NORTH CAROLINA COURT OF APPEALS REPORTS

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TABLE OF CONTENTS

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Torrey Dixon
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Patrick Wooten
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Arthur Yancey
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Ward A. Zimmerman
Tamara S. Zmuda

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3B	Scott Thomas	New Bern
4	Ernie Lee	Clinton
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29B	Jeff Hunt	Hendersonville
30	Michael Bonfoey	Waynesville

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3B	James Q. Wallace III	Beaufort
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CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF EVIDENCE CITED

CONSTITUTION OF NORTH CAROLINA CITED

RULES OF JUVENILE CODE CITED

RULES OF APPELLATE PROCEDURE CITED

27(a)	In re E.M., 761
28	N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co., 334
28(b)(6)	State v. West, 479
	State v. Fraley, 457

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ASHEVILLE JET, INC., D/B/A MILLION AIR ASHEVILLE, PLAINTIFF-APPELLEE v. THE CITY OF ASHEVILLE, NORTH CAROLINA MUNICIPAL CORPORATION; ASHEVILLE REGIONAL AIRPORT AUTHORITY; AND THE COUNTY OF BUNCOMBE, DEFENDANTS-APPELLANTS

No. COA08-1549

(Filed 19 January 2010)

1. **Appeal and Error— interlocutory order—no substantial right affected—no possibility of inconsistent verdicts**

Defendants' appeal from an interlocutory order denying their motion to dismiss plaintiff's claims was not properly before the Court of Appeals because the order does not affect a substantial right. As there was no possibility of inconsistent verdicts resulting from a state court action and a federal Part 16 proceeding, defendants will not be prejudiced by having to defend in both forums.

2. **Appeal and Error— interlocutory order—no substantial right affected—no possibility of inconsistent verdicts—no preemption**

Plaintiff's claims brought in state court are not preempted by his Part 16 proceeding initiated with the Federal Aviation Administration. Plaintiff cannot obtain any of the relief sought in his state court action in the Part 16 proceeding.

3. Appeal and Error— interlocutory order—no substantial right affected—no possibility of inconsistent verdicts—no preemption

Plaintiff's state court claims are not preempted by any express language in a Congressional enactment. The express language in the Airport and Airway Improvement Act preserves appropriate state court action involving disputes between federally funded airports and their tenants.

4. Appeal and Error— interlocutory order—no substantial right affected—no possibility of inconsistent verdicts—no preemption

Plaintiff's state court claims are not preempted by implication from the depth and breadth with which the Airport and Airway Improvement Act occupies the legislative fields of aviation and federally funded airports.

5. Appeal and Error— interlocutory order—no substantial right affected—no possibility of inconsistent verdicts—no preemption

Plaintiff's state court claims are not preempted by a conflict with a Congressional enactment. Plaintiff's claims and the redress plaintiff seeks in the Part 16 proceeding and the state court action are so dissimilar that there is no danger that the state court action will conflict with the Part 16 proceeding.

Judge JACKSON concurs in the result only by separate opinion.

Appeal by Defendants from order entered 15 September 2008 by Judge J. Marlene Hyatt in Superior Court, Buncombe County. Heard in the Court of Appeals 19 August 2009.

Roberts & Stevens, P.A., by Sarah Patterson Brison and Jacqueline D. Grant, for Plaintiff-Appellee.

Asheville City Attorney's Office, by City Attorney Robert W. Oast, Jr. and Associate City Attorney Kelly L. Whitlock, for Defendant-Appellant City of Ashville.

Womble Carlyle Sandridge & Rice, P.L.L.C., by James R. Morgan, Jr. and Robert T. Numbers, II, for Defendant-Appellant Asheville Regional Airport Authority.

McGEE, Judge.

Plaintiff entered into a lease with Asheville Regional Airport Authority (the Authority) to act as a Fixed Based Operator (FBO) at the Asheville Regional Airport (the Airport) on 1 January 1993, to provide general aviation services such as fueling, maintenance and ground services for private aircraft at the Airport. Pursuant to the lease agreement between Plaintiff and the Authority, Plaintiff was to pay the Authority a monthly rent amounting to five percent of Plaintiff's gross receipts.

The Authority receives federal money pursuant to 49 U.S.C. §§ 47101 *et seq.*, the Airport and Airway Improvement Act of 1982 (AAIA). By accepting these federal grants, the Authority agrees to abide by certain policies, rules, standards, and regulations set out in the AAIA. Approval for these grant applications is conditioned on the Authority's agreement to abide by the policies, rules, standards, and regulations concerning airport operations (grant assurances) established by the Federal Aviation Administration (FAA), a division of the Department of Transportation (DOT). Pursuant to 14 CFR 16.23, any "person directly and substantially affected by any alleged noncompliance" with the AAIA, including grant assurances, "may file a complaint with the [FAA] Administrator. A person doing business with an airport and paying fees or rentals to the airport shall be considered directly and substantially affected by alleged revenue diversion as defined in 49 U.S.C. 47107(b)." 14 CFR 16.23 (2008). This type of action is commonly known as a "Part 16 proceeding."

Encore FBO Acquisitions, LLC (Encore) entered into an FBO lease agreement with the Authority on 9 November 2007. Plaintiff initiated a Part 16 proceeding with the FAA pursuant to 14 CFR 16.23 on 25 January 2008, alleging that the Authority was in violation of multiple grant assurances. Specifically, Plaintiff alleged that the lease agreement between Encore and the Authority granted Encore substantially more favorable terms than those granted Plaintiff in its lease agreement with the Authority, including the rent charged to Encore. Plaintiff alleged that the lease agreement between Encore and the Authority violated certain sections of 49 U.S.C. § 47107(a) and 40103(e), implementing regulations, policy, and grant assurances.

Plaintiff also filed a complaint against Defendants in Buncombe County Superior Court on 6 February 2008, in which it alleged that the more favorable terms granted to Encore constituted a breach of Plaintiff's lease agreement with the Authority, because Plaintiff's

lease agreement included a provision guaranteeing that more favorable terms would not be granted to any competitor. Plaintiff's complaint included claims for breach of contract, constitutional violations, statutory violations, procedural violations, unfair and deceptive trade practices, and tortious interference with contract and business relations. Plaintiff asked for monetary and declaratory relief. The FAA is not a party to Plaintiff's state court action.

The Authority moved to dismiss Plaintiff's complaint on 28 July 2008, pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing that: (1) Plaintiff's claims were preempted by federal law, (2) Plaintiff had failed to exhaust its administrative remedies, (3) Plaintiff's claims were subject to the primary jurisdiction of the FAA, and (4) Plaintiff failed to state a claim upon which relief could be granted. The City of Asheville filed a motion to dismiss on the same grounds as the Authority on 7 August 2008. By order entered 15 September 2008, the trial court denied Defendants' motions to dismiss. Defendants appeal. Additional facts will be addressed in the body of this opinion.

I.

[1] Defendants argue a single assignment of error on appeal: "The trial court erred in denying Defendants' Motions to Dismiss because [Plaintiff's] claims for relief are preempted by federal law."

The dispositive question is whether this interlocutory appeal from the order of the trial court is properly before our Court. Defendants argue that their appeal from the 15 September 2008 order is properly before us because the 15 September 2008 order affects substantial rights that will be lost absent immediate appeal. We disagree.

N.C. Gen. Stat. § 1-277(a) (2007) states: "An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding[.]" *See also* N.C. Gen. Stat. § 7A-27(d)(1) (2007); *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). "A right is substantial when it will clearly be lost or irremediably and adversely affected if the order is not reviewed before final judgment." *RPR & Assocs. v. University of N.C.-Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 514 (2002) (citation omitted). " 'The "substantial right" test for

appealability is more easily stated than applied.' 'It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.' " *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982) (citations omitted). "[I]t is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds." *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253.

Defendants argue that, because the trial court denied their motions to dismiss, Defendants will "now be required to litigate the same issues in two different proceedings." Defendants contend that "the trial court's order affects [their] substantial right to avoid the possibility of inconsistent verdicts in separate trials. Our Supreme Court has held that the right to avoid the possibility of two trials on the same issues is a substantial right that *may* support immediate appeal." *Alexander Hamilton Life Ins. Co. of Am. v. J&H Marsh & McClennan, Inc.*, 142 N.C. App. 699, 701, 543 S.E.2d 898, 900 (2001) (citations omitted) (emphasis added).

> One writer, in seeking to formulate a rule based on our decisions in these cases, has concluded: "The right to avoid one trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal, while the right to avoid the possibility of two trials on the same issues can be such a substantial right." We adhere to our earlier statement that "[i]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal was sought is entered." However, we are of the opinion that the above statement constitutes, as the author suggests, only "a general proposition that in many circumstances should be helpful in analyzing the substantial right issue."

Green v. Duke Power Co., 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982) (internal citations omitted). Therefore, the possibility that Defendants may be required to defend two "trials" on the same issues does not create a *per se* right to immediate appeal of this interlocutory order. "Ordinarily the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Green*, 305 N.C. at 608, 290 S.E.2d at 596.

II.

In order to determine whether Defendants are facing the possibility of prejudice resulting from separate "trials" involving the same issues reaching different verdicts in this case, we must examine the relevant facts in the context of the procedures and purposes of the two proceedings at issue. *Id.* at 606, 290 S.E.2d at 595.

Plaintiff initiated a Part 16 proceeding against the Authority on 25 January 2008, alleging that the Authority had violated multiple federal statutes involving "regulations, policy and relevant grant assurances" by: (1) improperly leasing to Encore a federally funded apron that was previously open for general aviation use; (2) permitting Encore to operate without complying with minimum standards; and (3) providing substantially favorable lease terms to Encore." Plaintiff requested the FAA administrator to:

> (1) withhold any and all federal funds promised but [that] have not yet been paid to the Airport Sponsors; (2) refuse to accept future grant applications from the Airport Sponsors until the Airport is in compliance with applicable federal statutes, regulations, FAA policy and the grant assurances provided by the Airport Sponsors; and (3) seek repayment from each of the Airport Sponsors for the previously paid airport grant funds based on violations of applicable statutes, regulations, and grant assurances.

Plaintiff's 6 February 2008 complaint alleged claims for (1) breach of contract, (2) constitutional violations, (3) statutory violations, (4) procedural violations, (5) unfair and deceptive trade practices, and (6) tortious interference with contract and business relations. Plaintiff also sought monetary damages, a declaratory judgment, injunctive relief, and requested a jury trial.

III.

[2] In order to determine the appealability of the 15 September 2008 order, we must address Defendants' argument that Plaintiff's state court action is preempted by the Part 16 proceeding initiated with the FAA. This is because, if Plaintiff's state court action is preempted, there can only be one proceeding, and the possibility of inconsistent "verdicts" cannot exist. We are aware that "this '[C]ourt will not give advisory opinions or decide abstract questions.' " *Kirkman v. Wilson*, 328 N.C. 309, 312, 401 S.E.2d 359, 361 (1991) (citation omitted); *see also State v. Rackley*, —— N.C. App. ——, ——, 684 S.E.2d 475, 476

(2009). Though we hold Defendants' appeal is interlocutory, and though we address issues argued by Defendants in their appeal, we do so only because we find it necessary in order to reach our determination that Defendants' interlocutory appeal does not affect any substantial right, and is therefore not properly before us.

"State action may be foreclosed by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541, 150 L. Ed. 2d 532, 550 (2001).

> The question of whether a federal statute preempts state law is "basically one of congressional intent." Similarly, whether federal regulations preempt state law depends on whether the agency that prescribed the regulations "meant to pre-empt [state] law, and, if so, whether that action is within the scope of the [agency's] delegated authority."

Drake v. Lab. Corp. of Am. Holdings, 458 F.3d 48, 56 (2d Cir. 2006) (internal citations omitted).

As Plaintiff argues, pursuant to the Part 16 proceeding, Plaintiff has not asked for and, as we will discuss further below, *cannot obtain* any of the relief Plaintiff seeks from Plaintiff's state court action. The Part 16 proceeding only involves the issue of federal funding for the Authority's airport. Any person doing business with an airport receiving AAIA grant funds may initiate an enforcement proceeding against the airport by filing a complaint with the FAA alleging violations of grant assurances. *Airborne Tactical Advantage Co. v. Peninsula Airport Comm'n*, 2006 U.S. Dist. LEXIS 24271, 3-4 (E.D. Va. Mar. 21, 2006) (citations omitted). The FAA has sole jurisdiction to make the initial determination concerning an airport's alleged violation of grant assurances. *Id.* Any party to an action initiated with the FAA may appeal the final agency decision to an appropriate United States Court of Appeals. *Id.* at 5-6; *see also BMI Salvage Corp. v. FAA*, 272 Fed. Appx. 842, 845-46 (11th Cir. 2008).

Several federal circuit courts that have addressed this issue have held that the authority of the FAA to determine the issues before it in Part 16 disputes cannot be preempted by prior state court actions involving the same or similar issues. *Arapahoe County Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1218-21 (10th Cir. 2001); *American Airlines, Inc. v. DOT*, 202 F.3d 788, 799-800 (5th Cir. 2000) ("DOT is

an agency, not a 'court.' " (citation omitted). " 'We agree with the [defendant] . . . that "[t]he fact that the state court ruled on the same issue, regardless whether its ruling agreed with the Commission's ruling, does not affect the Commission's authority to determine its own jurisdiction." ' " (quoting *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 280 n.5 (D.C. Cir. 1986)). "[T]he competing policy considerations weigh against requiring DOT to grant preclusive effect to the state court proceeding." (citation omitted)); *NLRB v. Yellow Freight Systems, Inc.*, 930 F.2d 316, 320-22 (3d Cir. 1991).

> Turning to supremacy principles, we reiterate that the issue before the FAA was whether the Authority complied with the conditions imposed on it by federal law and agreement with a federal administrative agency, in return for the Authority's receipt of federal funds. This federal scheme regulating airport grant compliance is "designed in part to insure the maintenance of conditions essential to an efficient national air transport system, including access to airports on a reasonable and nondiscriminatory basis." On this point, we must agree with the Fifth Circuit that in the arena of aviation regulation "federal concerns are preeminent," and the Department of Transportation, through the FAA, is statutorily mandated to represent those concerns. Indeed, it is "difficult to visualize a more comprehensive scheme of combined regulation, subsidization, and operational participation than that which Congress has provided in the field of aviation." This certainly tilts the balance toward the application of supremacy principles to protect against state courts trumping the federal interests and concerns embodied within the airport grant program.

Arapahoe, 242 F.3d at 1220-21 (internal citations omitted); *see also NLRB*, 930 F.2d at 321 (Where a federal agency "acts in the public interest to enforce public, not private rights, . . . the 'parties cannot by contractual agreement divest the [agency's] function to operate in the public interest.' "). We therefore hold that were the trial court to render a decision in this matter before the Part 16 proceeding was complete, the state court decision, even *assuming arguendo* that it purported to resolve issues concerning grant assurances, would have no preclusive effect on the authority of the FAA to determine the issues before it. Our holding that state court action cannot have any preclusive effect on the FAA's ability to exercise its exclusive jurisdiction over Part 16 proceedings is not, however, the same as holding that state courts are precluded from addressing matters of state law that might involve issues related to those brought in a Part 16 pro-

ceeding. In addition, we must address the issue of what preemptive effect, if any, a prior Part 16 proceeding would have on a later state court action.

IV.

A.

[3] *Preemption by Express Language in a Congressional Enactment*

> The question of whether a federal statute preempts state law is "basically one of congressional intent." Similarly, whether federal regulations preempt state law depends on whether the agency that prescribed the regulations "meant to pre-empt [state] law, and, if so, whether that action is within the scope of the [agency's] delegated authority."

Drake, 458 F.3d at 56.

The AAIA includes no express language stating that Part 16 proceedings are the sole remedy available to resolve conflicts between federally funded airports and tenants. In fact, as Plaintiff points out, 49 U.S.C. § 40120 specifically states: "Additional remedies.—A remedy under this part [the AAIA] is *in addition to any other remedies provided by law*." 49 U.S.C. § 40120(c) (emphasis added).

> Even though we have found federal preemption of the standards of aviation safety, we still conclude that the traditional state and territorial law remedies continue to exist for violation of those standards. Federal preemption of the standards of care can coexist with state and territorial tort remedies. For instance, in *Silkwood*, the Supreme Court held that a state tort remedy can coexist with federal preemption of the regulation of nuclear safety. 464 U.S. at 256. The Court in *Silkwood* held that "insofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed, but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." *Id.*
>
> In the present case, we find no "irreconcilable conflict between federal and state standards." Nor do we find that "imposition of a [territorial] standard in a damages action would frustrate the objectives of the federal law." Quite to the contrary, it is evident

> in both the savings and the insurance clauses of the FAA that Congress found state damage remedies to be compatible with federal aviation safety standards. *The savings clause provides that "a remedy under this part is in addition to any other remedies provided by law." Clearly, Congress did not intend to prohibit state damage remedies by this language. . . . Furthermore, there is no federal remedy for [the relief sought in the plaintiff's state court complaint] to be found in the FAA itself.*

Abdullah v. American Airlines, Inc., 181 F.3d 363, 375 (3d Cir. V.I. 1999) (citations omitted) (emphasis added); *see also Drake*, 458 F.3d at 58 ("This 'saving' clause clearly indicates that the Act's remedies are not intended to be exclusive and that the Act therefore does not itself preempt Drake's claims for state-law remedies for violations of the FAA regulations.") (citation omitted). In *American Airlines v. Wolens*, 513 U.S. 219, 130 L. Ed. 2d 715 (1995), the United States Supreme Court stated:

> The United States maintains that the DOT has neither the authority nor the apparatus required to superintend a contract dispute resolution regime. Prior to airline deregulation, the [DOT's predecessor agency] set rates, routes, and services through a cumbersome administrative process of applications and approvals. When Congress dismantled that regime, the United States emphasizes, the lawmakers indicated no intention to establish, simultaneously, a new administrative process for DOT adjudication of private contract disputes. We agree.

Wolens, 513 U.S. at 232, 130 L. Ed. 2d at 727-28 (internal citations omitted). We hold that Plaintiff's claims are not preempted by any express language in a congressional enactment. To the contrary, express language in the AAIA preserves appropriate state court action involving disputes between federally funded airports and their tenants.

B.

Preemption by Implication from the Depth and Breadth of a Congressional Scheme That Occupies the Legislative Field

[4] Though Congress has clearly preempted the field of aviation safety, *see Arapahoe*, 242 F.3d at 1220-21, that is not tantamount to preemption of all matters concerning aviation or federally funded airports.

> [D]espite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654-55, 131 L. Ed. 2d 695, 704-05 (1995) (internal citations omitted). As we have noted above, Congress has expressly stated that the remedies available through Part 16 proceedings were in addition to "any other remedies provided by law." 49 U.S.C. § 40120(c). The *Wolens* Court stated that: "A remedy confined to a contract's terms simply holds parties to their agreements," *Wolens*, 513 U.S. at 229, 130 L. Ed. 2d at 726, and held "that the [relevant act's] preemption prescription bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves." *Id.* at 222, 130 L. Ed. 2d at 721; *see also id.* at 231, 130 L. Ed. 2d at 727; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 525-27, 120 L. Ed. 2d 407, 428-29 (1992) (plurality opinion). " 'There is nothing inherently inconsistent in the proposition that even if the federal government has entirely occupied the field of regulating an activity a state may simultaneously grant damages for violation of such regulations.' " *Abdullah*, 181 F.3d at 376 (citation omitted).

The relevant portion of the contract between Plaintiff and the Authority states:

> FAIRNESS IN DEALINGS. Lessor shall not require a greater level of service or performance from lessee than that which is required from any other occupant of the Airport providing some or all of the Commercial Aviation Activities ("Competitor"), nor shall Lessor grant terms more favorable than those contained in this Lease to any other Competitor. It is the intention of the parties that no Competitor, whether presently occupying the Airport or occupying the Airport hereafter, have an unfair advantage by paying a lesser rental than Lessee or being provided with terms or treatment which are directly more favorable to Competitor than those provided to or required of Lessee.

When an airport accepts federal AAIA grant funds, it must adhere to certain policies, conditions, and restrictions. Relevant among these are the following: "the airport will be available for public use on reasonable conditions and without unjust discrimination[.]" 49 U.S.C. § 47107(a)(1). "The terms imposed on those who use the airport and its services, including rates and charges, must be fair, reasonable, and applied without unjust discrimination[.]" *Airport Compliance Requirements*, FAA Order 5190.6A (hereinafter referred to as "Order 5190.6A") § 4-13(b).[1] "[F]ixed-base operators similarly using the airport will be subject to the same charges[.]" 49 U.S.C. § 47107(a)(5). "In respect to a contractual commitment, a sponsor may charge different rates to similar users of the airport if the differences can be justified as nondiscriminatory and such charges are substantially comparable. These conclusions must be based upon the facts and circumstances involved in every case." Order 5190.6A § 4-14d(1)(c).

The issues in the two proceedings are similar—whether Defendants treated Plaintiff and Encore in a sufficiently similar manner pursuant to the terms of the leases negotiated with the Authority by Plaintiff and Encore. However, the language of Plaintiff's contract with the Authority and the rules of contract interpretation relevant to that contract, and the language and application of the rules applicable to the Authority's grant assurances are not the same. The language of the contract between Plaintiff and the Authority is stated in mandatory terms, and places a strict obligation on the Authority to insure equity among all tenants providing similar services at the Airport. The language of this contract should be interpreted pursuant to our State's laws concerning contract interpretation. The regulations governing the Authority pursuant to its acceptance of AAIA grant funds are not identical to the terms of Plaintiff's contract with the Authority. Further, the FAA looks to federal law and its own regulations and policies to determine whether the Authority is in violation of any grant assurances.

We first examine relevant language from the contract between Plaintiff and the Authority: (1) "Lessor shall not require a greater level of service or performance from lessee than that which is required from any other occupant[,]" (2) "nor shall Lessor grant terms more favorable than those contained in this Lease to any other Competitor[,]" and (3) "no Competitor, whether presently occupying the Airport or occupying the Airport hereafter, [shall] have an unfair

1. Order 5190.6A was cancelled and replaced by Order 5190.6B, effective 30 September 2009.

advantage by paying a lesser rental than Lessee or [be] provided with terms or treatment which are directly more favorable to Competitor than those provided to or required of Lessee."

This language from the contract between Plaintiff and the Authority could be interpreted as holding the Authority to a higher standard than that imposed by the grant assurances. Relevant Part 16 procedural guidelines involving the interpretation of federal regulations governing the Authority's obligations pursuant to the acceptance of AAIA grant funds state: "In respect to a contractual commitment, a sponsor may charge different rates to similar users of the airport if the differences can be justified as nondiscriminatory and such charges are substantially comparable. These conclusions must be based upon the facts and circumstances involved in every case." Order 5190.6A § 4-14d(1)(c).

In light of our analysis thus far, we hold that Plaintiff's state contract claim is not preempted by implication from the depth and breadth of a congressional scheme that occupies the legislative field.

C.

Preemption by Implication Because of a Conflict with a Congressional Enactment

[5] According to the FAA:

> [T]he FAA interest in a lease is confined to its impact on the airport owner's obligations to the Government, the acceptability of the lease for such purposes should in no way be construed as an endorsement of the entire document. When a lease has been referred by an airport owner, reviewed in the appropriate FAA office, and found not to violate any compliance obligation, the owner should be advised that the FAA has no objection to it. The word "approved" should not be used for this purpose.

Order 5190.6A § 6-3(d). As Plaintiff notes, In *Platinum Aviation and Platinum Jet Center BMI v. Bloomington-Normal Airport Authority, Illinois*, Final Decision and Order of the FAA (Docket No. 16-06-09) (November 28, 2007), the FAA stated: "The [airport authority's] decision not to exercise the [lessee's] 'option provision' is a contract issue between [the airport authority] and [the lessee]; it must be resolved in state court, not through the Part 16 process." *Id.* at 18.

> The FAA neither approves nor monitors agreements between airport sponsors and airport tenants. The FAA does not arbitrate

> disputes through the Part 16 complaint process. Nor does the FAA enforce contract terms between parties to an agreement when the FAA is not a party to that agreement. Rather, the FAA enforces the grant agreements it enters into with airport sponsors.

Id. The "FAA is not able to represent both the federal interest and the Complainants' contractual interests in this case." *Id.* at 15. A state court has no "jurisdiction over a sponsor's federal obligations under the federal grant assurances. . . . However, the state court has otherwise broad authority to decide contractual disputes under state law." *Id.* at 19 (We note that in *Platinum Aviation*, there had been a prior state court action involving the same dispute, and another was pending at the time this final decision and order was entered).[2]

The FAA has explicitly decided that resolution of contract disputes not involving the FAA is a matter for state courts. *Id.* "The [agency's] statement is dispositive on the question of implicit intent to pre-empt unless either the agency's position is inconsistent with clearly expressed congressional intent, or subsequent developments reveal a change in that position." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714-15, 85 L. Ed. 2d 714, 722 (1985) (citation omitted). We note that the federal circuit courts that have addressed the preemption issue have not indicated that state court actions involving the same issues advanced in Part 16 proceedings are inappropriate, they have simply held that state court decisions cannot preclude the FAA from making a full independent review of all issues properly initiated in a Part 16 proceeding. *See Arapahoe,* 242 F.3d at 1218-21; *American Airlines*, 202 F.3d at 799-801; *NLRB*, 930 F.2d at 320-21.

Part 16 proceedings are strictly limited to determinations of whether an airport that has accepted AAIA grant funds is in compliance with the requirements attendant to the acceptance of those funds. Part 16 proceedings cannot resolve disputes between an airport and a third party. Part 16 proceedings cannot provide any civil remedy to a complainant, even if the FAA determines that a challenged lease violates federal grant assurances. The sole power of the FAA to penalize violations of federal grant assurances is through the withholding of grant funds to the offending authority.

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2. For a more thorough analysis of the differing duties of state courts and the FAA concerning contract issues involving potential violations of federal grant assurances, see the full FAA final decision and order entered in *Platinum Aviation.*

We hold that any determination made by the FAA that the Authority did not violate the terms of the Authority's agreements with the federal government pursuant to the acceptance of AAIA grant funds would not preclude Plaintiff's state court action, as Plaintiff's state court contract claim involves different issues, and also raises claims and seeks relief that cannot be addressed in Plaintiff's Part 16 proceeding. *See Abdullah*, 181 F.3d at 375-76. Plaintiff's claims and the redress Plaintiff seeks in both the Part 16 proceeding and the state court action are so dissimilar that, in this instance, we cannot say that the two actions will result in multiple "trials" on the same issues. A determination that the Authority has not violated any terms of the grant authority simply would not amount to a determination that the Authority did not violate the terms of the contract between Plaintiff and the Authority. We find no danger that the state court action could conflict with a congressional enactment on these facts, and therefore hold that there is no preemption by implication because of a conflict with a congressional enactment in this case.

In light of our holdings above, we further hold that if Plaintiff proceeds with both its state court action and the Part 16 proceeding, because the claims and remedies sought in the separate actions are so dissimilar, no factual or issue determination made in one of the proceedings would be binding in the other. Therefore, the possibility of prejudice to Defendants from inconsistent "verdicts" does not exist. To the extent, if any, that the state court's ruling (or the jury's verdict) encroaches on the FAA's exclusive jurisdiction concerning grant assurances, the state court disposition could not bind the FAA in the Part 16 proceeding. *Arapahoe*, 242 F.3d at 1220-21; *NLRB*, 930 F.2d at 321. We can foresee this potential in particular concerning Plaintiff's claims involving constitutional, statutory and procedural violations.

V.

While we do not preclude the possibility that a situation might arise where the facts and the remedies sought by a party in both a state court action and a Part 16 proceeding could be so similar that litigation in both forums would be inequitable, we are not faced with such a situation in this case. We therefore hold that in this case there is no possibility of inconsistent "verdicts" resulting from the state court action and the Part 16 proceeding, *Green*, 305 N.C. at 608, 290 S.E.2d at 596, and therefore Defendants will not be prejudiced by having to defend in both the state court action and the Part 16 proceeding. Having so held, we must further hold that the 15 September 2008

interlocutory order does not affect any of Defendants' substantial rights, *Alexander Hamilton*, 142 N.C. App. at 701, 543 S.E.2d at 900. Therefore this interlocutory appeal is not properly before us, and we must dismiss it.

Dismissed.

Judge ERVIN concurs.

Judge JACKSON concurs in the result only by separate opinion.

JACKSON, Judge, concurring in result only by separate opinion.

Although I concur with the result reached by the majority opinion, I write separately to emphasize that, because we dismiss the appeal as interlocutory, we should not discuss in-depth the merits of the federal preemption issue.

Our case law suggests that the purpose of dismissing interlocutory appeals is to prevent premature discussions of different aspects of a case through repeated, effectively meaningless, appeals. *See*, *e.g.*, *Veazey v. Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950) ("There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders."). In fact, this Court recently emphasized that, having dismissed an appeal as interlocutory, we could not properly discuss the merits of the appeal:

> Because we dismiss the State's appeal as interlocutory, the issues presented by defendant's motion and whether the trial court properly ruled upon defendant's motion are matters not properly before us at this time. *See Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931) ("It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter.") (citations omitted).

State v. Rackley, 200 N.C. App. 433, 434, 684 S.E.2d 475, 476 (2009). Both this Court and our Supreme Court have equated addressing the merits of an interlocutory appeal with issuing an advisory opinion: "At this stage of the proceeding the appeal is premature, and this

Court, if it now entertained the appeal, would be giving an advisory opinion on a matter that will not be in controversy if subsequently plaintiffs do recover on their primary claims." *Sportcycle Co. v. Schroader*, 53 N.C. App. 354, 357, 280 S.E.2d 799, 801 (1981); *see also Kirkman v. Wilson*, 328 N.C. 309, 312, 401 S.E.2d 359, 361 (1991) (vacating the Court of Appeals decision because the case should have been dismissed as interlocutory and, as such, the Court of Appeals opinion amounted to an advisory opinion).

Here, the substance of both the City's and Authority's appeal is whether "the trial court commit[ted] reversible error in denying the . . . motions to dismiss because Asheville Jet's claims for relief are preempted by federal law[.]" The Court holds that the appeal is interlocutory, and therefore, it should not reach the merits of the case. However, thirteen pages of the majority opinion discuss the issue of federal preemption in-depth.

The potential for inconsistent verdicts is an important discussion with respect to whether the appeal is interlocutory. *See, e.g.*, *Green*, 305 N.C. at 608, 290 S.E.2d at 596 ("Ordinarily the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue."). Simply noting that the claims are distinct and that the remedies are dissimilar, however, adequately emphasizes that inconsistent verdicts are not possible. A portion of the penultimate paragraph of section IV of the majority opinion seems sufficient to dispose of the case as interlocutory:

> . . . Plaintiff's state court contract claim involves different issues, and also raises claims and seeks relief that cannot be addressed in Plaintiff's Part 16 proceeding. *See Abdullah*, 181 F.3d at 375-76. Plaintiff's claims and the redress Plaintiff seeks in both the Part 16 proceeding and the state court action are so dissimilar that, in this instance, we cannot say that the two actions will result in multiple "trials" on the same issues. A determination that the Authority has not violated any terms of the grant authority simply would not amount to a determination that the Authority did not violate the terms of the contract between Plaintiff and the Authority.

Although I agree that this appeal is interlocutory and should be dismissed, I think that an extensive discussion of the merits of the case, as the majority has conducted, goes beyond our authority as an

appellate court. Therefore, I would vote only to dismiss as interlocutory based upon the reasoning set forth in this concurrence.

STATE OF NORTH CAROLINA v. PAUL JOSEPH SALVETTI

No. COA09-504

(Filed 19 January 2010)

1. Appeal and Error— motion to withdraw Alford plea—appeal as a matter of right

Defendant was entitled to appeal as a matter of right the denial of his motion to withdraw an *Alford* plea.

2. Appeal and Error— petition for certiorari granted—ancillary errors not considered

Where defendant's petition for *certiorari* from the adjudication of his guilty plea was granted, the appellate court did not decide whether he had a direct right of appeal for ancillary errors.

3. Criminal Law— Alford plea—adjudication—inquiry by judge

Defendant's argument that he would have changed his *Alford* plea if the court had informed him of his rights was not persuasive where the trial court did not personally address defendant and inform him of this right, but defendant signed the Transcript of Plea stating that he understood that he had the right to remain silent, the trial judge inquired as to whether defendant had reviewed the Transcript of Plea with his attorney and if he understood it, and defendant answered yes to both questions.

4. Criminal Law— Alford plea—erroneous information about length of sentence

Considering the totality of the circumstances, the Court of Appeals was not persuaded that defendant would have changed his plea had the trial judge personally informed him that the length of the maximum sentence was nine months longer than that shown on the worksheet. Defendant entered an *Alford* plea against the advice of his counsel for the purpose of protecting his wife and children.

5. Criminal Law— Alford plea—treated as guilty plea—defendant's knowledge

The trial judge's failure to personally advise defendant that he would be treated as guilty did not prejudice defendant's decision to enter an *Alford* plea where defendant signed a Transcript of Plea that indicated that he would be treated as guilty, the trial judge asked defendant whether he had reviewed the transcript with his attorney and understood it, and the trial judge referred to defendant's plea as a guilty plea multiple times and stated that defendant was going to jail based upon the evidence.

6. Criminal Law— Alford plea—informed choice

Considering defendant's colloquy with the judge and defendant's answers to questions about the Transcript of Plea, the trial court in fact determined that an *Alford* plea was the product of defendant's informed choice.

7. Criminal Law— acceptance of Alford plea—independent evidence of guilt

There was substantial evidence of defendant's guilt that was independent of his *Alford* plea and was sufficient to support acceptance of the plea.

8. Criminal Law— Alford plea—package deal with wife—not improper pressure

The prosecutor did not use improper pressure to induce defendant's *Alford* plea by offering a "package deal" that included defendant's wife. While not directly addressed in North Carolina, other jurisdictions have found that "package deals" are not *per se* involuntary.

9. Criminal Law— acceptance of Alford plea—further inquiry not necessary

The trial court's inquiry into the voluntariness of defendant's *Alford* plea was sufficient where defendant signed the Transcript of Plea and made statements in court to the effect that his plea was not coerced. There is nothing in the record to indicate that the outcome would have been different with further inquiry.

10. Criminal Law— Alford plea—motion to withdraw—competency of counsel

The trial court did not err by denying defendant's post-sentencing motion to withdraw his *Alford* plea where defendant

alleged that his counsel was incompetent by not withdrawing the plea after the court challenged the decision to not try the case. The trial court was in the best position to determine the competency of counsel and denied a motion for appropriate relief based on the same argument.

11. Criminal Law— Alford plea—consistent assertion of innocence—post-sentencing motion to withdraw

The trial court did not err by refusing to allow defendant to withdraw an *Alford* plea where defendant consistently asserted his innocence. An *Alford* plea does not require an admission of guilt and the plea transcript indicated that defendant entered the plea because he felt it was in his best interest. Precedent cited by defendant concerning the short time between the plea and the motion to withdraw involved a pre-sentencing motion, rather than a post-sentencing motion, as here.

Appeal by defendant from an order denying a motion to withdraw his plea entered 10 October 2008 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 17 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General R. Kirk Randleman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant appellant.

HUNTER, JR., Robert N., Judge.

On 6 October 2008, defendant, Paul Joseph Salvetti, entered an *Alford* guilty plea to one count of Class E felony child abuse pursuant to a plea agreement in Forsyth County Superior Court and was sentenced to an active term of 20-33 months' imprisonment. On 8 October 2008, defendant filed a motion to withdraw the guilty plea. On 10 October 2008, following a hearing on the motion in Forsyth County Superior Court, Judge Burke denied defendant's motion to withdraw the plea. Defendant gave timely notice of appeal under N.C. Gen. Stat. § 15A-1444(e) (2009). Additionally, defendant filed a petition for writ of certiorari for assignments of error for which defendant believed he did not have a right of appeal. Defendant asks that the judgment entered by the trial court be vacated. We hold that defendant was not prejudiced by the denial of his motion to withdraw the *Alford* plea and, as such, the trial court did not err. We grant de-

fendant's petition for certiorari on defendant's remaining assignments of error and accordingly overrule each assignment of error.

I. Background

On 27 August 2007, defendant was indicted by a Forsyth County Grand Jury on one count of Class E felony child abuse and one count of Class 1 misdemeanor contributing to the delinquency of a juvenile. On 7 July 2008, defendant was indicted by a Forsyth County Grand Jury on one count of Class E felony child abuse, one count of Class 1 misdemeanor contributing to the delinquency of a juvenile, and one count of Class C felony child abuse. Defendant's wife was indicted for similar charges. The charges stemmed from the couple's alleged abuse of defendant's 13-year-old adopted son, T.S. ("Pesha"), over a three-month period in 2007. The indictments charged defendant and his wife with "intentionally inflicting serious physical injury, starvation," knowingly causing a condition of a lack of education and proper care, and intentionally inflicting emotional and mental injury upon Pesha.

Defendant entered into a plea agreement on 6 October 2008. The terms of the plea agreement were contained in the Transcript of Plea (Form AOC-CR-300, Rev. 2/06) signed by defendant. Under the terms of the plea, defendant entered an *Alford* guilty plea to one count of Class E child abuse, and the court dismissed the Class C child abuse charges and misdemeanor charges for contributing to the delinquency of a juvenile. Defendant's wife also entered into a plea agreement on 6 October 2008. Under the terms of her plea agreement, defendant's wife entered an *Alford* guilty plea to two charges of felony child abuse, and one charge of misdemeanor contributing to the delinquency of a juvenile. Defendant's signed Transcript of Plea also contained a list of questions asking defendant whether he understood his rights and the consequences of his plea. Among the questions asked on the Transcript of Plea were: (1) whether defendant understood his right to remain silent; (2) whether defendant understood he was pleading guilty; (3) whether defendant considered it in his best interest to plead guilty; and (4) whether defendant understood that upon entering his *Alford* guilty plea he would be treated as guilty whether or not he admitted he was in fact guilty. Defendant answered "Yes" to all of the questions. In addition, a question contained in the Transcript of Plea asked defendant if anyone had promised him anything or threatened him in any way to cause him to enter the plea against his wishes, to which defendant answered "No."

On 6 October 2008, the cases of defendant and his wife were called for a joint plea proceeding. The trial court conducted the following colloquy pursuant to N.C. Gen. Stat. § 15A-1022 (2009):

THE COURT: Have you gone over the transcript of plea with your lawyers?

Mrs. Salvetti: Yes, sir.

Mr. Salvetti: Yes, sir.

THE COURT: Do you understand the questions on the transcripts of plea?

Mrs. Salvetti: Yes, sir.

Mr. Salvetti: Yes, sir.

THE COURT: Do you understand the nature of the charges against you?

Mrs. Salvetti: Yes, sir.

Mr. Salvetti: Yes.

THE COURT: Are you satisfied with your lawyers' services?

Mrs. Salvetti: Yes, sir.

Mr. Salvetti: Yes, sir.

THE COURT: Do you understand you have the right to plead not guilty and be tried by a jury?

Mrs. Salvetti: Yes, sir.

Mr. Salvetti: Yes, sir.

THE COURT: Do you understand when you plead guilty, you waive all your Constitutional rights to trial by jury?

Mrs. Salvetti: Yes, sir.

Mr. Salvetti: Yes, sir.

THE COURT: And you're pleading guilty, Paul, to Class E child abuse, and, Debbie, to felony child abuse, contributing to the delinquency of a minor and felony child abuse, all charges are consolidated in one Class E felony. Is that correct?

Mrs. Salvetti: Yes, sir.

Mr. Salvetti: Yes, sir.

THE COURT: Other than this plea arrangement, has anyone threatened you or promised you anything to cause you to enter this plea against your wishes?

Mrs. Salvetti: No, sir.

Mr. Salvetti: No.

THE COURT: It is with your own free will, fully understanding what you're doing?

Mrs. Salvetti: Yes, sir.

Mr. Salvetti: Yes, sir.

THE COURT: Do you have any questions about what I've just said or anything else connected with your case?

Mrs. Salvetti: No, sir.

Mr. Salvetti: No, sir.

The State then presented testimony from the Department of Social Services ("DSS") attorney Terry Boucher ("Boucher") to provide a factual basis for the plea. Boucher testified that Pesha contacted DSS in May 2007 to complain about the treatment he received from his parents. Boucher stated that defendant and his wife withdrew Pesha from public school in January 2007 and subsequently confined him to his bedroom with bare walls, no furniture, and boarded windows for the next three months. According to Boucher, Pesha was given "very limited food" and he had to "earn his way to have regular meals." When Pesha "escaped" from his room, he was hospitalized at North Carolina Baptist Hospital for approximately one week, during which time he gained approximately 10 pounds on a normal adolescent diet.

The State then called Pesha to read a victim impact statement wherein Pesha described the treatment he received from defendant and his wife. Pesha testified that defendant's wife made him eat poisoned fish, drink his own urine, and hit him with a baseball bat and a frying pan. Pesha stated that defendant and his wife took him to see Dr. Ronald Federici ("Federici"), a pediatric neuropsychologist who specialized in foreign adoption medicine and child psychology. However after the doctor visit, his treatment worsened. Pesha testified that from February through May of 2007 he was "hungry and cold," lost weight, suffered from headaches and stomachaches, and had to earn his food by working.

Following the victim impact statement, the trial court announced it was going to pronounce an active sentence. Defendant and his wife both objected to the testimony of Boucher and Pesha. The trial court then asked defendant and his wife why they were entering guilty pleas and not taking the case to trial. Defendant's counsel responded that defendant was not guilty of the crime but was pleading guilty against counsel's advice to protect his wife and children. Defendant's counsel explained that defendant's wife could not get a plea deal unless defendant pled guilty.

Federici testified that he evaluated Pesha over a three-day period in February of 2007. Federici testified that Pesha's adoption records revealed multiple factors that are known to contribute to both learning and behavior issues. According to Federici, Pesha's records indicated his parents were Roma Gypsy, placing Pesha in a high risk group for genetic problems that result from inbreeding. Pesha's records further indicated that he suffered "neurotoxic exposure to alcohol." Federici concluded that Pesha suffered from a number of psychological and developmental problems including: alcohol-related developmental disabilities, Attention Deficit Hyperactivity Disorder, language development disabilities, and pseudo-psychotic logic. Pesha was "out of control . . . a kid who couldn't be handled and couldn't be trusted." Defendant and his wife were overwhelmed by the intense conflict resulting from Pesha's behavior.

As part of Pesha's treatment, Federici advised defendant and his wife in developing a plan to help reform Pesha's behavioral problems, stripping Pesha of his privileges and forcing him to earn them back through good behavior. The plan included a "fixed-price" menu from which Pesha would have to earn his food through his reformed behavior. Federici testified, however, that to his knowledge defendant and his wife never withheld food from Pesha.

Prior to sentencing, defendant's counsel again stated to the trial court that defendant was entering the *Alford* plea against counsel's advice. Defendant's counsel stated that he advised defendant that he should not plead and expressly told defendant, "You're pleading guilty to a Class E felony." Defendant's counsel stated that he thought defendant's motives were noble, though "ill thought out," but he was entering an *Alford* plea to take advantage of the plea bargain.

The trial court sentenced defendant to a minimum of 20 months' and a maximum of 33 months' imprisonment. Two days later, on 8 October 2008, defendant filed two motions: (1) a motion to withdraw

the guilty plea, alleging defendant entered his plea in order to secure a plea deal for his wife, and (2) a motion for appropriate relief alleging ineffective assistance of counsel. The trial court denied both motions in a hearing held on 10 October 2008. The trial court explained that defendant had not expressed any desire to change his plea during the trial court's 6 October 2008 questioning of defendant and noted a lack of any legitimate basis for withdrawing the plea. Defendant appeals the trial court's order.

II. Analysis

A. Jurisdiction

[1] The jurisdiction of this Court for defendant's direct appeal is established by N.C. Gen. Stat. § 15A-1444(e) (2009) and by means of writ of certiorari. The aforementioned statute provides the following in pertinent part:

> [E]xcept when a motion to withdraw a plea of guilty or no contest has been denied, 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).

A post-sentencing motion to withdraw a plea is a motion for appropriate relief. *See State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990) (explaining that "[a] motion to withdraw a guilty plea made before sentencing is significantly different from a post-judgment or collateral attack on such a plea, which would be by a motion for appropriate relief"). N.C. Gen. Stat. § 15A-1444(f) provides that "[t]he ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A-1422."

In light of N.C. Gen. Stat. § 15A-1444 and our Supreme Court's decision in *State v. Dickens*, we hold that defendant is entitled to appellate review of the denial of his motion to withdraw the *Alford* plea as a matter of right. *See* 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980) (holding the defendant was entitled to appeal as a matter of right per section 15A-1444(e), when the superior court denied the defendant's post-sentencing motion to withdraw his guilty plea).

[2] Defendant also makes multiple assignments of error which are not directly related to the motion to withdraw his plea. Defendant's

remaining assignments of error allege that the trial court erred in adjudicating his guilty plea. The State contends these remaining issues are beyond the jurisdictional grant contained in N.C. Gen. Stat. § 15A-1444.

