creek constituted a navigable waterway so that a lake formed by damming the creek was subject to the public trust doctrine and available for use by the public without charge. A stream cannot be said to be navigable in fact for purposes of subjecting a lake created by damming that stream to the public trust doctrine in the absence of evidence tending to show that the pertinent stream is passable by watercraft over an extended distance both upstream of, under the surface of, and downstream from the lake. **Bauman v. Woodlake Partners, LLC, 441.**

WITNESSES

Name misstated on witness list—allowed to testify—The trial court did not abuse its discretion by allowing Karen Holman to testify when her name had been misstated as "Karen Holbrook" on the witness list provided by the State. The record does not reveal any defense motion or written agreement for the State to provide a witness list; moreover, this witness's testimony was purely to authenticate documents and tapes. **State v. Flint, 709.**

WORKERS' COMPENSATION

Carpal tunnel syndrome—compensable occupational disease—findings—The Industrial Commission did not err in a workers' compensation case by holding that plaintiff's carpal tunnel syndrome was a compensable occupational disease. The Commission's findings are supported by competent evidence and are binding. It is not for the appellate court to reweigh the evidence. **Evans v. Conwood LLC, 480.**

Causation—expert testimony—speculation and conjecture—The Industrial Commission erred in a workers' compensation case by finding that plaintiff's right knee injury was causally related to the compensable left knee injury where plaintiff's self-diagnosis was inadequate to establish medical causation and the expert medical testimony presented was insufficiently reliable to qualify as competent evidence on causation. **Nale v. Ethan Allen, 511.**

Denial of attorney fees—reasonable grounds to defend—The Industrial Commission did not abuse its discretion in a workers' compensation case by determining that defendants had reasonable grounds to defend plaintiff's claim and that plaintiff was not entitled to attorney fees under N.C.G.S. § 97-88.1. **Clayton v. Mini Data Forms, Inc., 410.**

Last injurious exposure—findings supported by evidence—The Industrial Commission did not err in a workers' compensation case by finding that plaintiff's last injurious exposure occurred after the employer became self-insured. The Commission's findings are supported by competent evidence in the record and the appellate court cannot reweigh the evidence. **Evans v. Conwood LLC, 480.**

Medical expenses—asthma—sufficiency of findings of fact—The Industrial Commission erred in a workers' compensation case in its findings of fact about plaintiff employee's asthma condition, and the award requiring defendants to pay medical expenses for plaintiff's asthma is reversed, because the testimony and evidence regarding plaintiff's asthma only established a causal link between plaintiff's employment and his development of asthma, without specifically addressing the possibility of an increased risk to plaintiff. **Hawkins v. Gen. Elec. Co., 245.**

Occupational disease—contact dermatitis—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's contact dermatitis was a compensable occupational disease, and the case is remanded to the Industrial Commission for the purpose of entering an order stating the amount to be paid for plaintiff's treatment and any resulting disability because the chemicals that plaintiff was exposed to list the ailment he has now acquired as a possible side-effect of exposure and a doctor testified that plaintiff developed this hypersensitivity as a direct result of his prolonged exposure to the chemicals at the GE facility. **Hawkins v. Gen. Elec. Co., 245.**

WORKERS' COMPENSATION—Continued

Sufficiency of findings of fact—conflicting as a matter of law—The Industrial Commission erred in a workers' compensation case by awarding plaintiff temporary total disability payments for a period of time and this issue is remanded to the Commission for further findings of fact. The Commission upon remand should determine the date plaintiff left the employ of defendant in North Carolina, where and when she worked in South Carolina, and the reason for her termination in South Carolina. **Nale v. Ethan Allen, 511.**

Sufficiency of findings of fact—nature of payments—An Industrial Commission opinion in a workers' compensation case was remanded (under *Rice*, 154 N.C. App. 680 (2002), and *Meares*, 172 N.C. App. 291 (2005)), for further findings of fact as to the nature of payments made to plaintiff during his return to part-time work, and plaintiff's various equitable arguments about the effect of giving defendants an offset are to be considered by the Commission on remand. **Clayton v. Mini Data Forms, Inc., 410.**

Total disability—continuing disability—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee is totally disabled even though defendants contend his condition subsided after he terminated his employment with GE because: (1) plaintiff in the instant case has presented competent evidence of continuing disability; and (2) plaintiff was 63 years old in 2005 when his employment with GE was terminated due to his occupational disease, he lacked a college education and his spelling and mathematical skills were below high school level, his work experience had been exclusively in the aircraft assembly and maintenance industries, and plaintiff would need significant training to find employment in another industry which was highly problematic given his age. **Hawkins v. Gen. Elec. Co., 245.**

Treatment—good faith effort—The Industrial Commission erred in a workers' compensation case by concluding that plaintiff had made a good faith effort to comply with the treatment of his authorized physician and thus erred by concluding that defendants shall reinstate temporary total disability benefits and medical compensation benefits to plaintiff. **Sykes v. Moss Trucking Co., Inc., 540.**

10% penalty—late payment of compensation—unilateral decision to pay partial disability benefits—The Industrial Commission erred in a workers' compensation case by concluding that plaintiff was not entitled to payment by defendants of a 10% penalty for late payment of compensation under N.C.G.S. § 97-18(g) because defendants did not pay all of the workers' compensation benefits that were due, but unilaterally decided to pay partial disability benefits, together with wages, rather than the total disability benefits to which the Commission found plaintiff was entitled. **Clayton v. Mini Data Forms, Inc., 410.**

ZONING

Consistency statement—approval of rezoning not required—Plaintiff's cross-assignment of error in a zoning case was overruled where plaintiff contended that approval of the rezoning request was required after the Board's adoption of a statement that the rezoning was consistent with the Town's zoning plan. Consistency between the proposed rezoning and the plan does not mean that denial of the proposal was inconsistent. **Coucoulas/Knight Props., LLC v. Town of Hillsborough, 455.**

ZONING—Continued

Denial of change—not arbitrary and capricious—comments of Board members—The denial of a zoning request was not arbitrary and capricious where nothing in the record supported the assertion that any of the Board members acted arbitrarily; rather, the whole record indicates that the Board gave careful consideration to the request and that those members who voted against it did so with a reasonable basis. **Coucoulas/Knight Props., LLC v. Town of Hillsborough, 455.**

Rezoning—denied—not discriminatory—The superior court erred by overturning the denial of plaintiff's rezoning request on the ground that it was unduly discriminatory. Substantial evidence supported the Town's denial and there was no evidence that plaintiff was treated differently from others similarly situated. The superior court did not apply the whole record test properly. **Coucoulas/Knight Props., LLC v. Town of Hillsborough, 455.**

Rezoning—discretion of Board—not limited by ordinance—The Town was not required to approve plaintiff's rezoning request by language in an ordinance that the discretion of the Board to deny rezoning is not limited if it determines that the rezoning is not in the public interest. The ordinance gives the Board the authority to deny requests that are not in the public interest; the public interest safety valve is not applicable here. **Coucoulas/Knight Props., LLC v. Town of Hillsborough, 455.**

Tracts greater than ten acres—exempt from subdivision ordinances—subject to zoning power—Defendant county's amendments to ordinances were valid exercises of the zoning power granted to the county by the General Assembly and were not *ultra vires*. Plaintiff argued that the amendments violated a statute that does not allow counties to adopt subdivision ordinances where the lots are greater than ten acres in size, but the fact that those lots are exempted from subdivision regulations does not mean that they are not subject to a county's zoning power. **Tonter Invs., Inc. v. Pasquotank Cnty., 579.**

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