Defendant, out of an abundance of caution, has also filed a petition for writ of certiorari for these remaining assignments of error. We grant defendant's petition for writ of certiorari and review each assignment of error. Because we are granting this writ, we do not decide whether a defendant does or does not have a direct right of appeal for ancillary errors which are not directly related to a motion to withdraw an *Alford* plea under N.C. Gen. Stat. § 15A-1444.

B. Inform and Advise Defendant

[3] Defendant contends that the trial court erred in adjudicating his guilty plea and alleges that the trial court failed to inform defendant of his rights and advise him of the consequences of his plea in violation of N.C. Gen. Stat. § 15A-1022 (2009). Specifically, defendant argues that the trial judge failed to inform him of the following: (1) his right to remain silent; (2) the maximum possible sentence on the charges for which defendant was being sentenced; and (3) failed to inform him that if defendant pled guilty he would be treated as guilty. As a result of these alleged errors, defendant argues that the trial court's judgment must be vacated. We disagree.

Because a plea of guilty requires a defendant to forfeit fundamental rights such as a trial by jury, our legislature has codified the procedural requirements governing a superior court's adjudication of guilty pleas. N.C. Gen. Stat. § 15A-1022. Prior to accepting a plea of guilty, section 15A-1022 requires a superior court judge to personally address a defendant and (1) inform defendant of his right to remain silent, per section 15A-1022(a)(1); (2) inform defendant of the maximum and minimum possible sentences on the charges for which defendant is being sentenced, per section 15A-1022(a)(6); and (3) advise defendant that if he pleads guilty, he will be treated as guilty even if he does not admit guilt, per section 15A-1022(d). *See* N.C. Gen. Stat. § 15A-1022.

This Court has declined to adopt a strict, mechanical standard of compliance with the requirements of section 15A-1022. *State v. Hendricks*, 138 N.C. App. 668, 670, 531 S.E.2d 896, 898 (2000) (declining to adopt a technical approach to compliance with N.C. Gen. Stat. § 15A-1022 where the trial judge failed to make some of the inquiries required by the statute); *see State v. Williams*, 65 N.C. App. 472, 481,

310 S.E.2d 83, 88 (1983) (declining to adopt a technical approach to compliance with N.C. Gen. Stat. § 15A-1022 where the trial judge made none of the inquiries required by the statute). Failure to strictly adhere to the requirements of the statute, without more, does not entitle defendant to have the judgment vacated. *Hendricks*, 138 N.C. App. at 670, 531 S.E.2d at 898. Defendant must show that he was prejudiced as a result of the error. *Id.* When assessing whether defendant was prejudiced by non-compliance with section 15A-1022, our Courts "must look to a totality of the circumstances" surrounding the acceptance of the plea "and determine whether non-compliance with the statute either affected defendant's decision to plead or undermined the plea's validity." *Id.* at 670-71, 531 S.E.2d at 899 (citing *Williams*, 65 N.C. App. at 481, 310 S.E.2d at 83). In order to vacate a defendant's plea, the trial court's error must have prejudiced the defendant such that there exists a "reasonable possibility that a different result could have or would have been reached" had the error not occurred. *Williams*, 65 N.C. App. at 481, 310 S.E.2d at 88.

As in *Williams* and *Hendricks*, it is clear that the trial court in the present case failed to adhere to the procedural requirements of section 15A-1022. *See Williams*, 65 N.C. App. at 481, 310 S.E.2d at 88; *Hendricks*, 138 N.C. App. at 669, 531 S.E.2d at 898. The trial judge did not personally address defendant and inform him of his right to remain silent. Defendant did, however, sign the Transcript of Plea stating that he understood that he had the right to remain silent. Additionally, the trial judge inquired as to whether defendant had reviewed the Transcript of Plea with his attorney and if he understood the questions in the Transcript of Plea. Defendant answered affirmatively to both questions. In light of these circumstances, defendant's argument that he would have changed his plea had the trial court verbally informed him of his right to remain silent is not persuasive and is without merit.

[4] Defendant next argues that the judgment must be vacated because the trial judge failed to inform defendant of the maximum sentence for which defendant was being sentenced as required by section 15A-1022(a)(6). *See* N.C. Gen. Stat. § 15A-1022(a)(6). We disagree.

The record reveals that a worksheet was attached to defendant's signed Transcript of Plea incorrectly stating the maximum sentence as eighty-nine months. The correct maximum sentence was ninety-eight months. Defendant argues that this error caused defendant to under-appreciate the seriousness of his plea. Looking at the totality of

the circumstances, we are not persuaded that defendant would have changed his plea had the trial judge personally informed him that the length of the maximum sentence was nine months longer than the eighty-nine-month maximum sentence indicated on the worksheet. For instance, as stated above, defendant pled guilty pursuant to the *Alford* plea agreement against the advice of his counsel for the purpose of protecting his wife and children. Accordingly, defendant's argument is without merit.

[5] Defendant also argues that the judgment must be vacated because the trial judge failed to inform defendant that by entering an *Alford* plea defendant would be treated as guilty as required by section 15A-1022(d). A review of the colloquy between the trial judge and defendant reveals that the trial judge did not personally inform defendant that defendant would be treated as guilty. Defendant did, however, sign the Transcript of Plea indicating affirmatively that he considered it to be in his best interest to enter an *Alford* guilty plea and that upon entry of his *Alford* guilty plea, defendant would be treated as guilty whether or not he admitted that he was in fact guilty. Additionally, the trial judge asked defendant whether he reviewed the Transcript of Plea with his attorney and whether he understood the questions in the Transcript of Plea. Defendant answered affirmatively to both questions. Furthermore, the transcript reveals that the trial judge referred to defendant's plea as a "guilty plea" multiple times and stated that defendant was "going to jail based upon the evidence [] heard." We conclude, in light of the circumstances of this case, that the trial judge's failure to personally advise defendant that he would be treated as guilty did not prejudice defendant's decision to plead. Accordingly, defendant's argument lacks merit and is overruled.

C. Trial Court's Findings

[6] Defendant also argues that the trial court erred in adjudicating his guilty plea. Specifically, defendant alleges that the trial court failed to determine whether defendant's plea was a product of defendant's informed choice as required by section 15A-1022(b). Based on the alleged error, defendant requests that this Court vacate the trial court's judgment. We disagree.

Prior to accepting a defendant's guilty plea, section 15A-1022(b) prohibits a superior court judge from accepting a plea of guilty "without first determining that the plea is a product of informed choice." N.C. Gen. Stat. § 15A-1022(b). The transcript reveals that the trial judge personally addressed defendant and inquired as to whether

defendant (1) understood the nature of the charges, (2) understood that he had the right to plead not guilty, (3) had reviewed and understood the questions in the Transcript of Plea, (4) was satisfied with his lawyer's services, and (5) understood that he was waiving his right to trial by jury. Defendant answered affirmatively to all of these questions. The trial judge further inquired as to whether defendant was threatened by anyone or promised anything other than the plea agreement that caused him to enter the plea against his wishes. Defendant answered, "No." Finally the trial judge asked if defendant entered the plea of his own free will and if he fully understood what he was doing. Defendant answered, "Yes, sir." In light of this colloquy and defendant's answers to the questions on the Transcript of Plea, we find the trial court did determine that defendant was fully informed of the consequences of his choice to enter an *Alford* plea. As such, we reject defendant's argument.

D. Factual Basis for the Plea

[7] Defendant alleges the trial court committed two errors relating to the factual basis for his *Alford* plea. First, defendant alleges that the trial court failed to determine that there was a factual basis for the plea. Second, defendant alleges the factual basis for the plea was insufficient to support the *Alford* plea. As a result of these errors, defendant argues that the trial court's judgment must be vacated. We disagree.

Section 15A-1022(c) requires that, prior to accepting a plea of guilty, a superior court judge must determine that there is a factual basis for a plea. N.C. Gen. Stat. § 15A-1022(c). Defendant asserts that the record shows the trial court did not make any "factual basis" determination during defendant's 6 October 2008 plea proceeding as required by section 15A-1022(c). In support of his argument defendant cites our Supreme Court's holdings in *State v. Sinclair* and *State v. Agnew*. Defendant contends that *Sinclair and Agnew* hold that a Transcript of Plea, alone or with a stipulation to a factual basis, is insufficient to provide the factual basis for accepting a defendant's plea. *See State v. Sinclair*, 301 N.C. 193, 270 S.E.2d 418 (1980); *State v. Agnew*, 361 N.C. 333, 643 S.E.2d 581 (2007). We find defendant's reliance on *Sinclair* and *Agnew* to be misplaced.

In *Sinclair*, our Supreme Court noted that section 15A-1022(c) requires the trial court to make a determination that a factual basis exists to support the defendant's plea. *See* 301 N.C. at 199, 270 S.E.2d at 421. In addressing whether the trial court's findings satisfied the

requirements of section 15A-1022(c), the Court held that the " 'trial judge may consider any information properly brought to his attention in determining whether there is a factual basis for a plea of guilty[.]' " *Id.* at 198**,** 270 S.E.2d at 421 (quoting *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185-86 (1980)). That which the trial court does consider, the Court held, "must appear in the record, so that an appellate court can determine whether the plea has been properly accepted." *Id.* Because the trial judge in *Sinclair* relied upon evidence that was later vacated by this Court, the record was then void of evidence sufficient to support the defendant's pleas. The Supreme Court further held the "defendant's bare admission of guilt" contained in the Transcript of Plea does not provide the " 'factual basis' contemplated by G.S. 15A-1022(c)." *Sinclair***,** 301 N.C. at 199, 270 S.E.2d at 421. Rather, "some substantive material independent of the plea itself [must] appear of record which tends to show that defendant is, in fact, guilty." *Id.* at 199, 270 S.E.2d at 421-22.

Agnew is also distinguishable from the present case. *See* 361 N.C. 333, 643 S.E.2d 581. In *Agnew*, during the plea hearing the trial judge personally addressed the defendant and asked him the questions listed on the Transcript of Plea. *See id.* at 334, 643 S.E.2d at 582. The trial judge, however, did not consider any evidence to support the factual basis of the plea other than the defense counsel's stipulation that a factual basis to support the plea existed. *Id.* The trial judge summarily held that, "[b]ased on that stipulation," a factual basis to support the entry of the plea existed. *Id.* In finding that the trial court erred, the Supreme Court affirmed its holding of *Sinclair* that the Transcript of Plea alone provides inadequate factual basis for acceptance of a guilty plea and that "additional substantive information" is required by section 15A-1022(c). *Id.* at 337, 643 S.E.2d at 584.

Furthermore, the Supreme Court held in *State v. Dickens* that a factual basis for the defendant's guilty plea based upon a prior conviction on the same charges and the defendant's statement in the Transcript of Plea that he was in fact guilty was sufficient to meet the requirements of section 15A-1022(c). *Dickens*, 299 N.C. at 82, 261 S.E.2d at 187.

In light of these cases, we find defendant's argument that the trial court failed to make a factual basis determination to be without merit. A review of the record reveals that, after the trial judge conducted a colloquy with defendant regarding his understanding of the charges against him and his entry of a guilty plea, the trial court accepted evidence from both parties in the form of testimony from the

DSS' attorney, the victim, and defendant's expert witness. Therefore, we find the record replete with evidence to support a factual basis and proper acceptance of defendant's guilty plea. *See Sinclair*, 301 N.C. at 198, 270 S.E.2d at 421.

Defendant further contends that the judgment must be vacated because there was an insufficient factual basis to support defendant's *Alford* plea. Specifically, defendant contends that starvation is defined as the willful refusal to feed and nourish another and that the evidence in the record is insufficient to support a finding of willfulness. We disagree.

As discussed above, our Supreme Court has held that section 15A-1022(c) requires that some "substantive material independent of the plea itself appear of record which tends to show that the defendant is, in fact, guilty." *Sinclair*, 301 N.C. at 199, 270 S.E.2d at 421-22. Additionally, " '[t]he trial judge may consider any information properly brought to his attention[.]' " *Id.* at 198, 270 S.E.2d at 421 (quoting *Dickens*, 299 N.C. at 79, 261 S.E.2d at 185-86).

Defendant tendered his *Alford* plea to a Class E felony of child abuse for the starvation of his adopted son, Pesha. At the outset of the 6 October 2008 hearing, defendant's counsel stipulated to the existence of a factual basis for defendant's plea.

The State offered the testimony of DSS Attorney Boucher who testified to the "horrendous" conditions in which Pesha was forced to live, that he was given limited food, and had to "earn his way to have regular meals." Boucher further testified that when Pesha escaped from his home and was subsequently hospitalized, Pesha gained approximately 10 pounds within a week while eating a normal diet. Pesha also testified by reading a victim impact statement in which he described how he was forced to work "very hard" to earn food. Defendant then offered his own expert's testimony.

While defendant argues that the evidence was insufficient to show willful refusal to feed and nourish Pesha, we find the record reveals substantial evidence independent of the plea itself which tends to show the defendant is guilty of the charge and thus sufficient to support the trial court's acceptance of the guilty plea.

E. Improper Pressure

[8] Defendant contends the judgment must be vacated because the prosecutor brought improper pressure upon defendant to induce defendant's guilty plea in violation of section 15A-1021(b). We disagree.

Section 15A-1021(b) states: "No person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest." N.C. Gen. Stat. § 15A-1021(b) (2009). The official commentary regarding the prohibition of improper pressure in section 15A-1021(b) lists three means by which a prosecutor shall not seek to induce a guilty plea: by charging or threatening to charge defendant with a crime that either is not supported by the facts, or is not ordinarily charged for defendant's alleged acts, nor by threatening defendant with a sentence more severe than is ordinarily imposed upon defendants who plead not guilty. *See* N.C. Gen. Stat. § 15A-1021(b) (official comment).

We find nothing in the record to indicate any of these forms of improper pressure was utilized by the prosecutor. As held above, we find there is a sufficient factual basis for the plea, thus the charges against defendant. Furthermore, there is no allegation that defendant was charged with a crime not ordinarily charged for the alleged acts, nor that he was threatened with a sentence more severe than would be imposed for pleading not guilty.

Defendant specifically alleges that the prosecutor's offer of a "package deal" plea constituted undue pressure and violated defendant's constitutional rights. Under the terms of the "package deal" plea, the prosecution was willing to offer defendant's wife, who was also facing child abuse charges, a plea deal, but only if defendant agreed to plead guilty.

Package plea deals offer leniency for a third party that are made contingent on the defendant pleading guilty. While North Carolina appellate courts have not directly addressed the issue of the voluntariness of package deal pleas, other jurisdictions both federal and state, have found they are not per se involuntary. *See United States v. Mescual-Cruz*, 387 F.3d 1, 7 (1st Cir. 2004); *Howell v. State*, 185 S.W.3d 319, 334 (Tenn. 2006) (concluding that a majority of jurisdictions have found package pleas are not invalid per se).

The Fourth Circuit has noted that package plea deals present a greater risk of inducing a false guilty plea by altering the defendant's assessment of the attendant risks. *U.S. v. Marrow*, 914 F.2d 608, 613 (4th Cir. 1990). We hold that the prosecutor did not use improper pressure to induce defendant's guilty plea, thus defendant's argument is without merit.

F. Inquiry into the Voluntariness of Defendant's Plea

[9] Defendant next argues the judgment must be vacated because the trial court failed to make a special inquiry into the voluntariness of defendant's *Alford* plea. We disagree.

Section 15A-1022(b) requires the trial judge to determine, by personal inquiry of the prosecutor, defendant's counsel and defendant if any improper pressure was exerted in reaching the plea agreement in violation of section 15A-1021(b). *See* N.C. Gen. Stat. § 15A-1022(b). The Fourth Circuit has noted that package plea deals which promise leniency for a third party present a greater risk of inducing a false guilty plea by altering the defendant's assessment of the attendant risks in the deal. *Marrow*, 914 F.2d at 613. As a result, "special care" must be given to determine if such a plea is voluntary. *Id.*

Here, we find the trial court's inquiry into the voluntariness of defendant's plea was sufficient. Defendant signed the Transcript of Plea on which he stated that he had not been threatened or promised anything, other than the plea itself, that had caused him to enter this plea against his wishes; and that he entered his plea of his own free will, with full understanding of what he was doing. The trial court personally addressed defendant and confirmed that defendant had read the Transcript of Plea and understood the questions in the transcript. The trial court then verbally asked defendant the same questions in the Transcript of Plea regarding voluntariness of the plea. To the question of whether anyone had made any threats or promises that caused him to enter his plea against his wishes, defendant responded, "No." To the question of whether he was entering the plea of his own free will, defendant responded, "Yes, sir." Moreover, prior to sentencing defendant admitted in court that he was entering the plea for the sake of his children and his wife. We agree with the Fourth Circuit's conclusion that "[w]hile not, in an appropriate case, an insurmountable barrier to a defendant who claims that his plea was coerced, such declarations made in open court carry a strong presumption of veracity." *Marrow*, 914 F.2d at 613-14.

We find nothing in the record that leads this Court to believe that had the trial court made some further inquiry of defendant that the outcome would have been different. Thus, we overrule defendant's assignment of error and hold the trial court made sufficient inquiry into the voluntariness of defendant's plea.

II. Denial of Motion to Withdraw Guilty Plea

[10] In defendant's final argument he contends the judgment must be vacated because the trial court's denial of defendant's post-sentencing motion to withdraw his guilty plea was erroneous as a matter of law. We disagree.

Defendant relies upon our Supreme Court's decision in *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990). In *Handy*, the Court held there is a "fundamental distinction" between motions to withdraw guilty pleas made pre-sentencing and motions made after sentencing when the defendant is dissatisfied with the sentence imposed. *Id.* at 536, 391 S.E.2d at 161. While a pre-sentencing motion to withdraw a guilty plea should be permitted for "any fair and just reason," *id.* at 539, 391 S.E.2d at 162, when a defendant seeks to withdraw a guilty plea after sentence, " 'it should be granted only to avoid manifest injustice.' " *Id.* at 536, 391 S.E.2d at 161 (quoting *State v. Olish*, 164 W.Va. 712, 715, 266 S.E.2d 134, 136 (1980)). "Factors to be considered in determining the existence of manifest injustice include whether: Defendant was represented by competent counsel; Defendant is asserting innocence; and Defendant's plea was made knowingly and voluntarily or was the result of misunderstanding, haste, coercion, or confusion." *State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002).

In addition to all the reasons stated in defendant's petition for writ of certiorari discussed above, defendant alleges that his assertion of innocence demonstrates that the denial of his motion to withdraw his plea is manifestly unjust. Moreover, defendant alleges his counsel was incompetent at the plea hearing as evidenced by the fact that he did not withdraw defendant's plea after the trial court questioned the wisdom of not trying the case. Defendant filed a motion for appropriate relief alleging ineffective assistance of counsel, which was denied. The trial court was in the best position to make a determination on the competency of defendant's counsel. We will not disturb the holding on appeal. *See State v. Streater*, ––– N.C. App. ––, ––, 678 S.E.2d 367, 378 (2009).

[11] Defendant's next argument in support of his contention that withdrawal of his *Alford* guilty plea would avoid manifest injustice is that he has consistently asserted his innocence. Defendant's reliance on *Russell* is misplaced. The defendant in *Russell* entered a plea of guilty. *See* 153 N.C. App. at ––, 570 S.E.2d at 246. In the present case, defendant entered an *Alford* plea which does not require admission

of guilt. *N.C. v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970). As indicated on the Transcript of Plea, defendant entered his *Alford* plea because he felt it was in his best interest to plead guilty.

Defendant also argues that the short time between entry of plea and motion to withdraw is evidence that denial of the plea was manifestly unjust. Defendant's reliance on *Handy* in support of this argument is misplaced. The Court in *Handy* considered the short time between entry of the plea and the motion to withdraw the plea. 326 N.C. at 540, 391 S.E.2d at 163. In *Handy*, however, the defendant's motion to withdraw his plea was entered *prior* to sentencing. *Id.* at 535, 391 S.E.2d at 160. As defendant's motion to withdraw his plea was entered post-sentencing and is subject to a different legal standard than a pre-sentencing motion, his argument is unpersuasive. *See id.* at 536, 539, 391 S.E.2d at 161, 162.

Defendant also alleges that weakness in the State's evidence which is insufficient to support the factual basis of the plea, further indicates the denial of his motion to withdraw his plea was manifestly unjust. As we held above, the State's evidence was sufficient to support the plea and, as such, defendant's argument is without merit.

Defendant provides the following additional reasons in support of his contention that denial of his motion to withdraw his guilty plea was manifestly unjust: the trial court's statements that the case should be tried; defendant's positive employment history and lack of a prior criminal record; that defendant did not understand the gravity of pleading; and that the record shows defendant is not a child abuser. We have reviewed all of defendant's allegations and find them to be cumulative and without merit.

Conclusion

Although the trial court did not verbally make the inquiry as required by N.C. Gen. Stat. § 15A-1022, defendant voluntarily signed the Transcript of Plea and the court properly accepted defendant's plea. In light of the totality of the circumstances attendant in this case, we hold that the trial court met the statutory requirements prior to accepting defendant's plea and, as such, did not commit prejudicial error.

No error.

Judges STEPHENS and BEASLEY concur.

STATE OF NORTH CAROLINA v. AHMED ABDUL RAHAMAN AKA SANDY MARSH, DEFENDANT

No. COA09-586

(Filed 19 January 2010)

1. Constitutional Law— double jeopardy—variance between indictment and instruction

The trial court did not err by denying defendant's pretrial motion to dismiss the charge of felonious possession of stolen property on double jeopardy grounds because the trial court's error in the previous trial did not amount to an acquittal of the crime of felony possession of stolen property and defendant could be retried for that offense. N.C.G.S. § 15-173 was inapplicable since the fatal variance in the original trial was between the indictment and the jury instructions instead of between the indictment and the evidence presented.

2. Indictment and Information— no fatal variance as to evidence—no defect on face of indictment

The trial court had jurisdiction to retry defendant on the same indictment where the judgment based on that indictment had been arrested by the Court of Appeals but there was no fatal variance as to the evidence, nor was there a defect on the face of the indictment itself.

3. Possession of Stolen Property— motion to dismiss—sufficiency of evidence—value of stolen property

The trial court did not err by denying defendant's motion to dismiss the charge of felony possession of stolen property based on alleged insufficient evidence of the value of the stolen property because the evidence, including the testimony of the truck owner and an officer, was sufficient to establish that the stolen vehicle was valued in excess of $1,000 at the time of the theft.

4. Evidence— lay opinion testimony—value of stolen property

The trial court did not abuse its discretion in a felonious possession of stolen property case by allowing an officer to testify as to his opinion of the truck's value. The basis or circumstances behind a non-expert opinion affect only the weight of the evidence and not its admissibility.

Appeal by defendant from judgment entered 25 September 2008 by Judge W.O. Smith in Lee County Superior Court. Heard in the Court of Appeals 28 October 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General LaToya B. Powell, for the State.

William D. Spence for defendant-appellant.

HUNTER, Robert C., Judge.

Ahmed Abdul Rahaman ("defendant"), also known as Sandy Marsh, appeals from a jury verdict finding him guilty of felonious possession of stolen property. Subsequent to the conviction, defendant pled guilty to having attained habitual felon status. After careful review, we find no error.

Factual Background

On 10 March 2005, at approximately 3:30 a.m., James Woodell ("Woodell") saw two vehicles parked on the shoulder of the road across from his residence. As he walked further outside of the house, both cars drove away in the direction of Chisholm Street. Woodell walked to the side of the road where the cars had been parked and found two hand carts. He then noticed that his neighbors' covered trailer, which was parked in their yard, had been opened. Upon inspection, it appeared that the padlock on the door of the trailer had been cut off and left on the ground. The trailer contained "Little Debbie" snacks. Woodell then notified his neighbors of what he had discovered and they called the police. Officer Joseph Sellars ("Office Sellars") responded to the call. Woodell described the vehicles he had seen on the corner as a small two-door car and a small red truck. Officer Sellars put out a "be on the lookout order" for the two vehicles described by Woodell.

Later that morning, at approximately 5:00 a.m., Officer Sellars saw a red Toyota truck on Chisolm Street and he began to follow it. Officer Sellars pulled up behind the truck and activated his blue lights. The driver of the truck pulled over at a boarding house on Chisholm Street. As Officer Sellars approached the truck, a man emerged from the passenger side, and Officer Sellars instructed the man to get back into the truck. The man stated that he had to use the bathroom, then proceeded to jump over a nearby fence and run into the woods. There were no other passengers in the truck.

Officer Sellars discovered that the truck was owned by Cyrus Brown ("Brown") and sent a radio request for another officer to go to Brown's house to inquire about the truck. In the truck bed, Officer Sellars found a table saw, tools, and a case of "Little Debbie" snacks. When police spoke with Brown, he was surprised to find that his 1984 Toyota pickup truck was missing. He was escorted by police to the boarding house where he identified the truck as his property.

Officer Sellars testified at trial that the man he saw exit the truck and run away was the same man that he had pulled over in a "vehicle stop" two days prior. After pulling the "booking photograph" from that incident, Officer Sellars identified the suspect as defendant. Defendant was subsequently located and arrested.

Procedural Background

In October 2006, defendant was brought to trial on various charges, including felony possession of stolen property (the Toyota truck) pursuant to N.C. Gen. Stat. § 14-71.1 (2007). The jury was instructed on the crime of felony possession of a stolen motor vehicle pursuant to N.C. Gen. Stat. § 20-106 (2007), a crime for which defendant was never indicted. The jury returned a verdict of guilty on the crime of felony possession of a stolen motor vehicle. Defendant then pled guilty to having attained habitual felon status and was sentenced to 151 to 191 months imprisonment. Defendant appealed and this Court held, *inter alia*, that the trial court improperly instructed the jury on the charge of felony possession of a stolen motor vehicle where defendant had been indicted for felony possession of stolen property. *State v. Marsh*, 187 N.C. App. 235, 243-44, 652 S.E.2d 744, 749 (2007) (holding the two charges "are separate and distinct statutory offenses"). The Court reasoned:

> The court's charge to the jury was for the offense of possession of a stolen vehicle under N.C. Gen. Stat. § 20-106. By charging the jury under the incorrect statute, the trial court lessened the State's burden of proof by not requiring the State to prove an element which elevated the charge from a misdemeanor to a felony, i.e. that the truck had a value of over $1,000.00.

Id. at 244, 652 S.E.2d at 749. The Court then arrested judgment on the felony possession of a stolen motor vehicle conviction and further vacated the judgment imposed for habitual felon status because that

judgment was based on the underlying felony conviction that was arrested. *Id.* at 245, 652 S.E.2d at 750.[1]

On 22 September 2008, defendant was retried for felony possession of stolen property, as alleged in the original indictment, and of having attained habitual felon status. On 25 September 2008, defendant was convicted of felonious possession of stolen property. He then pled guilty to having attained habitual felon status. Defendant was sentenced to 135 to 171 months imprisonment.

Analysis

I.

[1] First, defendant argues that the trial court erred in denying his pre-trial motion to dismiss the charge of felonious possession of stolen property on double jeopardy grounds. Specifically, defendant contends that when the trial court in the original trial failed to submit the proper jury instructions on the crime of possession of stolen property, it effectively dismissed that charge. Defendant asserts that the trial court's dismissal had the same effect as an acquittal pursuant to N.C. Gen. Stat. § 15-173 (2007), which states that if a motion to dismiss is granted, "judgment shall be entered accordingly; and such judgment shall have the force and effect of a verdict of 'not guilty' as to such defendant." In defendant's prior appeal, this Court did, in fact, hold that the trial court erred in failing to properly instruct the jury and arrested judgment on the felony possession of a stolen motor vehicle conviction. *Marsh*, 187 N.C. App. at 245, 652 S.E.2d at 749. However, we hold that the trial court's error in the previous trial did not amount to an acquittal of the crime of felony possession of stolen property and defendant could be retried for that offense.

The Double Jeopardy Clause of the United States Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. While "[t]he North Carolina Constitution does not specifically recognize former jeopardy as a defense, . . . [our Supreme] Court has interpreted the language of the law of the land clause of our state Constitution as guaranteeing the common law doctrine of former jeopardy." *State v. Brunson*, 327 N.C. 244, 247, 393 S.E.2d 860, 863 (1990).

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1. The Court also vacated the judgment for felonious possession of stolen goods (not related to the truck) and remanded for the trial court to sentence defendant for misdemeanor possession of stolen goods; however, that portion of the Court's analysis is not relevant to the issues presently before the Court. *Id.*

> This principle of double jeopardy, or former jeopardy, benefits the individual defendants by providing repose; by eliminating unwarranted embarrassment, expense, and anxiety; and by limiting the potential for government harassment. It benefits the government by guaranteeing finality to decisions of a court and of the appellate system, thus promoting public confidence in and stability of the legal system. The objective is to allow the prosecution one complete opportunity to convict a defendant in a fair trial.

State v. Fowler, ——N.C. App. ——, ——, 676 S.E.2d 523, 538 (2009) (internal citation and quotation marks omitted).

It is well established that "[t]he 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); *accord State v. Davis*,—— N.C. App. ——, ——, 680 S.E.2d 239, 242 (2009).

> In *State v. Midyette*, 270 N.C. 229, 154 S.E.2d 66 (1967), [our Supreme Court] recognized that when a person is acquitted of or convicted and sentenced for an offense, the prosecution is prohibited from *subsequently* (i.e., in a subsequent, separately tried case) indicting, convicting, or sentencing him a second time for that offense, or for any other offense of which it, in its entirety, is an essential element.

Gardner, 315 N.C. at 454, 340 S.E.2d at 708.[2] "While the Double Jeopardy Clause thus targets oppressive conduct of government prosecutors in seeking multiple prosecutions or multiple punishments, it has never precluded a second trial for a defendant who has succeeded in getting his first conviction set aside[] . . . . " *U.S. v. Bowe*, 309 F.3d 234, 238 (4th Cir. 2002) (citation and quotation marks omitted).

In the present case, defendant's argument is based on part one of the *Gardner* test, which states that a defendant is protected from "a second prosecution for the same offense after acquittal[.]" *Gardner*, 315 N.C. at 451, 340 S.E.2d at 707. Defendant relies heavily on *State v. Williams*, 318 N.C. 624, 350 S.E.2d 353 (1986), and *State v. Bowen*, 139 N.C. App. 18, 533 S.E.2d 248 (2000) for the proposition that when

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2. *Gardner* overruled *Midyette* on other grounds. 315 N.C. at 454, 340 S.E.2d at 708.

the trial court incorrectly instructs the jury on a crime for which defendant is not charged, the error amounts to an acquittal of the crime charged and any retrial for that crime violates the Double Jeopardy Clause.

In *Williams*, the defendant was charged with first-degree forcible rape. 318 N.C. at 628, 350 S.E.2d at 356. At the close of evidence at trial, the defendant moved to dismiss the charge due to insufficiency of the evidence and the trial court denied the motion. *Id.* Subsequently, "when [the trial judge] charged the jury[,] he did not instruct them on forcible rape; he instructed only on the offense of vaginal intercourse with a female under thirteen years of age." *Id.* Our Supreme Court determined that

> [n]o evidence was presented [to the trial court] to show that the alleged rape entailed the use of a weapon, the infliction of serious injury or aiding and abetting. Proof of at least one of those elements is necessary to sustain a conviction for first-degree rape . . . the theory of prosecution under which defendant was charged.

Id. Therefore, the trial court in *Williams* should have granted the defendant's motion to dismiss due to insufficiency of the evidence, but failed to do so and proceeded to instruct the jury on a crime for which the defendant was not charged. *Id.* The jury returned a verdict of guilty on the offense of first-degree forcible rape, on which they had not been instructed. *Id.* at 624, 350 S.E.2d at 354. The Court held that while there was sufficient evidence to support a charge of vaginal intercourse with a female under thirteen years of age, that was not the theory of rape that was alleged in the indictment. *Id.* at 628, 350 S.E.2d at 356.

> The failure of the trial court to submit the case to the jury pursuant to the crime charged in the indictment *amounted to a dismissal of that charge* and all lesser included offenses. Therefore, we hold that the trial judge did in fact dismiss the first and second-degree rape charges alleged in the indictment.

Id. (emphasis added). The Court held that the improper instructions amounted to plain error. *Id.* at 629, 350 S.E.2d at 356. The Court further held that "the failure of the allegations to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support that resulting conviction." *Id.* at 631, 350 S.E.2d at 357. The Court arrested the

judgment based on the first-degree rape conviction. *Id.* at 632, 350 S.E.2d at 358.

The Court in *Williams* found two errors: (1) there was insufficient evidence to support the charged offense of first-degree forcible rape; and (2) the trial court committed plain error in instructing the jury on the elements of vaginal intercourse with a female under thirteen years of age, a crime for which defendant was never charged. The Court did not state that the effective dismissal of the charge of first-degree rape by the trial court amounted to an acquittal of that charge. The Court did not address whether the defendant could be retried for first-degree rape, nor did it address the potential of a 5th Amendment violation should the State attempt to retry the defendant.

In *Bowen*, the defendant was convicted of three counts of first degree sexual offense, one count of statutory sexual offense, and five counts of taking indecent liberties with a minor child. 139 N.C. App. at 21, 533 S.E.2d at 250. As in *Williams*, there existed variances between the crimes charged and the jury instructions given at trial. On appeal this Court first held that the jury was improperly instructed on statutory sexual offense instead of first degree sexual offense as charged in three of the indictments. *Id.* at 22, 533 S.E.2d at 251. The Court relied on *Williams* and held that "the trial judge, by his failure to submit the proper jury instructions for the three counts of first degree (forcible) sexual offense against defendant, effectively dismissed those charges." *Id.* at 24, 533 S.E.2d at 252. The Court then vacated those judgments. *Id.* Second, the Court in *Bowen* held that the jury was improperly instructed on the elements of statutory sexual offense when the indictment for that charge failed to allege that defendant was at least six years older than one of the minor victims. *Id.* Again, applying *Williams*, the Court held that "by its failure to submit the proper jury instructions to the jury, the trial court effectively dismissed this charge." *Id.* at 25, 533 S.E.2d at 253. The Court then vacated that judgment as well. *Id.* Third, the Court held that the trial court erred in failing to instruct the jury on a necessary element of one of the five indecent liberties charges. *Id.* at 26, 533 S.E.2d at 253. Once again, relying on *Williams*, the Court found that the trial court's failure to properly instruct the jury amounted to a dismissal of that charge and the Court vacated the judgment for that indecent liberties conviction. *Id.* at 27, 533 S.E.2d at 254. As in *Williams*, the Court found that the improper instructions amounted to plain error. *Id.* at 23, 533 S.E.2d at 252.

Bowen did not deal with insufficiency of the evidence as seen in *Williams*. However, like *Williams*, *Bowen* does not discuss the State's ability to retry the defendant for charges that were effectively dismissed due to improper jury instructions. We do not seek to inject holdings into *Williams* and *Bowen* that simply are not there. We must review the facts of this case in light of what is actually stated in those cases.

In reviewing *Williams* and *Bowen*, we find that while it may be possible to distinguish this case from certain aspects of *Williams* due to the fact that there was insufficient evidence in that case to support the crime charged, we cannot distinguish this case from *Bowen*. This Court explicitly stated in *Bowen* that where a "jury is instructed and reaches its verdict on the basis of the elements set out in [one statute], but defendant was indicted and brought to trial on the basis of the elements set out in [a different statute], the indictment under which defendant was brought to trial cannot be considered valid and any judgment made thereon, must be vacated." *Id.* at 25, 533 S.E.2d at 253. Upon instructing the jury on a crime not charged, the trial court effectively dismissed the charge in the indictment. *Id.* Thus, we hold that the trial court in the present case effectively dismissed the crime of possession of stolen property when it instructed the jury on possession of a stolen motor vehicle.[3]

The next question we must reach, which was not addressed in *Bowen* or *Williams*, is whether the trial court's effective dismissal, which occurred when the improper instructions were given, amounts to an acquittal raising double jeopardy concerns. We hold that, under the facts of the current case, it does not. Defendant relies on N.C. Gen. Stat. § 15-173, which states that when the trial court grants a defendant's motion to dismiss at the close of evidence, that ruling has the same effect as a verdict of not guilty. We find this statute to be inapplicable in the present case.

In reviewing relevant case law, we find that a motion to dismiss is properly raised at the close of evidence where the State has not presented sufficient evidence to establish each essential element of the crime charged. *State v. Lindsay*, 45 N.C. App. 514, 515, 263 S.E.2d

3. In its brief, the State emphasizes the fact that the jury in this case was instructed on possession of a stolen motor vehicle and returned a guilty verdict as to that offense whereas in *Williams* and *Bowen* the jury was improperly instructed but returned verdicts on the crimes actually charged. This distinction is irrelevant because the effective dismissal occurred at the time the jury was improperly instructed; the dismissal was not contingent upon the jury's actual verdict.

364, 365 (1980). Additionally, a motion to dismiss is properly raised at the close of evidence where a material fatal variance exists between the indictment and the evidence presented at trial. *State v. Faircloth*, 297 N.C. 100, 107, 253 S.E.2d 890, 894 (1979) (citations omitted) ("[A] fatal variance between the indictment and proof is properly raised by a motion for judgment as of nonsuit or a motion to dismiss, since there is not sufficient evidence to support the charge laid in the indictment."). Both of these situations pertain to the State's failure to present evidence to support the crime, as alleged in the indictment, and the defendant's motion is properly brought *before* the jury is instructed. If the court grants the motion, the jury is never instructed on that particular offense and the trial court's order has the effect of a not guilty verdict. N.C. Gen. Stat. § 15-173.

However, the 5th Amendment right to be free from double jeopardy only attaches in a situation where the motion to dismiss is granted due to insufficiency of the evidence to support each element of the crime charged. *See State v. Mason*, 174 N.C. App. 206, 208-09, 620 S.E.2d 285, 287 (2005) (stating that "if reversal [by an appellate court] was based upon the sufficiency of the evidence, then the defendant may not be retried consistent with double jeopardy protection"), *appeal dismissed and disc. review denied*, 360 N.C. 293, 629 S.E.2d 280 (2006); *State v. Callahan*, 83 N.C. App. 323, 325, 350 S.E.2d 128, 129-30 (1986) (stating, "the State may not retry the defendant if the evidence at the first trial was not legally sufficient to sustain the verdict"), *disc. review denied*, 319 N.C. 225, 353 S.E.2d 409 (1987).

Conversely, our Supreme Court has held that the granting of a motion to dismiss due to a material fatal variance between the indictment and the proof presented at trial does *not* preclude retrial for the offense alleged on a proper indictment. *State v. Johnson*, 9 N.C. App. 253, 175 S.E.2d, 711 (1970). In *Johnson*, the indictment alleged that the defendant committed the crime of breaking and entering " 'a certain storehouse, shop, warehouse, dwelling house and building occupied by one Lloyd R. Montgomery, 648 Swannanoa River Road, Asheville, N.C.' " *Id.* at 254, 175 S.E.2d at 712. The evidence at trial tended to show that the defendant broke into "438 Swannanoa River Road in Asheville which was occupied by one Elvira L. Montgomery, who was engaged in business under the name of 'Cat and Fiddle Restaurant.' " *Id.* at 254-55, 175 S.E.2d at 712. The trial court granted the defendant's motion to dismiss due to a fatal variance between the indictment and the evidence presented at trial. *Id.* at 255, 175 S.E.2d

at 712. The State retried defendant for the offense of breaking and entering, but upon an indictment that corresponded to the evidence. *Id.* The defendant then appealed and asserted that his right to be free from double jeopardy had been violated. *Id.* Our Supreme Court held that "a judgment of dismissal for whatever reason entered after a trial on the first indictment would not sustain a plea of former jeopardy when defendant was brought to trial on the charge contained in the second indictment." *Id.* Therefore, not every dismissal pursuant to a motion to dismiss bars retrial as defendant alleges.

The present case does not deal with a motion to dismiss made by defendant due to insufficiency of the evidence. Therefore, we find that N.C. Gen. Stat. § 15-173 is inapplicable and does not support defendant's claim that the effective dismissal of the charges amounted to an acquittal, thus invoking double jeopardy protection. This case deals with a different type of fatal variance than that which is properly raised by a motion to dismiss. Here, the fatal variance in the original trial was between the indictment and the jury instructions, not between the indictment and the evidence presented. As stated in *Williams*, "the failure of the allegations to conform to the equivalent material aspects of the jury charge represents a *fatal variance*, and renders the indictment insufficient to support that resulting conviction." 318 N.C. at 631, 350 S.E.2d at 357 (emphasis added). Furthermore, where the trial court instructs the jury on a crime for which defendant was not charged, the court commits plain error. *Id.* at 629, 350 S.E.2d at 356.

Therefore, on defendant's previous appeal, this Court properly arrested the judgment, which effectively vacated the corresponding verdict and sentence. *State v. Scott*, 237 N.C. 432, 434, 75 S.E.2d 154, 156 (1953) ("The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below . . . .").[4] In the case *sub judice*, we hold that the State was not prohibited by the 5th Amendment from retrying the defendant for the same offense.

Our holding in this case adheres to the general principle espoused in our jurisprudence that when the trial court commits prejudicial error the defendant is entitled to a new trial. *See State v. Lyons*, 330 N.C. 298, 309, 412 S.E.2d 308, 314-15 (1991) (holding disjunctive jury instructions using "and/or" between the victims' names were fatally

4. We recognize that this Court in *Bowen* vacated the judgment as opposed to arresting it. Under the present facts, as this Court held on defendant's first appeal, arresting the judgment is the proper disposition.

ambiguous and required a new trial when the indictment had used the conjunctive "and" between the names); *State v. Taylor*, 301 N.C. 164, 171, 270 S.E.2d 409, 414 (1980) (holding "[the trial court's] failure to instruct on the theory charged in the bill of indictment, in addition to its instructions on theories not charged, constitutes prejudicial error entitling defendant to a new trial on the charge . . . ."); *Mason*, 174 N.C. App. at 208-09, 620 S.E.2d at 287 (stating "[g]enerally, the protection against double jeopardy does not bar a retrial for the same offenses that a defendant was convicted of if the defendant's convictions were reversed on appeal based upon trial error.").

II.

[2] Defendant further argues that the trial court lacked jurisdiction to retry defendant upon the same indictment where the judgment based on that indictment had been arrested by this Court. We disagree.

In situations where there was a fatal variance between the indictment and the evidence presented at trial, if the State seeks to retry defendant, it will need to obtain a new indictment that properly alleges the offense charged and will conform to the evidence against the defendant. *See Johnson*, 9 N.C. App. at 254-55, 175 S.E.2d at 712. However, in this case, there was no fatal variance as to the evidence, nor was there a defect on the face of the indictment itself. Accordingly, we see no reason why the State should be required to issue a new indictment that would be identical in substance to the prior one. Defendant's argument is, therefore, without merit.

III.

[3] Next, defendant argues that the trial court erred in denying his motion to dismiss the charge of felony possession of stolen property due to insufficiency of the evidence. Specifically, defendant claims that the State failed to provide sufficient evidence to prove that the value of the stolen property—the Toyota truck—exceeded $1,000.00, an element of the crime pursuant to N.C. Gen. Stat. § 14-71.1 and N.C. Gen. Stat. § 14-72 (2007). Defendant does not allege insufficiency with regard to any other element of the crime.

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.

> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

State v. Powell, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (internal citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002). "In conducting our analysis, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). "Both competent and incompetent evidence must be considered." *State v. Lyons*, 340 N.C. 646, 658, 459 S.E.2d 770, 776 (1995). "In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *Scott*, 356 N.C. at 596, 573 S.E.2d at 869.

"The fair market value of stolen property at the time of the theft must exceed the sum of [$1,000.00] for the possession to be felonious." *State v. Holland*, 318 N.C. 602, 610, 350 S.E.2d 56, 61 (1986), *overruled on other grounds by State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). "Stolen property's fair market value is the item's 'reasonable selling price[] at the time and place of the theft, and in the condition in which it was when [stolen].' " *State v. Davis*, —— N.C. App. ——, ——, 678 S.E.2d 709, 714 (2009) (quoting *State v. Dees*, 14 N.C. App. 110, 112, 187 S.E.2d 433, 435 (1972)). "The State is not required to produce 'direct evidence of . . . value' to support the conclusion that the stolen property was worth over $1,000.00, provided that the jury is not left to 'speculate as to the value' of the item." *Id.* (quoting *Holland*, 318 N.C. at 610, 350 S.E.2d at 61).

Here, Mr. Brown, the truck's owner, testified that he purchased the truck new in 1985 for $9,000.00; he had been the sole owner; and in his opinion, the truck was in "good shape." He specifically testified that the tires were in good condition, the radio and air conditioning worked, and there was no damage of which he was aware. Prior to the theft, the truck was never involved in an accident and had approximately 75,000 miles on the odometer. Although Mr. Brown did not express an opinion as to the value of the truck at the time of the theft, he did testify that after the truck was returned to him he had an accident that resulted in a "total loss." He received $1,700.00 from the insurance company, and would have received $2,100.00 had he relin-

quished the title. *See State v. Maynard*, 79 N.C. App. 451, 453-54, 339 S.E.2d 666, 668 (1986) (holding amount of money paid by insurer to owner is evidence of fair market value prior to vehicle's destruction). Furthermore, Officer Sellars testified that his job routinely required him to examine and value vehicles. He stated that it was his opinion that the car was valued at approximately $3,000 at the time of the theft. We find this evidence sufficient to establish that the vehicle stolen was valued in excess of $1,000.00 at the time of the theft, and, therefore, the trial court did not err in denying defendant's motion to dismiss.

IV.

[4] Finally, defendant argues that the trial court erred in allowing Officer Sellars to testify as to his opinion of the truck's value.

"On appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion. An abuse of discretion will be found only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (citation and quotation marks omitted), *cert. denied*, 360 N.C. 575, 635 S.E.2d 429 (2006).

> The general rule in North Carolina is that a witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific personal property. "[I]t is not necessary that the witness be an expert; it is enough that he is familiar with the thing upon which he professes to put a value and has such knowledge and experience as to enable him intelligently to place a value on it."

State v. Boone, 39 N.C. App. 218, 221, 249 S.E.2d 817, 820 (1978) (quoting 1 Stansbury's N.C. Evidence § 128 at 408 (Brandis rev. 1973); *see also State v. Odom*, 99 N.C. App. 265, 393 S.E.2d 146 (1990).

Here, Officer Sellars testified that: he had previously worked as a car salesman in his family's business; he was especially familiar with Toyota vehicles; and he routinely values vehicles as a police officer, particularly in wreck investigations. Officer Sellars testified that he spent approximately three hours taking inventory of the truck and that it was his opinion that "[i]n 2005 for a 1984 Toyota in running condition like this vehicle was that night . . . driving with headlights, brakes, and everything in working order with a running motor, [it] would be worth in the area of $3,000 in 2005."

We find no abuse of discretion in the trial court's decision to allow Officer Sellars' lay opinion as to the truck's value.

Again, the State is not required to provide direct evidence of value. *Davis*, —— N.C. App. at ——, 678 S.E.2d at 714. Moreover, "[t]he basis or circumstances behind a non-expert opinion affect only the weight of the evidence, not its admissibility." *State v. Edmondson*, 70 N.C. App. 426, 430, 320 S.E.2d 315, 318 (1984), *aff'd*, 316 N.C. 187, 340 S.E.2d 110 (1986).

Conclusion

We hold that the trial court properly denied defendant's pre-trial motion to dismiss the charge of felony possession of a stolen vehicle on double jeopardy grounds; the indictment utilized to retry defendant was valid; the trial court did not err in denying defendant's motion to dismiss the charge against him due to insufficiency of the evidence; and the trial court did not err in allowing Officer Sellars to testify regarding the value of the stolen truck.

No Error.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA v. DIMITRY SIMONOVICH

No. COA09-585

(Filed 19 January 2010)

1. Homicide— requested instruction—voluntary manslaughter—failure to show heat of passion or provocation

The trial court did not err by denying defendant's request for a jury instruction on voluntary manslaughter because there was no evidence that defendant was driven to strangle his wife by a legally recognized heat of passion or provocation even though defendant testified he was aware of his wife's past relationships with other men and her stated intent to continue that behavior.

2. Sentencing— requested instruction—aggravating factor—failure to submit proposed instruction in writing

The trial court did not err during the sentencing phase of a trial by denying defendant's request to provide a jury instruction

concerning the definition of an aggravating factor because defendant did not submit a proposed instruction in writing to the trial court as required by N.C.G.S. § 15A-1231(a).

3. Sentencing— mitigating factors—strong provocation— extenuating relationship

The trial court did not abuse its discretion by failing to find certain mitigating factors under N.C.G.S. § 15A-1340.16(e)(8) that defendant acted under strong provocation or that the relationship between the parties was extenuating based on the evidence of the wife's alleged infidelity because there was no evidence which would morally shift part of the fault for the crime to the victim.

Appeal by Defendant from judgment entered 7 August 2008 by Judge James U. Downs in Superior Court, Buncombe County. Heard in the Court of Appeals 27 October 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard L. Harrison, for the State.

M. Alexander Charns for Defendant-Appellant.

McGEE, Judge.

Dimitry Simonovich (Defendant) was convicted on 7 August 2008 of second-degree murder of his wife, Inna Simonovich (Inna). The trial court sentenced Defendant to an active term of 196 months to 245 months. Defendant appeals.

The evidence at trial tended to show that Defendant and Inna were natives of Belarus and were married to each other in Belarus on 8 August 2003. Inna emigrated to the United States with her parents less than three months later, while Defendant remained in Belarus. Defendant and Inna communicated regularly by telephone and Inna provided clothing and other material support to Defendant. Defendant's relationship with Inna began to deteriorate. They argued and Inna told Defendant she no longer loved him. They contemplated divorce, but Defendant remained hopeful and continued to work toward reuniting with Inna in the United States.

Defendant came to the United States on 1 March 2007 and began to teach himself English. At the time of trial, he could not speak English. Defendant and Inna shared an apartment in Asheville, which was located in the same apartment complex as Inna's family. At trial, Defendant testified through an interpreter that he found a job in-

stalling marble and granite countertops. Inna's mother testified through an interpreter that Inna worked as a cleaner at various locations around Asheville. During April of 2007, Inna became pregnant with Defendant's child. Defendant testified that he had been praying for Inna to become pregnant and that, when she told him about the pregnancy, he "was very excited."

Defendant further testified to the following at trial. Inna told Defendant that, while Defendant was still living in Belarus, she had sexual relationships with several men in the United States. On the evening Defendant arrived in the United States, Inna said to him: "Please forgive me. I have cheated on you." Defendant told Inna to "[f]orget everything that was before me—that happened before me. I came here; now let's start a new life together." Inna told Defendant about her relationships with other men and she continued to receive telephone calls from a man Defendant identified as Inna's "boyfriend." Defendant testified that Inna kept pornographic materials in their apartment and used a computer to view pornographic web sites and Russian dating web sites. Defendant wanted Inna to stop seeing other men and had several arguments with Inna about that.

Inna's mother and sister testified at trial through interpreters. Inna's mother testified that she did not know what Inna used the computer for. Inna's sister, Larisa, testified that she was not aware of Inna having any relationships outside of her marriage to Defendant nor was she aware of Inna's use of the internet for pornographic or dating purposes. Larisa also testified that she did not hear Inna tell Defendant that Inna had sex with other men.

Defendant testified that at times the arguments were heated and physically threatening to Inna. During one argument, Defendant took Inna's telephone, intending to erase her boyfriend's telephone number from the telephone's memory, but became angry and broke the telephone instead. During another argument, Defendant broke Inna's discs containing pornographic materials and threw a pornographic magazine at her.

Defendant described another incident during which Inna took Defendant's passport and locked herself in the bedroom. Defendant kicked open the bedroom door and Inna called out for her sister, who was a neighbor, to help. Inna refused to return Defendant's passport, and Defendant "grabbed her by the neck." Defendant and Inna struggled until Inna reached for a pair of scissors and Defendant then

released her. Defendant again grabbed Inna and she bit him. Inna ran to her sister's apartment and Defendant went to sleep.

Defendant testified that he and Inna fought again on 27 July 2007. Defendant wanted to have sex with Inna, but she was not interested. Inna told Defendant that she did not love him and that they could no longer live together. Inna also told Defendant that "[i]f [she] wanted to have sex [she] could find [herself] another man." When Defendant told her that he did not want her to find another man, Defendant said Inna replied, "I will do it just to make you angry. I will go with someone else or I will make a phone call and they will come and get me." Defendant took Inna's telephone and car keys and left the apartment for the night. Defendant worked all the next day.

Defendant testified that when he returned home from work the next day, Inna was not there. She returned later with her mother and demanded that Defendant return her keys. Defendant and Inna argued and Inna again threatened to leave. After some time, Defendant asked Inna to forgive him and she replied, "[n]ever." Defendant and Inna continued to argue, and at one point, Defendant testified he said: "If you don't want to stay with me, then give me half of the money and I will pack up my things and I will leave." Defendant testified Inna said they had no money to divide because she had taken their $5,000 savings and had rented and furnished a new apartment. Defendant testified that he "got really mad at her for this."

The argument escalated and Inna began making threats to "go with another man." Defendant replied "[i]f you . . . do this, then I would probably choke you." Defendant testified that he "wanted to gather my clothes and go, maybe get in the car and go to sleep just like [the night before], but [he] thought 'tomorrow is the church services,' so [he] didn't want to go anywhere." Defendant remained in the apartment and the argument continued. Inna began to threaten to inflict bruises on herself, go to the courthouse where she worked, and have Defendant put in jail as an abusive spouse. Defendant testified he eventually said, "Inna, do not annoy me because you don't even realize how angry you're making me." Inna responded, "[w]ell, I am going to create [sic] this for you."

Defendant testified that he grabbed Inna at her throat because he wanted "to close her mouth, to keep her quiet[.]" Defendant "did not know what [he] was doing at that moment[,]" but he testified that he put his hands on Inna's throat because he "simply wanted her to shut up, not to aggravate [him], not to make [him] mad." Defendant held

onto Inna's throat until she began to slide off the bed. Defendant then noticed that Inna's face was bloody and she was not breathing. Defendant could not feel Inna's pulse. He got dressed and drove toward the courthouse looking for a police officer.

Defendant found an officer, made gestures indicating strangulation, and said "my wife." Defendant showed the officer his identification with his address on it and the officer began to understand what Defendant was trying to tell him. Defendant presented his hands to the officer and the officer placed him in handcuffs.

Defendant was charged with first-degree murder and was tried on 28 July 2008. A jury found Defendant guilty of second-degree murder. The jury further found that Defendant "knew at the time he committed the offense (2nd Degree Murder) that the victim was pregnant and that the foregoing was an aggravating factor."

Voluntary Manslaughter

[1] Defendant first argues that the trial court erred by denying Defendant's request for a voluntary manslaughter jury instruction. We disagree.

"First-degree murder is the unlawful killing—with malice, premeditation and deliberation—of another human being." *State v. Arrington*, 336 N.C. 592, 594, 444 S.E.2d 418, 419 (1994) (citations omitted). "Voluntary manslaughter is the killing of another human being without malice and without premeditation and deliberation under [1] the influence of some passion or [2] heat of blood produced by adequate provocation." *State v. Watson*, 338 N.C. 168, 176, 449 S.E.2d 694, 699 (1994), *cert. denied*, 514 U.S. 1071, 131 L. Ed. 2d 569, *overruled on other grounds by State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995).

Voluntary manslaughter is a lesser included offense of first-degree murder. *State v. Woodard*, 324 N.C. 227, 232, 376 S.E.2d 753, 756 (1989). "A jury must be instructed on a lesser included offense only when evidence has been introduced from which the jury could properly find that the defendant had committed the lesser included offense." *Woodard*, 324 N.C. at 232, 376 S.E.2d at 756 (citations omitted). "In order to receive an instruction on voluntary manslaughter, there must be evidence tending to show '[a] killing [was] committed in the heat of passion suddenly aroused by adequate provocation, or in the imperfect exercise of the right of self-defense [.]' " *State v. Vincent*, —— N.C. App. ——, ——, 673 S.E.2d 874, 876 (2009) (quoting *State v. Huggins*, 338 N.C. 494, 497, 450 S.E.2d 479, 481 (1994)).

Defendant does not argue that he acted "in the imperfect exercise of the right of self defense," *Id.*, but rather that Inna's "sexual taunting was tantamount to her being in bed with another man[,]" and that, as a result of this taunting, Defendant "snapped and grabbed his wife around the neck." Defendant requests us to consider these facts as sufficient to warrant a jury instruction on voluntary manslaughter. Specifically, Defendant argues the following factors support such an interpretation of the events:

> [(1)] [Inna] and [Defendant] were married when the adultery took place.
>
> [(2)] They were married when the threat to commit adultery again was made.
>
> [(3)] The passion suddenly aroused in [Defendant] was when the deceased told him—while they were in the marital bed—that she was going to have sex with other men (as she had done on other occasions during the marriage, and then told him about).
>
> [(4)] She was leaving him, she didn't love him and she had spent all of their savings.
>
> [(5)] The past adultery provided the basis for believing the threat to commit adultery.

Our Supreme Court has held that it is not sufficient to simply show that a defendant acted in a heat of passion. There must also be a showing that "[s]uch sudden heat of passion [arose] upon what the law recognizes as adequate provocation." *Woodard*, 324 N.C. at 232, 376 S.E.2d at 756 (citing *State v. Ward*, 286 N.C. 304, 210 S.E.2d 407 (1974) *death penalty vacated mem.*, 428 U.S. 903, 49 L. Ed. 2d 1207 (1976)). Provocation which will justify an instruction on manslaughter " 'must be more than mere words; as language, however abusive, neither excuses nor mitigates the killing[.]' " *State v. Watson*, 287 N.C. 147, 154, 214 S.E.2d 85, 90 (1975) (citations omitted).

Our Supreme Court held in *Ward*:

> When one spouse kills the other in a heat of passion engendered by the discovery of the deceased and a paramour in the very act of intercourse, or under circumstances clearly indicating that the act had just been completed, or was "severely proximate," and the killing follows immediately, it is manslaughter. However, a mere suspicion, belief, or knowledge of past adultery between

> the two will not change the character of the homicide from murder to manslaughter. The law extends its indulgence to a transport of passion justly excited and to acts done before reason has time to subdue it; the law does not indulge revenge or malice, no matter how great the injury or grave the insult which first gave it origin.

Ward, 286 N.C. at 312-13, 210 S.E.2d at 413-14 (internal citations omitted).

In the case before us, Defendant and Inna were in bed when they began arguing. Defendant testified he was aware of Inna's past relationships with other men and her stated intent to continue that behavior. There was no evidence that Defendant had found Inna "in the very act of intercourse, or under circumstances clearly indicating that the act had just been completed, or was 'severely proximate[.]' " *Id.* There was, therefore, no evidence that Defendant was driven to strangle Inna by a legally recognized heat of passion. To the contrary, Defendant himself testified that he put his hands on Inna's throat because he "simply wanted her to shut up, not to aggravate [him], not to make [him] mad."

Although Defendant acknowledges that he did not find Inna "in the very act of intercourse, or under circumstances clearly indicating that the act had just been completed, or was 'severely proximate,' " *Id.*, he "requests that [this Court] extend existing case law to consider the evidence of on-going adulterous behavior of a spouse, along with the promise to continue the adulterous intercourse, to be adequate provocation and sufficiently proximate to warrant a voluntary manslaughter instruction." Our Supreme Court has developed longstanding case law governing the range of legally adequate provocations for voluntary manslaughter. *See Id.* Defendant's conduct is clearly not within that range and our Court cannot extend existing case law in the manner requested by Defendant. Because there was no evidence that Defendant was driven to kill Inna by a legally recognized adequate provocation, we find no error in the trial court's refusal to instruct the jury on voluntary manslaughter.

Jury Instructions

[2] Defendant next assigns error to the trial court's denial of Defendant's request to provide a jury instruction concerning the definition of an "aggravating factor." We disagree.

During the sentencing phase of Defendant's trial, the trial court submitted a verdict sheet to the jury, with the following question:

> Do you find from the evidence presented, beyond a reasonable doubt, the following factor:
>
> That the Defendant knew at the time he committed the offense (2nd Degree Murder) the victim was pregnant and that the foregoing was an aggravating factor?
>
> ___ Yes.
>
> ___ No[.]

Prior to the trial court's instructing the jury, Defendant and the trial court had the following exchange:

> [Defendant's Counsel]: Would you define for them an aggravating factor?
>
> [Judge]: Sir?
>
> [Defendant's Counsel]: Isn't there a definition in the statute of an aggravating factor?
>
> [Judge]: I don't know.

However, Defendant submitted no special instruction to the trial court in writing at that time. The trial court instructed the jury in pertinent part as follows:

> [D]efendant has denied not so much the existence of the factor—but you can consider that he has—but has denied the fact that it was aggravating. The fact that the State has alleged such factor exists is no evidence that it does, in fact, exist or that it is aggravating. Under our system of justice, when a defendant denies the existence of an aggravating factor and/or whether it is aggravating, he's not required to prove that it does not exist or that it is not aggravating. It is presumed that it does not exist and it is presumed that it is not aggravating. The State must prove to you beyond a reasonable doubt that such factor—aggravating factor exists.

Defendant renewed his objection to the trial court's instruction on "aggravating factor."

Defendant argues that the trial court's failure to define "aggravating factor" "implicitly asked [the jury] to make a decision based on no

more than their personal feelings and opinions about Inna's 15-week-old pregnancy." Defendant further argues that, because "the abortion issue" is "politically charged," a juror's opinion about it "could well color a juror's consideration of the non-statutory aggravating factor that the deceased had been pregnant."

"At the close of the evidence or at an earlier time directed by the judge, any party may tender written instructions." N.C. Gen. Stat. § 15A-1231(a) (2009). Our Supreme Court has recognized that, "such requested special instructions 'should be submitted in writing to the trial judge at or before the jury instruction conference.' " *State v. Augustine*, 359 N.C. 709, 729, 616 S.E.2d 515, 530 (2005) (internal citations omitted). The Supreme Court has also held that "a trial court did not err where it declined to give requested instructions that had not been submitted in writing." *Id.* (citations omitted).

In the case before us, Defendant requested that the trial court instruct the jury as to the definition of "aggravating factor." When asked for clarification, Defendant responded by asking the trial court: "Isn't there a definition in the statute of an aggravating factor?" The trial court did not know whether there was such a definition. Defendant did not submit a proposed instruction in writing to the trial court. Defendant submitted to this Court an addendum to the record on appeal containing a document titled "Jury Instructions Not Given[,]" which purports to define "aggravating factor." We note, however, that this instruction was not submitted to the trial court, in writing or otherwise. Because Defendant failed to submit a requested instruction in writing to the trial court, we hold that the trial court did not err by declining to instruct the jury as to a definition of "aggravating factor."

Mitigating Factors

[3] Defendant next argues that the trial court erred by failing to find certain mitigating factors. Specifically, Defendant contends that the trial court should have found as mitigating the following factor: that Defendant acted under strong provocation or that the relationship between Defendant and Inna was extenuating because of the uncontradicted evidence of Inna's infidelity.

N.C. Gen. Stat. § 15A-1340.16(a) states that a trial court "shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court." N.C.G.S. § 15A-1340.16(a) (2009). The trial court

is required to consider the mitigating factors set forth in N.C.G.S. § 15A-1340.16(e) and to make written findings of fact concerning these factors. *See State v. Johnson*, —— N.C. App. ——, ——, 674 S.E.2d 727, 731, *appeal dismissed* 363 N.C. 378, 679 S.E.2d 395 (2009). " 'A sentencing judge must find a statutory mitigating sentence factor if it is supported by a preponderance of the evidence. A mitigating factor is proven when the evidence is substantial, uncontradicted, and there is no reason to doubt its credibility.' " *Id.* (quoting *State v. Kemp*, 153 N.C. App. 231, 241, 569 S.E.2d 717, 723, *disc. rev. denied* 356 N.C. 441, 573 S.E.2d 158 (2002)). "A trial judge is given 'wide latitude in determining the existence of . . . mitigating factors,' and the trial court's failure to find a mitigating factor is error only when 'no other reasonable inferences can be drawn from the evidence.' " *State v. Norman*, 151 N.C. App. 100, 105-06, 564 S.E.2d 630, 634 (2002) (internal citations omitted).

Defendant argues the mitigating factor set forth in N.C.G.S. § 15A-1340.16(e)(8) that "[t]he defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating" applies to the facts before us, and that the trial court erred by failing to find this mitigating factor. N.C. Gen. Stat. § 15A-1340.16(e)(2007). Defendant relies on *State v. Mixion*, 110 N.C. App. 138, 429 S.E.2d 363, *disc. review denied*, 334 N.C. 437, 433 S.E.2d 183 (1993), to support his contention that he acted under strong provocation or that his relationship with Inna was otherwise extenuating. Our Court noted in *Mixion* that, though N.C.G.S. § 15A-1340.16(e)(8) is listed as one factor, each component must be analyzed separately. *Id.* at 152, 429 S.E.2d at 371. We begin with a determination of whether "the relationship between . . . [D]efendant and [Inna] was otherwise extenuating." N.C.G.S. § 1340.16(e)(8).

In *Mixion*, we held that a trial court did not err in failing to find an extenuating relationship on the following facts. The victim and the defendant's sister-in-law entered their house and found the victim's husband, the defendant. *Mixion*, 110 N.C. App. at 142, 429 S.E.2d at 365. The victim was angry with the defendant and shouted at him. *Id.* The victim then drew a pistol and brandished it at the defendant. *Id.* A struggle ensued and the defendant eventually shot the victim, killing her. *Id.* The defendant claimed that the marriage was " 'mutually stormy and difficult.' " *Mixion*, 110 N.C. App. at 151, 429 S.E.2d at 371. The son of the defendant and the victim testified that each parent was at fault. *Id.* The wrongs to the defendant done by the victim included that she: "[(1)] apparently shot a gun at [the] defendant dur-

ing their marriage[;] [(2)] falsely accused [the] defendant of having venereal disease[;] and [(3)] threatened to shoot [the] defendant [twice.]" *Id.*

In *Mixion*, we noted:

> An extenuating relationship should be found if circumstances show that part of the fault for a crime can be "morally shifted" from defendant to the victim.
>
> . . .
>
> Past difficulties in a marital relationship are not sufficient to support a finding of an extenuating relationship. In *State v. Bullard*, 79 N.C. App. 440, 339 S.E.2d 664 (1986), the Court stated that although the defendant and victim had been arguing over an extended period of time, this evidence did not compel a finding that they had an extenuating relationship, because this evidence did not "necessarily lessen the seriousness of the crime committed."

Id. at 151-52, 429 S.E.2d at 371 (internal citations omitted). So noting, we held that "we cannot conclusively determine that this mitigating factor exists." *Id.* at 152, 429 S.E.2d at 371.

Here, Defendant contends that Inna's "sexual infidelity and betrayal" were "far worse than just 'past difficulties[.]' " We disagree. The evidence at trial suggested that, at most, Inna repeatedly had extra-marital sexual relationships and that the couple repeatedly fought about that behavior. In light of the facts of Mixion, we are not persuaded that any of Inna's actions "necessarily lessen the seriousness of the crime committed." *Mixion*, 110 N.C. App. at 152, 429 S.E.2d at 371 (internal citations omitted). We therefore hold that the trial court did not err by failing to find as a mitigating factor an extenuating relationship between Inna and Defendant.

Defendant further argues that *Mixion* supports his contention that he acted under a strong provocation. We note that, in *Mixion*, the trial court apparently found that the defendant had acted under a strong provocation, though that point was discussed only in passing and was not the subject of the appeal. *Mixion*, 110 N.C. App. at 152, 429 S.E.2d at 371. Our Court has held that: "Strong provocation means the defendant did not act in a state of 'cool [] blood.' " *State v. Pelham*, 164 N.C. App. 70, 83, 595 S.E.2d 197, 206 (2004) (quoting *State v. Deese*, 127 N.C. App. 536, 538-39, 491 S.E.2d 682, 685 (1997)).

In *Deese*, we noted that "evidence tending to show that the victim threatened or challenged the defendant is relevant in determining the existence of provocation." *Deese*, 127 N.C. App. at 539, 491 S.E.2d at 685 (citations omitted). As with an "extenuating relationship," "[t]he legislature has provided this statutory mitigating factor to reduce a defendant's culpability when circumstances exist that 'morally shift part of the fault for a crime from the criminal to the victim.' " *Id.* (citations omitted).

In *Deese*, the victim and the defendant had a history of quarreling. *Id.* at 537, 491 S.E.2d at 683. The victim was the owner of the building in which the defendant lived and was checking the water meter. *Id.* The defendant confronted the victim, who threatened to " 'beat [the defendant's] [a–]' with a metal cane." *Id.* When the victim approached the defendant, the defendant went inside his apartment to retrieve a loaded shotgun. *Id.* The victim began to walk away towards his car, but when the defendant returned with the gun, the argument began again. *Id.*, 491 S.E.2d at 684. The victim approached the defendant with the metal cane raised and the defendant shot the victim, killing him. *Id.* at 537-38, 491 S.E.2d at 684.

In this case, there was no evidence suggesting that Inna physically threatened or challenged Defendant in any manner. The only threat or challenge she made to Defendant was the threat to commit further adultery and the threat to report him to law enforcement as an abuser. Considering our prior case law, and the facts of this case, we find no evidence which would " 'morally shift part of the fault for a crime from the criminal to the victim.' " *Id.* at 539, 491 S.E.2d at 685 (citations omitted). We therefore find that the trial court did not err by failing to find as a mitigating factor that Defendant acted under strong provocation.

No error.

Judges WYNN and BRYANT concur.

STATE OF NORTH CAROLINA v. DERRICK WHEELER

No. COA09-768

(Filed 19 January 2010)

1. Constitutional Law— right to counsel—discharge of appointed counsel—refused

The trial court did not abuse its discretion by denying defendant's motion to discharge his appointed counsel and represent himself where he had previously told the judge that he wanted his appointed attorney to take over and select the jury. Defendant had already discharged four or five appointed lawyers and the trial court made clear that defendant would not be permitted to discharge defense counsel again if defendant wanted the lawyer to conduct the jury selection.

2. Appeal and Error— plain error—not argued in brief—waived

Defendant waived appellate review of whether there was plain error in the trial court's failure to instruct the jury on a lesser included offense where defendant did not argue plain error in his brief.

3. Sentencing— three misdemeanors—sentence excessive

The trial court erred by sentencing defendant to 165 days in prison for three misdemeanors where the most serious conviction carried a maximum punishment of 75 days. Pursuant to N.C.G.S. § 15A-1340.22, the cumulative consecutive sentences for two or more misdemeanors shall not exceed twice the maximum sentence of the most serious offense.

4. Probation and Parole— probation—24 months—findings not sufficient

A sentence for three misdemeanors was remanded where the court placed defendant on probation for 24 months without making a finding that a term longer than 18 months was necessary. N.C.G.S. § 15A-1343.2(d).

Appeal by Defendant from judgments and commitment entered 17 October 2008 by Judge Thomas D. Haigwood in Superior Court, Pitt County. Heard in the Court of Appeals 2 December 2009.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

Russell J. Hollers III for Defendant-Appellant.

STEPHENS, Judge.

I. Factual Background and Procedural History

On 28 January 2008, a Pitt County Grand Jury returned bills of indictment against Defendant for the crimes of fleeing/eluding arrest with a motor vehicle, reckless driving, speeding, giving a false fire alarm, assault on a public officer, failure to heed a siren, driving left of center, improper passing, first degree kidnapping, assault on a female, and assault inflicting serious bodily injury. The record on appeal contains a handwritten document dated 16 September 2008, in which Defendant expressed his desire to represent himself. On 13 October 2008, Defendant signed a written waiver of counsel.[1]

This matter came on for trial during the 13 October 2008 Pitt County Superior Court criminal session, the Honorable Thomas D. Haigwood presiding. The trial court inquired of Defendant regarding his understanding of the nature of the charges against him, his right to the assistance of counsel, and the consequences of his decision to proceed without counsel. Defendant confirmed that he understood the charges against him and stated that he would like to proceed without counsel. Defendant signed a waiver of counsel form. The trial judge allowed Defendant's waiver of counsel and appointed Jeff Foster ("Mr. Foster") as stand-by counsel.

Prior to the full proceedings, Mr. Foster informed the trial judge that Defendant would like for him to select the jury. In response, the trial judge informed Defendant that

> you're going to have it one way or the other way. You're either going to have Mr. Foster represent you and be your lawyer or you're going to be—you're going to represent yourself and he's there to assist you, or you can ask him questions.
>
> But you can't have it both ways. So you need to tell me—I explained to you earlier in great detail that I will hold you to the same knowledge of the law and how you conduct yourself in this case just as I would any other member of this bar.

1. Neither the 16 September nor the 13 October 2008 documents contained in the record on appeal are file stamped.

The trial judge asked Defendant, "Now, tell me, do you want Mr. Foster to represent you or do you want to represent yourself?" Defendant responded, "I'll let [Mr. Foster] go ahead and take over. . . . I think that probably would be better right now because I'm really unprepared." The trial judge further explained to Defendant, "Now, you need to understand if I put him back in here representing you in this matter, I'm not going to permit you to discharge him. He's in it to the end." Defendant responded that he understood.

The day after jury selection, Defendant again tried to discharge Mr. Foster and represent himself. Defendant admitted that he had already discharged four or five attorneys prior to trial. As a result of his previous waiver of his right to represent himself, the trial judge denied Defendant's motion to discharge defense counsel.

At trial, the evidence presented by the State tended to show the following: On 11 January 2008, Delores Purvis ("Purvis") was working at Alliance One in Farmville, North Carolina, when she took a "lunch break" a little after 8:00 p.m. On her break, Purvis went to her vehicle which was parked in the employee parking lot to relax and listen to music. While sitting in her vehicle, Purvis saw Defendant's van driving into the parking lot. Defendant parked his van beside Purvis' vehicle, and exited his van and approached Purvis' vehicle. Defendant opened the driver's side door of Purvis' vehicle and asked Purvis for money. Purvis explained that she only had ten or fifteen dollars, and Defendant said that he needed more than that for gas. Purvis eventually closed her door, told Defendant she was leaving, and drove away.

Defendant followed Purvis in his van. Defendant pulled up behind Purvis and then suddenly swerved in front of Purvis' vehicle, forcing Purvis to stop suddenly in the middle of the two-lane street to avoid hitting Defendant. Defendant exited his van and walked over to the driver's side of Purvis' vehicle. Defendant again requested money from Purvis, and Purvis repeated her earlier answer that she only had ten to fifteen dollars. Defendant said that he needed more money, and he grabbed Purvis' arm and twisted it until it broke. Defendant reached into the car and attempted to grab Purvis' "fanny pack" which was sitting in the front passenger's seat. Defendant punched Purvis in the shoulder with a closed fist and kicked her left knee. Defendant finally grabbed the fanny pack from Purvis, returned to his van, and drove away toward Greenville, North Carolina.

Purvis was scared and unable to drive without the use of her broken arm, and she remained in her vehicle which was still parked

in the middle of the street. A woman driving a sports utility vehicle ("SUV") pulled up behind Purvis, and told her to turn her lights on because she had almost hit Purvis' vehicle. Purvis yelled for the woman to call the police, and the SUV drove away. Approximately ten to fifteen minutes after leaving, Defendant came back and parked his van on the opposite side of the road. Defendant "jumped out [of] the [van]" and asked for more money. Defendant hit Purvis in the shoulder again and kicked her, and Defendant tried to force Purvis out of the car by pulling on her injured arm. Defendant picked Purvis up, carried her toward his van, and placed Purvis in the front passenger seat. The woman in the SUV came back and parked a short distance behind Defendant's van. Purvis kicked open the passenger door of Defendant's van and ran to the woman's SUV and climbed into the back seat. Defendant approached the SUV, but returned to his van and drove away when he saw police lights approaching. Purvis was taken to the hospital, and her arm was placed in a cast for six to seven weeks.

Officer Brett Foust ("Foust"), a detective with the narcotics unit with the Pitt County Sheriff's Office, testified that he arrived on the scene in a marked sheriff's vehicle with his blue lights activated where Purvis' and Defendant's vehicles were stopped. Foust exited his vehicle, drew his gun, and yelled for Defendant to "[s]top" and "[g]et on the ground." Defendant ignored Foust's orders and left the scene in his van. Foust returned to his vehicle, followed Defendant, and advised on the radio that he was involved in a car chase. Foust followed Defendant's vehicle with his blue lights and siren turned on for approximately a mile and a half until Defendant made a sharp u-turn into a field on the left-hand side of the road and then continued driving on the opposite side of the road toward Greenville. Foust observed Defendant "carelessly and recklessly pass multiple vehicles in the double yellow line, passing them on the left[,]" and "almost strike other vehicles who were coming" in the other lane. Foust testified that the speed of the chase "[got] up in about the 90s[, but] most of the time seemed like [it was] staying in the mid-80s." The posted speed limit was 55 miles per hour for the stretch on which the chase occurred.

Deputy William A. Gibbs ("Gibbs") of the Pitt County Sheriff's Office joined the chase and initially traveled behind Defendant and Officer Foust with his blue lights and siren turned on. During the chase, "stop sticks" were thrown in the road in order to stop Defendant's vehicle. Defendant and Officer Foust drove their vehicles

over the stop sticks which deflated their tires. Gibbs became the lead police vehicle once Foust's tires were deflated and followed Defendant for approximately one mile. Defendant stopped his vehicle and Gibbs pulled in behind him. Defendant exited his vehicle, and Gibbs instructed him to get down on the ground. Gibbs repeated this instruction four or five times, but Defendant did not comply. Finally, a Farmville police officer helped get Defendant on the ground, at which point Gibbs was able to restrain Defendant with handcuffs. Gibbs testified that Defendant appeared to be intoxicated.

The evidence presented by Defendant tended to show the following: Defendant testified that he went to see Purvis at the Alliance One employee parking lot in order to tell her that he was leaving town for two to three weeks and that this made Purvis jealous because she thought he was going to see another woman. Defendant testified that he asked Purvis to follow him to a gas station so that she could use her credit card to pay for his gas. Defendant pulled into a gas station and expected Purvis to pull in behind him, but her car continued driving past the gas station. At that point, Defendant realized that his cell phone was in Purvis' vehicle, so Defendant got back inside his van to catch up to Purvis, and he pulled up beside her. Defendant asked Purvis if she had his phone and Purvis started to pull off. Defendant pulled in front of Purvis' vehicle, stopped, and exited his van. Defendant walked up to Purvis' door and asked for his cell phone. Purvis refused to give Defendant his cell phone. Defendant reached inside the vehicle to feel for his phone but it was not there. Defendant tried to take Purvis' keys to prevent her from leaving, and he felt Purvis scratching him. Defendant's reaction to being scratched caused Purvis to hit her hand on the door frame. At that point, a woman driving an SUV pulled up beside Purvis' vehicle and told them to turn on their lights because she had almost hit Purvis' vehicle. Purvis yelled for the woman to call 911. Defendant still could not find his cell phone, but he reached inside the vehicle and grabbed Purvis' fanny pack. Defendant got into his van and drove away.

Defendant looked inside the fanny pack and realized that he still did not have his cell phone, so he drove back to where Purvis' vehicle was stopped in the road. Defendant did not see Purvis' vehicle so he pulled over on the side of the road in the grass. Defendant was looking around for his cell phone when he felt a pain in his cheekbone, and he realized he was being hit in the face with keys. Defendant held Purvis to prevent her from hitting him again, and then the two agreed to leave together in Defendant's van. Defendant

helped Purvis into the van. The lady in the SUV returned and yelled for Purvis to run to her car. Purvis jumped out of the van and ran to the SUV. The driver of the SUV yelled that she was armed, and Defendant left the scene. Defendant testified that he did not see any police following him and that "[t]here wasn't no chase."

On 17 October 2008, the jury found Defendant guilty of felonious operation of a motor vehicle to elude arrest, guilty of giving a false fire alarm, guilty of false imprisonment, and guilty of assault inflicting serious injury. The trial court entered consecutive judgments on the verdicts, committed Defendant to the custody of the North Carolina Department of Correction for eight to ten months for eluding arrest, and ordered Defendant to pay $5,782.50 in restitution and attorney's fees. The trial court imposed a term of 75 days imprisonment for assault inflicting serious injury, 45 days for false imprisonment, and 45 days for giving a false fire alarm. The trial court suspended these sentences and followed Defendant's jail term with 24 months of supervised probation. Defendant gave notice of appeal from the judgments and commitment in open court.

II. Discussion

A. Waiver of Right to Represent Oneself

[1] Defendant argues that the trial court committed reversible error in denying his motion to have defense counsel removed and permit him to represent himself. The State contends that Defendant waived his right to self-representation when he told the trial judge that he wanted Mr. Foster to take over and select the jury. We are persuaded by the State's contention.

Our case law on the waiver of one's right to self-representation is limited. Our Court addressed this issue in *State v. Walters*, 182 N.C. App. 285, 641 S.E.2d 758 (2007), in which the State argued that the defendant had waived his right to self-representation by electing to proceed with his attorney after requesting to represent himself. *Id.* at 291, 641 S.E.2d at 761. This Court rejected the State's argument in *Walters* after finding that the defendant had timely asserted his right to self-representation when his case was called prior to jury selection and stated his dissatisfaction with his appointed counsel. *Id.* at 293, 641 S.E.2d at 762.

Our analysis in *Walters* relied heavily on the decision of the United States Court of Appeals for the Fourth Circuit in *United States v. Singleton*, 107 F.3d 1091 (4th Cir.), *cert. denied*, 522 U.S. 825, 139

L. Ed. 2d 41 (1997). We find the analysis in *Singleton* helpful in our consideration of the case *sub judice*, although we note that decisions from the Fourth Circuit are non-binding on this Court. In *Singleton*, defendant Singleton was represented by appointed counsel until the second day of Singleton's three-day trial. *Id.* at 1094. Defense counsel cross-examined 15 of the government's witnesses on the first day of trial. *Id.* On the second day, as defense counsel prepared to cross-examine the second witness of that day, Singleton notified the trial court that he was not satisfied with his attorney and wanted to participate personally in the cross-examination and in the closing argument. *Id.* The trial court denied Singleton's requests. *Id.* As defense counsel proceeded, Singleton interjected in an attempt to participate in his representation. *Id.* The trial court ruled that Singleton could not participate in the trial, and informed Singleton that "[i]f you decide you want to discharge [defense counsel], I will deal with that when it occurs." *Id.*

Singleton expressed his desire to discharge defense counsel. *Id.* The trial court allowed Singleton to discharge his attorney, but cautioned Singleton that he would not be permitted to both represent himself *and* have an attorney in an advisory role, instructing Singleton that, "You will either take it alone or you are not going to take it alone. I will not allow some hybrid." *Id.* Singleton decided to represent himself for the remainder of his trial, and was convicted of 16 of the 20 counts on which he was indicted. *Id.* at 1095.

On appeal, Singleton argued that the trial court failed to ensure that his waiver of counsel and decision to represent himself was made " 'knowingly and intelligently,' " or in the alternative, that the trial court "undermined his right of self-representation by refusing his request for a recess before beginning his representation of himself and by denying him [his appointed counsel's] assistance in an advisory role." *Id.* In its analysis, the Fourth Circuit noted that "[a]s with the right to counsel, a defendant may waive his right to self-representation." *Id.* at 1096. "In order to preserve both the right to counsel and the right to self-representation, a trial court must proceed with care in evaluating a defendant's expressed desire to forgo the representation of counsel and conduct his own defense." *Id.*

> ["]A trial court evaluating a defendant's request to represent himself must traverse . . . a thin line between improperly allowing the defendant to proceed *pro se*, thereby violating his right to counsel, and improperly having the defendant proceed with

> counsel, thereby violating his right to self-representation. A skillful defendant could manipulate this dilemma to create reversible error.["]

Id. (quoting *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir. 1995) (en banc) (internal quotation marks and citations omitted)). "Of the two rights, however, the right to counsel is preeminent and hence, the default position." *Id.*

> Because of the legal preeminence of the right to representation by counsel and the need to maintain judicial order, we have held that while the right to counsel may be waived only expressly, knowingly, and intelligently, "the right to self-representation can be waived by failure timely to assert it, or by subsequent conduct giving the appearance of uncertainty." [*United States v. Gillis*, 773 F.2d 549, 559 (4th Cir. 1985) (citations omitted)]. Consequently, if a defendant proceeds to trial with counsel and asserts his right to self-representation only after trial has begun, that right may have been waived, and its exercise may be denied, limited, or conditioned. Accordingly, after trial has begun with counsel, the decision whether to allow the defendant to proceed *pro se* rests in the sound discretion of the trial court.

Id.

In *Singleton*, the Fourth Circuit held that the trial court did not abuse its discretion in limiting Singleton's representation to either self-representation or by appointed counsel and refusing to permit any "hybrid" representation. *Id.* The Fourth Circuit noted that Singleton did not express his desire to waive counsel until the second day of his three-day trial and the jury and witnesses were waiting expectantly. *Id.* at 1099. Thus, the trial court was under no obligation to allow Singleton to begin representing himself mid-trial. *Id.*

We find the Fourth Circuit's analysis in *Singleton* informative and instructive in our consideration of the present case. Here, before trial, Defendant made a knowing and intelligent waiver of his right to the assistance of counsel and informed the trial court that he wanted to proceed *pro se*. Thereafter, Defendant informed the trial court of his desire for appointed counsel to select the jury. The trial court allowed Defendant's request but expressly informed Defendant that he would be held to his decision and he would not be permitted to discharge defense counsel again. Defendant accepted the trial court's conditions and stated that he wished to proceed with counsel. After the

jury had been selected and impaneled and trial had begun, Defendant once again attempted to discharge defense counsel. The trial court denied Defendant's request, noting that Defendant had already discharged four or five lawyers and that Defendant had been uncooperative with appointed counsel.

In light of the timing of Defendant's request and Defendant's repeated attempts to frustrate the efforts of appointed counsel, and in considering the Fourth Circuit's decision in *Singleton*, we hold that the trial court did not abuse its discretion in denying Defendant's motion to discharge counsel and represent himself. *See United States v. Lawrence*, 605 F.2d 1321, 1322-25 (4th Cir. 1979) (where represented defendant first asserts right to self-representation only after jury had been selected though not sworn, decision to allow *pro se* representation rests in sound discretion of trial court); *United States v. Dunlap*, 577 F.2d 867, 868 (4th Cir. 1978) (holding that a defendant does not have an absolute right to dismiss counsel and conduct his own defense after trial has begun because of need "to minimize disruptions, to avoid inconvenience and delay, to maintain continuity, and to avoid confusing the jury"). The trial court made it clear to Defendant that he would not be permitted to discharge defense counsel again if he decided he wanted Mr. Foster to conduct the jury selection. Defendant informed the trial court that he understood and wanted Mr. Foster to take over. Defendant's argument that he was denied his right to self-representation is overruled.

B. Jury Instructions

[2] Defendant next argues that the trial court erred by failing to instruct the jury on the lesser included offense of misdemeanor fleeing to elude arrest.

The trial court instructed the jury on felonious operation of a motor vehicle to elude arrest, but did not instruct on the lesser included offense of misdemeanor fleeing to elude arrest. Defendant failed to object to this instruction at trial, and is thus limited to plain error review. *See* N.C. R. App. P. 10(c)(4). In criminal trials, plain error review is available for challenges to jury instructions and evidentiary issues. *Dogwood Dev. and Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008).

> Although in his assignment of error he "specifically and distinctly contended" pursuant to Rule 10(c)(4) of the Rules of Appellate Procedure that the error amounted to plain error, defendant

> failed to argue in his brief that the trial court's instruction amounted to plain error. *See* N.C. R. App. P. 28(a), (b)(5). Accordingly, defendant has waived appellate review of this assignment of error.

State v. Nobles, 350 N.C. 483, 514-15, 515 S.E.2d 885, 904 (1999). Defendant's argument is dismissed.

C. Sentencing for Three Consecutive Terms for Misdemeanors

[3] Defendant also argues that the trial court erroneously sentenced him to three consecutive terms for misdemeanor offenses. The State concedes that this portion of Defendant's sentence was entered in error.

Pursuant to N.C. Gen. Stat. § 15A-1340.22 (2007), if a trial court imposes consecutive sentences for two or more misdemeanors, "the cumulative length of the sentences of imprisonment shall not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense." Here, the trial court entered three consecutive misdemeanor judgments against Defendant for assault, false imprisonment, and false fire alarm. The trial court suspended the sentences and placed Defendant on probation for a total of 165 days.

Defendant is a Level II offender for misdemeanor sentences. Defendant's most serious misdemeanor conviction was for assault inflicting serious injury, which is an A1 misdemeanor that carries a maximum punishment for a Level II offender of 75 days. N.C. Gen. Stat. § 15A-1340.23(c) (2007). Thus, the trial court could only impose consecutive sentences totaling twice the maximum sentence for assault inflicting serious injury, or 150 days. Accordingly, the trial court erred in imposing consecutive sentences totaling 165 days. This portion of the trial court's commitment is remanded for resentencing.

D. Supervised Sentence for Probation

[4] In his final argument, Defendant contends that the trial court incorrectly placed him on supervised probation for 24 months without making a finding that the term of probation was necessary. The State also concedes that this portion of Defendant's sentence should be remanded.

Pursuant to N.C. Gen. Stat. § 15A-1343.2(d), "[u]nless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for of-

fenders sentenced under Article 81B shall be . . . [f]or misdemeanants sentenced to community punishment, not less than six nor more than 18 months[.]" N.C. Gen. Stat. § 15A-1343.2(d) (2007). Here, the trial court entered consecutive judgments for assault inflicting serious injury, false imprisonment, and false fire alarm. The trial court suspended these sentences and placed Defendant on supervised probation for 24 months, to begin after he served his active sentence. However, the trial court did not make specific findings that a longer period of probation was necessary. Accordingly, this portion of Defendant's sentence is remanded for further findings pursuant to N.C. Gen. Stat. § 15A-1343.2.

NO ERROR in part, REMANDED in part.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA v. CURLEY JACOBS AND BRUCE LEE McMILLIAN

No. COA04-541-3

(Filed 19 January 2010)

1. Sentencing— consolidated charges—most serious conviction—aggravating factors

The trial court erred in sentencing defendant in the aggravated range for burglary when the court did not find any aggravating factors for burglary. As the trial court consolidated defendant's convictions for burglary, robbery, and impersonating a law enforcement officer, and the trial court was required to enter a sentence for the most serious offense of a set of consolidated offenses, the trial court was limited to sentencing defendant for the burglary conviction. The trial court's finding of factors aggravating defendant's conviction of impersonating a law enforcement officer was erroneous.

2. Sentencing— aggravating factors—not harmless error

In a prosecution for robbery with a dangerous weapon, impersonating a law enforcement officer, first-degree burglary, and second-degree kidnapping, the trial court's finding of two aggravating factors was not harmless error. Evidence of the aggravating factors was not so overwhelming nor uncontroverted that

any rational finder of fact would have found these aggravating factors beyond a reasonable doubt.

On remand from the North Carolina Supreme Court in 363 N.C. 576, 681 S.E.2d 339 (2009) (*per curiam*), vacating and remanding the decision of the Court of Appeals, *State v. Jacobs*, —— N.C. App. ——, 668 S.E.2d 346 (2008), for reconsideration of the issue of harmless error consistent with *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, *Blackwell v. North Carolina*, 550 U.S. 948, 167 L. Ed. 2d 1114 (2007). Appeal by defendants from judgments entered 29 September 2003 by Judge Gary L. Locklear in Robeson County Superior Court. Originally heard in the Court of Appeals 3 March 2005.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

C. Scott Holmes for defendant Curley Jacobs.

BRYANT, Judge.

On 4 November 2002, defendant Curley Jacobs was indicted by the grand jury in Robeson County for robbery with a dangerous weapon, impersonating a law enforcement officer, first-degree burglary, and two counts of second-degree kidnapping. Defendant Jacobs was convicted of all charges by a jury on 29 September 2003. The trial court consolidated the two kidnapping offenses for sentencing and found four statutory aggravating factors pursuant to N.C. Gen. Stat. § 15A-1340.16: that Jacobs (I) induced others to participate in the commission of the offense, (II) joined with more than one other person in committing the offense and was not charged with conspiracy, (III) took advantage of a position of trust or confidence to commit the offense, and (IV) committed the offenses against a physically infirm victim. The trial court also consolidated the burglary, robbery and impersonating offenses ("the burglary offenses") and found the same four factors in aggravation of the offense of impersonating a law enforcement officer. The trial court then sentenced Jacobs in the aggravated range on each of the consolidated judgments, with the following sentences to run consecutively: 36 to 53 months for the two second-degree kidnapping counts and 95 to 123 months for the consolidated offenses of first-degree burglary, impersonating a law enforcement officer, and robbery with a dangerous weapon.

This case comes before us on remand from the North Carolina Supreme Court for reconsideration of the issue of harmless error in the trial court's aggravation of Jacobs' sentences under *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, *Blackwell v. North Carolina*, 550 U.S. 948, 167 L. Ed. 2d 1114 (2007). For the reasons discussed below, we remand for resentencing.

Facts

The evidence presented at trial tended to show the following: Early on the morning of 30 July 2002, defendants Jacobs and McMillian, along with William Robert Parker, Sharrone Brayboy, and George Allen Locklear drove to the home of Lee Otis Chavis in Shannon, North Carolina. Jacobs and McMillian remained in their vehicles, while Parker and Brayboy knocked on Chavis' door. When Chavis opened the door, Parker and Brayboy were standing on the front steps wearing "real thin blazers" bearing the letters "DEA" and "badge[s]" on their belts "like a detective would wear." In addition, Parker had a "chrome looking" handgun, while Brayboy carried a double-barreled shotgun. Parker and Brayboy told Chavis that they were looking for him, and Chavis asked to see the warrant. Brayboy responded that if Chavis did not open the door, he would be shot. Parker and Brayboy then entered the home, forced Chavis to the floor, and bound his hands behind his back with plastic handcuffs. Parker and Brayboy also brought Chavis' wife, Goldie, into the living room and bound her hands behind her back. Parker and Brayboy then searched the home and found Chavis' son, Benson Chavis, in a back bedroom. Parker and Brayboy also bound Benson's hands behind his back and brought him into the living room.

As Parker and Brayboy were "tearing up everything in the bedroom[,]" McMillian entered the residence. Parker and Brayboy called McMillian "Sarge," and they informed the Chavises that "they were going to need to talk to him to see what they were going to do" and that "there was [sic] some more guys across the road raiding a house[.]" After Parker, Brayboy, and McMillian left the home, the Chavises freed themselves and discovered that the three men had taken several firearms and approximately $1,700.00 in cash.

After leaving the Chavis residence, Parker, Brayboy, and McMillian joined Jacobs and Locklear, who were waiting outside. The five men left in two vehicles, one of which was an older model Chevrolet Caprice that had previously been used by the Robeson County Sheriff's Department. At a subsequent meeting at Locklear's

home, the five men divided Chavis' firearms and cash, as well as crystal methamphetamine also taken from the Chavis residence.

Robeson County Sheriff's Department Detective Reggie Strickland investigated the incident and subsequently arrested Brayboy on 6 August 2002. Following an interview with Brayboy, Detective Strickland arrested Parker, whose statements then led to Jacobs' arrest on 8 August 2002. McMillian turned himself in to law enforcement officials on 12 August 2002.

At sentencing, the trial court, lacking the benefit of subsequent federal and State case law, erred in finding the following four aggravating factors rather than submitting them to the jury: that defendant Jacobs (I) induced others to participate in the commission of the offense, (II) joined with more than one other person in committing the offense and was not charged with conspiracy, (III) took advantage of a position of trust or confidence to commit the offense, and (IV) committed the offenses against a physically infirm victim. On remand, we now consider whether the trial court's error was harmless. Because we conclude that the trial court's findings of the first (I) and fourth (IV) aggravating factors were not harmless, we remand for resentencing on the kidnapping offenses. In addition, because the trial court erred in making findings in aggravation and mitigation of impersonating a law enforcement officer rather than burglary, the most serious of the second set of consolidated offenses, we remand for resentencing on the burglary offenses as well. We begin our analysis with this set of offenses.

The Consolidated Burglary Offenses

[1] "[I]n situations where a defendant is convicted of two or more offenses, the General Assembly has given the trial court discretion to consolidate the offenses into a single judgment." *State v. Tucker*, 357 N.C. 633, 636, 588 S.E.2d 853, 855 (2003), *cert. denied*, *Tucker v. Hardy*, 552 U.S. 1118, 169 L. Ed. 2d 762 (2008). Our State's Structured Sentencing Act provides, in pertinent part:

> The judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense, and its minimum sentence of imprisonment shall be within the ranges specified for that class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment.

N.C. Gen. Stat. § 15A-1340.15(b) (2001).

Thus, when separate offenses of different class levels are consolidated for judgment, the trial judge is required to enter a sentence for the conviction at the highest class. *Id.* "The trial court may, however, depart from the appropriate sentencing guidelines for the most serious offense upon finding that aggravating or mitigating factors exist." *Tucker*, 357 N.C. at 637, 588 S.E.2d at 855 (citing N.C.G.S. § 15A-1340.16(b)). "Since the trial judge is required by the Structured Sentencing Act to enter judgment on a sentence for the most serious offense in a consolidated judgment, aggravating factors applied to the sentence for a consolidated judgment will only apply to the most serious offense in that judgment." *Id.*

Here, our review of the record reveals a form entitled "Felony Judgment Findings of Aggravating and Mitigating Factors" ("the findings form") which lists the aggravating and mitigating factors found by the trial court. The findings form for case file number 02 CRS 055305 (the consolidated burglary, robbery and impersonating offenses) lists the offense to which aggravating and mitigating factors were applied as "Impersonate Law Enforcement (M)". In contrast, in file number 02 CRS 055302 (the kidnapping offenses), the trial court correctly listed the offense as second-degree kidnapping on the findings form. This suggests that the trial court made its findings of aggravating and mitigating factors in relation to the kidnapping and impersonating offenses, but not the burglary charge. In addition, the trial transcript reveals that during its oral discussion of the aggravators and mitigators, the trial court begins by stating that Jacobs had been found guilty of "the file numbers previously read into the record." The file numbers for all of the offenses had previously been read into the record. The trial court, however, did not state to which charges the findings applied and sometimes referred to aggravation of "this crime", suggesting that it was focused on only a single offense. Thus, it appears the trial court found aggravating and mitigating factors in the commission of the misdemeanor of impersonating a law enforcement officer, but made no findings in regard to burglary, the most serious offense of that set of consolidated offenses. Because N.C.G.S. § 15A-1340.15(b) requires that the judge enter sentence for the most serious of a set of offenses consolidated for judgment, the trial court was limited to sentencing Jacobs for the burglary charge, an offense for which it found no aggravating or mitigating factors. *See id.* Thus, the trial court erred in sentencing Jacobs in the aggravated range for burglary, when it did not find any aggravating factors in regard to that offense. We remand to the trial court for a new sentencing hearing for the con-

solidated offenses of first-degree burglary, robbery with a dangerous weapon, and impersonating a law enforcement officer.

Despite this conclusion, however, and in light of the prolonged procedural history of this case, we elect to conduct the required harmless error review of the four aggravating factors in relation to both the burglary and the kidnapping offenses. Because the same four aggravating factors were found for each set of consolidated offenses and were based on the same evidence, our harmless error analysis is the same for the burglary and kidnapping offenses.

Harmless Error Review

[2] In *Blakely v. Washington*, 542 U.S. 296, 304-05, 159 L. Ed. 2d 403, 414-15 (2004), the United States Supreme Court held that a defendant's right to trial by jury under the Sixth Amendment to the United States Constitution is violated when a trial judge sentences a defendant beyond the statutory maximum based on aggravating factors found by the trial judge rather than the jury. Subsequently, the United States Supreme Court held that so-called *Blakely* error was subject to federal harmless error analysis. *Washington v. Recuenco*, 548 U.S. 212, 221-22, 165 L. Ed. 2d 466, 476-77 (2006). The North Carolina Supreme Court, applying *Blakely* and *Recuenco* to our State's Structured Sentencing Act, has agreed that *Blakely* error is subject to harmless error analysis. *Blackwell*, 361 N.C. at 42, 638 S.E.2d at 453.

In conducting harmless error review under *Blackwell*,

> we must determine from the record whether the evidence against the defendant was so "overwhelming" and "uncontroverted" that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt. The defendant may not avoid a conclusion that evidence of an aggravating factor is "uncontroverted" by merely raising an objection at trial. Instead, the defendant must bring forth facts contesting the omitted element, and must have raised evidence sufficient to support a contrary finding.

Id. at 49-50, 638 S.E.2d at 458 (internal citations and quotation marks omitted). Therefore, we now consider the evidence presented which might support or contest each of the four statutory aggravating factors found by the trial court.

I

We begin by considering whether the evidence that Jacobs "induced others to participate in the commission of the offense" was so overwhelming and uncontroverted that the jury would have found this aggravating factor beyond a reasonable doubt. N.C.G.S. § 15A-1340.16(d)(1) (2009). We conclude that the evidence on this issue was neither overwhelming nor uncontroverted.

During sentencing, the State suggested the evidence was that Jacobs "was a dominant player and planning player in this activity." However, the defense argued that Parker's testimony contradicted this contention. At trial, Parker testified that he planned the crimes: "I went to a house in Shannon. I was told a drug dealer stayed there, and I plotted it out and figured out what to do about robbing the man." Parker went on to say that "[n]obody really picked [the house,]" but that Parker had been there previously with Jacobs to buy drugs. Parker also stated that he had brought up the idea of robbery and questioned Jacobs about the house and the man who lived there. Parker was asked directly whether Jacobs planned the crime and replied: "I can't say that [Jacobs] planned it because it's not—it ain't like that. I took my part in it, I'm the one that had to do the planning for the thing. I ran the show." Finally, Parker stated that he got everyone ready to go and commit the crimes and that he "was in charge." The trial court acknowledged the conflict in the evidence when finding this aggravating factor: "Factor 1(a), induced others to participate, *in spite of the William Parker testimony*, such as that [sic]. It's undisputed that—well, now it's undisputed that Mr. Jacobs kind of picked out the house and such as that [sic], knew the folks." (Emphasis added).

Based on Parker's testimony, we cannot conclude that the evidence that Jacobs induced others to commit the crimes was "so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Blackwell*, 361 N.C. at 49, 638 S.E.2d at 458. The evidence could have supported a determination by the jury that Parker induced Jacobs and the others into committing these crimes and that Jacobs did no more than answer Parker's questions and go along with Parker's plan. Thus, the trial court's error in finding this factor was not harmless and Jacobs is entitled to a new sentencing hearing.

Where there is error in the finding of one aggravating factor, we need not consider any remaining aggravating factors, but rather must

remand for resentencing. *State v. Hurt*, 361 N.C. 325, 332, 643 S.E.2d 915, 919 (2007). However, out of an abundance of caution and as a guide to the trial court, we will conduct harmless error analysis of each of the remaining three aggravating factors as well.

II

We next examine whether the evidence that Jacobs "joined with more than one other person in committing the offense and was not charged with committing a conspiracy" was so overwhelming and uncontroverted that the jury would have found this aggravating factor beyond a reasonable doubt. N.C.G.S. § 15A-1340.16(d)(2). We conclude that the evidence on this issue was overwhelming and uncontroverted.

Jacobs was not charged with conspiracy and all the testimony was that this crime involved Jacobs and four other men. The record indicates that while Jacobs' specific role in the crimes was contested, the evidence that he was involved at some level was overwhelming and would not support a contrary finding. *Blackwell*, 361 N.C. at 49-50, 638 S.E.2d at 458. Because we conclude that "a rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt[,]" the trial court's error in finding this aggravating factor was harmless. *Id.*

III

We also examine whether the evidence that Jacobs "took advantage of a position of trust" in committing these crimes was so overwhelming and uncontroverted that the jury would have found this aggravating factor beyond a reasonable doubt. N.C.G.S. § 15A-1340.16(d)(15). We conclude that the evidence on this issue was overwhelming and uncontroverted and, therefore, any error was harmless.

Jacobs has argued that the trial court erred in finding this aggravating factor because the evidence tended to show that he himself never dressed as a law enforcement officer or was even seen by the victims during the robbery and, thus, he could not have taken advantage of their trust. However, Jacobs was charged with impersonating a law enforcement officer under a theory of acting in concert and the jury convicted him of that charge. The evidence that Parker and Brayboy dressed as law enforcement officers in order to deceive the victims and win their confidence was uncontroverted and overwhelming. The trial court's error in finding this aggravating factor was harmless.

IV

Finally, we consider whether the evidence that victim Chavis was "physically infirm" was so overwhelming and uncontroverted that the jury would have found this aggravating factor beyond a reasonable doubt. N.C.G.S. § 15A-1340.16(d)(11). We conclude that the evidence on this issue was not overwhelming and uncontroverted, and in turn, the trial court's error in making this finding was not harmless.

The policy supporting this statutory aggravating factor is to "discourage wrongdoers from taking advantage of a victim because of the victim's young or old age or infirmity." *State v. Mitchell*, 62 N.C. App. 21, 29, 302 S.E.2d 265, 270 (1983). Our courts have recognized two different ways in which a criminal may "take advantage" of the age of a victim.

> First, he may "target" the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Or the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend himself.

State v. Thompson, 318 N.C. 395, 398, 348 S.E.2d 798, 800 (1986); *see also State v. Rios*, 322 N.C. 596, 599, 369 S.E.2d 576, 578 (1988); *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997). "Age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person." *State v. Hines*, 314 N.C. 522, 525, 335 S.E.2d 6, 8 (1985). Although these cases focus on age, we believe their reasoning applies equally to physical infirmity, the vulnerability the trial court found here.

Chavis testified that he was on disability, had suffered two major heart attacks and undergone bypass surgery, and had diabetes and high blood pressure. Evidence also indicated that Jacobs had known Chavis for some time and according to Parker "knew everything about the man." It would be reasonable for a jury to believe that Jacobs knew of Chavis' poor health and infirmity. However, to properly find this aggravating factor, we must determine whether uncontroverted and overwhelming evidence supports the theory that Jacobs chose Chavis as a victim because of his infirmity or that Jacobs took advantage of Chavis' infirmity during the burglary and

kidnapping because he knew Chavis was unlikely to effectively intervene or defend himself.

There is no evidence, much less uncontroverted and overwhelming evidence, that Chavis' infirmity played any role in his selection as a victim. Parker testified that he chose the house to rob and did so because he believed a drug dealer lived there and that there would be drugs and cash on hand. Parker stated that Jacobs had been in Chavis' home a few days before the crimes and had seen money in Chavis' drawer. All of the evidence suggests that Chavis was chosen as a victim because he was believed to keep money and drugs in his home, not because he was infirm.

Nor was there evidence that anyone took advantage of Chavis' physical infirmity during the kidnapping and robbery. Testimony indicates that Chavis was treated no differently than the two other victims who were not alleged to be physically infirm. The decision to dress as law enforcement officers suggests that Jacobs and his criminal cohorts planned to rely on trickery rather than physical force to perpetrate their crimes against Chavis. Nothing about Chavis' physical infirmity made him more likely to fall for this masquerade.

Given the lack of evidence that Jacobs took advantage of Chavis' infirmity, we cannot conclude that a rational jury would have found this aggravating factor beyond a reasonable doubt. Thus, the trial court's error in finding this factor was not harmless.

Conclusion

The trial court erred in making findings in mitigation and aggravation of the lesser offense of impersonating a law enforcement officer rather than burglary, the most serious of the consolidated offenses, and further erred in sentencing Jacobs in the aggravated range for the consolidated burglary offenses. The trial court also erred per *Blakely* in finding aggravating factors rather than submitting them to the jury. Because we cannot conclude that a rational fact-finder would have found aggravating factors I and IV beyond a reasonable doubt, the trial court's errors were not harmless, and Jacobs is entitled to a new sentencing hearing.

Remanded for a new sentencing hearing.

Judges STEPHENS and HUNTER, Robert N., concur.

BURTON v. WILLIAMS

[202 N.C. App. 81 (2010)]

LUTHER G. BURTON, ADMINISTRATOR OF THE ESTATE OF WALTER NICKS BURTON, SR., PLAINTIFF v. TONY A. WILLIAMS, DEFENDANT

No. COA09-582

(Filed 19 January 2010)

Release— directed verdict in favor of party with burden of proof—documentary evidence

The trial court properly directed verdict in favor of plaintiff despite the fact that plaintiff had the burden of proof at trial because plaintiff established his claim that the release was unsupported by consideration through documentary evidence, which the parties stipulated as being genuine and authentic. Further, defendant made no argument at trial or on appeal that the release was, in fact, supported by consideration. Defendant failed to cite authority, and none was found, suggesting that a notary public's acknowledgment was equivalent to a party's execution of an instrument under seal.

Appeal by defendant from order entered 2 October 2008 by Judge Kenneth C. Titus in Durham County Superior Court. Heard in the Court of Appeals 4 November 2009.

Woodruff, Reece & Fortner, by Gordon C. Woodruff, for plaintiff-appellee.

Ta-Letta Bryant Saunders for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Tony A. Williams appeals from the trial court's directed verdict in favor of plaintiff Luther G. Burton, the administrator of the estate of Walter Nicks Burton, Sr. Defendant's principal argument is that the trial court violated his constitutional right to a jury trial by granting plaintiff's motion for a directed verdict at the close of plaintiff's evidence because plaintiff was the party with the burden of proof at trial. Our Supreme Court, however, has held that the right to a jury trial is not absolute and is predicated on a preliminary determination by the trial court as to whether there exist genuine issues of fact and questions regarding the credibility of the evidence to be submitted to the jury. Because plaintiff established his claim through documentary evidence, which the parties stipulated was authentic and correct, the trial court properly directed the ver-

dict in favor of plaintiff despite plaintiff having the burden of proof at trial.

Facts and Procedural History

On 20 February 1998, Mr. Burton and his wife Ruth Inez P. Burton (both now deceased) sold their home to defendant, providing owner-financing for $160,000.00 of the $185,000.00 purchase price. The Burtons conveyed the real estate to defendant by general warranty deed, which was secured by a purchase money deed of trust in the amount of $160,000.00. Both the general warranty deed and deed of trust were recorded. Defendant gave a promissory note to Mr. Burton, in which defendant agreed to pay $160,000.00 at 7% interest in 151 monthly payments of $1,240.48.

Due to Mr. Burton's declining health, he executed a power of attorney on 9 March 2005, making plaintiff, his son, his attorney-in-fact. On 7 September 2005, defendant and Mr. Burton executed a promissory note addendum, which continued the monthly payments of $1,240.48 until 1 March 2018. In addition to the addendum, they both signed a payment agreement release on 8 September 2005 that provided that if Mr. Burton died prior to defendant completely repaying the promissory note, then the note became null and void and defendant would be "relieved of any and all remaining financial obligations to or claims by the estate, beneficiaries, creditors, heirs, or assignees of [Mr. Burton]." The addendum and release were recorded on 3 February 2006.

Mr. Burton moved to a nursing home after brain surgery in late 2006. Plaintiff found the release while cleaning out his father's home in April 2007. Plaintiff, as his father's attorney-in-fact, filed suit in Johnston County Superior Court, asserting that the addendum and release were void and unenforceable because (1) Mr. Burton lacked the mental capacity to assent to the addendum and release at the time of their execution; (2) they were procured through undue influence and duress; (3) they were procured through fraud; and (4) they were unsupported by consideration. Plaintiff sought to have the addendum and release stricken from the public record. Plaintiff also asserted claims for punitive damages and attorney's fees.

Defendant filed an answer generally denying plaintiff's claims. Mr. Burton died on 7 July 2007, and plaintiff was substituted as the administrator of his estate by order entered 15 October 2007. By another order entered 15 October 2007, the action was removed to Durham County, where the property is located. Plaintiff filed a notice

of *lis pendens* on 10 March 2008 and defendant filed a motion to set it aside on 19 March 2008. Defendant also moved for summary judgment. On 16 May 2008, plaintiff filed a motion to amend the complaint asserting a claim for breach of fiduciary duty and requesting imposition of a constructive trust on the property. After conducting a hearing on 27 May 2008 regarding the outstanding motions in the case, the trial court entered an order on 18 August 2008 (1) denying defendant's motion for summary judgment; (2) denying defendant's motion to set aside plaintiff's *lis pendens*; and (3) allowing plaintiff's motion to amend his complaint.

Prior to trial, both plaintiff and defendant filed motions *in limine* to exclude any testimony coming under the Dead Man's Statute, which the trial court granted. The jury trial began on 16 September 2008, and at the close of plaintiff's evidence, both plaintiff and defendant moved for directed verdicts. The next day, the trial court denied defendant's motion but granted plaintiff's on the ground that the release was void and unenforceable for lack of consideration. On 2 October 2008, the trial court entered a judgment and order reflecting its rulings and directing the verdict in favor of plaintiff. Defendant moved to stay the order of directed verdict and the trial court denied the motion. Defendant's motion for reconsideration was also denied. Defendant timely appealed to this Court.

Discussion

Defendant first argues that the trial court erred by directing a verdict in favor of plaintiff on the issue of whether the release was supported by consideration when plaintiff had the burden of proof on this issue at trial. Defendant maintains that his constitutional right under N.C. Const. art. I, § 25 to a jury trial was violated because, by granting plaintiff's motion for a directed verdict at the close of plaintiff's evidence, the trial court "usurped the jury's responsibility" by "prevent[ing] him from presenting evidence and calling witnesses."

Contrary to defendant's contention, however, our Supreme Court, in addressing whether a verdict may properly be directed in favor of the party with the burden of proof, has held that "[t]he constitutional right to trial by jury is not absolute; rather, it is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact and credibility which require submission to the jury." *Bank v. Burnette*, 297 N.C. 524, 537, 256 S.E.2d 388, 396 (1979) (internal citation omitted). The Court "stressed" that "there are neither constitutional nor procedural impediments to directing a verdict for the party with the burden of proof where *the credibility of [the]*

movant's evidence is manifest as a matter of law." *Id.* The Court explained that "if the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn[,]" it is proper to direct the verdict for the proponent notwithstanding a party's right to a jury trial. *Id.* at 536, 256 S.E.2d at 395.

Thus the dispositive issue on appeal is whether, under the facts of this case, it was proper for the trial court to grant plaintiff's motion for a directed verdict at the close of plaintiff's evidence, plaintiff having the burden of proof on his claim that the release was not supported by consideration. When a party moves for a directed verdict, the trial court must determine

> whether the evidence is sufficient to go to the jury. In passing upon such motion the court must consider the evidence in the light most favorable to the non-movant. That is, the evidence in favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor. It is only when the evidence is insufficient to support a verdict in the non-movant's favor that the motion should be granted.

Dockery v. Hocutt, 357 N.C. 210, 216-17, 581 S.E.2d 431, 436 (2003) (internal citation and quotation marks omitted).

While not unconstitutional, it is ordinarily not appropriate to direct a verdict in favor of the party with the burden of proof. *See Burnette*, 297 N.C. at 538, 256 S.E.2d at 396 (cautioning that "instances where credibility is manifest will be rare, and courts should exercise restraint in removing the issue of credibility from the jury"). A directed verdict in favor of the party with the burden of proof is proper, however, " 'when the proponent has established a clear and uncontradicted *prima facie* case and the credibility of [the proponent's] evidence is manifest as a matter of law.' " *Town of Highlands v. Edwards*, 144 N.C. App. 363, 366, 548 S.E.2d 764, 766 (quoting *Homeland, Inc. v. Backer*, 78 N.C. App. 477, 481, 337 S.E.2d 114, 116 (1985), *disc. review denied*, 316 N.C. 377, 342 S.E.2d 896 (1986)), *disc. review denied*, 354 N.C. 74, 553 S.E.2d 212 (2001); *accord Smith v. Carolina Coach Co.*, 120 N.C. App. 106, 109-10, 461 S.E.2d 362, 364 (1995) (stating conversely that a directed verdict for proponent is not improper where proponent's right to recovery does not depend on credibility of proponent's evidence and "pleadings, evidence, and stipulations show that there is no issue of genuine fact for jury consideration"). Although the determination of whether the credibility of

the proponent's evidence is established as a matter of law "depends on the evidence in each case[,]" there are three "recurrent situations" in which it may be established: (1) where the "non-movant establishes [the] proponent's case by admitting the truth of the basic facts upon which the claim of [the] proponent rests"; (2) where "the controlling evidence is documentary and [the] non-movant does not deny the authenticity or correctness of the documents"; or (3) where "there are only latent doubts as to the credibility of oral testimony and the opposing party has failed to point to specific areas of impeachment and contradictions." *Burnette*, 297 N.C. at 537-38, 256 S.E.2d at 396 (citations and quotation marks omitted).

Here, the trial court determined that this case presented the second situation, noting that by stipulating to the evidence to be presented at trial, "everyone has conceded that [the release] is the document that is the basis of the agreement and as a matter of law, it is not a valid contract, there being absolutely no consideration specified . . . ." The trial court further observed that "[b]ased on [the parties'] stipulations as to the exhibits, there's no other exhibit that's going to be presented to the Court which would change the contract at all." Thus, the trial court granted plaintiff's motion for directed verdict on his claim that the release is an invalid contract and unenforceable due to a total absence of consideration.

Generally, "for a contract to be enforceable it must be supported by consideration." *Investment Properties v. Norburn*, 281 N.C. 191, 195, 188 S.E.2d 342, 345 (1972). "[A]ny benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee, is sufficient consideration to support a contract." *Brenner v. School House, Ltd.*, 302 N.C. 207, 215, 274 S.E.2d 206, 212 (1981). As a general rule, a "promise to perform an act which the promisor is already bound to perform cannot constitute consideration to support an enforceable contract." *Virmani v. Presbyterian Health Services Corp.*, 127 N.C. App. 71, 76, 488 S.E.2d 284, 287, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 38 (1997). When, however, "the new promise entails some additional benefit to be received by the [promisor] or some detriment to the promisee, the new promise is supported by consideration." *Sam Stockton Grading Co. v. Hall*, 111 N.C. App. 630, 632, 433 S.E.2d 7, 8 (1993). Where there is "no genuine issue of material fact as to the lack of consideration," the trial court may enter judgment as a matter of law. *Penn Compression Moulding, Inc. v. Mar-Bal, Inc.*, 73 N.C. App. 291, 294, 326 S.E.2d 280, 283 (holding trial court should have entered summary

judgment for defendant where "undisputed" documentary evidence established that no new consideration was exchanged for plaintiff's renewed promise to pay pre-existing debt), *aff'd per curiam*, 314 N.C. 528, 334 S.E.2d 391 (1985).

Here, as evidenced by the trial court's pre-trial order, the parties stipulated that, along with other documents, the (1) 20 February 1998 deed of trust, (2) 20 February 1998 promissory note, (3) 7 September 2005 addendum, and (4) 8 September 2005 release are "genuine" and "authentic." According to these documents, the original agreement between the Burtons and defendant in 1998 consisted of the Burtons' deeding their property to defendant in exchange for a deed of trust and promissory note providing for the $160,000.00 purchase price plus interest to be paid over 20 years in 151 monthly installments of $1,240.48. The addendum to the promissory note executed on 7 September 2005 continues repayment under the terms of the original note. The release, which was executed the day after the addendum, provides in pertinent part:

> 1. That *should [Mr. Burton] expire prior to the completion of the terms and provisions of that certain Promissory Note . . . and any amendments thereto, then and in that event [defendant] shall be relieved of any and all remaining financial obligations to or claims by the estate, beneficiaries, creditors, heirs, or assignees of [Mr. Burton]*. It is further agreed that the aforementioned Promissory Note and attendant amendments as such, shall become a nullity upon the death of [Mr. Burton], and that no presentment of negotiable instruments shall be made to [defendant] or his assigns, beneficiaries, creditors or heirs.
>
> 2. BENEFIT: This agreement shall be binding upon and inure to the benefit of the parties hereto and their legal representatives, successors and assigns.
>
> 3. ENTIRE AGREEMENT: *This agreement contains the entire understanding of the parties*. It may not be changed orally. This agreement may be amended or modified only in writing that has been executed by both parties hereto.
>
> 4. INTERPRETATION: This agreement shall be interpreted under the laws of the State of North Carolina.[1]

(Emphasis added.)

1. In the release, Mr. Burton is erroneously named the "payor" and defendant the "payee."

The release fails to recite any consideration for the new agreement to release defendant from having to continue to make payments on the promissory note in the event that Mr. Burton died prior to the debt being paid off in full. The release, moreover, provides that it reflects the "entire understanding of the parties." Thus, according to the "understanding of the parties," no consideration was exchanged in support of the new agreement, making it void and unenforceable. *See Chemical Corp. v. Freeman*, 261 N.C. 780, 781, 136 S.E.2d 118, 119 (1964) (*per curiam*) (holding agreement not to compete signed 15 days after employment contract was new contract and thus required "new consideration"); *Haynes v. B & B Realty Grp., LLC*, 179 N.C. App. 104, 110, 633 S.E.2d 691, 695 (2006) (concluding real estate agent's services to start-up agency in exchange for addendum to independent contractor agreement giving agent interest in agency was not new consideration to support addendum where agent had pre-existing duty under original agreement to provide agency with same services); *Penn Compression Moulding*, 73 N.C. App. at 294, 326 S.E.2d at 282 (finding new agreement was not supported by consideration and defendant was entitled to judgment as a matter of law where plaintiff forced defendant to promise to pay referral commission in order to get plaintiff to pay pre-existing debt for goods received).

Neither in opposition to plaintiff's motion for a directed verdict nor on appeal does defendant argue that if allowed, he would have presented evidence showing that the release was, in fact, supported by consideration. Instead, defendant argued at trial that the release was a "gratuitous transfer" requiring no consideration. As the trial court noted, however, any parol evidence that the release was intended to be a gift conveyance would have been excluded under the Dead Man's Statute, N.C. R. Evid. 601, and the parties had stipulated that there would be no documentary evidence other than what plaintiff had presented that would "change the contract at all." More importantly though, while defendant made this argument at trial, nowhere in his appellate brief has he argued that the release was a gift conveyance. By not carrying forward this contention on appeal, it is deemed abandoned under N.C. R. App. P. 28(b)(6).[2]

Defendant also argued in opposition to plaintiff's motion for directed verdict that the notary public's acknowledging the *release*

2. The Supreme Court adopted new rules of appellate procedure on 2 July 2009, with an effective date of 1 October 2009 and "applies to all cases appealed on or after that date." Because defendant noticed appeal prior to that date, the newly adopted rules do not govern this appeal.

constituted the release being executed "under seal," which created a presumption that the release was supported by consideration. On appeal, however, defendant argues that the *addendum* to the promissory note, which was executed under seal, "provided a presumption of consideration." It is fundamental that " 'the law does not permit parties to swap horses between courts in order to get a better mount,' meaning, of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court." *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)), *disc. review denied*, 358 N.C. 550, 600 S.E.2d 469 (2004).

Defendant nonetheless mistakes the effect of a notary public's acknowledging a document as opposed to a party's executing an agreement "under seal." The purpose of the notarial seal is to "authenticate the document to which it is duly affixed and to provide prima facie evidence of the notary's official character." 58 Am. Jur. 2d *Notaries Public* § 42 (2009). A notary public, however, "does not swear to the truth of the information in the document being notarized." *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 573, 374 S.E.2d 385, 394 (1988). In contrast, when a party executes an agreement under seal, "the presence of [the] seal render[s] the document to which it [i]s affixed indisputable as to the terms of the underlying obligation . . . ." 58 Am. Jur. 2d *Seals* § 2 (2009). *See generally Garrison v. Blakeney*, 37 N.C. App. 73, 78-79, 246 S.E.2d 144, 148 (setting out history of use of "seal" in England and America), *disc. review denied*, 295 N.C. 646, 248 S.E.2d 251 (1978). In North Carolina, an instrument under seal "imports consideration" to support that instrument, *Justus v. Deutsch*, 62 N.C. App. 711, 715, 303 S.E.2d 571, 573, *disc. review denied*, 309 N.C. 821, 310 S.E.2d 349 (1983), or, stated differently, the presence of a seal raises a presumption that the instrument is supported by consideration, *Supply Co. v. Dudney*, 56 N.C. App. 622, 624, 289 S.E.2d 600, 602 (1982). "[T]he determination of whether an instrument is a sealed instrument . . . is a question for the court." *Square D Co. v. C. J. Kern Contractors*, 314 N.C. 423, 426, 334 S.E.2d 63, 65 (1985).

The addendum at issue here was executed under seal, with the word "SEAL" appearing beside defendant's signature at the end of the document. The word "SEAL," however, does not appear next to either defendant's or Mr. Burton's signature on the release; it is only acknowledged with the notary's official stamp. Defendant cites no

authority, and we have found none, suggesting that a notary public's acknowledgment is equivalent to a party's execution of an instrument under seal. Since the release was not executed under seal, the presumption that it is supported by consideration was not triggered.

Because plaintiff established his claim that the release was unsupported by consideration through documentary evidence, which the parties stipulated as being genuine and authentic, and defendant made no argument at trial or on appeal that the release was, in fact, supported by consideration, the trial court properly directed the verdict in favor of plaintiff despite the fact that plaintiff had the burden of proof on this issue at trial. *See Merrill, Lynch v. Patel*, 98 N.C. App. 134, 137, 389 S.E.2d 604, 606 (1990) (affirming trial court's directed verdict for broker who had burden of proof on claim to collect on overdue investment account where investor admitted existence of account and calculation of debt and did not challenge authenticity or correctness of documentary evidence establishing these facts).

Affirmed.

Judges CALABRIA and GEER concur.

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, PLAINTIFF v. E. JEAN WOODS, D.D.S., DEFENDANT

No. COA09-341

(Filed 19 January 2010)

1. Appeal and Error— interlocutory order—discovery denied—no proceeding filed—no substantial right affected

No substantial right was affected, and defendant's appeal was dismissed as from an interlocutory order, where the trial court quashed notices of deposition and subpoenas defendant had served upon the Dental Board while it was investigating defendant's conduct as a dentist. The applicable statute governing disciplinary proceedings for dentists does not permit a defendant to engage in discovery until a Notice of Hearing is filed. Defendant cannot create an action in which to conduct discovery by filing motions in superior court.

2. Appeal and Error— interlocutory order—discovery—patient files—substantial right

A dentist's appeal from an order granting the Dental Board's motion to enforce subpoenas for her patient records affected a substantial right and was subject to immediate appellate review where she asserted a statutory privilege under the Health Insurance Portability and Accountability Act (HIPAA). Arguments on appeal not grounded in HIPAA were dismissed.

3. Dentists— disciplinary investigation—patient records—HIPAA—release not prohibited

The Health Insurance Portability and Accountability Act (HIPAA) did not prohibit release of patient records by a dentist to the Dental Board, a health oversight agency that requested the records as part of a disciplinary investigation.

Appeal by defendant from orders filed 2 January 2009 by Judge Narley Cashwell in Wake County Superior Court. Heard in the Court of Appeals 30 September 2009.

Carolin Bakewell, for petitioner-appellee.

Michaux & Michaux, P.A., by Eric C. Michaux, for defendant-appellant.

STEELMAN, Judge.

Appellant has failed to demonstrate that the trial court's order quashing her notices of deposition and subpoenas affected a substantial right, and the appeal of that order is dismissed. Appellant's assertion of privilege pursuant to HIPAA does affect a substantial right and is subject to immediate appellate review. The subpoenas of the Dental Board for patient records pursuant to a disciplinary investigation are permitted pursuant to HIPAA Regulations, under the provisions of 45 C.F.R. § 164.512(d).

I. Factual and Procedural Background

In November 2007, the North Carolina State Board of Dental Examiners (Dental Board) received a complaint concerning treatment provided by Dr. E. Jean Woods (Woods), to a minor child. Subsequently, the Dental Board received a complaint from an individual claiming that Woods "couldn't stop using drugs." When a complaint is received, the Dental Board goes through a two-step process:

(1) conduct a investigation to see if there is validity to the complaint, and (2) if the complaint is found to be valid, conduct a disciplinary hearing. The two complaints against Woods were combined and assigned to an Investigative Panel of the Dental Board. The Investigative Panel conducted a pharmacy audit, which raised questions concerning whether Woods prescribed controlled substances in excessive amounts and whether she prescribed medication to treat conditions outside the scope of the practice of dentistry.

On 2 April 2008, the Dental Board issued a subpoena pursuant to N.C. Gen. Stat. § 90-27 directing Woods to produce twenty patient records. On 24 April 2008, Woods filed a motion in superior court pursuant to Rule 45(c) of the North Carolina Rules of Civil Procedure to quash the subpoena. On 8 May 2008, the trial court denied the motion. On 12 May 2008, Woods filed the same motion to quash the subpoena with the Dental Board. On 25 June 2008, the Dental Board denied the motion.

On 25 July 2008, Woods filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings (OAH) asserting that the Dental Board's denial of her motion to quash the subpoena substantially prejudiced her rights, failed to use the proper procedures, and failed to act as required by law. She contended that her patients' records were private, and the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320d *et seq.*, prohibited their disclosure. On 31 July 2008, OAH filed a "Notice of Contested Case and Assignment." On 4 August 2008, the Dental Board moved to dismiss Woods' petition because the matter was still in the investigative stage, no formal proceeding was pending, and the matter was not properly before OAH.

On 13 August 2008, Woods served notices of deposition and subpoenas to the Dental Board, its President, and its Secretary-Treasurer. On 14 August 2008, Woods received a second subpoena from the Dental Board, which requested twenty-one patient records; the original twenty records plus one additional patient record. On 15 August 2008, Woods filed a motion to quash the second subpoena with the Dental Board.

On 20 August 2008, the Investigative Panel filed a motion with the Dental Board to quash the subpoenas and the notices of deposition issued by Woods, asserting that Woods was not entitled to conduct discovery during the investigative stage of the matter. At the hearing on the motion to quash the subpoenas, Woods withdrew the

challenged notices of deposition and subpoenas. On 9 September 2008, the Dental Board denied the Investigative Panel's motion as being moot.

Also, on 9 September 2008, the Dental Board denied Woods' motion to quash the second subpoena. On 16 September 2008, Woods filed a Petition for a Contested Case Hearing with OAH asserting that the Dental Board's denial of her motion to quash the second subpoena substantially prejudiced her rights, failed to use the proper procedures, and failed to act as required by law. She also filed a document styled as "Motion to Consolidate, Motion to Compel, and Stay" seeking to consolidate her two petitions on the original and second subpoenas, to compel the Dental Board, its President, and its Secretary-Treasurer to present themselves for deposition, and to stay the Dental Board from issuing subpoenas. On 22 September 2008, the Dental Board filed a motion with OAH to dismiss Woods' petitions and her motion to consolidate, compel, and stay.

On 25 September 2008, the Dental Board filed a motion in superior court seeking an order to enforce the original and second subpoenas issued to Woods for her patient records. On 27 October 2008, Woods served the Dental Board, its President, and its Secretary-Treasurer, with new subpoenas and notices of deposition. On 31 October 2008, the Dental Board filed a motion in superior court to quash the subpoenas and notices of deposition served 27 October, again asserting that Woods was not entitled to conduct discovery during the investigative stage of the matter.

On 6 November 2008, Woods appealed to the superior court from the Dental Board's 25 June and 9 September 2008 orders denying her motions to quash the subpoenas for her patient records. On 14 November 2008, Administrative Law Judge Shannon R. Joseph entered an order granting the Dental Board's 4 August and 22 September 2008 motions to dismiss Woods' petitions for lack of jurisdiction.

On 28 November 2008, Woods filed a motion in superior court to compel the Dental Board, its President, and its Secretary-Treasurer, to submit to depositions. On 2 January 2009, Judge Cashwell entered orders granting the Dental Board's motion to enforce the subpoenas for the patient records, granting the Dental Board's motion to quash the notices of deposition and subpoenas issued by Woods, and dismissing Woods' appeal from the Dental Board's orders denying her motions to quash the subpoenas for her patient records.

From the two orders entered by Judge Cashwell on 2 January 2009, Woods appeals.

II. Interlocutory Appeal

We must first address the Dental Board's argument that Woods' appeal should be dismissed as interlocutory.

Woods contends that she is entitled to appellate review from the orders of the trial court pursuant to N.C. Gen. Stat. § 7A-27. The Dental Board contends that Woods' appeal is interlocutory because the orders are not final judgments in the matter.

" '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.' " *Edwards v. GE Lighting Systems, Inc.*, —— N.C. App. ——, ——, 668 S.E.2d 114, 116 (2008) (quoting *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). Interlocutory orders are "immediately appealable in only two instances: (1) if the trial court certifies that there is no just reason to delay the appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) or (2) when the challenged order affects a substantial right the appellant would lose without immediate review." *Wiggs v. Peedin*, —— N.C. App. ——, ——, 669 S.E.2d 844, 847 (2008) (citing *Embler v. Embler*, 143 N.C. App. 162, 164-65, 545 S.E.2d 259, 261 (2001)).

In the instant case, the trial court's discovery orders are interlocutory because they do not " 'dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy.' " *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (alterations omitted) (quoting *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999)). There was no Rule 54(b) certification; and our review is limited to whether a substantial right is affected.

A. Trial Court's Order Granting the Dental Board's Motion to Quash Woods' Notices of Deposition and Subpoenas

[1] In her first argument, Woods contends that the trial court erred by quashing the notices of deposition and subpoenas she served upon the Dental Board, its President, and its Secretary-Treasurer, because she is entitled to conduct discovery pursuant to N.C. Gen. Stat. § 90-41.1.

Article 2 of Chapter 90 of the General Statutes governs the practice of dentistry in North Carolina, and establishes the Board of Dental Examiners to regulate that profession. N.C. Gen. Stat. § 90-22 (2007). Disciplinary proceedings are governed by N.C. Gen. Stat. §§§ 90-41, 90-41.1 and 90-42. N.C. Gen. Stat. § 90-41.1 provides:

> (c) Following the service of the notice of hearing as required by Chapter 150B of the General Statutes, the Board and the person upon whom such notice is served shall have the right to conduct adverse examinations, take depositions, and engage in such further discovery proceedings as are permitted by the laws of this State in civil matters. The Board is hereby authorized and empowered to issue such orders, commissions, notices, subpoenas, or other process as might be necessary or proper to effect the purposes of this subsection; provided, however, that no member of the Board shall be subject to examination hereunder.

N.C. Gen. Stat. § 90-41.1(c) (2007). When the terms of a statute are clear and unambiguous, this Court is to apply the plain meaning of the words, with no need to resort to judicial construction. *Wiggs v. Edgecombe Cty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (citing *Diaz v. Division of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006)). The terms of the statute do not permit a defendant to engage in discovery until the Dental Board files a notice of hearing. Further, the Administrative Procedures Act does not permit one to engage in formal discovery while an agency is still investigating the merits of a complaint. N.C. Gen. Stat. § 150B-39 (2007).

In the instant case, no notice of hearing has been filed, and the matter is still under investigation. Woods cannot, by filing motions in superior court, create an action in which to conduct discovery.

The terms of N.C. Gen. Stat. § 90-41.1(c) are clear and unambiguous. Because no proceeding has been filed against Woods, she was not entitled to engage in discovery. Thus, no substantial right of Woods is affected. Woods' appeal from the order granting the Dental Board's motion to quash her notices of deposition and subpoenas is dismissed.

B. Trial Court's Order Granting the Dental Board's Motion to Enforce the Investigative Panel's Subpoenas for Woods' Patient Records

[2] In her second argument, Woods contends that the trial court erred by granting the Dental Board's motion to enforce the Investigative Panel's subpoenas for Woods' patient records because the

records are privileged documents, which she is prohibited from disclosing under HIPAA. *See* 42 U.S.C. § 1320d *et seq.*

"An order regarding discovery matters is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *In re Will of Johnston*, 157 N.C. App. 258, 261, 578 S.E.2d 635, 638 (2003) (citations omitted), *aff'd*, 357 N.C. 569, 597 S.E.2d 670 (2003). However, when a party asserts a statutory privilege, which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1). *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581.

Defendant asserts a statutory privilege based upon HIPAA. *See* 42 U.S.C. § 1320d *et seq.* "[I]n determining whether a substantial right is affected by the challenged order, it suffices to observe that, if [Woods] is required to disclose the very documents that [she] alleges are protected from disclosure by the statutory privilege, then 'a right materially affecting those interests which a [person] is entitled to have preserved and protected by law'—a "substantial right"—is affected." *Sharpe*, 351 N.C. at 164-65, 522 S.E.2d at 580-81 (quoting *Oestreicher v. Stores*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976)); *see also Lockwood v. McCaskill*, 261 N.C. 754, 136 S.E.2d 67 (1964) (allowing immediate appellate review for plaintiff asserting the physician-patient privilege after the trial court's interlocutory order, which granted defendants' motion to compel plaintiff's psychiatrist to submit to a deposition regarding plaintiff's medical treatment history).

Woods' appeal from the trial court's order granting the Dental Board's motion to enforce the Investigative Panel's subpoenas for her patient records affects a substantial right and is subject to immediate appellate review.

The balance of Woods' arguments on appeal of the trial court's order granting the Dental Board's motion to enforce the subpoenas are not grounded upon a statutory privilege under HIPAA. Because we grant appellate review based solely upon such statutory privilege, these arguments are interlocutory and are dismissed.

III. The Dental Board's Subpoenas

[3] In her third argument, Woods contends that the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. 1320d *et seq.*,

and regulations thereunder, preclude disclosure of the patient records being sought by the Dental Board. We disagree.

Statutory interpretation is a question of law, which this Court reviews *de novo*. *In re Appeal of Murray*, 179 N.C. App. 780, 786, 635 S.E.2d 477, 481 (2006) (citation omitted). "The paramount objective of statutory interpretation is to give effect to the intent of the legislature." *In Re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671 (1999), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 663-65, 548 S.E.2d 513, 516-18 (2001)).

While no North Carolina court has considered the specific issue presented in this appeal, we find cases decided in other states construing the same federal statutes and regulations to be persuasive.

HIPAA regulates how healthcare providers use, transfer, and retain patient information. *See* 42 U.S.C. § 1320d *et seq*. HIPAA prohibits the wrongful disclosure of individually identifiable health information. 42 U.S.C. § 1320d-6. However, "[u]nder this authority, regulations have been promulgated establishing procedures for the uses and disclosure of such information." *In re Petition for Subpoenas*, 274 Mich. App. 696, 699, 736 N.W.2d 594, 597 (2007) (citing 45 C.F.R. 164.502-164.534), *appeal denied*, 478 Mich. 854, 731 N.W.2d 91 (2007).

The Code of Federal Regulations provides: "A covered entity may not use or disclose protected health information, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter." 45 C.F.R. § 164.502(a) (2009). The Federal Regulations further provide that Woods may disclose:

> protected health information to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of:
>
> (i) The health care system;

45 C.F.R. § 164.512(d)(1)(i) (2009). The Dental Board is a health oversight agency. *See* 45 C.F.R. § 164.501 (2009); N.C. Gen. Stat. § 90-22(b) (2007).

In *In re Petition for Subpoenas*, the Michigan Attorney General sought the enforcement of an investigative subpoena for patient records from a dentist under investigation for insurance fraud. 274 Mich. App. 696, 736 N.W.2d 594. The Michigan Court of Appeals held that HIPAA did not preclude enforcement of the subpoena. *Id.* at 700, 736 N.W.2d at 597-98. The Court held:

> Petitioner requested the patient health information at issue incident to an insurance fraud investigation conducted by the [Michigan Department of Community Health (MDCH)]. This information pertained to the MDCH's "oversight activities authorized by law," particularly a disciplinary investigation concerning respondent's provision of dental care, so respondent, as a health care provider was authorized to release information under HIPAA regulations, 45 CFR 164.512(d)(1).

Id. at 700-01, 736 N.W.2d at 598 (citations and quotations omitted).

In *Solomon v. Board of Physicians*, the Board of Physician Quality Assurance issued a subpoena to a physician seeking the medical records of nineteen patients. 155 Md. App. 687, 845 A.2d 47 (2003), *cert. denied*, 381 Md. 676, 851 A.2d 595 (2004). The subpoena was issued pursuant to an investigation by the Board based upon a patient complaint against the physician. The physician argued that HIPAA precluded her from complying with the subpoena. The Maryland Court of Appeals rejected the physician's argument because the subpoena was issued before HIPAA came into effect. The Court noted that even if HIPAA applied, "the regulations are not applicable to disclosures of medical records to a licensure or disciplinary agency, such as the Board." *Id.* at 704-05, 845 A.2d at 57 (citing 45 C.F.R. § 164.512(d)).

In *Chapman v. Health and Hospitals Corps.*, a nurse sought to compel a hospital to produce a patient's medical record in connection with an administrative disciplinary hearing. 7 Misc. 3d 933, 796 N.Y.S.2d 876 (2005). The hospital argued it was prohibited from producing the patient medical record by HIPAA. The New York Supreme Court held that HIPAA did not prohibit the disclosure of the patient record because the hospital was a covered entity permitted to disclose "in the course of any judicial or administrative proceeding." *Id.* at 937, 796 N.Y.S.2d at 879 (citing 45 C.F.R. § 164.512(e)).

Woods cites 45 C.F.R. § 164.512(e) as controlling the instant case, not 45 C.F.R. § 164.512(d), and argues that subpart (e) prohibits the

disclosure of her patient records. Subpart (d) provides when health information may be used and disclosed for health oversight activities including licensure and disciplinary actions. 45 C.F.R. § 164.512(d) (2009). Subpart (e) provides when health information may be disclosed for judicial and administrative proceedings. 45 C.F.R. § 164.512(e) (2009). Subpart (e)(ii) provides that a subpoena, which is not accompanied by a court or administrative order must show that: (A) the party seeking the information has made reasonable efforts to ensure that the individual whose records are being requested has been given notice of the request; or (B) reasonable efforts have been made to procure a qualified protective order pursuant to 45 C.F.R. § 164.512(e)(1)(v) that prohibits the use of the information for any purpose other than that proceeding and requires the destruction of the information at the end of the proceeding. Subpart (d) does not contain such a requirement.

Respondent in *In re Petition for Subpoenas* asserted this identical argument. The Michigan Court of Appeals rejected the argument holding, "respondent's claim is belied by the plain language of § 512(e), which states that '[t]he provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.' " *In re Petition for Subpoenas*, 274 Mich. App. at 702, 736 N.W.2d at 599 (quoting 45 C.F.R. 164.512(e)(vi)(2)). The Court further held that because MDCH was a health oversight agency, and the requested information pertained to MDCH's oversight activities authorized by law, that respondent, as a health care provider, was authorized to release the information under 45 C.F.R. § 164.512(d)(1).

The Dental Board is a health oversight agency and requested Woods' patient records as part of the Dental Board's oversight activities, which includes "civil, administrative, or criminal investigations." 45 C.F.R. § 164.512(d) (2009). Thus, we hold that 45 C.F.R. § 164.512(d) is applicable to the instant case.

We find the reasoning of the above-cited cases to be persuasive and hold that HIPAA did not prohibit the disclosure of Woods' patient records to the Dental Board pursuant to its investigation. The Dental Board was conducting a disciplinary investigation, and Woods, as a health care provider, was authorized to release the requested information under HIPAA regulations.

This argument is without merit.

Woods failed to argue her remaining assignments of error in her brief, and they are deemed abandoned pursuant to Rule 28(b)(6) of the Rules of Appellate Procedure.

DISMISSED IN PART, AFFIRMED IN PART.

Judges McGEE and JACKSON concur.

DAVID SCHEERER, INDIVIDUALLY, AND MOUNTAIN LIFE REALTY, LLC, PLAINTIFFS-APPELLANTS V. JACK FISHER, INDIVIDUALLY, AND RENAISSANCE VENTURES, LLC, HIGHLAND FOREST PARTNERS, LLC, DEFENDANTS-APPELLEES

No. COA09-236

(Filed 19 January 2010)

1. **Contracts— breach—oral instead of written—brokerage services**

   The trial court erred by dismissing plaintiffs' claim for breach of an express contract even though the alleged agreement between the parties was oral instead of written. However, plaintiffs may be subject to discipline by the N.C. Real Estate Commission for allegedly entering into an oral agreement for brokerage services.

2. **Quantum Meruit— brokerage services—original contract failed to close—reasonable compensation**

   The trial court erred by dismissing plaintiffs' claim in *quantum meruit* when the undisputed facts established conduct demonstrating that defendants took action to deny a licensed real estate agent compensation that was earned for the services he rendered. Although the original contract the agent negotiated failed to close, the law implies a promise to pay some reasonable compensation for services rendered.

Appeal by plaintiffs from order entered 13 November 2008 by Judge Ronald K. Payne in Haywood County Superior Court. Heard in the Court of Appeals 15 September 2009.

Ridenour Law Firm, P.A., by Eric Ridenour and J. Hunter Murphy, for plaintiffs-appellants.

Melrose, Seago & Lay, P.A., by Randal Seago, for defendants-appellees.

CALABRIA, Judge.

David Scheerer ("Scheerer") and Mountain Life Realty, LLC ("Mountain Life") (collectively "plaintiffs"), appeal an order dismissing plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2007) for failure to state a claim upon which relief could be granted. We reverse.

I. BACKGROUND

According to plaintiffs' allegations in their amended complaint, in January 2007, Scheerer notified Jack Fisher ("Fisher"), member-manager of Renaissance Ventures, LLC ("Renaissance Ventures"), that developments known as Highland Forest, LLC, and Indian Ridge Preserve, LLC (collectively "the properties"), were for sale. Scheerer and Fisher had a prior professional relationship and as a result, Fisher knew that Scheerer was a licensed real estate agent. At Fisher's request, Scheerer investigated the costs of developing the properties and negotiated terms with the owners of the properties ("the sellers").

On 20 March 2007, Fisher, as member-manager of Renaissance Ventures, executed purchase contracts ("the purchase contracts") for the properties for a combined total price of $20,000,000.00. One of the terms of the purchase contracts stated that at the closing of the properties, the sellers would pay Scheerer two per cent (2%) of the purchase price as commission. Fisher and Renaissance orally agreed to pay Scheerer 2% of the purchase price for his role as the buyer's procuring agent.

The relevant portion of the purchase contracts stated:

> 12. Brokerage. Seller agrees to pay commissions of two percent (2%) of the Purchase Price...to...David Schear [sic], and shall deliver to Purchaser at Closing signed receipts from each of the foregoing parties acknowledging its receipt of payment in full of all commissions, brokerage fees, or similar fees of whatever nature and kind arising out of the transactions contemplated herein. Seller and Purchaser represent and warrant

> each to the other that they have not retained any other brokers in connection with this transaction. Either party guilty of a breach of this representation and warranty shall indemnify the other party for any claims, suits, liabilities, costs, judgments and expenses, including reasonable attorneys' fees for commissions resulting from or arising out of such party's actions in violation of this representation and warranty. These warranties shall survive the Closing.

In April 2007, through no fault of either plaintiffs or sellers, Fisher and Renaissance Ventures unilaterally rescinded the purchase contracts. Shortly thereafter, Fisher began negotiations with Anthony Antonio ("Antonio"), whereby Fisher agreed that Antonio would purchase the properties for substantially less than $20,000,000.00, then assign the new purchase contracts to Fisher. While Fisher was negotiating with Antonio, he continued to have simultaneous discussions with Scheerer regarding the amount Fisher would subsequently offer for the purchase of the properties and the timing of this subsequent offer. At no time did Fisher inform Scheerer of his negotiations with Antonio.

Fisher formed a new company, Highland Forest Partners, LLC ("Highland Partners"), for the purpose of holding title to the properties. On 3 October 2007, Fisher, through Highland Partners, purchased the properties. The deeds were then recorded in the Haywood County Registry. Fisher did not pay plaintiffs any commission for their role in procuring the properties for defendants.

On 4 January 2008, plaintiffs filed a complaint in Haywood County District Court. The case was subsequently transferred to Haywood County Superior Court. Plaintiffs then filed a voluntary dismissal against several original defendants and filed an amended complaint that added Renaissance Ventures as a defendant. The result of these filings was that plaintiffs' ultimate action was solely against Fisher, Highland Partners, and Renaissance Ventures (collectively "defendants"). Plaintiffs alleged breach of an express contract against Fisher and Renaissance Ventures. In the alternative, plaintiffs alleged a breach of implied contract and *quantum meruit* against defendants for reasonable compensation for the commission due for the 3 October 2007 purchase of the properties.

Defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2007), for failure to state a claim upon which relief could be granted. Defendants argued in their motion that plain-

tiffs' claims were barred because they violated public policy. On 13 November 2008, the trial court granted defendants' motion to dismiss. From this order, plaintiffs appeal.

II. Rule 12(b)(6)

> 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. On a motion to dismiss, the complaint's material factual allegations are taken as true.

Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (2007) (internal citations omitted).

> Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wood v. Guilford Cty., 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (internal citation omitted). The standard of review on an appeal of a grant of a motion to dismiss is *de novo*. *Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 429.

III. Express Contract

[1] Plaintiffs argue that the trial court erred in dismissing their claim of breach of an express contract because the alleged agreement between plaintiffs and defendants was oral, not written. We agree.

"[T]he authority of a duly authorized agent to contract to convey lands need not be in writing under the statute of frauds." *Lewis v. Allred*, 249 N.C. 486, 489, 106 S.E.2d 689, 692 (1959) (internal citations omitted). *See also The Property Shop v. Mountain City Investment Co.*, 56 N.C. App. 644, 653, 290 S.E.2d 222, 227-28 (1982); *Reichler v. Tillman*, 21 N.C. App. 38, 41, 203 S.E.2d 68, 70 (1974); A.S.M., Annotation, *Necessity of Written Authority to Enable Agent to Make Contract Within Statute of Frauds*, 27 A.L.R. 606 (1923); 72 Am. Jur. 2d *Statute of Frauds* § 299 (2009). "Furthermore, the authority of an agent to sell the lands of another may be shown *aliunde* or by parol." *Lewis*, 249 N.C. at 489, 106 S.E.2d at 692 (internal citation omitted); *Parker v. Glosson*, 182 N.C. App. 229, 239, 641 S.E.2d 735, 741 (2007)

(Tyson, J., dissenting); *Burgin*, 181 N.C. App. at 517, 640 S.E.2d at 431 (Tyson, J., dissenting). An agreement to compensate an agent or broker for services in the buying or selling of real estate need not be in writing. *Palmer v. Lowder*, 167 N.C. 331, 83 S.E. 464 (1914); *Lamb v. Baxter*, 130 N.C. 67, 40 S.E. 850 (1902); *Abbott v. Hunt*, 129 N.C. 403, 40 S.E. 119 (1901); W.W. Allen, Annotation, *Brokerage or Agency Contract Concerning Real Property as Within Statute of Frauds*, 151 A.L.R. 648 (1944).

In the instant case, plaintiffs alleged in their amended complaint that Scheerer, a real estate broker licensed in North Carolina, by and through his company, Mountain Life, became aware that the properties were for sale. Fisher asked Scheerer to draft a contract for defendants to purchase the properties. Renaissance, through Fisher, entered into written contracts to buy the properties, and orally agreed to pay plaintiffs a 2% commission based on the purchase price since plaintiffs represented the buyers. Renaissance, through Fisher, unilaterally rescinded the contracts. Fisher and Highland Partners subsequently purchased the properties. Plaintiffs' 2% commission was never paid. Plaintiffs have alleged sufficient facts to state a claim for breach of an express contract.

Defendants urge this Court to hold that N.C. Admin. Code tit. 21, r. 58A.0104(a) (2008), established by the North Carolina Real Estate Commission ("the Commission"), requires real estate agency brokerage contracts to be in writing in order to be enforceable. This regulation states in pertinent part:

> Every agreement for brokerage services in a real estate transaction . . . shall be in writing and signed by the parties thereto. Every agreement for brokerage services between a broker and an owner of the property to be the subject of a transaction must be in writing and signed by the parties from the time of its formation. Every agreement for brokerage services between a broker and a buyer or tenant shall be express and shall be reduced to writing and signed by the parties thereto not later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another. However, every agreement between a broker and a buyer or tenant which seeks to bind the buyer or tenant for a period of time or to restrict the buyer's or tenant's right to work with other agents or without an agent shall be in writing and signed by the parties thereto from its formation. A broker shall not continue to represent a buyer or tenant with-

> out a written, signed agreement when such agreement is required by this Rule.

N.C. Admin. Code tit. 21, r. 58A.0104(a) (2008). This regulation was passed pursuant to the enabling legislation in N.C. Gen. Stat. § 93A-3(c) (2007), which states in pertinent part, "[t]he Commission shall have power to make reasonable bylaws, rules and regulations that are not inconsistent with the provisions of [N.C. Gen. Stat. § 93A-1 *et seq.*] and the General Statutes[.]"

The recent case of *McAlister v. Hunter* guides our analysis of this issue. 634 F.Supp.2d 577 (W.D.N.C. 2009). *McAlister* involved a real estate broker who had a commission agreement that failed to follow the guidelines of the Commission set out in N.C. Admin. Code tit. 21, r. 58A.0104. *Id.* at 581-82. The *McAlister* court found that failure to follow the administrative requirements of N.C. Admin. Code tit. 21, r. 58A.0104 had no bearing on the validity of the contract, stating:

> [U]nder North Carolina law contracts between a broker and property owner to negotiate the sale of land are not required to be in writing in order to be legally enforceable. Therefore, Plaintiff's failure to satisfy the administrative requirements established by the North Carolina Real Estate Commission pursuant to the authority of N.C.G.S. 93A-3(c) do not void the contract in this case. Instead, these failures subject Plaintiff to possible discipline by the Real Estate Commission.

Id. at 581-82 (internal citations omitted). *See also* N.C. Gen. Stat. § 93A-6(15) (2007) (stating that the Commission has the power to suspend or revoke a license, or reprimand or censure a licensee if, after a hearing, the Commission finds the licensee guilty of "[v]iolating any rule or regulation promulgated by the Commission").

Further support for the conclusion that plaintiffs stated a valid claim based on the oral brokerage contract can be found by comparing the statutes from other jurisdictions to the North Carolina Administrative Code. A sample of the language found in statutes from states that have specific provisions requiring brokerage contracts to be in writing is "no action shall be brought" on such a contract,[1] or that such contracts are "void," "invalid," "not valid," or that no oral brokerage contract "shall be valid."[2] We note that there is no such lan-

1. Ariz Rev. Stat. Ann. § 44-101 (2009); R.I. Gen. Laws § 9-1-4(6) (2008); VA. Code Ann. § 11-2(7) (2009).

2. Cal. Civ. Code § 1624(a)(4) (West 2010); Conn. Gen. Stat. Ann. § 20-325a(b) (West 2009); Idaho Code Ann. § 9-508 (2009); Ind. Code § 32-21-1-10 (2009); Mich. Comp.

guage in N.C. Admin. Code tit. 21, r. 58A.0104(a) (2008) stating that an oral real estate brokerage contract is void or invalid, or that a party to such a contract is prohibited from bringing an action in North Carolina based on that contract. Therefore, when a plaintiff brings an action "simply to recover compensation for the personal services of the plaintiff [as a real estate broker] alleged to have been rendered under an agreement with the defendant and at his request[,]" the agreement "need not be in writing[.]" *Lamb*, 130 N.C. at 68, 40 S.E. at 851.

Under more than 100 years of prevailing case law in North Carolina, oral contracts to compensate a real estate broker for his or her professional services were not required to be in writing under our Statute of Frauds, N.C. Gen. Stat. § 22-1 *et seq.* (2007). Today, we reaffirm those precedents. "No court has been more faithful to *stare decisis*." *Rabon v. Hospital*, 269 N.C. 1, 20, 152 S.E.2d 485, 498 (1967). Therefore, while plaintiffs may be subject to discipline by the Commission for allegedly entering into an oral agreement for brokerage services, sufficient facts exist to state a claim for breach of an express contract. The trial court erred in holding otherwise.

IV. *Quantum Meruit*

[2] Plaintiffs argue that the trial court erred in dismissing their claim of *quantum meruit* for failure to state a claim upon which relief can be granted. We agree.

"Under Rule 8(a)(2) of the North Carolina Rules of Civil Procedure, plaintiff[s] [are] entitled to seek alternative forms of relief." *Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 642, 599 S.E.2d 410, 412 (2004) (citing N.C. Gen. Stat. § 1A-1, Rule 8(a)(2) (2003) ("Relief in the alternative or of several different types may be demanded.")). If plaintiffs' allegations in their claim for *quantum meruit* are accepted as true, no contract exists and *quantum meruit* is not excluded as a remedy *per se*. *Id.*

"[R]ecovery in *quantum meruit* will not be denied where a contract may be implied from the proven facts but the express contract alleged is not proved." *Paxton v. O.P.F., Inc.*, 64 N.C. App. 130, 132, 306 S.E.2d 527, 529 (1983). *See also Allen v. Seay*, 248 N.C. 321, 322, 103 S.E.2d 332, 333 (1958) (stating that even if a plaintiff's complaint

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LAWS ANN. § 566.132(1)(e) (West 2009); MONT. CODE ANN. § 28-2-903(1)(e) (2007); NEB. REV. STAT. § 36-107 (2008); OR. REV. STAT. § 41.580(1)(g) (2005); TEX. OCC. CODE ANN. § 1101.806(C) (Vernon 2009); UTAH CODE ANN. § 25-5-4(1)(e) (2008); WASH. REV. CODE ANN. § 19.36.010 (West 2010); WIS. STAT. ANN. § 240.10(1) (West 2009).

fails to establish an express contract, the plaintiff's case may go to the jury if the complaint contains sufficient allegations to support a claim of *quantum meruit*). The rationale for allowing a plaintiff to plead both breach of express contract and breach of implied contract is that if the plaintiff "fail[s] to prove the existence of an express contract, [he or] she is not foreclosed from recovery in *quantum meruit* if a contract can be implied and the reasonable value of [his or] her services can be drawn from the evidence." *Potter v. Homestead Preservation Assn.*, 330 N.C. 569, 579, 412 S.E.2d 1, 7 (1992).

> To recover in *quantum meruit*, plaintiff[s] must show: (1) services were rendered to defendants; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously. In short, if plaintiff[s] alleged and proved acceptance of services and the value of those services, [they were] entitled to go to the jury on *quantum meruit*.

Environmental Landscape Design v. Shields, 75 N.C. App. 304, 306, 330 S.E.2d 627, 628 (1985) (internal citations omitted).

> Moreover, when under an existing contract of agency to sell land in which no stipulation is made for compensation the broker has . . . produced a purchaser who is ready, willing and able to buy the land, the rule seems to be that the broker is entitled to recover the reasonable value of his services.

White v. Pleasants, 225 N.C. 760, 763, 36 S.E.2d 227, 229 (1945).

In the instant case, as to their claim for *quantum meruit*, plaintiffs alleged that: (1) defendants had a prior professional relationship with Scheerer and therefore knew Scheerer was a real estate agent; (2) defendants knew plaintiffs were working on behalf of defendants to find property suitable for defendants to purchase; (3) plaintiffs told defendants that such property was for sale; (4) both parties expected plaintiffs to be paid a commission for their work; and (5) defendants were ready, willing, and able buyers and in fact purchased the properties located by plaintiffs.

The allegations stated by plaintiffs in their amended complaint, taken as true, show: (1) plaintiffs provided services to defendants; (2) defendants knowingly and voluntarily accepted the services; (3) plaintiffs did not perform these services gratuitously; (4) defendants were ready, willing and able buyers and in fact closed on the properties after rescinding the first contract and arranging for Antonio to purchase and assign the properties. More importantly, after rescind-

ing the contract but prior to closing, defendant Fisher continued to mislead plaintiffs by continuing discussions for submitting subsequent offers to purchase the properties. The undisputed facts establish conduct demonstrating that defendants took action to deny Scheerer compensation that was earned for the services he rendered. Although the original contract he negotiated failed to close, the law implies a promise to pay some reasonable compensation for services rendered. Plaintiffs' allegations state a valid claim for relief in *quantum meruit*.[3]

V. CONCLUSION

Plaintiffs have alleged sufficient facts that, taken as true, state claims for both breach of an express contract and *quantum meruit*. Accordingly, the trial court erred by dismissing plaintiffs' action for failing to state a claim upon which relief could be granted. The order of the trial court dismissing plaintiffs' claims must be reversed.

Reversed.

Judges WYNN and ELMORE concur.

STATE OF NORTH CAROLINA v. MARK ANTHONY FLETCHER

No. COA09-926

(Filed 19 January 2010)

1. Motor Vehicles— driving while impaired—findings of fact supported

In a driving while impaired case, the trial court's findings of fact made after a hearing on defendant's motion to suppress blood test results were supported by competent evidence. The findings of fact supported the trial court's denial of defendant's motion to suppress.

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3. We note that defendants again urge us to find that (1) plaintiffs violated N.C. Admin. Code tit. 21, r. 58A.0104(a) and (2) the violation would force us to dismiss plaintiffs' *quantum meruit* claim due to public policy concerns. N.C. Admin. Code tit. 21, r. 58A.0104(a), by its terms, does not require a written contract prior to "the time one of the parties makes an offer to purchase." Because plaintiffs' *quantum meruit* claim involves services rendered prior to any offer to purchase, we decline to address this argument.

2. Motor Vehicles— driving while impaired—non-consensual blood draw—constitutional

N.C.G.S. § 20-139.1(d1), which allows a non-consensual blood draw for analysis of its blood alcohol content in the absence of a search warrant where an officer has probable cause and a reasonable belief that a delay in testing would result in dissipation of the person's blood alcohol content, is constitutional on its face and as applied in this case.

Appeal by defendant from judgment entered 4 February 2009 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 9 December 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Leslie C. Rawls, for defendant-appellant.

JACKSON, Judge.

Mark Anthony Fletcher ("defendant") appeals the 4 February 2009 oral order denying his motion to suppress blood test results. For the reasons stated below, we affirm.

On the evening of 1 June 2008, Officer Carrie Powers of the Pinehurst Police Department ("Officer Powers") and three other officers were operating a checkpoint on Highway 5. The blue lights on all four police vehicles were flashing. Officer Powers noticed defendant's Cadillac as it approached the checkpoint because the car did not slow down. She then stepped to the side of the road and motioned for the car to stop. Defendant was driving the car and was the only occupant of the car. After he rolled down the window, defendant would neither look at Officer Powers nor answer her questions. He would not give her his driver's license, and Officer Powers could not understand what he said because he was "mumbling." She also noticed "a strong cologne odor in the car[.]" Based upon these circumstances, Officer Powers asked defendant to step out of the car. She recognized a "strong" odor of alcohol on defendant's breath and began to conduct several field sobriety tests. The first test indicated that defendant had been drinking. Defendant did not perform either of the following two tests according to Officer Powers's instructions. Officer Powers then administered a portable breathalyzer and arrested defendant for driving while impaired ("DWI"). She transported defendant to the police station where she could administer the Intoximeter.

Once at the police station, Officer Powers read defendant his rights with respect to the Intoximeter at 1:05 A.M., and defendant waived those rights. Officer Powers then waited more than the required fifteen minutes before beginning the test. Defendant made six separate attempts to blow into the machine for the requisite amount of time but never provided a valid sample. Defendant was marked as a refusal at 1:44 A.M. Officer Powers then transported defendant to Moore Regional Hospital ("the hospital") in order to compel a blood test. Following a drive of two to three minutes and no more than a five-minute wait at the hospital, defendant's blood was drawn. The results of that test showed a 0.10-gram alcohol concentration in defendant's blood.

On 14 July 2008, defendant was indicted for habitual impaired driving, based upon the 1 June 2008 incident in addition to three previous DWI convictions on 26 April 2000, 11 July 2001, and 18 September 2003. On 3 February 2009, defendant moved to suppress the results of the blood test. During a hearing on the motion on 4 February 2009, Officer Powers testified as to the circumstances surrounding the arrest and her belief as to the low probability of quickly obtaining a search warrant prior to the blood test. The trial court issued oral findings of fact and conclusions of law, denying defendant's motion. Defendant then pled guilty but reserved his right to appeal the denial of his motion to suppress. Defendant now appeals.

[1] Defendant's first three arguments center on whether two of the trial court's findings of fact are supported by competent evidence, and if not, whether his motion to suppress the blood test results should have been granted. Because we hold that the findings of fact are supported by competent evidence, we disagree with defendant's assertion that his motion to suppress should have been granted.

This Court reviews a trial court's denial of a motion to suppress by determining whether its findings of fact are supported by competent evidence and whether those findings support the trial court's conclusion of law. *State v. Allison*, 148 N.C. App. 702, 704, 559 S.E.2d 828, 829 (2002) (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). "[T]he trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citations and internal quotation marks omitted).

Defendant first contends that the trial court did not have competent evidence before it to support the finding of fact "that she [Officer

Powers] reasonably believed that such a delay under those circumstances would result in the dissipation of the percentage of alcohol in the defendant's blood." We disagree.

> North Carolina General Statutes, section 20-139.1(d1) provides,
>
> If a person refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine.

N.C. Gen. Stat. § 20-139.1(d1) (2007). A reasonable belief generally must be " 'based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing' " the point at issue. *State v. Edwards*, 164 N.C. App. 130, 137, 595 S.E.2d 213, 218, *disc. rev. denied*, 358 N.C. 735, 603 S.E.2d 879 (2004) (quoting *Michigan v. Long*, 463 U.S. 1032, 1049, 77 L. Ed. 2d 1201, 1220 (1983)) (internal quotation marks omitted).

In this case, defendant does not question whether he had refused to submit to a test or whether probable cause existed in order to compel a blood test. Therefore, the only issue is whether Officer Powers's belief was reasonable under the circumstances. Defendant contends that Officer Powers's belief—that the delay caused by obtaining a court order would result in the dissipation of defendant's percentage of blood alcohol—was unreasonable and "not grounded in fact or knowledge[.]" However, competent evidence exists to suggest that her belief was reasonable. Officer Powers testified that the magistrate's office in Carthage was twelve miles away. She also testified that she had been to the magistrate's office on approximately twenty to thirty occasions late on Saturday night or early Sunday morning. She testified that the weekends are often "very busy" at the magistrate's office and that, of the twenty to thirty weekend nights she had traveled there, she had had to stand in line "[s]everal of those times." Officer Powers further testified that she frequently had been to the emergency room at the hospital on weekend nights and that "most of the time" it was busy then. Based upon her four years' experience as a police officer, Officer Powers opined that the entire process of driving to the magistrate's office, standing in line, filling out the required forms, returning to the hospital, and having defendant's blood drawn

would have taken "anywhere from two to three hours[.]" Although other evidence exists that could have supported a contrary finding, we hold that the trial court's finding of fact as to Officer Powers's reasonable belief is supported by competent evidence.

Defendant also argues that the trial court's finding of fact—"that exigent circumstances did exist allowing the officer to compel the defendant to provide a blood sample without a . . . search warrant"—is not supported by competent evidence. We disagree.

"The withdrawal of a blood sample from a person is a search subject to protection by article I, section 20 of our constitution." *State v. Carter*, 322 N.C. 709, 714, 370 S.E.2d 553, 556 (1988) (citing *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966); *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986)). Therefore, "a search warrant must be issued before a blood sample can be obtained, unless probable cause and exigent circumstances exist that would justify a warrantless search." *Id.* (citing *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986)). This Court has recognized that "alcohol and other drugs are eliminated from the blood stream in a constant rate, creating an exigency with regard to obtaining samples . . . ." *State v. Davis*, 142 N.C. App. 81, 86–87, 542 S.E.2d 236, 239 (2001) (citing *Schmerber v. California*, 384 U.S. 757, 770, 16 L. Ed. 2d 908, 920 (1966)).

Here, defendant had failed multiple field sobriety tests and was unsuccessful at producing a valid breath sample using the Intoximeter at the police station. Officer Powers testified as to the distance between the police station and the magistrate's office, her belief that the magistrate's office would be busy late on a Saturday night, and her previous experience with both the magistrate's office and the hospital on weekend nights. Considering our caselaw that recognizes the exigency surrounding obtaining a blood sample when blood alcohol level is at issue, *Davis*, *supra*, and the evidence of a probability of significant delay if a warrant were obtained, we hold that the trial court had before it competent evidence to support its finding that exigent circumstances existed.

Because defendant's third argument is premised upon the trial court's lack of competent evidence to support its findings of fact, and because we hold that the trial court's findings of fact are supported by competent evidence, we reject defendant's third argument that the trial court erred by denying his motion to suppress the results of the blood test.

[2] Fourth, defendant contends that the trial court erred in denying his motion to suppress, because without consent, exigent circumstances, a search warrant, or probable cause, the blood draw violated defendant's rights pursuant to the Fourth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution. As his final argument, defendant challenges the constitutionality of North Carolina General Statutes, section 20-139.1. We disagree with both of these contentions and will address them together, as did defendant.

The United States Constitution provides, "The right of the people to be secure in their persons, . . . against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. am. IV. It further protects "any person" from governmental deprivation "of life, liberty, or property, without due process of law[.]" U.S. Const. am. XIV § 1. Our North Carolina Constitution also guards these rights, as reflected by its law of the land clause and prohibition against general warrants. N.C. Const. art. I §§ 19, 20. *See also State v. Bryant*, 359 N.C. 554, 563, 614 S.E.2d 479, 485 (2005) ("[T]he Law of the Land Clause of the North Carolina Constitution, N.C. Const. art. I, § 19, is synonymous with due process of law as found in the Fourteenth Amendment to the Federal Constitution.") (internal quotation marks and citations omitted) and *State v. Grooms*, 353 N.C. 50, 73, 540 S.E.2d 713, 727–28 (2000) (recognizing the similarity between the Fourth Amendment of the United States Constitution and the general warrants clause of the North Carolina Constitution).

Our Supreme Court previously has examined the constitutionality of warrantless blood draws. *See*, *e.g.*, *Carter*, 322 N.C. at 714, 370 S.E.2d at 556 (noting that, so long as probable cause and exigent circumstances are present, a warrantless blood draw is justified); *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986) (noting that the Fourth Amendment prohibits only unreasonable searches and that probable cause and exigent circumstances would justify a warrantless blood draw). The United States Supreme Court also has determined that, while blood tests clearly fall within the purview of the Fourth Amendment, probable cause and the "destruction of evidence" caused by the body's diminution of alcohol in the bloodstream together meet the Fourth Amendment's requirements for a reasonable—in this case warrantless—search of the person. *Schmerber v. California*, 384 U.S. 757, 767–71, 16 L. Ed. 2d 908, 917–20 (1966).

In order to proceed with a non-consensual blood test in the absence of a search warrant, North Carolina General Statutes, section

20-139.1(d1) requires both probable cause and an officer's reasonable belief that a delay in testing would result in dissipation of the person's blood alcohol content. N.C. Gen. Stat. § 20-139.1(d1) (2007). In effect, our legislature has codified what constitutes exigent circumstances with respect to DWI's. In the case *sub judice*, defendant argues that our previous caselaw concerning the exigency of testing for blood alcohol content is outdated. Defendant bases this assertion upon our courts' widespread acceptance of retrograde extrapolation methodology, which allows experts to determine from a blood test one's previous blood alcohol content. *See*, *e.g.*, *State v. Cook*, 362 N.C. 285, 661 S.E.2d 874 (2008) and *State v. Teate*, 180 N.C. App. 601, 638 S.E.2d 29 (2006). However, defendant does not present us with any caselaw that calls into question that the diminution of blood alcohol content constitutes an exigent circumstance. We decline now to question the body of precedent that recognizes the exigency of ascertaining one's blood alcohol content, especially considering that only our Supreme Court has the authority to interpret our Constitution with finality. *See State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984) (citing *White v. Pate*, 308 N.C. 759, 304 S.E.2d 199 (1983)). Pursuant to our caselaw, we hold that North Carolina General Statutes, section 20-139.1(d1) is constitutional.

For the reasons stated herein, we hold that competent evidence supports the findings of fact that Officer Powers reasonably believed that a delay would result in the dissipation of the alcohol in defendant's blood and that exigent circumstances existed that allowed a warrantless blood draw. We also hold that the trial court did not err in denying defendant's motion to suppress. Finally, North Carolina General Statutes, section 20-139.1 is not unconstitutional on its face nor in its application to this case.

Affirmed.

Judges HUNTER, Robert C. and BRYANT concur.

RICHARD WAYNE BARFIELD, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, DEFENDANT

No. COA09-549

(Filed 19 January 2010)

1. Collateral Estoppel and Res Judicata— collateral estoppel— not raised in pleadings—asserted at summary judgment

In a case involving alleged excessive force by a highway patrolman which began in federal court but was reversed for lack of jurisdiction, defendant raised a claim of collateral estoppel in the Industrial Commission by arguing it in his motion for summary judgment and at the summary judgment hearing, even though it was not raised in defendant's pleadings.

2. Appeal and Error— collateral estoppel—substantial right—argument not made

An appeal from summary judgment in the Industrial Commission on collateral estoppel was dismissed as from an interlocutory order where defendant did not make a legal or factual argument that a substantial right would be affected if the merits were not reached before final judgment.

3. Appeal and Error— interlocutory order—based on statute of limitations rather than immunity

An appeal was from an interlocutory order where it involved an action resulting from a highway patrol trooper's alleged use of excessive force that was grounded in the statute of limitations and not immunity, as defendant contended. The Legislature passed a Session Law concerning waiver of the State's immunity in such cases, but defendant's argument here is that the officer was not acting within the scope of his employment, so that plaintiff's claim was not within the Session Law and was barred by the statute of limitations.

Appeal by defendant from order entered 8 January 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 October 2009.

James Michael Gay for plaintiff-appellee.

Attorney General Roy A. Cooper, by Special Deputy Attorney General William H. Borden, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant North Carolina Department of Crime Control and Public Safety ("defendant") appeals the North Carolina Industrial Commission's 8 January 2009 order granting partial summary judgment in favor of plaintiff Richard Wayne Barfield ("plaintiff"). After careful review, we dismiss defendant's appeal.

Background

On 5 November 1986, plaintiff filed a civil rights action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of North Carolina against North Carolina State highway patrolman Gary Blackwood ("Blackwood") in his individual capacity. Plaintiff alleged that Blackwood used excessive force during his arrest of plaintiff on 3 February 1985. On 22 September 1988, a jury found that Blackwood had, "in the course of arresting plaintiff on February 3, 1985, use[d] excessive, unnecessary or unreasonable force thereby causing damage[.]" Judgment was entered against Blackwood, individually, in the amount of $500,000.00.

In an order filed 24 May 1991, and in a subsequent judgment entered 14 January 1992, the Federal District Court ordered the State to pay $100,000.00 in satisfaction of plaintiff's judgment against Blackwood. The State appealed and the judgment was reversed by the Fourth Circuit Court of Appeals in the case of *In re Secretary of the Dep't of Crime Control & Pub. Safety*, 7 F.3d 1140, 1145 (4th Cir. 1993) (holding that the Eleventh Amendment to the United States Constitution, which "generally deprives the federal courts of jurisdiction to hear actions for money damages brought against a State by its own citizens or by citizens of another state," barred the Federal District Court from ordering the State to pay money damages to plaintiff), *cert. denied*, 114 S. Ct. 2106, 128 L. Ed. 2d 667 (1994).

On 18 July 2005, Session Law 2005-243 was enacted, which provided:

> Notwithstanding G.S. 143-299, where a judgment was entered in a civil action in federal court prior to the effective date of this act against a member of the Highway Patrol for an injury to a person and where the court that rendered the judgment concluded that the person's injury was the result of an act of the member of the Highway Patrol committed while acting within the course and scope of the officer's employment, the person who brought the action has 180 days from the effective date of this act to file an

> action to recover damages under Article 31 of Chapter 143 of the General Statutes. It shall not be a defense that the member of the Highway Patrol is no longer a State employee, or that any time limit for seeking the recovery of damages or any other time limit of civil procedure has expired. The limitation on the amount that may be recovered under this section shall be the limit of liability under Article 31 of Chapter 143 of the General Statutes applicable at the time the tort occurred. No interest on the amount recoverable shall accrue until an amount of damages is awarded under Article 31 of Chapter 143 of the General Statutes as authorized by this section.

Session Law 2005-243 explicitly suspended the three year statute of limitations provided in N.C. Gen. Stat. § 143-299 (2007). On 12 January 2006, plaintiff filed a Claim for Damages Under Tort Claims Act in the North Carolina Industrial Commission alleging that Blackwood, in the course and scope of his employment, used excessive, unnecessary, or unreasonable force during his arrest of plaintiff on 3 February 1985. Both parties filed motions for summary judgment. On 10 June 2008, the Deputy Commissioner: (1) granted partial summary judgment to plaintiff, finding that he fell within the provisions of Session Law 2005-243 and was not required to prove negligence; (2) denied plaintiff's motion with regard to damages; (3) denied defendant's motion for summary judgment; and (4) referred the case to a hearing to take evidence on the issue of damages. Defendant appealed to the Full Commission and on 8 January 2009, the Commission affirmed and adopted, with modifications, the 10 June 2008 Order of the Deputy Commissioner. Defendant now appeals the Order of the Full Commission. After careful review, we dismiss the appeal as interlocutory.

Analysis

Defendant asserts the following substantive arguments on appeal: (1) plaintiff's claim is barred on sovereign immunity grounds; (2) because the federal court did not determine that Blackwood was acting within the course and scope of his employment, plaintiff's claim does not fall within the parameters of Session Law 2005-243 and is thus barred by the statute of limitations; (3) the Industrial Commission erred in concluding as a matter of law plaintiff was not required to establish negligence; and (4) plaintiff's claim is barred because it violates the doctrine of collateral estoppel. In order to reach the merits of these arguments, we must first establish the propriety of this interlocutory appeal.

Defendant in this case appeals from the Industrial Commission's denial of its motion for summary judgment. "The denial of summary judgment is not a final judgment, but rather is interlocutory in nature. We do not review interlocutory orders as a matter of course." *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 230, *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001). "If, however, 'the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review[,]' we may review the appeal . . . ." *Id.* (quoting *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995)). "The moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party. Whether a substantial right is affected is determined on a case-by-case basis." *Id.* (internal citation omitted). Here, defendant relies upon the doctrines of collateral estoppel and sovereign immunity to warrant appellate review of its interlocutory appeal.

[1] First, we address defendant's argument that this appeal should be reviewed on the ground of collateral estoppel. Defendant specifically contends that at the prior trial before the Federal District Court plaintiff asserted that Blackwell acted intentionally, but in order for plaintiff to recover against defendant in the present action, he must establish that Blackwell acted negligently while in the course and scope of his employment. Defendant asserts that this case has already been decided on the merits and it has been determined that Blackwell acted intentionally, not negligently, and thus plaintiff is barred from bringing a new action against defendant on the basis of negligence. Plaintiff does not claim that Blackwell acted negligently; rather, plaintiff asserts that the Session Law provides a remedy for plaintiff regardless of whether Blackwell acted intentionally or negligently. The Industrial Commission agreed with plaintiff and found as a matter of law that plaintiff did not have to prove negligence.

Defendant did not assert the affirmative defense of collateral estoppel in its original answer or its answer to plaintiff's amended complaint. "The North Carolina Rules of Civil Procedure require a party to affirmatively set forth any matter constituting an avoidance or affirmative defense . . . and our courts have held the failure to do so creates a waiver of the defense." *HSI N.C., LLC v. Diversified Fire Protection of Wilmington, Inc.*, 169 N.C. App. 767, 773, 611 S.E.2d 224, 228 (2005) (internal citation omitted) (holding defendants

waived affirmative defense of estoppel at summary judgment by failing to affirmatively assert defense in their original answer or amended answer), *disc. review denied*, 359 N.C. 851, 619 S.E.2d 507; N.C. Gen. Stat. § 1A-1, Rule 8(c) (2007). However, our Courts have held "that absent prejudice to plaintiff, an affirmative defense may be raised by a motion for summary judgment regardless of whether or not it was pleaded in the answer. The affirmative defense relied upon should be referred to in the motion for summary judgment[.]" *Miller v. Talton*, 112 N.C. App. 484, 487, 435 S.E.2d 793, 796 (1993) (internal citation omitted). In the present case, defendant failed to raise the issue of collateral estoppel in its pleadings; however, defendant argued the issue in its motion for summary judgment and at the summary judgment hearing. Accordingly, we find that the issue was before the Commission and plaintiff was made aware of the defense by defendant's motion for summary judgment prior to the hearing.

[2] We now address whether the issue of collateral estoppel affects a substantial right. "The denial of summary judgment based on collateral estoppel, like *res judicata*, may expose a successful defendant to repetitious and unnecessary lawsuits. Accordingly, . . . the denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right . . . [such that the appeal] is properly before us." *McCallum*, 142 N.C. App. at 51, 542 S.E.2d at 231. "Our courts have generally taken a restrictive view of the substantial right exception [and] [t]he burden is on the appealing party to establish that a substantial right will be affected." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (internal citation omitted). In violation of our Rules of Appellate Procedure, defendant makes no legal or factual argument whatsoever that a substantial right would be affected if the merits of this case are not reached interlocutory. N.C. R. App. P. 28(b)(6). The cases cited by defendant, after its general statement of grounds for appellate review, are not factually analogous and do not support its claim that the present case should be heard on an interlocutory basis. Upon review of defendant's substantive collateral estoppel argument, we do not find that a substantial right will be affected if this case is allowed to proceed to final judgment and, therefore, we decline to rule on the merits of defendant's collateral estoppel argument.

[3] Second, defendant claims that this case should be reviewed on the ground of sovereign immunity since the Legislature did not waive immunity in the Session Law for plaintiff's particular claim. "It has long been established that an action cannot be maintained against the

State of North Carolina *or an agency thereof* unless it consents to be sued or upon its waiver of immunity, and that *this immunity is absolute and unqualified*." *Guthrie v. State Ports Authority*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983). "Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Id.* at 537-38, 299 S.E.2d at 627.

> [T]he denial of summary judgment on grounds of sovereign immunity is immediately appealable, though interlocutory, because it represents a substantial right, as "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial."

Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) (quoting *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411, 425 (1985)). Accordingly, if defendant's arguments are based on immunity from suit, then we may properly hear this case interlocutory. Upon careful review, we find that defendant's sovereign immunity argument is actually grounded in the defense of the statute of limitations, not immunity from suit altogether.

Session Law 2005-243 clearly states that "[t]he limitation on the amount that may be recovered under this section shall be the limit of liability under Article 31 of Chapter 143 of the General Statutes applicable at the time the tort occurred." Furthermore, the Session Law provides that the three year statute of limitations found in N.C. Gen. Stat. § 143-299 would not serve to bar a potential litigant's claim. We interpret the Session Law to mean that the State waived its immunity to the extent that a litigant fell under the distinct parameters of the Session Law. According to the Session Law, in order to succeed on a claim against the defendant (a State agency), a plaintiff was required to show that a federal court had rendered a judgment against a member of the Highway Patrol for an injury to the plaintiff committed while the officer was acting within the course and scope of his employment. Plaintiff in the present case argued before the Industrial Commission that it fell within the parameters of the Session Law and was thus entitled to damages up to the amount allowed by law. Defendant disagreed. The crux of defendant's argument is that the judgment rendered in plaintiff's civil action against Blackwell did not hold that Blackwell, a highway patrol officer, was acting within the course and scope of his employment and, therefore, plaintiff's claim is still barred by the statute of limitations. Though defendant

attempts to frame its argument in terms of sovereign immunity, the essence of defendant's argument is that plaintiff did not fall within the scope of the Session Law and, therefore, his claim is barred by the statute of limitations. In other words, defendant is not asserting full immunity from suit; rather, defendant is arguing that the federal court's judgment was insufficient to support plaintiff's claim under the Session Law.[1]

Having found that defendant's argument is actually based on a claim that the statute of limitations bars plaintiff's suit, we must now determine whether denial of defendant's motion for summary judgment affected a substantial right. *McCallum*, 142 N.C. App. at 50, 542 S.E.2d at 230. In *Lee v. Baxter*, 147 N.C. App. 517, 556 S.E.2d 38 (2001), this Court noted that "a motion to dismiss 'based on a statute of limitation[s] does not [a]ffect a substantial right and is therefore not appealable.' " *Id.* at 520, 556 S.E.2d at 38 (quoting *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000)). "For this purpose, we see no reason to treat a motion for summary judgment based on the statute of [limitations] differently than a motion to dismiss based on the statute of limitations." *Id.*[2] In the present case, defendant has not met its burden of establishing that a substantial right would be affected by allowing this case to proceed to a final judgment.

In sum, there are no justifiable grounds for hearing this interlocutory appeal. Although defendant wraps its arguments in a shroud of sovereign immunity, the essence of defendant's arguments pertain to a defense to liability. We therefore dismiss this interlocutory appeal and remand to the Industrial Commission for a hearing as to damages.

Appeal Dismissed.

Judges CALABRIA and GEER concur.

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1. As a matter of law, the Industrial Commission held that the judgment rendered by the federal court was sufficient to meet the requirements of the Session Law.

2. *Lee* specifically dealt with a motion for summary judgment based on a statute of repose; however, we find the present situation to be analogous.

STATE OF NORTH CAROLINA v. REBECCA ARNOLD NEVILLE

No. COA09-412

(Filed 19 January 2010)

1. Appeal and Error— preservation of issues—sufficiency of evidence

Defendant did not preserve for appellate review the question of whether there was sufficient evidence of second-degree murder where defendant moved to dismiss the charge of first-degree murder, but neither moved to dismiss second-degree murder nor argued that the evidence of any of the elements of second-degree murder was insufficient.

2. Homicide— second-degree murder—sufficiency of evidence—driving car into yard

Defendant's argument that the evidence in a second-degree murder prosecution did not show a specific intent to harm a particular person was irrelevant. Moreover, there was ample evidence from which a jury could find that defendant intentionally drove in a manner so reckless as to support a finding of malice.

3. Evidence— witness's impression—admission not prejudicial

The admission of the impression of the victim's sibling that defendant intentionally drove her car into the victim was not prejudicial where the jury acquitted defendant of first-degree murder. Defendant did not show that admission of the testimony contributed to her conviction for second-degree murder.

Appeal by Defendant from judgment entered 25 June 2008 by Judge James E. Hardin, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 17 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General Kevin Anderson, for the State.

William D. Spence, for Defendant.

BEASLEY, Judge.

Defendant (Rebecca Neville) appeals from judgment entered upon her conviction of second-degree murder. We conclude the Defendant had a fair trial, free of reversible error.

On 12 August 2006 Defendant's vehicle struck four-year-old Keligah Randolph (the victim), who died from the resulting injuries. In June 2008 Defendant was tried non-capitally for the first-degree murder of the victim. At trial, Stephanie Randolph testified that in August 2006 she lived in Rocky Mount, North Carolina, where she worked at a restaurant. Randolph had four children, including the victim, who were cared for by a local day-care center while Randolph was at work. Because Randolph did not have a car, the day care center provided transportation for the children to and from the center.

On 12 August 2006, Randolph finished work at the restaurant at around midnight and went home. Her children were not home, so Randolph made several phone calls to locate them. Randolph received a call from her nine-year-old daughter, Jessica Applewhite, who reported that she and the other three children were with Defendant. Randolph told Jessica to ask Defendant to bring them home. When Defendant arrived at Randolph's house, the children went inside to go to bed, while Randolph and Defendant stood on Randolph's front porch and argued. Randolph was upset because the day care center did not have permission to release her children to Defendant. Their exchange became heated and Randolph told Defendant to leave.

Defendant drove away, but returned a few minutes later, and they argued again. When Randolph refused to allow Defendant to come inside and use Randolph's bathroom, Defendant urinated in Randolph's yard. Randolph told Defendant to leave; Defendant drove away but returned in several minutes. Defendant apologized, they hugged, but then started to argue. Defendant left Randolph's yard and returned again. Randolph left the porch and went down to the yard, threatened to call the police if Defendant did not leave, and shoved Defendant off the curb. The conflict escalated to a physical fight, with Randolph and Defendant shoving and hitting each other in the middle of the street. By this time, Randolph's children had gotten out of bed and were watching from the porch.

Randolph testified that Defendant got back into her car with an "evil" look on her face. Randolph heard Defendant "start the car and throw it in reverse and pull up in [her] yard," and Randolph ran to the side of the house. When Randolph saw the victim trying to climb the steps of her front porch, she ran back to the front of the house, but could not get there in time. She heard skidding tires, the car being shifted into reverse, and then a "big thump" as Defendant's car hit the victim, who was at the steps of Randolph's front porch.

Dr. M.G.F. Gilliland testified as an expert in forensic pathology. She told the jury that, when the victim was struck by Defendant's car, he suffered very serious injuries and died almost instantly. Rocky Mount Police Department Officer Chris Mosley testified that he was a Traffic Safety officer who was trained to investigate car accidents. Without objection, Mosley was tendered and accepted as qualified to offer opinion testimony about the results of his investigation. Mosley testified that the distance from the curb to Randolph's porch was about seventeen feet and that he observed "acceleration marks" where Defendant's car went over the five-inch curb into Randolph's yard. Rocky Mount Police Department Special Officer Wayne Harrell, who also investigated the case, corroborated Mosley's testimony that there were "acceleration marks" where Defendant's car went into Randolph's yard. Harrell also testified that he had tested Defendant's car and determined that it idled normally, with no apparent mechanical malfunctions.

At the close of the State's evidence the trial court denied Defendant's motion to dismiss the charge of first-degree murder.

Other evidence will be discussed as pertinent to the appellate issues. Following the presentation of evidence, defense counsel renewed his motion to dismiss the charge of first-degree murder on the grounds that he "d[id] not think there is evidence of any specific intent." The court denied Defendant's motion, and instructed the jury on possible verdicts of first-degree murder, second-degree murder, voluntary manslaughter, involuntary manslaughter, or not guilty. The jury returned a verdict of guilty of second-degree murder, and the trial court sentenced Defendant to 120 to 153 months in prison. From this judgment and conviction, Defendant appeals.

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[1] Defendant argues first that the trial court erred by denying her motion to dismiss the charge against her at the close of all the evidence "on the grounds that all the evidence was insufficient to establish every element of second degree murder." We conclude that Defendant failed to preserve this issue for appellate review. We further conclude that even assuming, *arguendo*, that the issue were preserved, it is without merit.

At the end of the State's evidence, Defendant moved to dismiss the charge of first-degree murder:

> THE COURT: . . . The State of North Carolina having rested its case. Are there motions on behalf of the defendant?

> DEFENSE COUNSEL: Judge, first I'd move at this time to dismiss the first-degree murder indictment. . . . [S]everal of the essential elements even in the light most favorable to the State, in my opinion, have not been met. I believe what you have, at this point, is something less than first degree murder. . . . And we would just ask you to consider, at this point, dismissing the first-degree murder indictment.

At the close of all the evidence, Defendant renewed his motion to dismiss the first-degree murder charge:

> THE COURT: All right. . . . Are there motions on behalf of the defendant at the close of all the evidence?
>
> DEFENSE COUNSEL: There are, Judge. At this time, . . . I would also again renew my motion to dismiss the charge of first-degree murder. Basically, the same argument I told you at the end of the State's evidence. I do not think there is evidence of any specific intent. And I do not feel like that that should get to the jury at this point. Otherwise, I don't have any other motions or objections.
>
> . . . .
>
> THE COURT: All right. At the close of all the evidence, the defendant having made the motion to dismiss specifically the charge of first-degree murder, but as it relates to all lesser potential included offenses, the defendant's motion is denied.

(emphasis added). Defendant neither moved to dismiss the charge of second-degree murder, nor argued to the trial court that there was insufficient evidence of any of the elements of second-degree murder. Thus, Defendant failed to preserve for appellate review the sufficiency of the evidence of the charge. N.C.R. App. P. 10(b)(1) ("to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling party desired the court to make"). Further, even assuming, *arguendo*, that the issue was preserved, our review of the record reveals that the evidence was more than adequate to submit the charge of second-degree murder to the jury.

[2] "The essential elements of second[-]degree murder are an unlawful killing with malice, but without premeditation or deliberation." *State v. Brower*, 186 N.C. App. 397, 403, 651 S.E.2d 390, 394 (2007), *disc. review denied*, 362 N.C. 363, 661 S.E.2d 742 (2008) (citing N.C. Gen. Stat. § 14-17 [(2009)]). Defendant argues that there was insuffi-

cient evidence that she "committed an intentional act aimed at harming someone" and "no evidence that defendant aimed the car at anyone." However:

> "Intent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice." Accordingly, . . . it was necessary for the State to prove only that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind. The State was not required to show that defendant had a conscious, direct purpose to do specific harm or damage, or had a specific intent to kill.

State v. Rich, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000) (quoting *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991)). Accordingly, Defendant's argument, that the evidence failed to show a specific intent to harm any particular person, is irrelevant to our determination of the sufficiency of the evidence of second-degree murder.

Moreover, we conclude that there was ample evidence from which a jury could find that Defendant "had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result[.]" *Rich*, 351 N.C. at 395, 527 S.E.2d at 304. Defendant asserts that she "testified that the car's motion occurred because it went out of control and the State offered no evidence to the contrary." We disagree, and conclude that the State's evidence was more than sufficient to allow the jury to find that the victim's death was not due to Defendant's "losing control" of her vehicle. The testimony of all the eyewitnesses, including Defendant, showed that, at the time she ran over the victim, Defendant was agitated, angry, and not exhibiting appropriate personal self-control. For example, just before Defendant drove her car into the victim, she urinated in Randolph's yard and fought with Randolph. Law enforcement officers testified that there were "acceleration marks" where Defendant drove into the yard, and that Defendant's car was operating properly at the time of the incident. Randolph testified that Defendant had an "evil look" just before she drove her car into the victim. And, it was undisputed that, at the time Defendant's car struck the victim, the yard was dark and there were several small children in the yard. Defendant's own testimony was that she did not know where the children were standing when she started her car and didn't even know she had hit the victim. We easily conclude that there was

sufficient evidence from which a jury could find that Defendant intentionally drove in a manner so reckless as to support a finding of malice. This assignment of error is overruled.

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[3] Defendant's remaining arguments are addressed to the trial court's admission of Jessica's testimony that her "impression" was that Defendant drove her car into the victim "on purpose just to get back at my Mom." Defendant argues that admission of this evidence constitutes reversible error. We disagree.

The challenged testimony consists of the following:

PROSECUTOR: And you saw [Defendant] drive.

JESSICA: Yes.

PROSECUTOR: Did it make an impression on you?

JESSICA: Yes.

PROSECUTOR: What impression did it make on you?

JESSICA: She did it on purpose just to get back at my mom.

PROSECUTOR: Who are you saying did what on purpose?

JESSICA: [Defendant.]

PROSECUTOR: Did what?

JESSICA: Hit my brother.

PROSECUTOR: What did it look like she was trying to do?

JESSICA: To get back at my mom just for fussing at her.

However, "admission of this evidence went solely to the question of premeditation and deliberation. The jury's verdict of second-degree murder acquitted defendant of the charge of murder in the first[-]degree and therefore rendered harmless any prejudice which might have arisen from its admission." *State v. Williams*, 288 N.C. 680, 699, 220 S.E.2d 558, 571 (1975). Defendant concedes that evidence of her intent "is not an element of murder in the second[-] degree." "[A]s the jury, by their verdict, negatived the existence of premeditation in doing the act, the testimony was harmless[.]" *State v. Vann*, 162 N.C. 534, 539, 77 S.E. 295, 297 (1913).

See also, *e.g.*, *State v. Berkley*, 56 N.C. App. 163, 165, 287 S.E.2d 445, 447 (1982):

> As to armed robbery and first-degree sexual offense, defendant was acquitted of these crimes. He was convicted of the lesser crimes of common law robbery and second-degree sexual offense; and these convictions render harmless any error with respect to the greater crimes, absent some showing that the verdicts of guilty as to the lesser crimes were affected thereby. No such showing has been made.

(citing *State v. Casper*, 256 N.C. 99, 122 S.E.2d 805 (1961); *State v. DeMai*, 227 N.C. 657, 44 S.E.2d 218 (1947); *State v. Wynn*, 25 N.C. App. 625, 214 S.E.2d 274 (1975); *State v. Sallie*, 13 N.C. App. 499, 186 S.E.2d 667 (1972); and *State v. Keyes*, 8 N.C. App. 677, 175 S.E.2d 357 (1970)). In *Keyes*, this Court held that "[c]onviction of the lesser offense . . . rendered harmless any error with respect to . . . defendant's guilt of the more serious offense, absent some showing that the verdict of guilty of a lesser offense was affected thereby." *Keyes*, 8 N.C. App. at 680, 175 S.E.2d at 359 (citations omitted).

In the instant case, the jury's verdict necessarily means that it rejected Jessica's testimony that Defendant killed the victim with premeditation and deliberation. Defendant has not shown that admission of testimony about specific intent contributed to her conviction of second-degree murder, and our own review reveals no likelihood that admission of this evidence prejudiced Defendant. This assignment of error is overruled.

For the reasons discussed above, we conclude that Defendant had a fair trial, free of reversible error.

No error.

Judges STEPHENS and HUNTER, JR. concur.

PENTECOSTAL PILGRIMS AND STRANGERS CORPORATION, PLAINTIFF v. MARK E. CONNOR, FONVILLE MORISEY REALTY, INC., AND MOUNT PEACE BAPTIST CHURCH, DEFENDANTS

No. COA09-398

(Filed 19 January 2010)

Appeal and Error— interlocutory order—lack of jurisdiction

Plaintiff's appeal from the trial court's order granting defendant's motion to dismiss was dismissed for lack of jurisdiction. Plaintiff did not recognize that the trial court's order was interlocutory and failed to address which, if any, substantial right would be affected absent immediate review.

Appeal by plaintiff from an order entered 10 September 2008 by Judge Carl Fox in Wake County Superior Court. Heard in the Court of Appeals 1 October 2009.

The Shanahan Law Group, PLLC, by Kieran Shanahan, for plaintiff appellant.

Wardell & Associates, PLLC, by Bryan E. Wardell, for Mount Peace Baptist Church defendant appellee.

HUNTER, JR., Robert N., Judge.

Plaintiff, Pentecostal Pilgrims and Strangers Corporation ("Pentecostal Pilgrims"), appeals from an order allowing the motion to dismiss of defendant Mount Peace Baptist Church ("Mount Peace"), for failure to state a claim upon which relief may be granted pursuant to North Carolina Rule of Civil Procedure 12(b)(6). Neither party has addressed the jurisdictional threshold question of whether this appeal is interlocutory and, if so, nonetheless affects a substantial right. " '[I]t is well established in this jurisdiction that if an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves.' " *Yordy v. N.C. Farm Bureau Mut. Ins. Co.*, 149 N.C. App. 230, 230-31, 560 S.E.2d 384, 384 (2002) (quoting *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980)). For the reasons set forth below, we dismiss this appeal as interlocutory.

I. Factual Background

Pentecostal Pilgrims alleged the following in its complaint: In January 1996, Pentecostal Pilgrims purchased a 4.73-acre tract of

commercial real estate ("the property"), located in Raleigh, North Carolina, for $255,000.00. The property was purchased through a deed of trust securing a promissory note in favor of Wachovia Bank of North Carolina ("Wachovia Bank"). In June 2006, Pentecostal Pilgrims was having financial difficulty making the payment and decided to sell the property.

Pentecostal Pilgrims consulted with Fonville Morisey Realty, Inc. ("Fonville Morisey") real estate agent Mark E. Connor ("Connor") on the marketing of the property. Pentecostal Pilgrims' pastor, Bishop Vernon Jones ("Bishop Jones"), and church secretary, Shelby S. Taylor ("Taylor"), shared confidential information about Pentecostal Pilgrims' finances and goals with Connor.

On or about 12 June 2006, Pentecostal Pilgrims signed Fonville Morisey's "Exclusive Right to Sell Listing Agreement" ("Listing Agreement"). The Listing Agreement showed the sales price as $1,500,000.00. Taylor was designated to communicate with Connor on behalf of Pentecostal Pilgrims; she reported their negotiations to Bishop Jones. Pentecostal Pilgrims alleges that, under the Listing Agreement, Connor had a duty to inform it of potential buyers, as well as show and market the property to those purchasers.

On or about 14 June 2006, Pentecostal Pilgrims received a certified demand letter from Wachovia Bank indicating that the property would be sold through a foreclosure auction sale before 12 July 2006. The next day, Pentecostal Pilgrims called Connor to inform him that the property was in foreclosure and would be sold; therefore, the property needed to be sold before the foreclosure date.

Pentecostal Pilgrims alleges that Connor waited one to two weeks after the parties signed the Listing Agreement to place the "For Sale" sign on the property and waited until 16 June 2006 to enter the property into the Multiple Listing Service database. On or about 19 June 2006, Taylor, at Connor's request, signed a Dual Agency Addendum on behalf of Pentecostal Pilgrims. The Dual Agency Addendum did not identify Mount Peace as Connor's second client. Moreover, Connor asked Taylor to "back date" the Addendum to 12 June 2006, the date of the original Exclusive Right to Sell Listing Agreement. Pentecostal Pilgrims alleges that Connor secured the dual agency so that he could also represent Mount Peace where Connor was a member and President of the Board of Trustees.

On 19 June 2006, Connor told Pentecostal Pilgrims that Mount Peace was interested in purchasing the property and that he knew of

a "back-up buyer" who could pay cash if Mount Peace could not buy the property. Five potential buyers tried to contact Connor to inquire about the property prior to the foreclosure sale. Connor did not show the property to any prospective buyers. Moreover, individuals advised Pentecostal Pilgrims that they contacted Connor about viewing and purchasing the property; however, neither Connor nor Fonville Morisey returned the individual's phone calls or met them to view the property.

On 30 June 2006, Connor notified Pentecostal Pilgrims about Mount Peace's offer to purchase the property for $800,000.00. This was the first offer Connor conveyed to Pentecostal Pilgrims after being hired. Pentecostal Pilgrims accepted the offer and requested a written Agreement for Purchase and Sale of Real Property. Connor told Taylor that these documents would arrive between 5-7 July 2006. Pentecostal Pilgrims alleges that it did not hear from Connor for several days.

On 7 July 2006, Pentecostal Pilgrims notified Wachovia Bank about the upcoming sale of the property. Herb Utter ("Utter"), the beneficiary of the Trust for which Wachovia held the note, allowed Pentecostal Pilgrims to bring the note current and postpone foreclosure proceedings if Pentecostal Pilgrims provided him the Agreement for Purchase and Sale of Real Property on 10 July 2006, and by the morning of 11 July 2006. On 8 July 2006, Taylor emailed Connor on behalf of Pentecostal Pilgrims noting the conversation with Utter about postponing the foreclosure proceedings. Connor did not respond to Taylor's email. Taylor demanded to know who the "back-up buyer" was, but Connor did not disclose the information. Connor did not supply the Agreement for Purchase and Sale of Real Property and missed the deadline that Utter imposed.

On 10 July 2006, Pentecostal Pilgrims received an email from Connor indicating that Mount Peace reduced its offer to $525,000.00. When Taylor called Connor to protest this offer, Connor said that he considered it to be a fair offer. Connor missed two appointments with Pentecostal Pilgrims on 10 July 2006, but finally arrived at 4:45 p.m. with the Agreement for Purchase and Sale of Real Property. On 12 July 2006, Pentecostal Pilgrims, Connor and Stephany Hand ("Hand"), attorney for Mount Peace, met with officers from Wachovia Bank in an attempt to postpone foreclosure proceedings. At this time Utter, via telephone conference, gave Wachovia instructions to foreclose on the property. Connor and Hand then began asking questions about bidding on the property at the foreclosure sale.

On 14 July 2006, Connor personally began to submit and sign initial bids and subsequent upset bids on behalf of Mount Peace. On 11 October 2006, Connor submitted and signed a successful upset bid for $485,743.28. Mount Peace purchased the property through the foreclosure sale and a Final Report and Account of Foreclosure Sale was filed on 16 January 2007. In January 2007, Mount Peace began occupying the property.

On 21 September 2007, Mount Peace filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. On 10 September 2008, the trial court granted the motion to dismiss Pentecostal Pilgrims' claims against Mount Peace. On 8 October 2008, Pentecostal Pilgrims filed and served written notice of appeal.

II. Interlocutory Appeal Jurisdiction

When appealing an interlocutory order, Rule 28(b) of the North Carolina Rules of Appellate Procedure specifically requires that an appellant's brief include the following:

> *A statement of the grounds for appellate review*. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

N.C.R. App. P. 28(b)(4) (2009). The burden rests on the appellant to establish the basis for an interlocutory appeal. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

Pentecostal Pilgrims' complaint states causes of action against multiple defendants: Connor, Fonville Morisey, and Mount Peace. Therefore, the court's grant of Mount Peace's motion to dismiss was not a final judgment as to all parties to the litigation and, as such, the order was interlocutory. *See, e.g. Pratt v. Staton*, 147 N.C. App. 771, 773, 556 S.E.2d 621, 623 (2001) (providing that "[a]n order . . . granting a motion to dismiss certain claims in an action, while leaving other claims in the action to go forward, is plainly an interlocutory order").

Our Supreme Court has distinguished final judgments from interlocutory orders in the following manner:

> Judgments and orders of the Superior Court are divisible into these two classes: (1) Final judgments; and (2) interlocutory orders. A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Veazey v. Durham, 231 N.C. 357, 361, 57 S.E.2d 377, 381 (1950). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). N.C.R. Civ. P. 54 provides in pertinent part that an interlocutory order is immediately appealable if the order represents "a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment." N.C. R. Civ. P. 54(b).

A party may appeal an interlocutory order if it affects a substantial right claimed in any action or proceeding and "[will] work injury [to the appellant] if not corrected before final judgment." *Goldston*, 326 N.C. at 728, 392 S.E.2d at 737. A substantial right is " 'a legal right affecting or involving a matter of substance as distinguished from matters of form; a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right.' " *Oestreicher v. Stores*, 290 N.C. 118, 120, 225 S.E.2d 797, 805 (1976) (citation omitted). Whether an order affects a substantial right is decided on a case-by-case basis. *Estrada v. Jaques*, 70 N.C. App. 627, 642, 321 S.E.2d 240, 250 (1984).

In the present case, the superior court's order granting Mount Peace's Rule 12(b)(6) motion to dismiss was a final judgment as to only one party, Mount Peace. Thus, the order is interlocutory and not immediately appealable. *Hudson-Cole Dev. Corp. v. Beemer, Inc.*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 312 (1999). The motion did not dispose of Pentecostal Pilgrims' additional claims against Connor and Fonville Morisey. The judgment dismissing Pentecostal Pilgrims' claims against Mount Peace adjudicates " 'the rights and liabilities of fewer than all the parties[.]' " *Christopher v. Bruce-Terminix Co.*, 26 N.C. App. 520, 521, 216 S.E.2d 375, 376 (1975) (citation omitted). Moreover, the trial court did not certify that "there is no just reason

for delay." *Id.* Therefore, Pentecostal Pilgrims does not have an appeal as of right from the trial court's order.

An immediate appeal from an interlocutory order may be taken from an order that affects a substantial right of appellant. *Hudson-Cole Dev. Corp.*, 132 N.C. App. at 344, 511 S.E.2d at 312. Pentecostal Pilgrims' appeal is interlocutory because the trial court's order dismissing the claims against Mount Peace does not dispose of the cause of action as to remaining defendants Mark Connor and Fonville Morisey Realty, Inc. Therefore, the order is not a final judgment. Moreover, in its appellate brief, Pentecostal Pilgrims did not recognize that its appeal was interlocutory and, as such, did not provide this Court with a jurisdictional basis as to which, if any, substantial right would be affected absent immediate review. Accordingly, Penecostal Pilgrams' appeal is

Dismissed.

Judges STEPHENS and BEASLEY concur.

RICHARD JAMES LEE, PETITIONER-APPELLANT v. WILLIAM C. GORE, JR., AS COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT-APPELLEE

No. COA09-370

(Filed 19 January 2010)

Motor Vehicles— revocation of driving privileges—properly executed affidavit required—willful refusal of chemical analysis

The trial court erred by upholding the Division of Motor Vehicles (DMV) revocation of petitioner's North Carolina driving privileges because N.C.G.S. § 20-16.2 requires that the (DMV) receive a properly executed affidavit that includes all the requirements set forth in N.C.G.S. § 20-16.2(c1) before the (DMV) is vested with the authority to revoke a driver's license. A form DHHS 3908 cannot serve as a substitute for a properly executed affidavit indicating petitioner willfully refused a chemical analysis.

Appeal by Petitioner from order entered 22 October 2008 by Judge Henry E. Frye, Jr. in Superior Court, Wilkes County. Heard in the Court of Appeals 27 October 2009.

Richard J. Lee, J.D., LL.M., Petitioner-Appellant, pro se.

Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel, for Respondent-Appellee.

McGEE, Judge.

Petitioner, a resident and registered driver of the State of Florida, was driving through Wilkes County just before midnight on 22 August 2007, when he was stopped by Officer Jason Ratliff of the Wilkesboro Police Department. Officer Ratliff testified at a later review hearing before the Division of Motor Vehicles (the Division) that he believed probable cause existed to arrest Petitioner for driving while impaired. Officer Ratliff transported Petitioner to an intake center to administer a chemical analysis (by an Intoxilyzer alcohol analyzer) to determine the concentration of alcohol in Petitioner's body. Officer Ratliff testified that Petitioner never specifically refused to submit to the chemical analysis. Officer Ratliff told Petitioner several times that failure to take the chemical analysis would result in Petitioner's being marked as willfully refusing the chemical analysis, and would result in the revocation of Petitioner's North Carolina driving privileges. However, Petitioner did not agree to take the Intoxilyzer test and Officer Ratliff marked "refused" on a form DHHS 3908 at 12:47 a.m. on 23 August 2007.

Officer Ratliff testified he then went to a magistrate to execute an affidavit concerning Petitioner's refusal to submit to a chemical analysis. Form DHHS 3907, titled "Affidavit and Revocation Report," was created by the Administrative Office of the Courts for this purpose. Form DHHS 3907 includes fourteen sections with an empty box before each section. The person swearing to the accuracy of the affidavit, having been "first duly sworn," checks the boxes relevant to the circumstances, and then signs the affidavit in front of an official authorized to administer oaths and execute affidavits. Section fourteen of form DHHS 3907 states: "The driver willfully refused to submit to a chemical analysis as indicated on the attached [form] ☐ DHHS 3908, ☐ DHHS 4003." Officer Ratliff testified that he did not check the box for section fourteen and the affidavit he sent to the Division did not have the box for section fourteen checked. Therefore, the "Affidavit and Revocation Report" sent to the Division

did not state that Petitioner had willfully refused to submit to a chemical analysis.

Upon receipt of the form DHHS 3907 sent by Officer Ratliff, the Division revoked Petitioner's North Carolina driving privileges. Petitioner requested a review hearing to contest the revocation, and a hearing was conducted on 20 November 2007 before Administrative Hearing Officer P.M. Snow. At this hearing, it was discovered that the copy of form DHHS 3907 received by the Division had an "x" in the section fourteen box. All the other boxes marked on the form DHHS 3907 contained check marks, not "x's." Petitioner's copy of the form DHHS 3907 did not contain the "x" in the box preceding section fourteen.

Hearing Officer Snow decided that the revocation of Petitioner's North Carolina driving privileges was proper. Petitioner then appealed the decision of Hearing Officer Snow to Wilkes County Superior Court, which affirmed the decision of Hearing Officer Snow. Petitioner appeals.

In Petitioner's second argument, he contends the trial court erred in upholding the Division's revocation of Petitioner's North Carolina driving privileges because the Division was without authority to revoke Petitioner's driving privileges. We agree.

N.C. Gen. Stat. § 20-1 (2006)[1] states: "The Division of Motor Vehicles of the Department of Transportation is established. This Chapter sets out the powers and duties of the Division." Therefore, we must look to N.C. Gen. Stat. § 20-1 *et seq*. for the full scope of the duties and powers conferred upon the Division by the General Assembly. N.C. Gen. Stat. § 20-16.2 is the statute delineating the powers of the Division when a person has been charged with an implied-consent ⊕ offense, and that person refuses to submit to a chemical analysis.

> (c) Request to Submit to Chemical Analysis.—A law enforcement officer or chemical analyst shall designate the type of test or tests to be given and may request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis,

1. The events related to this appeal occurred before the effective date of the current version of N.C. Gen. Stat. § 20-16.2. Though we cite the version of the statute in effect on 23 August 2007, for the purposes of this appeal, there are no material differences between the current version of this statute, and the version in effect on 23 August 2007.

> none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law.
>
> (c1) Procedure for Reporting Results and Refusal to Division.—Whenever a person refuses to submit to a chemical analysis . . . the law enforcement officer and the chemical analyst *shall* without unnecessary delay *go before an official authorized to administer oaths and execute an affidavit(s) stating that*:
>
> . . . .
>
> (5) The . . . person willfully refused to submit to a chemical analysis.
>
> The officer shall immediately mail the affidavit(s) to the Division. If the officer is also the chemical analyst who has notified the person of the rights under subsection (a), the officer may perform alone the duties of this subsection.
>
> (d) Consequences of Refusal; Right to Hearing before Division; Issues.—*Upon receipt of a properly executed affidavit required by subsection (c1)*, the Division shall expeditiously notify the person charged that the person's license to drive is revoked for 12 months, effective on the tenth calendar day after the mailing of the revocation order unless, before the effective date of the order, the person requests in writing a hearing before the Division.
>
> . . . .
>
> (e) Right to Hearing in Superior Court.—If the revocation for a willful refusal is sustained after the hearing, the person whose license has been revoked has the right to file a petition in the superior court for a hearing on the record. The superior court review shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license.

N.C. Gen. Stat. § 20-16.2 (2006).

In the 20 November 2007 hearing conducted pursuant to N.C. Gen. Stat. § 20-16.2(d), Hearing Officer Snow concluded in the "Findings of Fact, Conclusions of Law and Decision" that any failure by Officer Ratliff to check the box for section fourteen on the affi-

davit could not have prejudiced Petitioner, and did not deprive the Division of the authority to revoke Petitioner's license. Hearing Officer Snow concluded, as a matter of law, that Petitioner willfully refused to submit to a chemical analysis and that "the Order of Revocation of the driving privilege of [Petitioner] is sustained."

Petitioner appealed pursuant to N.C. Gen. Stat. § 20-16.2(e) to Wilkes County Superior Court. The trial court affirmed the 20 November 2007 decision of the Division by order entered 22 October 2008.

However, the uncontroverted testimony of Officer Ratliff before Hearing Officer Snow was that Officer Ratliff never marked any box associated with section fourteen on the affidavit before he made his affirmation to the magistrate and executed the affidavit. Officer Ratliff was asked at the hearing: "you never went back and told the magistrate or gave anybody authority to change that affidavit [to check the box associated with section fourteen]." Officer Ratliff responded, "no, sir." Officer Ratliff also agreed that "the copy [of the affidavit that was] with the Division . . . [was] not the same [one] that [Officer Ratliff] swore to in front of the magistrate."

When construing N.C. Gen. Stat. § 20-16.2, our Court has stated:

> "The intent of the legislature controls the interpretation of a statute. When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein."

Nicholson v. Killens, 116 N.C. App. 473, 477, 448 S.E.2d 542, 544 (1994), quoting *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978) (citations omitted). " 'Statutes imposing a penalty are to be strictly construed.' " *Killens*, 116 N.C. App. at 477, 448 S.E.2d at 544, quoting *Carter v. Wilson Construction Co.*, 83 N.C. App. 61, 68, 348 S.E.2d 830, 834 (1986).

"Whenever a person refuses to submit to a chemical analysis . . . the law enforcement officer and the chemical analyst *shall* without unnecessary delay *go before an official authorized to administer oaths and execute an affidavit*(s) stating that: . . . (5) The . . . person willfully refused to submit to a chemical analysis." N.C. Gen. Stat. § 20-16.2(c1) (emphasis added). "The officer shall immediately mail the affidavit(s) to the Division." *Id.* "*Upon receipt* of *a properly exe-*

cuted affidavit required by subsection (c1), the Division shall expeditiously notify the person charged that the person's license to drive is revoked for 12 months[.]" N.C. Gen. Stat. § 20-16.2(d) (emphasis added).

Construing N.C. Gen. Stat. § 20-16.2 strictly, as we are compelled to do, *Killens*, 116 N.C. App. at 477, 448 S.E.2d at 544, we hold that the plain language of the statute requires that the Division receive a "properly executed affidavit" that includes all the requirements set forth in N.C. Gen. Stat. § 20-16.2(c1) before the Division is vested with the authority to revoke a driver's license pursuant to N.C. Gen. Stat. § 20-16.2.

"The presumption is that no part of a statute is mere surplusage, but each provision adds something which would not otherwise be included in its terms." *Domestic Electric Service, Inc. v. Rocky Mt.*, 285 N.C. 135, 143, 203 S.E.2d 838, 843 (1974) (citation omitted). If we were to hold that the Division had the authority to revoke Petitioner's license without first obtaining an affidavit including a sworn statement of willful refusal as stated in N.C. Gen. Stat. § 20-16.2(c1), we would be rendering that language meaningless, as mere surplusage.

We are not convinced by the argument of Respondent that, because the form DHHS 3908 was sent to the Division along with the affidavit, and the form DHHS 3908 was marked "refused," the requirement that the sworn affidavit include an affirmative statement of Petitioner's willful refusal was satisfied. Although form DHHS 3907 includes boxes to check indicating that either form DHHS 3908 or form DHHS 4003 is attached, nowhere in N.C. Gen. Stat. § 20-16.2 is it required that a form DHHS 3908 (or a form DHHS 4003) be attached to the affidavit mandated under N.C. Gen. Stat. § 20-16.2(c1). We hold that a form DHHS 3908 is not a substitute for a "properly executed affidavit" as required by N.C. Gen. Stat. § 20-16.2(c1).

N.C. Gen. Stat. § 20-16.2 did require, however, that Officer Ratliff complete an affidavit indicating that Petitioner had wilfully refused the chemical analysis, and that Officer Ratliff, before an "official authorized to administer oaths and execute [affidavits]," swear under oath to the truth of the information included in the affidavit. Officer Ratliff quite admirably and honestly informed Hearing Officer Snow that Officer Ratliff failed to check the box indicating Petitioner had willfully refused to submit to the chemical analysis before he executed the affidavit in front of the magistrate. Therefore, the requirements of N.C. Gen. Stat. § 20-16.2(c1) were not met.

We note that there was no evidence presented at the hearing indicating Officer Ratliff ever showed the magistrate the form DHHS 3908, nor even that Officer Ratliff brought the form with him when he went to execute the affidavit. Therefore, even assuming *arguendo* the form DHHS 3908 could be considered a part of the affidavit, which construing the plain language of N.C. Gen. Stat. § 20-16.2 we hold it cannot, there was no evidence the magistrate had any knowledge of the form DHHS 3908, or of it having been marked as "refused," at the time the affidavit was executed. Therefore, there is no evidence that Officer Ratliff swore before the magistrate in any manner that Petitioner had willfully refused to submit to the chemical analysis. The form DHHS 3908 cannot serve as a substitute for a properly executed affidavit.

We hold that the Division never received "a properly executed affidavit required by subsection (c1)" and, therefore, the Division had no authority to revoke Petitioner's license pursuant to N.C. Gen. Stat. § 20-16.2, or any other statute. Absent the authority to revoke Petitioner's license, there was also no authority pursuant to N.C. Gen. Stat. § 20-16.2 for the Division to conduct a review hearing, or for appellate review in the superior court.

Therefore, the rulings of Hearing Officer Snow and the superior court affirming the revocation of Petitioner's license are void. We vacate the order of the superior court affirming the decision of Hearing Officer Snow, and remand to the Division for reinstatement of Petitioner's North Carolina driving privileges. In light of this holding, we do not address Petitioner's additional arguments.

Vacated and remanded.

Judges WYNN and BRYANT concur.

IN RE D.Y., B.M.T., J.A.T.

[202 N.C. App. 140 (2010)]

IN THE MATTER OF: D.Y., B.M.T., J.A.T., MINOR CHILDREN

No. COA09-1087

(Filed 19 January 2010)

Child Abuse and Neglect— permanency planning order—hearing—evidence not presented

A permanency planning order was remanded for a new hearing where the trial court relied on the written reports of DSS, the guardian *ad litem*, prior court orders, and oral arguments by the attorneys, but did not receive sworn testimony.

Appeal by respondent-mother from order entered 3 June 2009, *nunc pro tunc* 13 May 2009, by Judge John W. Dickson in Cumberland County District Court. Heard in the Court of Appeals 21 December 2009.

Christy E. Wilhelm for respondent-appellant mother.

John F. Campbell, for petitioner-appellee Cumberland County Department of Social Services.

Pamela Newell Williams for guardian ad litem.

STEPHENS, Judge.

Respondent-mother appeals from a permanency planning order. For the following reasons, we reverse and remand.

I. Procedural History and Factual Background

On 24 April 2008, the Cumberland County Department of Social Services ("DSS") filed a petition alleging that D.Y., B.M.T.,[1] and J.A.T. were neglected and dependent juveniles. DSS stated it had received a report that respondent-mother was threatening to commit suicide and harm the children. Furthermore, DSS claimed that respondent-mother had hit her mother "repeatedly in the head and all over her body in the presence of the children," and "verbally attacked her children by yelling at them and asking if they wanted some of that also, indicating the physical altercation between her and their grandmother[.]" Additionally, DSS alleged that the children had admitted to being afraid of respondent-mother because she had beaten them in

1. The parties refer to the minor child, B.M.T., as "B.N.T." in their briefs. However, the order from which appeal is taken and most of the preceding pleadings and orders refer to the minor child as "B.M.T." Therefore, we refer to the minor child as "B.M.T." throughout our opinion.

the past and had slapped their faces. Finally, DSS stated that respondent-mother had admitted to being diagnosed as bi-polar, had previously tried to commit suicide, was not taking her prescribed mental health medications, and was using marijuana. Respondent-mother was voluntarily admitted to Cape Fear Medical Center after the police gave her the choice of admission to the hospital or being taken to jail. D.Y. was picked up by her father and was residing with him when the petition was filed. B.M.T. and J.A.T. were residing with their maternal grandmother.

An adjudicatory hearing was held on 21 January 2009. At the hearing, respondent-mother stipulated that the "juveniles were dependent at the time of the filing of the Petition based on domestic violence between the Respondent Mother and grandmother[.]" The court accepted the stipulation and dismissed the allegations of neglect. The court noted that D.Y. had been placed with her father and was doing well in this placement. The court found that the placement of B.M.T. and J.A.T. with their maternal grandmother had been disrupted and they had been relocated to the residence of D.Y.'s father. However, J.A.T. was unhappy with this placement and was subsequently placed with court-approved caretakers. The trial court ordered that respondent-mother be allowed supervised visitation with B.M.T. and J.A.T., follow all recommendations of a psychological assessment, and complete an anger management program.

A permanency planning review hearing was held on 13 May 2009. The court found:

> That it is not possible for the juveniles to return home at this time. The Respondent Mother has not completed all recommendations on the Family Service Agreement Plan and the juveniles have expressed they do not wish to return home to the Respondent Mother.

The court further found that "[r]eturn of the juveniles to the Respondent Mother would be contrary to the welfare and best interest of the juveniles." Accordingly, the court declined to return the juveniles to respondent-mother's custody and ordered that the juveniles remain in their placements. The court continued the existing visitation plan. Respondent-mother appeals.

II. Discussion

We first consider respondent-mother's argument that the trial court failed to hold a proper hearing. Respondent-mother asserts that

the trial court's findings of fact are unsupported by properly introduced evidence, and that therefore, the trial court erred in its conclusions of law. We agree.

One of the stated purposes of the Juvenile Code is "[t]o provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents[.]" N.C. Gen. Stat. §7B-100(1) (2008). Another stated purpose is "[t]o develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family." N.C. Gen. Stat. §7B-100(2) (2008). In child custody matters,

> [w]henever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony. Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child.

In re Shue, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984).

In *In re D.L.*, 166 N.C. App. 574, 603 S.E.2d 376 (2004), this Court reversed a permanency planning order where the trial court's findings of fact were unsupported by sufficient evidence. In *D.L.*, the trial court allowed the respondent-mother to speak at the permanency planning hearing. *Id.* at 582, 603 S.E.2d at 382. DSS did not offer any testimony into evidence other than the DSS attorney's statements. *Id.* "Statements by an attorney are not considered evidence." *Id.* In reversing the order of the trial court, our Court noted that

> [t]he only "evidence" offered by DSS was a summary prepared on 11 September 2002. "By stating a single evidentiary fact and adopting DSS and guardian *ad litem* reports, the trial court's findings are not 'specific ultimate facts . . . sufficient for this Court to determine that the judgment is adequately supported by competent evidence.' " *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (quoting *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002)); *see also . . . Shue*, 311 N.C. at 597, 319 S.E.2d at 574 ("Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child."). . . .

> As *no* evidence was presented by either DSS or [respondent-mother] regarding the permanency plan, the trial court's findings of fact are unsupported. Without any evidence to support its findings, the trial court erred in its conclusions of law.

Id. at 582-83, 603 S.E.2d at 382.

We conclude that the present matter is indistinguishable from *D.L.* In the case *sub judice*, the trial court entered an order based solely on the written reports of DSS and the guardian *ad litem*, prior court orders, and oral arguments by the attorneys involved in the case. *See id.*; *Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337 ("By stating a single evidentiary fact and adopting DSS and guardian *ad litem* reports, the trial court's findings are not 'specific ultimate facts . . . sufficient for this Court to determine that the judgment is adequately supported by competent evidence.' ") (citation omitted). Although respondent-mother was given the opportunity to address the court, she did not take the stand and was not sworn. No sworn testimony from respondent-mother or any other witness was received. *Cf. D.L.*, 166 N.C. App. at 582, 603 S.E.2d at 382 (although the respondent-mother took the stand and was sworn, she offered no testimony regarding the permanency plan). DSS did not offer any witnesses for testimony and the trial court did not examine any witnesses.

We conclude, therefore, that because no evidence was presented, the trial court's findings of fact are unsupported, and its conclusions of law are in error. Accordingly, as in *D.L.*, the order of the trial court must be reversed and the matter remanded for further proceedings consistent with this opinion.

Because we remand for a new hearing, we need not address respondent-mother's remaining arguments on appeal.

REVERSED and REMANDED.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA v. DAMIEN SMITH

No. COA09-467

(Filed 19 January 2010)

Jurisdiction— superior court—juvenile delinquency petitions

The superior court lacked jurisdiction to enter judgment against defendant. Because the district court received juvenile delinquency petitions charging defendant with first-degree kidnapping, second-degree sexual offense, and robbery with a dangerous weapon more than thirty days after the juvenile court counselor approved the petitions, the district court failed to establish jurisdiction over the matter and could not transfer jurisdiction to the superior court.

Appeal by defendant from judgment entered 17 October 2008 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 October 2009.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for the State.

Kimberly P. Hoppin for defendant-appellant.

BRYANT, Judge.

Defendant Damien Smith appeals from convictions entered pursuant to a plea agreement for first-degree kidnapping, second-degree sexual offense, and robbery with a dangerous weapon. For the reasons stated herein, we vacate the convictions.

On 26 February 2008, a Mecklenburg County juvenile court counselor received complaints filed against defendant on charges of first-degree sex offense, kidnapping, and robbery with a dangerous weapon. On 28 February 2008, the court counselor approved juvenile delinquency petitions against defendant. On 4 April 2008, the juvenile delinquency petitions were filed in Mecklenburg County District Court charging defendant with first-degree sexual offense, in violation of N.C.G.S. § 14-27.4(a); kidnapping, in violation of N.C.G.S. § 14-39; and robbery with a dangerous weapon, in violation of N.C.G.S. § 14-87. A hearing to transfer the matters from juvenile to superior court was held 21 May 2008, and a transfer order was entered 13 June 2008.

On 30 June 2008, defendant was indicted in Mecklenburg County Superior Court on the charges of first-degree sexual offense, robbery with a dangerous weapon, and first-degree kidnapping. Defendant entered into the aforementioned plea agreement but retained the right to appeal the trial court's order that defendant enroll in satellite-based monitoring for sex offenders upon the completion of his sentence. On the convictions for first-degree kidnapping and second-degree sex offense, the judgments were consolidated, and defendant was sentenced to a term of 116 to 149 months in the custody of the North Carolina Department of Correction. For the armed robbery conviction, defendant was sentenced to a consecutive term of 103 to 133 months. Defendant appeals.

On appeal, defendant raises three issues: (I) whether the trial court lacked jurisdiction over defendant when it entered judgment; (II) whether defendant was denied effective assistance of counsel; and (III) whether the trial court erred by sentencing defendant as a level III felon. We address only issue I.

I

Defendant argues the trial court lacked jurisdiction over defendant where the Mecklenburg County Clerk's Office received the juvenile petitions charging defendant more than thirty days after the court counselor approved the petitions for filing, a jurisdictional violation of N.C. Gen. Stat. § 7B-1703. Furthermore, defendant argues that, because the district court established no jurisdiction, jurisdiction could not be transferred to Mecklenburg County Superior Court, and the convictions must be vacated. We agree.

Under, North Carolina General Statutes, section 7B-1703(b),

> Except as provided in G.S. 7B-1706 [allowing diversion plans], if the juvenile court counselor determines that a complaint should be filed as a petition, the counselor shall file the petition as soon as practicable, but in any event within 15 days after the complaint is received, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor.

N.C. Gen. Stat. § 7B-1703(b) (2007).

In *In re J.B.*, 186 N.C. App. 301, 650 S.E.2d 457 (2007), this Court held that a violation of N.C.G.S. § 7B-1703(b) is of jurisdictional consequence. There, pursuant to N.C.G.S. § 7B-1703(b), the juvenile court intake counselor received a complaint and made a timely de-

termination that a juvenile petition should be filed; however, the petition was not filed in the office of the clerk of court for more than thirty days after receipt of the complaint. We held that because of the delay the trial court lacked jurisdiction and the disposition order had to be vacated.

Here, the Mecklenburg County juvenile court counselor received the complaints filed against defendant on 26 February 2008. The determination to approve the petitions for filing was made 28 February 2008; however, the petitions were not filed with the Mecklenburg County Clerk of Court's Office until 4 April 2008, more than thirty days after the complaints against defendant were received by the court counselor. Therefore, because the petition was not "filed within, at a maximum, thirty days after receipt of the complaint," *In re J.B.*, 186 N.C. App. at 303, 650 S.E.2d at 458, the trial court lacked jurisdiction over the petitions and could not transfer jurisdiction to a superior court. Accordingly, the dispositions on these matters must be vacated.

Vacated.

Judges WYNN and McGEE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 JANUARY 2010)

BALTZELL v. DOWDY No. 09-94	Mecklenburg (07CVS12352)	Dismissed
BRICKER v. RHONEY FURN. HOUSE No. 09-314	Indus. Comm. (IC987125) (IC144263)	Affirmed
CALLANAN v. WALSH No. 09-482	Transylvania (01CVD129)	Dismissed
DAVIS v. COOK No. 09-141	Cherokee (08CVS34)	Affirmed
FAIRBANKS v. BREWINGTON No. 09-237	Guilford (07CVS10064)	Affirmed
FEIERSTEIN v. N.C. DEPT. OF ENV'T No. 08-1396	Indus. Comm. (TA18276)	Affirmed in part, reversed and remanded in part
GARNER v. CHEEK No. 09-214	Wake (07CVD3401)	Affirmed
HOLLAND v. HORNE No. 09-399	Scotland (06CVS1057)	Affirmed
HUDSON v. LAIL No. 08-1126	Transylvania (06CVD43) (98CVD292)	Affirmed
HUSKETH v. N.C. DEP'T OF CORR. No. 09-411	Indus. Comm. (TA19402)	Reversed and Remanded
IN RE E.G. & M.G. No. 09-1127	Avery (07J22-23)	Affirmed
IN RE E.L. No. 09-1028	Guilford (08J166)	Affirmed
IN RE GREGORY No. 09-872	Forsyth (06SP82)	Dismissed
IN RE H.A.G.S. & E.M.C.S. No. 09-980	Wilkes (09JA34-35)	Reversed
IN RE M.C.S. & K.R.S. No. 09-1031	Wake (07JT832-833)	Affirmed
IN RE M.J.P. No. 09-1015	Forsyth (06J196)	Reversed and Remanded

IN RE P.P. & M.P. No. 09-1079	Pitt (00JT206-207)	Affirmed
JOINT REDEVELOPMENT v. JACKSON-HEARD No. 09-37	Pasquotank (00CVS641)	Affirmed
KLUTTZ v. NEXT SAFETY, INC. No. 09-153	Ashe (07CVS443)	Affirmed
KUCMIERZ v. FOUR OAKS BANK & TRUST No. 09-491	Wake (08CVS15947)	Affirmed
POPE v. JOHNS MANVILLE No. 09-281	Indus. Comm. (IC532319)	Affirmed
RIEPER v. PEARCE No. 09-131	Wake (07CV10365)	Affirmed
SNOW v. WAKE FOREST UNIV. No. 09-189	Forsyth (07CVS7931)	Affirmed
SPERRY v. KOURY CORP. No. 09-391	Indus. Comm. (IC396280)	Affirmed
STATE v. ALVARDO No. 09-428	Montgomery (05CRS51959)	No Error
STATE v. BAKER No. 09-468	Mecklenburg (07CRS211946) (07CRS211948) (07CRS211945) (07CRS211949)	No Error
STATE v. BERRIO No. 09-608	Union (07CRS52535) (07CRS52528) (07CRS52538) (07CRS52533) (07CRS52536) (07CRS52531) (07CRS52534) (07CRS52523) (07CRS52537) (07CRS52532)	No Error
STATE v. CONLEY No. 09-456	Robeson (06CRS52305)	No Error
STATE v. DEWALT No. 09-589	Forsyth (08CRS12958)	Affirmed
STATE v. DEXTER No. 09-385	Pamlico (05CRS476) (05CRS483) (05CRS472)	Affirmed

STATE v. GAINEY No. 09-686	Mecklenburg (07CRS26) (06CRS253067)	Harmless error in part; no error in part
STATE v. GATLING No. 09-735	Durham (07CRS52277)	No Error
STATE v. HOSCH No. 09-583	Cleveland (08CRS2257) (07CRS55884)	No Error
STATE v. JACOBY No. 09-751	Buncombe (02CRS64479) (02CRS64658) (02CRS64478) (02CRS64659)	Affirmed; remanded for correction of judgments
STATE v. JONES No. 09-673	Forsyth (08CRS17227) (08CRS55197) (08CRS55206)	No error in part, judgment arrested in part
STATE v. MILLSAP No. 09-627	Buncombe (07CRS59234) (07CRS59235) (07CRS59233)	Affirmed; remanded for correction of judgments
STATE v. MORGAN No. 09-766	Mecklenburg (07CRS228052) (07CRS228053) (07CRS228054) (07CRS228808)	No Error
STATE v. MURDOCK No. 09-615	Iredell (08CRS2142)	Affirmed
STATE v. REVELS No. 09-380	Scotland (08CRS486) (07CRS52533)	No error in part; Reversed and remanded in part
STATE v. RICHARDSON No. 09-914	Forsyth (08CRS58553)	Reversed
STATE v. SMITH No. 09-565	Guilford (05CRS100044)	No Error
STATE v. SMITH No. 09-708	Mecklenburg (06CRS244862) (06CRS244861)	No Error
STATE v. STADLER No. 09-648	Alamance (08CRS52590)	No prejudicial error

STATE v. WELLS No. 09-690	Randolph (06CRS55467) (06CRS55466)	No prejudicial error
STATE v. WHITE No. 09-602	Catawba (08CRS52130)	No error in part, dismissed in part
STATE v. WHITLOCK No. 09-824	Forsyth (08CRS55353)	No Error

IN RE CLARK

[202 N.C. App. 151 (2010)]

IN THE MATTER OF JANET CLARK

No. COA08-1043

(Filed 2 February 2010)

1. Costs— attorney fees—incompetent adult—restoration of competency

The trial court had the statutory authority to award attorney fees from an incompetent adult's estate under N.C.G.S. § 35A-1202(10), which gave the guardian of the person the right to employ legal assistance for the benefit of the ward. N.C.G.S. § 35A-116(a) does not represent the only statutory provision under which the court had authority to approve payment of attorney fees.

2. Costs— attorney fees—incompetent adult—opposition to restoration of competency

The trial court did not abuse its discretion by approving payment of attorney fees from an incompetent adult's estate to law firms which unsuccessfully opposed the restoration of competency to the ward. There were a number of factors, taken together, which justified the guardian's concern that restoration of competency and the removal of herself as guardian might not be in the ward's best interest.

3. Costs— attorney fees—establishment of trust—preservation of assets

The trial court did not abuse its discretion by awarding attorney fees from a ward's estate where the attorneys were retained to assist in the establishment of a special needs trust and the preservation of assets and where the ward was in the process of receiving a large personal injury settlement. Compensation for a service provider acting on behalf of a ward is not contingent upon the ward's approval.

4. Costs— witness fees—restoration of competency to adult—representatives of trustee

The trial court did not err in an action in which an adult's competency was restored by requiring payment of witness fees from a ward's estate to representatives of the trustee where the witnesses were subpoenaed by the ward's attorney before competency was restored but competency had been restored by the time the subpoenas were issued.

5. Guardian and Ward— restoration of competency—evidentiary support

There was either evidentiary support for challenged findings in an action to restore an adult's competency, or the findings did not involve prejudicial error.

6. Attorneys— counsel for guardian of ward—no ethical violations

The trial court did not err in its ruling that the legal counsel for the guardian of an adult ward did not commit ethical violations and was not subject to sanctions. Although the formation of the retainer agreement was questioned, the guardian of the person is clearly authorized to retain legal counsel and the fact that the guardian of the estate did not sign the agreement is beside the point. The findings that the counsel had exercised his best judgment on behalf of the client were amply supported by the record, and there was no error in the findings and conclusions that there was no conflict of interest in the counsel's relationship with the Corporation of Guardianship. There was ample support for findings to the effect that the relationship between counsel and the Corporation of Guardianship was fully disclosed and there was no demonstration that the relationship adversely affected his representation of his client.

7. Appeal and Error— attorney fees as sanction—denied—appeal not frivolous

A motion for remand of an award of attorney fees as a sanction for a frivolous appeal was denied, even though all of appellants' arguments were rejected in the appeal, where the arguments were not so totally without merit that they could be branded completely frivolous. Additionally, there was no evidence that the appeal was taken for an improper purpose.

8. Appeal and Error— attorney fees—restoration of competency—original jurisdiction—clerk of superior court

Motions for attorney fees made on appeal in an action to restore competency were dismissed without prejudice to petitioner's right to submit a request for such fees to the clerk of superior court, who has original jurisdiction over matters involving management by a guardian of her ward's estate.

Appeal by former ward and petitioner for restoration of former ward's competency from order entered 27 February 2008 by Judge

Paul C. Ridgeway in Harnett County Superior Court. Heard in the Court of Appeals 8 April 2009.

McLeod & Harrop, by Donald E. Harrop, Jr.; Jones & Jones, P.L.L.C. by Cecil B. Jones, for appellants.

Wyrick, Robbins, Yates, & Ponton, LLP by, K. Edward Greene; Tobias S. Hampson, for appellee Booth, Harrington, & Johns, LLP.

Bain, Buzzard & McRae, LLP by Robert A. Buzzard, for appellee Gail Zawacki.

ERVIN, Judge.

I. Factual Background

On 11 May 2005, Janet Clark (Ms. Clark) was involved in a serious motor vehicle accident. Ms. Clark sustained a broken knee and a traumatic brain injury, remained comatose for two and a half weeks, spent two months as an inpatient at WakeMed Hospital, and required months of additional rehabilitation. Prior to her injury, Ms. Clark had a history of substance abuse and mental health problems.

On 3 June 2005, Ms. Clark's husband, Roger Clark (Mr. Clark), petitioned to have his wife adjudicated incompetent and to have himself appointed as her general guardian. On 24 June 2005, Ms. Clark was adjudicated incompetent. Four days later, Mr. Clark was appointed Ms. Clark's general guardian. On 26 October 2005, Mr. Clark resigned as guardian of Ms. Clark's estate, claiming that his own disability made it difficult for him to competently oversee Ms. Clark's assets. On 10 November 2005, the Clerk of Superior Court of Harnett County appointed William M. Pope as guardian of Ms. Clark's estate in lieu of Mr. Clark.

Mr. Clark continued to serve as guardian of Ms. Clark's person until he resigned on 9 January 2006, once again attributing his resignation to his disability. On 19 January 2006, the court relieved Mr. Clark of his fiduciary responsibilities and appointed Ms. Clark's sister, Gail Zawacki (Ms. Zawacki), to serve in his stead. Prior to being officially appointed as guardian of Ms. Clark's person, Ms. Zawacki retained A. Frank Johns (Mr. Johns) of Booth, Harrington & Johns, LLP (Booth Harrington)[1] to represent Ms. Clark in connection with

1. Booth, Harrington & Johns, LLP became Booth, Harrington & Johns of NC, PLLC during the pendency of this litigation.

certain guardianship and trust-related issues that were expected to arise in connection with anticipated litigation. According to the 4 January 2006 retainer agreement executed by Booth Harrington and Ms. Zawacki, Booth Harrington's representation of Ms. Clark was to consist of five phases, and a sixth, optional, phase:

I. PHASE 1 APPEARANCE AND RECOGNITION OF ATTORNEY OF RECORD IN GUARDIANSHIP PROCEEDINGS[]

. . . .

II. PHASE 2—COURT APPEARANCE AND RECOGNITION OF ATTORNEY OF RECORD[]

. . . .

III. PHASE 3—PROVIDE EXPERTISE AND GUIDANCE IN THE COURT ORDERED MEDIATION RELATING TO THE IMPACT OF BENEFITS

. . . .

IV. PHASE 4—LIFE PLANNING AND STRUCTURE AND LUMP-SUM DEVELOPMENT OF ALL PRODUCTS AND SERVICES THAT WILL FUND THE [SPECIAL NEEDS TRUST (SNT)][]

. . . .

V. PHASE 5—CREATE, DEVELOP AND FUND [AN SNT][]

. . . .

VI. PHASE 6—SNT ADMINISTRATION (OPTIONAL)[]

. . . .

The compensation to be received by Booth Harrington under the retainer agreement was contingent upon the receipt of a recovery in a personal injury litigation that had been instituted on Ms. Clark's behalf against Tyco International (US) Inc.; Tyco Electronics Corporation; and Robert Bruce Gorman stemming from the 11 May 2005 accident (the Tyco litigation). The retainer agreement provided that Booth Harrington would be paid $7,500.00 for the work to be performed during Phase 1 and $11,500.00 for the work to be performed during each subsequent phase.

After undertaking to represent Ms. Clark, Mr. Johns petitioned to have Ms. Clark undergo "a comprehensive physical and cognitive assessment" and to receive rehabilitation. On 18 January 2006, the

court entered an order allowing Ms. Clark to temporarily reside at the Florida Institute for Neurological Rehabilitation (FINR), which provides treatment for patients that have sustained traumatic brain injuries. During her stay at FINR, Ms. Clark raised numerous complaints, including allegations that female nursing staff had shoved their fists in her rectum, that she had been beaten, and that she had been served ant-covered food.

On 5 January 2007, Mr. Clark petitioned for restoration of Ms. Clark's competency or, alternatively, for Ms. Zawacki's removal as guardian of Ms. Clark's person.[2] On 12 January 2007, Mr. Johns filed a Motion to Dismiss; a Motion to Quash Subpoena directed at a subpoena issued for Ms. Zawacki at the request of counsel for Mr. Clark; and a Motion for Multidisciplinary Evaluation or, in the Alternative, a Rule 35 Mental Examination; and a Motion for Jury Trial.[3] On 19 January 2007, the Clerk of Superior Court appointed Christopher Carr to serve as Ms. Clark's guardian *ad litem* in the pending guardianship-related matters. On 22 January 2007, Mr. Johns filed a Motion to File Affidavits Under Seal; a Motion to Stay Disbursements; a Motion for Continuance; an Amended Motion for Multidisciplinary Evaluation, or, in the Alternative, a Rule 35 Mental Examination; an Amended Motion to Dismiss; and an Amended Motion for Jury Trial and Demand for Jury Trial.

On 22 January 2007, the Clerk of Superior Court entered an Order to File Affidavits Under Seal and an Order for Jury Trial. On 24 January 2007, the Clerk of Superior Court entered an Order for Multidisciplinary Evaluation and an Order for Continuance. On 1 February 2007, the Clerk of Superior Court entered an Order of Recusal, in which the Clerk's office recused itself from serving as a hearing officer in this matter.

On 2 February 2007, the Clerk of Superior Court entered an Order indicating the belief that Ms. Clark might be moved from her current placement and ordering that the Multidisciplinary Evaluation take place as scheduled. On 5 February 2007, Ms. Clark submitted a letter requesting that a hearing be held to consider the restoration of her competency, indicating that she would prefer that Mr. Clark serve as her guardian rather than Ms. Zawacki, and stating that Mr. Jones should be deemed her representative rather than Mr. Johns. On 5

2. Mr. Clark was represented by Cecil B. Jones.

3. At the time that these filings were made, Mr. Johns and Marylynn S. Jones, another attorney practicing with Booth Harrington, were representing Ms. Clark.

February 2007, the Clerk of Superior Court entered a Modification of Order Entered 02-02-07 allowing FINR to release Ms. Clark into Ms. Zawacki's custody so long as she was returned to Florida on 27 and 28 February 2007 for the Multidisciplinary Evaluation.

On 5 February 2007, Judge Richard T. Brown entered an Order Approving Final Settlement Between Plaintiff and Defendant in the Tyco litigation. The total settlement approved by Judge Brown amounted to $4,000,000.00. In approving the settlement of the Tyco litigation, Judge Brown found as a fact, among other things, that:

> 7. Plaintiff engaged A. Frank Johns, Esq., and the firm of BOOTH HARRINGTON & JOHNS LLP and owes $74,653.35.
>
> a. Plaintiff agreed to pay the firm of Booth Harrington & Johns LLP $7,500.00 **FOR THE FIRST ENUMERATED PHASE ADDRESSING GUARDIANSHIP ISSUES, and $11,500.00 FOR EACH OF FOUR OTHER ENUMERATED PHASES**. These fees were confirmed in a separate retainer agreement and shall be payable to Booth Harrington & Johns LLP as the contingent retainer and minimum fee owed by the Client to the Law Firm in connection with the Matter regardless of the outcome of the Matter or the amount of attorney time involved in bringing the Matter to its conclusion. Flat fees due to Booth Harrington & Johns LLP under the retainer agreement total $53,500.
>
> b. Additionally, the firm of Booth Harrington & Johns, LLP has represented the interests of the Plaintiff in subsequent hearings in the guardianship forum. These matters are currently ongoing and require further representation. Total hourly rate fees for additional guardianship representation are currently outstanding in the amount of $21,153.35.

Among other things, the 5 February 2007 order provided that $729,667.00 was to be paid to Booth Harrington's trust account, with $74,653.35 to be paid to Booth Harrington for legal fees; various amounts to be paid to other creditors; and the balance to be paid to the trustee of an SNT to be established by Booth Harrington for Ms. Clark's benefit. The order approving the personal injury settlement made Mr. Johns and Booth Harrington responsible for creating the SNT and provided that the legal fee payment to Booth Harrington was intended to cover:

> the phases of services to create the [SNT] for the benefit of [Ms. Clark]; to represent [Ms. Clark's] interests and those of the guardian of the person, [Ms.] Zawacki[,] in guardianship hearings and process; and to provide counsel to the trustee of the [SNT] for [SNT] administration and future Medicaid eligibility, to assure the proper purchase of annuity contracts, to assure that the prorating of lump sum distributions are correctly distributed to the trustee of the [SNT], and to assure that [the] initial distributions into the [SNT] and from it meet all tax, regulatory and fiduciary requirements necessary to sustain eligibility for governmental benefits, including Supplemental Security Income ("SSI"), Community Assistance Program ("CAP"), Social Security Disability Income ("SSDI"), Medicare and Medicaid during all stages of [Ms. Clark's] life.

According to a draft Irrevocable Special Needs Trust (d)(4)(C) Pooled Trust of Janet Clark attached to the 5 February 2007 order, the trustee of the SNT was to be the Corporation of Guardianship, a corporate entity for which Mr. Johns originally served as incorporator and on whose Board of Directors he continued to serve.[4] An additional $1,800,000.00 was "to be paid to an insurance company chosen by counsel for [Ms. Clark] for purchase of an annuity for the benefit of Ms. Clark."

On the day after Judge Brown entered the order approving the settlement of the Tyco litigation, Ms. Clark was released into the custody of Ms. Zawacki, who resided in New Jersey. On 12 February 2007, while riding in a car with Ms. Zawacki, Ms. Clark "began screaming and swearing at [her]." As a result of this incident, Ms. Clark was involuntarily committed to Hagedorn Psychiatric Hospital in New Jersey.

On 22 February 2007, Mr. Clark petitioned for Ms. Zawacki's immediate removal as guardian of Ms. Clark's person. In response, Ms. Zawacki retained Robert A. Buzzard of Bain, Buzzard & McRae (Bain Buzzard) to represent her in her fiduciary capacity. A guarantee of legal fees was executed by the Corporation of Guardianship on 9 March 2007. Booth Harrington advised the Corporation of Guardianship to execute this document.

On 23 February 2007, the Clerk of Superior Court entered an order requesting that a current multidisciplinary evaluation be per-

4. The documents actually creating the SNT were accepted by the Corporation of Guardianship on 7 February 2007 and signed by Judge Brown on 12 February 2007.

formed upon Ms. Clark in New Jersey. On 26 February 2007, Mr. Johns filed a Motion to Dismiss Petition. On 27 February 2007, Mr. Johns filed a Motion for Modification of MDE.[5] On 27 February 2007, the Clerk of Superior Court entered an Order providing that the multidisciplinary evaluation of Ms. Clark could be conducted in New Jersey rather than Florida. On 1 March 2007, Judge Brown declined a request to remove Booth Harrington as Ms. Clark's counsel. On 15 May 2007, Bain Buzzard filed an answer on behalf of Ms. Zawacki.

On 21 May 2007, this matter came on for hearing before Judge William C. Gore, Jr. On that date, Judge Gore entered an Order Disqualifying Attorney that was subsequently signed on 26 June 2007. In that order, Judge Gore recited that Booth Harrington opposed restoration of Ms. Clark's competency; that no representative of Booth Harrington "had contacted or communicated with [Ms. Clark] since the filing of the Petition of Restoration;" that Ms. Clark had indicated that she did not want Booth Harrington to represent her; and that Ms. Clark "wished to proceed on her own accord fully" and ordered that Mr. Johns and Ms. Jones be "disqualified and removed from representing [Ms. Clark] in this proceeding." All interested parties entered into settlement discussions and signed a Memorandum of Settlement which provided that its terms would "be reduced to a consent order within the next ninety days" and that the parties had agreed, in pertinent part, that:

1. The current [SNT] shall be replaced with a substitute irrevocable special needs trust to reflect a change in the trustee of the current special needs trust[.]

2. The modified and/or substituted trust referenced above . . . shall be funded by the annuity payments made pursuant to the terms of the personal injury settlement with [Ms.] Clark.

. . . .

4. All parties hereto [] agree to forever release, discharge and hold harmless [Ms.] Zawacki from any actions she has taken individually or as guardian of the person for [Ms.] Clark.

5. Until the aforementioned modified or substitute trust shall be set up and approved[,] [Ms.] Clark shall receive assistance

5. Although the Motion for Modification for MDE was filed on 27 February 2007, it was dated 22 February 2007 and appears to have precipitated the entry of the 23 February 2007 order changing the location at which the multidisciplinary evaluation could be conducted.

from the settlement funds from her personal injury matter currently held in the trust account of [Mr.] Johns, an amount equal to $8,000.00 per month which is hereby deemed a reasonable and appropriate reimbursement of her living expenses[.]

. . . .

7. It is hereby agreed that all parties hereto shall present to the court any unpaid reimbursements, expenses or fees on the same date of the presentment of the modified or substitute trust and that all reasonable fees shall be authorized by the court and distributed per the court order *after giving all parties an opportunity to be heard.*

8. *That an accounting of the monies paid to date from the [SNT] and payments made of monies held in trust by [Mr.] Johns or his firm shall be provided to the parties.*

Finally, in an Order for Restoration of Competency entered on 21 May 2007 and signed on 26 June 2007, Judge Gore ordered, after reciting that "the guardian of the person indicated through counsel that she would not be opposing restoration" and after making findings of fact based on observations made by the guardian *ad litem*, that Ms. Clark's rights "be fully restored and that she is competent to handle her personal and financial affairs."

On 23 May 2007, Mr. Johns transferred $319,572.01 from Booth Harrington's trust account to the Corporation of Guardianship, which deposited that amount in the SNT. Mr. Johns did not make the initial $16,000.00 payment to Ms. Clark or the subsequent $8,000.00 monthly payments called for in the Memorandum of Settlement out of a concern that, if he did so, he would be violating the 5 February 2007 order. On 1 June 2007, Mr. Johns filed a Report of Disbursements And Proof of Funding as Directed In Order Approving Final Settlement Between Plaintiffs and Defendants which accurately reflected the payments that he had, in fact, made.

On 29 June 2007, Mr. Clark filed a Motion for Payment of Attorney Fees and Assessment of Costs seeking reimbursement for attorney's fees and costs pursuant to N.C. Gen. Stat. § 35A-1116. On the same date, Ms. Clark filed a Motion in the Cause for Contempt or, in the Alternative, for Rule 60 Relief based on Mr. Johns' failure to make the payments required by the Memorandum of Settlement. On 26 September 2007, the trial court entered an Order Denying Plaintiff's Motion for Contempt in which it found that "[t]he Memorandum of

Settlement" was "a recital of the parties' settlement agreement" and was "not enforceable through the contempt powers of the Court" since it had not been reduced to final form and incorporated into a consent order.

On 10 July 2007, Booth Harrington petitioned for an award of $55,984.08 in attorney's fees for its representation of Ms. Clark. On 13 August 2007 and 22 August 2007, respectively, counsel for Ms. Clark obtained the issuance of subpoenas directed to employees of the Corporation of Guardianship and to Mr. Johns. On 31 August 2007, Mr. Johns filed an Objection to Subpoena and Motion to Quash. In addition, the Corporation of Guardianship also objected to and moved to quash the subpoena directed to its employees. Ultimately, the dispute involving the information which counsel for Ms. Clark sought to obtain was resolved by means of an Order entered by Judge Franklin F. Lanier on 31 August 2007 and signed on 10 September 2007.

On 7 September 2007, Booth Harrington filed an amended petition requesting an additional $12,145.17 for time spent "defending motions and subpoenas served by [Mr.] Jones, attorney for Mr. [] Clark and Ms. [] Clark." On 10 September 2007, Bain Buzzard petitioned for approval of $28,135.00 in attorney's fees. On 13 September 2007, Mr. Clark filed an Amended Motion for Payment of Attorneys Fees and Assessment of Costs in which he sought, among other things, to have his own attorney's fees, which totaled $32,451.57, paid by Ms. Zawacki, Mr. Johns, or the guardianship estate and the fees awarded to the guardian *ad litem* be paid by Ms. Zawacki or Mr. Johns.

On 26 September 2007, the trial court entered an order in the Tyco litigation which modified the 5 February 2007 order by terminating the SNT. In the 24 September 2007 order, the trial court, in an attempt to modify and effectuate the Memorandum of Settlement, ordered that:

A. The Corporation of Guardianship, Inc. shall, within three days of the entry of this Order, issue a check in the amount of $64,000.00 to [Mr.] Jones, in trust for [Ms.] Clark and, except as specifically authorized herein or by further order of this Court, shall distribute no other funds from the [SNT];

B. [Mr.] Jones shall, upon receipt of the funds transferred pursuant to paragraph (A) above, immediately issue a check to

[Ms.] Clark for $40,000.00 and thereafter, for a period of three consecutive months, make monthly payments of $8,000.00 to [Ms.] Clark;

C. The Corporation of Guardianship, Inc., shall as soon thereafter as possible, but in no event beyond 15 days after the entry of this Order, file a final accounting of the [SNT] with this Court;

. . . .

E. The Corporation of Guardianship, Inc., shall thereafter wind down the administrative requirements for the operation of the trust, retaining sufficient funds on hand, in an amount allowed by the Court, to pay reasonable fees for professional services including the filing of tax returns in a timely manner in the normal course of trust [operation];

F. Within ten days after the [approval of the final accounting of the SNT], the Corporation of Guardianship, Inc., shall issue a net check representing the remaining funds held for the benefit of [Ms.] Clark in trust, to [Mr.] Jones, in trust;

G. Within 15 day[s] of the entry of this Order, [Mr.] Jones and Alton C. Bain shall present a proposed Janet Clark Irrevocable Discretionary Trust to this Court for approval, and at the same time present an institutional trustee to the Court for consideration of appointment as trustee of the Janet Clark Irrevocable Discretionary Trust;

The trial court ordered that the proceeds of the annuities purchased under the order approving the settlement of the Tyco litigation be paid into the Janet Clark Irrevocable Discretionary Trust as well.

On 19 September 2007, Booth Harrington filed a second amended petition seeking approval of an additional $11,950.00 in fees from the ward's estate. On 24 September 2007, the Corporation of Guardianship filed a letter requesting reimbursement for time and expenses relating to the attendance of Jerry Hollingsworth and Sonya Tomlinson at the 10 September 2007 hearing in response to a subpoena issued by counsel for the Clarks. On 10 December 2007, Mr. Clark filed a Second Amended Motion for Payment of Attorneys Fees and Assessment of Costs in which he sought, among other things, to have his own attorney's fees, which totaled $34,964.07, paid by Ms. Zawacki, Mr. Johns, or the guardianship estate and the fees

and expenses of the guardian *ad litem* paid by Ms. Zawacki or Mr. Johns. On 19 November 2007, Bain Buzzard filed a Motion seeking approval of $29,023.00 in attorney's fees relating to its representation of Ms. Zawacki.

The various fee-related motions came on for hearing before the trial court on 31 January 2008. The parties filed affidavits and various other items of information in anticipation of or during the 31 January 2008 hearing. On 27 February 2008, the trial court entered an Order Approving the Payment of Attorneys Fees and Expenses. In its order, the trial court found with respect to Mr. Clark's request for the imposition of sanctions against Mr. Johns that:

> e. During the period from January 4, 2007 to May 21, 2007, Ms. Clark was, as a matter of law, a client with diminished mental capacity, and as such, Mr. Johns' professional conduct during that period was specifically governed by Rule 1.14 of the North Carolina Rules of Professional Conduct.
>
> f. While it is clear that Ms. Clark, during this period of legal incompetency, expressed her desire that Mr. Johns be relieved of his duty to represent her, there is no evidence and indeed, evidence to the contrary, that the court appointed guardian of the person ever sought to have Mr. Johns removed from the case.
>
> g. Ms. Clark's desire to have Mr. Johns removed from the case was considered by the Court on March 1, 2007, and the Court declined to relieve Mr. Johns of his duties.
>
> h. Mr. Johns formed the opinion that [Mr.] Clark, Ms. Clark's husband, was attempting to exert influence over Ms. Clark during her period of incompetency with a view to gaining access to funds from Ms. Clark's settlement. Mr. Johns, in his professional opinion, and consistent therewith, concluded that securing the funds in a special needs pooled trust was the most appropriate method of ensuring that the funds would be protected and available for the future health and welfare needs of his client, Ms. Clark.
>
> i. After forming this opinion, . . . Mr. Johns vigorously and zealously challenged efforts by Mr. Clark to have Ms. Clark's competency restored, and successfully urged the court to order a multidisciplinary examination of Ms. Clark.
>
> j. Mr. Johns also vigorously and zealously opposed allowing the settlement funds to be used for any purpose other than funding the special needs pooled trust. Ultimately, on the eve of the hear-

ing to consider the restoration of Ms. Clark's competency, Mr. Johns agreed not to oppose the restoration provided that the funds would be placed in an irrevocable special needs trust with a suitable third party trustee[.]

. . . .

l. The Corporation of Guardianship, Inc., is a North Carolina non-profit corporation established in 1979. [Mr.] Johns led the effort to establish the Corporation [] Guardianship, Inc., and currently serves on its board of directors and as secretary and registered agent for the corporation. His law firm serves as legal counsel to the Corporation when legal services are needed[.]

m. Because Mr. Johns serves as an officer and on the board of the Corporation of Guardianship, Inc., and receives financial benefit from the Corporation in those instances when the Corporation hires Mr. John's law firm to act as counsel, the potential for a conflict of interest exists between Mr. Johns and clients utilizing the Corporation of Guardianship's services at his suggestion. However, Mr. Johns represented to the Court that he routinely informs clients of his relationship with the Corporation, and that he did so with respect to [Ms.] Clark. The Court has no evidence from [Ms.] Zawacki, who served as guardian of the person during the relevant time that the decision to use the Corporation and Mr. Johns' firm was being considered, that such a disclosure was not made. Moreover, the Court concludes that the potential conflict of interest in this instance was tenuous.

Based upon these findings of fact, the trial court concluded that "there was no evidence of any violation of Rules of Professional Conduct by [Mr.] Johns or [Booth Harrington], and as such, the [trial court found] no basis to impose the sanctions" sought by Mr. Clark.

In addition, the trial court found, "with respect to the petition of [t]he Corporation of Guardianship for reimbursement for time and expenses of [Mr.] Hollingsworth and [Ms.] Tomlinson," that "these witnesses are only entitled to reimbursement for mileage at $0.485 per mile plus a witness fee of $5.00 per day," rather than the $156.17 in travel expenses and $2,600.00 in hourly charges that they had originally claimed, since they were only entitled to the Uniform Witness Fees set out in N.C. Gen. Stat. § 7A-314.[6] As a result, the trial court

6. The trial court specifically found that the amounts originally requested by Mr. Hollingsworth and Ms. Tomlinson were not "unreasonable."

awarded $83.09 to Mr. Hollingsworth and $78.09 to Ms. Tomlinson, with these amounts to be paid by the Corporation of Guardianship "from funds presently held in trust in conformance with the Order entered on even date [in the Tyco litigation]."

The trial court concluded, with respect to the attorney's fee claim advanced by Bain Buzzard, that "the fees and expenses as itemized in the Motion were reasonable and necessary for the representation of" Ms. Zawacki, "especially in light of the contentious and complex issues that have arisen throughout the administration of this estate." For that reason, "the Court allow[ed] the fee application of [Bain Buzzard] in the amount of $29,023.00 and order[ed] the same to be assessed against" the ward's estate.

Finally, the trial court made extensive findings of fact addressing Booth Harrington's claim for attorney's fees:

> 45. On February 5, 2007, Judge Brown found that, pursuant to the flat fee arrangement in the aforementioned retainer agreement, the sum of $53,500.00 was owed by Ms. Clark to the firm.
>
> 46. The Court further found, in the February 5, 2007 order that the firm had represented the interests of Ms. Clark in subsequent hearings in the guardianship forum; that these matters were ongoing and required further representation[;] and that the hourly rate fees in the amount of $21,153.35 [were] due the firm over and above the flat fee retainer fees owed.
>
> . . . .
>
> 48. In this case, the order of Judge Brown approving the settlement agreement was entered on February 5, 2007, well in advance of much of the work required by the flat fee retainer agreement. Because of circumstances beyond the imagination of all involved, after February 5, 2007, the parties engaged in protracted litigation, resulting in, among other things, [Booth Harrington's] being disqualified from representing Ms. Clark after May 21, 2007 and, because of Ms. Clark's restoration of competency, the abandonment of the need for a special needs trust.
>
> 49. These subsequent facts materially changed the position of the parties, and thus, the Court revisits the portion[s] of Judge Brown's order allowing fees to [Booth Harrington].
>
> 50. Specifically, the Court now finds that Phase 4 of the flat fee retainer agreement, which called for the development of a life

plan for Ms. Clark, was not required or performed by [Booth Harrington] largely because Ms. Clark was adjudged competent on May 21, 2007. She was, from that point forward, able to develop her own plans for life care.

51. Irrespective of whether a fee contract is in place between a lawyer and a client, a lawyer always has a duty to review the fee for reasonableness in consideration of all circumstances. . . . In this case, charging Ms. Clark $11,500.00 for Phase 4 is no longer appropriate because those service were not required or performed by [Booth Harrington].

. . . .

53. Judge Brown has previously approved the hourly arrangement for services rendered above and beyond those contemplated in the flat fee retainer agreement. . . . Judge Brown also awarded fees to [Booth Harrington] based upon time expended for the time period prior to February 1, 2007.

54. Likewise, the Court finds that with respect to the time expended by [Booth Harrington] through and including May 21, 2007, the date that the firm was relieved of its obligation to further represent Ms. Clark, such fees should also be approved because they were necessary for the ongoing representation of Ms. Clark and were above and beyond the services contemplated in the flat fee retainer agreement.

. . . .

56. The Court finds that the time expended by [Booth Harrington] after May 21, 2007 falls into one of two broad categories: (a) time expended completing work on the special needs trust and other matters already underway so as to facilitate an orderly transfer of responsibility to Ms. Clark, and (b) time expended responding to accusations, including accusations of contempt of court and professional malfeasance.

57. While both of these broad categories of work were necessary, the Court finds that as to time expended after May 21, 2007 completing the special needs trust and transferring funds, the firm was adequately compensated for this time through the flat fee retainer agreement.

58. With respect to time expended after May 21, 2007 by the firm defending itself against accusations of wrongdoing, the Court

finds that there is no legal or equitable basis for shifting these fees to Ms. Clark and therefore denies the firm's petition for fees incurred after May 21, 2007.

. . . .

60. Based upon the foregoing, the Court is disallowing the following amounts from the fee application of [Booth Harrington]:

a. $11,500.00 for Phase 4 of the Flat Fee Retainer Agreement[.]

b. $2,341.50 for work performed from [May 22, 2007 through June 29, 2007]. . .

c. $12,145.17 for work performed and expenses incurred from [June 30, 2007, through September 6, 2007].

As a result, the trial court concluded that "the remaining fees requested by [Booth Harrington] . . . were reasonable and necessary for the representation of [Ms.] Clark, especially in light of the contentious and complex issues that have arisen throughout the administration of this estate" and awarded Booth Harrington $42,142.19 to be paid "by the Corporation of Guardianship, Inc., from funds presently held in trust in conformance with the Order entered on even date herewith in the [Tyco litigation]." Mr. Clark and Ms. Clark noted appeals to this Court from the trial court's order.

II. Legal Analysis

A. Attorney's Fees

[1] The Clarks first contend that the trial court erred by awarding attorney's fees to Bain Buzzard and Booth Harrington in light of their opposition to Mr. Clark's ultimately successful attempt to obtain restoration of her competency. In challenging the trial court's ruling, the Clarks argue both that the trial court lacked statutory authority to award attorney's fees to Bain Buzzard and Booth Harrington and that, even if the trial court had the authority to award the requested attorney's fees, it abused its discretion by awarding attorney's fees from the ward's estate. We disagree.

The first issue that we must address is the extent, if any, to which the trial court had the statutory authority to award attorney's fees to Bain Buzzard and Booth Harrington from the ward's estate. The Clarks contend that the trial court lacked the authority to award the fees in question because N.C. Gen. Stat. § 35A-1116(a), which governs

the assessment of costs in guardianship proceedings, only provides for the taxing of "reasonable fees and expenses of counsel for the petitioner." As a result, since neither Bain Buzzard nor Booth Harrington represented the petitioner in the proceeding in which Ms. Clark's competency was restored, the Clarks contend that the trial court erred by awarding attorney's fees to those firms from the ward's estate. We do not find this argument persuasive, however, since it erroneously assumes that N.C. Gen. Stat. § 35A-1116(a) represents the only statutory provision under which the trial court had the authority to approve payment of attorney's fees from the ward's estate.

According to N.C. Gen. Stat. § 35A-1202(10), a guardian of the person is "appointed solely for the purpose of performing duties relating to the care, custody and control of a ward." N.C. Gen. Stat. § 35A-1101(17) defines a "ward" as "a person who has been adjudicated incompetent. . . ." An incompetent adult "lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family or property[,] whether the lack of capacity is due to mental illness . . . or similar cause or condition."

> The guardian of the person may give any consent or approval that may be necessary to enable the ward to receive medical, *legal*, psychological, or other professional care, counsel, treatment, or service. . . . The guardian of the person may give any other consent or approval on the ward's behalf that may be required or in the ward's best interest[.]

N.C. Gen. Stat. § 35A-1241(a)(3) (emphasis added). "It [is] well settled that the employment of counsel for legal advice and assistance in connection with the administration of the ward['s] estate is a proper expense to be charged [by the guardian], if in reasonable amount, and for the benefit of the [ward]." *Maryland Casualty Co. v. Lawing*, 225 N.C. 103, 108, 33 S.E.2d 609, 612 (1945) (citations omitted). As a result, given that the guardian of the person had the right to employ legal assistance for the benefit of the ward, the trial court had ample statutory authority to authorize payment of attorney's fees to Bain Buzzard and Booth Harrington for work performed on behalf of Ms. Clark and the guardian of the person pursuant to N.C. Gen. Stat. § 35A-1241(3). The fact that the trial court had the authority to approve fee awards to Bain Buzzard and Booth Harrington does not, however, end our inquiry, since the Clarks have also challenged the fee amounts actually approved in the trial court's order.

"Recovery of attorney's fees, even when authorized by statute is within the trial court's discretion and will only be reviewed for an abuse of that discretion." *Martin Architectural Prods., Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 182, 574 S.E.2d 189, 193 (2002). In order to demonstrate an abuse of discretion, the party challenging an award of attorney's fees must show " 'that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision.' " *Terry's Floor Fashions, Inc. v. Crown Gen. Contrs., Inc.*, 184 N.C. App. 1, 17, 645 S.E.2d 810, 820, *disc. review denied*, 362 N.C. 373, 664 S.E.2d 561 (2007) (quoting *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005)).

According to the Clarks, the trial court abused its discretion by approving the payment of attorney's fees to the firms in question because they unsuccessfully opposed Mr. Clark's petition for the restoration of Ms. Clark's competency in furtherance of what the Clarks perceive to be their "financial self-interest in fighting the petition and keeping [Ms. Clark] an incompetent." According to the Clarks, "to require the prevailing party to pay tens of thousands of dollars to the losing 'parties' is certainly an abuse of discretion and contrary to the policy of this state." This is particularly true, in the Clarks' opinion, given Ms. Clark's expressed preference that Booth Harrington no longer serve as her attorney.

1. Bain Buzzard

[2] As we have already noted, Ms. Zawacki employed Bain Buzzard after Mr. Clark filed a petition, for which Ms. Clark later expressed support, seeking to have Ms. Clark's competency restored. By that time, Ms. Zawacki knew that Ms. Clark had a long history of substance abuse, including the use of alcohol, cocaine, marijuana and opiates. After the accident, neuropsychological testing revealed that Ms. Clark suffered from organic personality changes, including paranoid delusions. Ms. Clark also admitted that, during the time that she lived with Mr. Clark following the accident, she continued to use alcohol and marijuana. The relationship between Ms. Clark and Mr. Clark was characterized by volatile behavior, including accusations of abusive conduct. Mr. Clark had voluntarily resigned both as guardian of the estate and guardian of the person due to physical limitations that he attributed to a disability. In addition, Mr. Clark only expressed opposition to the existing arrangements for the handling of Ms. Clark's assets shortly before the settlement of the Tyco litigation.

When considered in aggregate, these factors justify Ms. Zawacki's concern that the restoration of Ms. Clark's competency and her own removal as guardian of Ms. Clark's person might well not serve Ms. Clark's best interests. As a result, despite the fact that Ms. Clark's competency was restored, we conclude that the trial court did not abuse its discretion by concluding that Ms. Zawacki's decision to employ Bain Buzzard was appropriate and that Bain Buzzard's fees should be paid from the ward's estate.

2. Booth Harrington

[3] Similarly, Booth Harrington was retained to assist in the establishment of a special needs trust and to perform other legal services for Ms. Clark relating to the preservation of her assets. Ensuring that such activities are carried out properly is clearly within the scope of the duties appropriately performed by a guardian of the person, particularly given that Ms. Clark was in the process of receiving a large personal injury settlement which needed to be handled carefully. Thus, the principal purposes for which Booth Harrington was employed by the guardian of the person was clearly in Ms. Clark's best interest.

An award of compensation for a service provider acting on behalf of a ward is not contingent upon the ward's approval. For that reason, the fact that Ms. Clark became dissatisfied with Booth Harrington is not determinative of the extent to which its fees should be paid from the ward's estate. In addition, for the reasons set forth above, the fact that Booth Harrington resisted the restoration of Ms. Clark's competency does not, given the facts revealed by the present record, disqualify the firm from receiving compensation from Ms. Clark's resources. In its order, the trial court carefully analyzed Booth Harrington's fees for reasonableness. Based upon that analysis, the trial court disallowed Booth Harrington's "Phase 4" fees given the restoration of Ms. Clark's competency and denied Booth Harrington's request for compensation for work performed after 21 May 2007 on the grounds that the firm's efforts "completing the special needs trust and transferring funds" were "adequately compensated . . . through the flat fee retainer agreement" and that "there is no legal or equitable basis for shifting" the cost of "defending itself against accusations of wrongdoing" after that date "to Ms. Clark." As a result, we conclude that the trial court did not abuse its discretion in awarding fees to Booth Harrington from the ward's estate.

B. Witness Fees

[4] Next, the Clarks challenge the trial court's decision to award witness fees to employees of the Corporation of Guardianship from the ward's estate. Although the Clarks concede that N.C. Gen. Stat. § 35A-1116(a) provides that "costs shall be assessed as in special proceedings" and that N.C. Gen. Stat. § 7A-306(c)(1) provides that witness fees are taxable as costs in special proceedings, they argue that N.C. Gen. Stat. § 35A-1116(c)(1) permits the taxing of costs to Ms. Clark's estate only "if the respondent is adjudicated incompetent and is not indigent" and that, since Ms. Clark's competency was restored, the necessary precondition for taxing witness fees to her estate did not exist in this instance. We disagree.

As we have already noted, the Corporation of Guardianship served as trustee of Ms. Clark's SNT. The Clarks' counsel subpoenaed Mr. Hollingsworth and Ms. Tomlinson to appear at the 10 September 2007 hearing. By the time that the subpoenas directed to Mr. Hollingsworth and Ms. Tomlinson were issued, the question of Ms. Clark's competence had already been decided in her favor. In the event that this Court were to adopt the Clarks' narrow reading of N.C. Gen. Stat. § 35A-1116(c)(1), a respondent in a guardianship who had been found to be competent could issue subpoenas without any risk of being held responsible for the resulting witness fees throughout the remainder of a guardianship proceeding, regardless of the extent to which the respondent's competency genuinely remained at issue. Given that the issue of Ms. Clark's competence had already been decided and given that the witness fee award in question resulted from subpoenas issued at the request of counsel for the Clarks, we conclude that the limitations set out in N.C. Gen. Stat. § 35A-1116(c)(1) do not control the present issue, that the assessment of these witness fees was governed by N.C. Gen. Stat. § 7A-306(c)(1), and that the trial court was entitled to assess the witness fees in question against the ward's estate.

The trial court also had the authority to assess the fees in question against the ward's estate pursuant to N.C. Gen. Stat. § 36C-7-709, which provides that "[a] trustee is entitled to be reimbursed out of the trust property for expenses properly incurred in the administration of the trust. . . ." Mr. Hollingsworth and Ms. Tomlinson were subpoenaed to appear at the 10 September 2007 hearing in their capacity as representatives of the trustee of the SNT, so that the trial court had authority to require the payment of any expenses associated with the performance of their duties from the assets of the trust. As a result,

awarding witness fees to Mr. Hollingsworth and Ms. Tomlinson from Ms. Clark's assets was appropriate for this reason as well. Thus, the trial court did not err by requiring the payment of witness fees associated with the Corporation of Guardianship's compliance with a subpoena issued by the Clarks' counsel from Ms. Clark's estate.

B. Challenged Findings of Fact

[5] The Clarks challenge Finding of Fact Nos. 15, 19, 33 and 57 on the grounds that these findings lack sufficient evidentiary support. When the trial court sits as the trier of fact, its findings of fact are conclusive on appeal if supported by competent evidence, even though there may be sufficient evidence to support alternative findings as well. *Creech v. Ranmar Props.*, 146 N.C. App. 97, 100, 551 S.E.2d 224, 227 (2001), *cert. denied* 356 N.C. 160, 568 S.E.2d 191(2002). After careful review of the challenged findings, we conclude that they either have sufficient record support or that any deficiencies in the evidentiary support for these findings of fact did not prejudice the Clarks.

In Finding of Fact No. 15, the trial court found that:

> On March 1, 2007, a hearing was held before Judge Brown regarding the removal of [Ms.] Zawacki as [Ms.] Clark's guardian of the person. The motion was denied at that time. Also at that hearing, [Ms.] Clark made it known to the Court that she did not wish to have the firm of [Booth Harrington] represent her interests. The Court after hearing arguments of counsel, declined to terminate the firm's representation of Ms. Clark.

The record contains an affidavit by Mr. Johns in which he states that, "[o]n March 1, 2007, a hearing was held before Judge Brown after [Mr.] Clark petitioned for the emergency removal of [Ms.] Zawacki as [Ms.] Clark's guardian of the person" and that, "[a]fter hearing the arguments of counsel, Judge Brown declined to terminate this firm's representation of [Ms.] Clark." In addition, the record demonstrates that Ms. Zawacki continued to serve as a guardian of the person until Ms. Clark's competency was restored. Although the Clarks concede that Mr. Johns' affidavit supports Finding of Fact No. 15, they challenge this affidavit as "self-serving" and note that "[t]he record does not contain any transcript of such a hearing" or "any order of Judge Brown concerning these issues." The fact that the Clarks believe that other evidence would be preferable to Mr. Johns' affidavit does not, however, render Finding of Fact No. 15 lacking in adequate record

support. As a result, Finding of Fact No. 15 is sufficiently supported by the record.

In Finding of Fact No. 19, the trial court found that, "by an order entered by Judge Gore on May 21, 2007, [Mr.] Johns and [Booth Harrington] were disqualified from further representation of [Ms.] Clark." On appeal, the Clarks argue that "the trial court neglected to state accurately and fully that the removal occurred prior to the hearing on competency." In essence, the Clarks are challenging the trial court's failure to place what they believe to be proper emphasis upon the order in which various events took place rather than the accuracy of the trial court's statement. As a result, given that Finding of Fact No. 19 is a correct statement of events that occurred on 21 May 2007 and given the absence of any indication that the trial court's failure to place the amount of emphasis upon the precise order of events that the Clarks deem appropriate prejudiced their chances for a different outcome before the trial court, we do not believe that the challenged finding is prejudicially erroneous.

In Finding of Fact No. 33, the trial court found that:

> The remedy for any alleged breach of fiduciary duty by a guardian lies in a civil action against that guardian and the guardian's bond. In this case, the parties, in their Memorandum of Settlement of May 21, 2007, have released and discharged [Ms.] Zawacki for any action she took individually or as guardian of the person of [Ms.] Clark.

The Clarks argue that, while Finding of Fact No. 33 contains a correct statement of "the remedy for a breach of fiduciary duty by a guardian," the trial court "erroneously" found "that the parties have released and discharged [Ms.] Zawacki of any liability she might have [for actions taken on behalf of Ms. Clark] in a Memorandum of Settlement signed on 21 May 2007." As we understand the Clarks' argument, they are not challenging the accuracy of the trial court's description of the Memorandum of Settlement; instead, they are contesting the correctness of the trial court's legal determination in light of its previous pronouncement "that [the Memorandum of Settlement] was not enforceable by contempt in that it was not 'an adjudication of the parties' respective rights.' " The challenged finding accurately describes the relevant provision of the Memorandum of Settlement. In addition, rather than holding the Memorandum of Settlement unenforceable, the trial court merely held that it could not be enforced through the use of the Court's contempt power. Lastly,

we are unable to see how any of the language in Finding of Fact No. 33 prejudiced the Clarks' chances for a more favorable outcome on the disputed issues which were before the trial court in this case. As a result, we are unable to discern any prejudicial error in Finding of Fact No. 33.

Finally, the trial court stated in Finding of Fact No. 57 that:

> While both of these broad categories of work were necessary, the Court finds that as to time expended after May 21, 2007 completing the special needs trust and transferring funds, the firm was adequately compensated for this time through the flat fee retainer agreement.

On appeal, the Clarks challenge the trial court's determination that the time expended by Booth Harrington "responding to accusations" after 21 May 2007 was "necessary." However, given that the trial court expressly declined to approve Booth Harrington's request for payment for this portion of its work from the ward's estate, any error on the part of the trial court in making the challenged finding could not have prejudiced the Clarks. As a result, we conclude that all of the challenged findings of fact either had adequate record support, did not involve any prejudicial error, or both.

C. Sanctions Issues

[6] Finally, the Clarks challenge the trial court's determination that Mr. Johns did not commit any ethical violations and was not, for that reason, subject to monetary sanctions. After carefully reviewing the record in light of the applicable law, we are unable to discern any error of law in the trial court's rulings on these issues.

First, the Clarks seem to question Mr. Johns' conduct in connection with the formation of the retainer agreement. As best we understand their argument, the Clarks appear to question the failure to make guardian of the estate a party to the retainer agreement. However, N.C. Gen. Stat. § 35A-1241(a)(3) clearly authorizes a guardian of the person to retain legal counsel on behalf of the ward. For that reason, the fact that the guardian of the estate did not sign the retainer agreement is simply beside the point. Furthermore, as the trial court found, while Ms. Zawacki signed the retainer agreement prior to her official appointment as guardian of the person, she clearly ratified that agreement after assuming her fiduciary responsibilities. As a result, there is no reason to question

the manner in which Mr. Johns and Ms. Zawacki entered into the retainer agreement.

Secondly, the Clarks contend that Mr. Johns violated Rule 1.14 of the Rules of Professional Conduct by failing to make any effort to maintain a normal attorney-client relationship between himself and Ms. Clark and that the trial court erred by finding and concluding to the contrary. To be sure, Rule 1.14 of the N.C. Rules of Professional Conduct requires an attorney representing a client with diminished mental capacity, "as far as reasonably possible, [to] maintain a normal client-lawyer relationship with the client." However, Rule 1.14(b) of the Rules of Professional Conduct specifically provides that:

> [w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client.

In this instance, there is no question but that Ms. Clark wanted her competency restored, objected to Mr. Johns' actions to the extent that they obstructed her attempts to obtain that goal, and wanted him relieved as her attorney. However, the trial court found as a fact that Mr. Johns genuinely believed that Mr. Clark was attempting to obtain control over Ms. Clark's personal injury settlement for his own purposes and that it would not be in Ms. Clark's best interests for her competency to be restored. The Clarks have not argued on appeal that the record did not support the trial court's findings, and our independent review of the record shows that these findings have ample record support. As long as Ms. Clark's competency had not been restored, Mr. Johns had a duty to exercise his best judgment on behalf of his client, which is exactly what the trial court found that he did. Since the trial court's findings of fact have ample record support and since the trial court's findings support its conclusions, the trial court's determination with respect to this issue is sufficient to withstand the Clarks' challenge on appeal.

Finally, the Clarks contend that the trial court erred by failing to find and conclude that Mr. Johns violated Rule 1.7 of the Rules of Professional Conduct, which prohibits the concurrent representation of clients with conflicting interests. More particularly, the Clarks argue that Mr. Johns labored under impermissible conflicts of interest arising from his relationship with the Corporation of Guardian-

ship, from the advice he gave to the Corporation of Guardianship in connection with the employment of counsel for Ms. Zawacki following the filing of the petition for the restoration of Ms. Clark's competency, and from the support that he gave to Ms. Zawacki in resisting the petition for the restoration of Ms. Clark's competency. Although there is no question but, as the trial court found, that Mr. Johns served as Ms. Clark's counsel and had a long history of involvement with the Corporation of Guardianship, there is ample record support for the trial court's findings to the effect that the relationship between Mr. Johns and the Corporation of Guardianship was fully disclosed at the time that the Corporation for Guardianship was made trustee of the SNT. Furthermore, the Clarks have not demonstrated that Mr. Johns' relationship with the Corporation of Guardianship adversely affected his representation of Ms. Clark. In addition, the Clarks' complaints about Mr. Johns' support for Ms. Zawacki's opposition to the restoration of her competency amount to little more than a reiteration of their contention that Mr. Johns acted unprofessionally by opposing the restoration of her competency without adequately communicating with her, an argument which we have already addressed. As a result, we are unable to discern any error in the trial court's findings of fact and conclusions of law with respect to the conflict of interest issue.

Motion for Attorney's Fees

[7] On appeal, both Ms. Zawacki and Booth Harrington filed motions requesting an award of attorney's fees accrued during the appellate process. For the reasons stated below, we deny Booth Harrington's motion made pursuant to N.C.R. App. P. 34 and dismiss the motions made by both Ms. Zawacki and Booth Harrington pursuant to N.C. Gen. Stat. § 35A-1241 without prejudice to any right Ms. Zawacki and Booth Harrington may have to seek such relief from the Clerk of Superior Court, at least in the first instance.

Booth Harrington has requested that this matter be remanded to the trial court for an award of attorney's fees on appeal pursuant to N.C.R. App. P. 34, which authorizes the imposition of sanctions "against an attorney or party or both when the court determines that an appeal or any proceeding in an appeal was frivolous." Although we have rejected all of the Clarks' challenges to the trial court's order, we do not believe that their arguments on appeal were so totally without merit that we can brand them as completely frivolous. In addition, we see no evidence that the Clarks' appeal was taken for an improper

purpose, such as harassment or delay. As a result, we deny Booth Harrington's motion that this case be remanded for an award of attorney's fees on appeal pursuant to N.C.R. App. P. 34.

[8] Ms. Zawacki and Booth Harrington have both requested a remand for an award of attorney's fees on appeal pursuant to N.C. Gen. Stat. § 34A-1241 predicated on the logic underlying this Court's decision in *City Finance Co. v. Boykin*, 86 N.C. App. 446, 358 S.E.2d 83 (1987); *see also Hill v. Jones*, 26 N.C. App. 168, 215 S.E.2d 40 (1973). As a general proposition, "[t]he Clerk of Superior Court has original jurisdiction over matters involving management by a guardian of her ward's estate." *In re Caddell*, 140 N.C. App. 767, 769, 538 S.E.2d 626, 627-28 (2000). For that reason, we believe that all of the issues relating to the request made by Ms. Zawacki and Booth Harrington for reimbursement for attorney's fees on appeal pursuant to N.C. Gen. Stat. § 35A-1241, including both the extent to which they are entitled to an award of such fees pursuant to N.C. Gen. Stat. § 35A-1241 and the extent to which the Clerk deems any such fees "reasonable and proper expenditures" in the exercise of her discretion, should be resolved by the Clerk in the first instance. For that reason, we conclude that Ms. Zawacki's and Booth Harrington's motion for a remand for an award of attorney's fees on appeal pursuant to N.C. Gen. Stat. § 35A-1241 should be dismissed without prejudice to their right, if any, to submit a request for the payment of such fees to the Clerk.[7]

AFFIRMED.

Judges ELMORE and STROUD concur.

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7. As we noted above, the Clerk's office recused itself from serving as a hearing officer in this matter. The exact scope of this recusal decision is not clear to us from our review of the record. In the event that the Clerk's office believes that it should not hear and decide the "attorney's fees on appeal" issue, then any motion that Ms. Zawacki and Booth Harrington choose to file should be heard and decided by the appropriate decisionmaker acting in place of the Clerk.

BAILEY AND ASSOCIATES, INC., PETITIONER v. WILMINGTON BOARD OF ADJUSTMENT AND CITY OF WILMINGTON, RESPONDENTS, AND JOHN BLACKWELL AND WIFE, ELIZA BLACKWELL; VICTOR BYRD AND WIFE, CAROLYN BYRD; VISHAK DAS AND WIFE, TRACY DAS; BILL DOBO AND WIFE, BARBIE DOBO; BOB DOBO AND WIFE, JEAN DOBO; BARBIE DOBO; BUTCH DOBO AND WIFE, SHELLY DOBO; PATRICK EDWARDS AND WIFE, KIM EDWARDS; MATT EPSTEIN AND NINA BROWN; EARL GALLEHER AND WIFE, LAUREN GALLEHER; BARBARA GUARD AND HUSBAND, RON GUARD; GLENDA FLYNN; JANE HARDWICK; L.T. HINES AND WIFE, JOY HINES; WRIGHT HOLMAN AND SUSAN KEYES; JIM LONG AND WIFE, BESS LONG; ANN MCCRARY; KENYATA MCCRARY AND WIFE, GRACE MCCRARY; PEM NASH AND WIFE, GRETCHEN NASH; DONNA NOLAND; PAT PATTERSON AND WIFE, MARY PATTERSON; DREW PIERSON AND WIFE, KNOX PIERSON; DAVID POWELL AND WIFE, JANICE POWELL; ALLEN RIGGAN AND WIFE, PAM RIGGAN; NANCY ROSE; ROLF SASS AND WIFE, JANIS SASS; BEN SPRADLEY AND WIFE, SANDEE SPRADLEY; CHARLES SWEENY AND WIFE, JUNE SWEENY; SUSAN SWINSON; GEORGE TURNER AND WIFE, SUE TURNER; JOYCE ZIMMERMAN; NOAH ZIMMERMAN AND WIFE, KATHRYN ZIMMERMAN; ROBERT SMITH AND WIFE, MARY SMITH, INTERVENOR-RESPONDENTS

No. COA09-18

(Filed 2 February 2010)

1. Appeal and Error— motion to dismiss—mootness

Petitioner's motion to dismiss intervenors' appeal on mootness grounds was denied because intervenors' claim remained viable even after the City of Wilmington repealed section 18-215 of its Land Development Code and added "Division III Conservation Resource Regulations."

2. Zoning— motion to intervene—properly granted

The trial court did not err in granting intervenors' motion to intervene in a zoning ordinance case because intervenors alleged sufficient special damages to support intervention pursuant to N.C.G.S. § 160A-388(e2). Intervenors also satisfied the standards for intervention pursuant to N.C.G.S. § 1A-1, Rule 24(a)(2) because the City of Wilmington could not adequately represent intervenors' interests before the trial court.

3. Zoning— motion to dismiss appeal as untimely—issue not raised before the Board of Adjustment

The trial court did not err by denying intervenors' motion to dismiss petitioner's appeal from the City of Wilmington's Technical Review Committee to the Board of Adjustment as untimely pursuant to Wilmington City Code § 18-27. This argument was not raised before the Board of Adjustment by any party, and the trial

court and appellate courts have statutory authority to review only those issues presented to the Board of Adjustment.

4. Zoning— Rule 60 motion—issue not raised before the Board of Adjustment

The trial court did not err in denying intervenors' motion for relief pursuant to N.C.G.S. § 1A-1, Rule 60 based on the alleged discovery of new evidence which would justify the trial court remanding petitioner's appeal to the Board of Adjustment for a new hearing and determination. As the trial court had jurisdiction over the appeal on the basis of a writ of *certiorari* seeking review of the Board of Adjustment's order, the trial court was acting as an appellate court rather than a trial court, and the motion could not properly be granted by the trial court.

5. Zoning— judicial estoppel—issue not raised before the Board of Adjustment

The trial court did not err by failing to hold that petitioner was judicially estopped from denying that it was subject to Wilmington's Conservation Overlay District restrictions because the trial court's scope of review on *certiorari* was limited to errors alleged to have occurred before the Board of Adjustment. Intervenor's failure to raise the issue of estoppel before the Board of Adjustment precluded the trial court and the Court of Appeals from considering intervenors' estoppel claim.

Appeals by Intervenor-Respondents and Petitioner from order entered 26 July 2008 by Judge John E. Nobles, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 10 June 2009.

Shanklin & Nichols, LLP, by Matthew A. Nichols and Kenneth A. Shanklin, for Petitioner-Appellant and Appellee.

Law Office of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for Intervenor-Appellants and Appellees.

ERVIN, Judge.

Bailey and Associates, Inc., (Petitioner) owns a 4.5 acre tract of property located at 201 Summer Rest Road in Wilmington, North Carolina, which is locally know as the "old Babies Hospital" (the Property). Intervenor-Respondents (Intervenors) own property that is located contiguous to or near the Property. Intervenors appeal from an order entered 26 July 2008 (1) allowing their motion to inter-

vene, (2) denying their motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, to remand this matter to the Board of Adjustment of the City of Wilmington (Board of Adjustment) and declining to hold that Petitioner was judicially estopped from challenging the Board of Adjustment's decision, (3) denying their motion to dismiss Petitioner's appeal as untimely, (4) reversing the 29 January 2008 decision of the Board of Adjustment denying Petitioner's appeal from the 7 August 2007 determination of Senior Environmental Planner Phillip Prete (Planner Prete) specifying that the Property was subject to the City of Wilmington's (City) Conservation Overlay District "performance controls," and (5) remanding the matter to the Board of Adjustment for the entry of an order reversing Planner Prete's 7 August 2007 determination that the Property was subject to the City's Conservation Overlay District "performance controls." Petitioner cross-appealed on the sole issue of whether the trial court erred by allowing Intervenors' motion to intervene on the grounds that Intervenors lack standing to intervene because they are not "aggrieved" persons pursuant to N.C. Gen. Stat. § 160A-388(e2). After careful consideration of the record in light of the applicable law, we affirm the trial court's order.

I. Factual Background

Motts Creek, a saltwater marsh and stream, is located immediately before the bridge that crosses the Intracoastal Waterway and provides access to the Town of Wrightsville Beach. The Property adjoins Motts Creek. Prior to 24 March 2009, Section § 18-215 of the City's Land Development Code[1] designated certain areas as Conservation Overlay Districts in order "to protect important environmental and cultural resources within the City[.]" The City deemed such protection necessary "to maintain the City's diverse and ecologically important natural systems; to preserve the City's estuarine systems important for fin fishing and shell fishing; to provide open space; and to retain the City's archaeological and historical heritages." The development rules applicable to property located in or "associated with" Conservation Overlay Districts as of 2 February 1999 included stringent building setbacks, buffers, stormwater runoff controls, and other limitations on land use within protected areas. Intervenors argued before the Board of Adjustment that Motts Creek was located in a Conservation Overlay District, making the Property

1. As will be discussed in more detail below, the City repealed Conservation Overlay District § 18-215 and amended the Land Development Code by adding "Division III Conservation Resource Regulations" on 24 March 2009.

subject to these "performance controls." Petitioner, on the other hand, denied that Motts Creek was in a Conservation Overlay District.

In 2005, Petitioner began working on "The Sidbury," a development to be located on the Property. On 8 February 2005, Petitioner and various City planning staff members, including Kaye Graybeal (Graybeal), who then served as the Planning Manager, convened a "concept meeting" to review matters related to the proposed development. Although Planner Prete did not attend the 8 February 2005 "concept meeting," Ms. Graybeal consulted him after the meeting.

At that time, Ms. Graybeal and Planner Prete reviewed the Property using a Conservation Overlay Map and determined that Motts Creek was classified as "tidal waters," which "are not regulated as conservation resources by Section 18-215 of the Wilmington City Code," on that map. Ms. Graybeal e-mailed Petitioner on 8 February 2005, with a copy to Planner Prete, stating that "[n]o portion of the site is located within a conservation overlay district and is therefore not subject to the COD setback." Ms. Graybeal forwarded the email to Frank Smith (Smith), Petitioner's architect, with the additional indication that "the COD maps on file in the Planning Division indicate the adjacent water body designated as WTW[2] which is not listed as a protected resource in the ordinance."

After receiving this information, Petitioner continued to plan for the development of the Property. The City's Technical Review Committee (TRC) reviewed Petitioner's plans on 23 October 2006. After Petitioner requested confirmation of this determination in writing, Planner Prete e-mailed Petitioner on 7 August 2007 stating that the TRC had determined that the Property "is within the COD and subject to COD setbacks." In essence, the TRC determined that Motts Creek "is brackish tidal marsh" and "subject to the City COD controls[,]" which meant that all structures on the Property were "required to be setback 100 feet from the edge of the resource for non-residential development or 75 feet for residential development" and that "[a] vegetated buffer zone of 35 feet from the edge of the resource" would be necessary. Petitioner appealed this determination to the Board of Adjustment on 8 August 2007.

The Board of Adjustment heard Petitioner's appeal at a public hearing held on 18 October 2007. On 29 January 2008, the Board of Adjustment issued an order affirming the determination made by Planner Prete and the TRC. Petitioner sought review of the Board of

2. WTW represented the Conservation Overlay District code for tidal waters.

Adjustment's order in the New Hanover County Superior Court by filing a petition for writ of *certiorari* on 17 April 2008. Judge Allen W. Cobb issued the requested writ of *certiorari* on 17 April 2008 in order to allow consideration of Petitioner's contentions on the merits.

On 24 April 2008, Intervenors filed their proposed motion to intervene and a response to Petitioner's petition for writ of *certiorari*, which contended, among other things, that Petitioner's "appeal is time-barred." On 26 July 2008, the trial court entered an order allowing Intervenors' motion to intervene; denying Intervenors' motion for relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, or the doctrine of judicial estoppel; denying Intervenors' motion to dismiss Petitioner's appeal as untimely; reversing the 29 January 2008 order of the Board of Adjustment affirming the determination of Planner Prete and the TRC; and remanding the Board of Adjustment's 29 January 2008 order "for entry of an Order reversing . . . Planner Prete's . . . determination letter." From this order, both Petitioner and Intervenors appeal.

II. Motion to Dismiss

Before we address Intervenors' and Petitioner's substantive arguments on appeal, we must address Petitioner's motion to dismiss Intervenors' appeal on mootness grounds. We conclude that Intervenors' appeal is not moot.

On 24 March 2009, the City of Wilmington repealed former Section 18-215 and enacted a new ordinance entitled "Division III Conservation Resource Regulations" (Conservation Resource Regulations). The new ordinance includes the following "*Savings provision*:"

> (f) *Savings provision.* The Conservation Resource Regulations in this Division shall not affect any pending litigation or appeals involving the City's former Conservation Overlay District regulations (prior LDC Section 18-215 *et seq.*). The Conservation Resource Regulations shall not apply to any site plan application accepted by the City at the time of the adoption of this Division; provided, however, the applicant submits all documentation required for approval within two (2) years of the date of the completion of any pending litigation or the date of the site plan acceptance, whichever is the later date.

Wilmington, NC, Division III Conservation Resource Regulations (24 March 2009). Petitioner contends in its dismissal motion that the

repeal of former Section 18-215 and its replacement with Section 18-341 moots Intervenors' appeal.

"Jurisdiction in North Carolina depends on the existence of a justiciable case or controversy." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001), *disc. review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002) (quoting *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 544 S.E.2d 821 (2001); *Town of Pine Knoll Shores v. Carolina Water Serv.*, 128 N.C. App. 321, 494 S.E.2d 618 (1998)). " 'To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the complaint that litigation appears unavoidable[;] [m]ere apprehension or the mere threat of an action or suit is not enough.' " *Property Rights Advocacy Group v. Town of Long Beach*, 173 N.C. App. 180, 182, 617 S.E.2d 715, 717 (2005) (quoting *State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc.*, 149 N.C. App. 656, 658, 562 S.E.2d 60, 62-63 (2002) (internal quotation omitted)). "Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979).

As a general proposition, the "[r]epeal of a challenged law generally renders moot the issue of the law's interpretation or constitutionality." *See Property Rights Advocacy*, 173 N.C. App. at 183, 617 S.E.2d at 718 (citing *State v. McCluney*, 280 N.C. 404, 407, 185 S.E.2d 870, 872 (1972) (holding that the "repeal of [a statute] renders moot the question of its constitutionality" and that the "constitutionality of the [new] Act does not arise on this appeal [and] . . . will be decided if and when it is presented"). However, the repeal of a challenged statute does not have the effect of mooting a claim arising under that statute in the event that there is a reasonable possibility that the law will be reenacted following the dismissal of the legal challenge, *see City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 71 L. Ed. 2d 152 (1982), *followed by Thomas v. North Carolina Dep't of Human Resources*, 124 N.C. App. 698, 478 S.E.2d 816 (1996), or if the repeal of the challenged statute does not provide the injured party with adequate relief or the injured party's claim remains viable. *Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 352, 578 S.E.2d 688, 690 (2003) (holding that an appeal was not moot because the "amendment to the ordinance at bar . . . did not give [the petitioner] the relief

sought" so that the "[p]etitioner's claim and injury remain viable"). In this instance, the City's repeal of former Section 18-215 included a "*Savings provision*" which expressly provided that "[t]he Conservation Resource Regulations in this Division shall not affect any pending litigation or appeals involving the City's former Conservation Overlay District regulations (prior LDC Section 18-215 *et seq.*)" and would not "apply to any site plan application accepted by the City at the time of the adoption of this Division" so long as the "applicant submits all documentation required for approval within two (2) years of the date of the completion of any pending litigation or the date of the site plan acceptance, whichever is the later date." The "*Savings provision*" makes the new ordinance applicable on a prospective basis, expressly preserves Intervenors' appeal from the trial court's order, and preserves Petitioner's right to proceed to develop the Property on the basis of its prior application without having to comply with the new ordinance in the event that its site plan application had been accepted "at the time of the adoption of this Division." As a result, in the event that Intervenors successfully challenge the trial court's order, they will be entitled to have Petitioner required to comply with the "performance controls" specified in former Section 18-215 despite its repeal. Thus, given that Intervenors' claim remains viable, its appeal from the trial court's order is not moot and Petitioner's motion to dismiss Intervenors' appeal is denied. *See Lambeth*, 157 N.C. App. at 352, 578 S.E.2d at 690.

III. Legal Analysis

On cross-appeal, Petitioner argues that the trial court erred by granting Intervenors' motion to intervene because (1) the Intervenors are not aggrieved parties pursuant to N.C. Gen. Stat. § 160A-388(e2) and (2) the Intervenors did not meet the standards required for intervention pursuant to N.C. Gen. Stat. § 1A-1, Rule 24. On appeal, Intervenors argue that (1) Petitioner's appeal to the Board of Adjustment should have been dismissed as untimely pursuant to Section § 18-27 of the City Code; (2) the trial court erred by entering an order denying Intervenors' motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60; and (3) the trial court erred by failing to apply the doctrine of judicial estoppel to preclude Petitioner from denying that the Property was subject to the rules applicable to Conservation Overlay Districts. After careful consideration of the record in light of the applicable law, we conclude that the trial court did not err in making any of these determinations.

A. Petitioner's Appeal

[1] "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (quoting *Flast v. Cohen*, 392 U.S. 83, 99, 20 L. Ed. 2d 947, 961 (1968)). "It is not necessary that a party demonstrate that injury has already occurred, but a showing of 'immediate or threatened injury' will suffice for purposes of standing." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 642-43, 669 S.E.2d 279, 282 (2008) (quoting *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990) (internal citation omitted)).

N.C. Gen. Stat. § 160A-388(e2) authorizes an "aggrieved party" to seek review of decisions made by boards of adjustment under zoning ordinances. N.C. Gen. Stat. § 160A-388(e2); *see also Heery v. Highlands Zoning Bd. of Adjust.*, 61 N.C. App. 612, 613, 300 S.E.2d 869, 870 (1983). "An aggrieved party is one who can either show an interest in the property affected, or if the party is a nearby property owner, some special damage, distinct from the rest of the community[.]" *Allen v. Burlington Bd. of Adjust.*, 100 N.C. App. 615, 618, 397 S.E.2d 657, 659 (1990). Specifically, in the zoning context, this Court has stated:

> The mere fact that one's proposed lawful use of his own land will diminish the value of adjoining or nearby lands of another does not give to such other person a standing to maintain an action, or other legal proceeding, to prevent such use. If, however, the proposed use is unlawful, as where it is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have a standing to maintain such proceeding.

Jackson v. Guilford Cty. Bd. of Adjust., 275 N.C. 155, 161, 166 S.E.2d 78, 82 (1969) (citations omitted).

In addition, "[N.C. Gen. Stat. § 1A-1,] Rule 24 governs intervention in all civil actions, including appeals pursuant to [N.C. Gen. Stat.] § 160A-388(e)." *Councill v. Town of Boone Bd. of Adjust.*, 146 N.C. App. 103, 107, 551 S.E.2d 907, 910, *disc. review denied*, 354 N.C. 360,

560 S.E.2d 130 (2001) (citing *Procter v. City of Raleigh Bd. of Adjust.*, 133 N.C. App. 181, 183, 514 S.E.2d 745, 746 (1999)). According to N.C. Gen. Stat. § 1A-1, Rule 24(a):

> Upon timely application anyone shall be permitted to intervene in an action: . . .
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

As a result, a party is entitled to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) in the event that he or she can demonstrate (1) an interest relating to the property or transaction, (2) practical impairment of the protection of that interest, and (3) inadequate representation of the interest by existing parties. *See Harvey Fertilizer & Gas Co. v. Pitt County*, 153 N.C. App. 81, 85, 568 S.E.2d 923, 926 (2002) (citing *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999) (citations omitted)). This Court reviews a trial court's decision granting or denying a motion to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2), on a *de novo* basis. *See Harvey*, 153 N.C. App. at 89, 568 S.E.2d at 929.

In this case, Intervenors contended that they were entitled to participate in this proceeding as a matter of right because they owned property that was "contiguous" to the "subject property" or in the "immediate vicinity" to the "subject property." According to Intervenors, the tracts of property owned by Petitioner and Intervenors were "located immediately and directly next to . . . Motts Creek," the body of water that Intervenors claim to be in a Conservation Overlay District under former Section 18-215. Intervenors described Motts Creek as a "brackish, saltwater tidal marsh." Intervenors used Motts Creek for canoeing, crabbing, kayaking, fishing, hiking trails, catching baitfish, and feeding ducks. Intervenors also claimed that Summer Rest Road was their "sole means of ingress and egress" to their properties. Intervenors stated in their intervention motion that:

> If Petitioner is successful in setting aside enforcement of the COD zoning ordinance that applies to its property, the Intervenor-Respondents, especially the Contiguous Owners, will suffer spe-

cific, direct loss and damage to their properties and the use and enjoyment of the properties in the following ways:

(i) the density of any building on the Petitioner's property will necessarily be significantly increased if Petitioner does not have to satisfy the more restrictive setback lines required by the COD;

(ii) the COD regulations of protecting "important environmental and cultural resources within the City" such as Motts Creek and Motts Creek's "diverse and ecologically important natural systems" that are "important for fin fishing and shell fishing" as well as open space will be set aside allowing for more pollution and destruction of Motts Creek—the very creek in which the Intervenor-Respondents and their families recreate in;

(iii) with the heightened density afforded to Petitioner if the COD is not enforced, will come significantly increased traffic, light pollution, noise and other related pollution that will all lead to a pecuniary loss in the value of the Intervenor-Respondents' properties; and,

(iv) it will establish adverse precedent to the citizens and property owners in the City of Wilmington that **one informal, mistaken email by one employee for the City** can divest and strip the City of Wilmington of its legislative, zoning and police powers in enforcing its zoning ordinances such that rather than the Petitioner being purportedly harmed by such a mistake all of the remaining citizens and property owners in the City will be harmed—which is not allowed under the controlling law of North Carolina. *City of Raleigh v. Fisher*, 232 N.C. 629, 61 S.E.2d 897 (1950); *Hayes v. Town of Fairmont*, 130 N.C. App. 125, 502 S.E.2d 380 (1998).

Several of the individual Intervenors also testified before the Board of Adjustment about how they and their property would be injured in the event that Petitioner's development was not made subject to the "performance controls" mandated by the former ordinance. John Blackwell testified that "I live on the first house on the left on Summer Rest Road. . . . I have about 400 feet of property that borders Motts Creek and my living room[,] dining room, kitchen look out over the creek right towards where the project is being proposed." According to Mr. Blackwell, "I have three small children . . . and we were just out there on the creek last night feeding the ducks and enjoying the serenity and the beautiful area. . . . I think it would be a

shame to see a piece of property in such a prominent location be completely ignored as far as the [Conservation Overlay District] is concerned[.]" Jane Hardwick testified that "I am especially concerned about some of the wildlife that could be affected, and just feel like it is, you know, one of the few special places left in this county that we have counted on being protected by this conservation overlay." Robert Smith stated, "I think the City recognized the need to ensure that environmentally sensitive areas are regulated and protected. And, that's exactly what the code says, and it's for the benefit of the community." Smith opined that "[w]e have a kayak; we have a canoe; I walk my dog every morning around the creek overlooking it. It's a wonderful community resource, and there are reasons why we have a conservation overlay district and look to the City to uphold and support these limited resources." Earl Galleher testified that "[e]very single day when I drive by Motts Creek there's fishermen . . . catching bait, there's people out feeding the ducks, it is a constantly used resource, and that was our understanding of why the conservation overlay district line is there in the first place." Mr. Galleher stated that "[the Conservation Overlay District line] was placed there and we would highly object to that line not being upheld in this circumstance, and we would ask that you very carefully consider a circumstance of relieving the developer from having to comply with this. My wife and I were particularly alarmed when the developer told us, a group of us meeting out there, that if we didn't agree with his project, he would rip down every tree on that property, and that was most alarming to us."

In *Mangum*, a group of neighboring landowners alleged in response to a property owner's request for writ of *certiorari* "that they either owned property immediately adjacent to or in close proximity to the subject property." *Mangum*, 362 N.C. at 644, 669 S.E.2d at 283. The *Mangum* Court reasoned that "[w]hile this assertion, in and of itself, is insufficient to grant standing, it does bear some weight on the issue of whether the complaining party has suffered or will suffer special damages distinct from those damages to the public at large." *Id.* Moreover, the neighboring landowners "testified during the Board hearing . . . [as to the] adverse effects on their property[.]" *Id.* The Supreme Court held that "the allegations and evidence presented by petitioners in regards to the 'increased traffic, increased water runoff, parking, and safety concerns,' as well as the secondary adverse effects on petitioners' businesses, were sufficient special damages to give standing to petitioners[.]" *Id.*

We are unable to distinguish the special damages found sufficient to support intervention by the Supreme Court in *Mangum* and the special damages alleged by Intervenors here. In fact, Intervenors' allegation that development of the Property without the "performance controls" required of property associated with a Conservation Overlay District will "significantly increase[] traffic, light pollution, noise and other related pollution that will all lead to a pecuniary loss in the value of the Intervenor-Respondents' properties" is remarkably similar to the special damage allegations deemed sufficient in *Mangum*. As a result, we conclude that the trial court did not err by allowing Intervenors' motion to intervene pursuant to N.C. Gen. Stat. § 160A-388(e2).

In addition, we also believe that the trial court did not err by concluding that Intervenors satisfied the standards for intervention pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2). In addition to the factors discussed above, Intervenors rely on the decision of this Court in *Northwestern Bank v. Robertson*, 25 N.C. App. 424, 213 S.E.2d 363 (1975), to support their allegation that the City could not adequately represent Intervenors' interests before the trial court since their interest is "of such direct and immediate character that [Intervenors] will gain or lose by direct operation of the judgment[.]" *Northwestern Bank v. Robertson*, 25 N.C. App. 424, 426, 213 S.E.2d 363, 365 (1975) (quoting *Griffin & Vose, Inc. v. Minerals Corp.*, 225 N.C. 434, 35 S.E.2d 247 (1945)). This contention, in addition to Intervenors' claims that (1) Intervenors are the owners of property that is "contiguous" or near the Property, and that (2) the development of the Property in the absence of the "performance controls" that would be required in the event that the Property was found to be in or associated with a Conservation Overlay District will "significantly increase[] traffic, light pollution, noise and other related pollution that will all lead to a pecuniary loss in the value" of Intervenors' properties, satisfies the requirements of N.C. Gen. Stat. § 1A-1, Rule 24(a)(2). As a result, we conclude that the trial court did not err by granting Intervenors' motion to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2). *See Councill*, 146 N.C. App. at 107, 551 S.E.2d at 910 (holding that a motion to intervene was improperly denied when intervenors alleged "that approval of Councill's application for a conditional use permit would: (1) result in an increase of traffic volume[;] . . . (2) cause significant risks to the health and safety of [the intervenors] and their families; and (3) cause a reduction in the fair market value of their property").

B. Intervenors' Appeal

[2] In reviewing the decision of a board of adjustment, "the superior court sits as an appellate court, and not as a trier of facts." *Overton v. Camden County*, 155 N.C. App. 391, 393, 574 S.E.2d 157, 160 (2002) (quoting *Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527, *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000) (internal quotation omitted). The superior court's review of a board of adjustment's decision is limited to determining whether:

> 1) the [b]oard committed any errors in law; 2) the [b]oard followed lawful procedure; 3) the petitioner was afforded appropriate due process; 4) the [b]oard's decision was supported by competent evidence in the whole record; and 5) [whether] the [b]oard's decision was arbitrary and capricious.

Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust., 152 N.C. App. 474, 475, 567 S.E.2d 440, 441, *disc. review denied*, 356 N.C. 611, 574 S.E.2d 676 (2002) (quoting *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 146 N.C. App. 388, 390, 552 S.E.2d 265, 267 (2001), *rev'd per curiam on other grounds*, 355 N.C. 269, 559 S.E.2d 547 (2002)). "If the superior court is reviewing either the sufficiency of the evidence or whether the board's decision was arbitrary and capricious, the superior court applies the 'whole record test.' " *Overton*, 155 N.C. App. at 393, 574 S.E.2d at 159-60 (quoting *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 140 N.C. App. 99, 102, 535 S.E.2d 415, 417 (2000), *aff'd*, 354 N.C. 298, 554 S.E.2d 634 (2001)). The findings of the board of adjustment "are binding if supported by substantial competent evidence presented at the hearing[,]" *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 218, 488 S.E.2d 845, 849 (1997), *disc. review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997) (citing *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 135-36, 431 S.E.2d 183, 186 (1993)), and "[t]he reviewing court may not substitute its own judgment for that of the body when the record contains competent and substantial evidence supporting the findings[,] . . . even though conflicting evidence in the record would have allowed the court to reach a contrary finding if proceeding *de novo*." *Tate Terrace*, 127 N.C. App. at 218, 488 S.E.2d at 849 (citing *CG&T Corp. v. Bd. of Adjust. of Wilmington*, 105 N.C. App. 32, 40, 411 S.E.2d 655, 660 (1992)). If the board's decision is challenged as resting on an error of law, *de novo* review is proper. *See Westminster Homes*, 140 N.C. App. at 102, 535 S.E.2d at 417; *see also*

Capital Outdoor, 152 N.C. App. 474, 567 S.E.2d 440. "An appellate court's review of the trial court's zoning board determination is limited to determining whether the superior court applied the correct standard of review, and to determin[ing] whether the superior court correctly applied that standard." *Overton*, 155 N.C. App. at 393-94, 574 S.E.2d at 160 (citing *Westminster Homes*, 140 N.C. App. at 102-03, 535 S.E.2d at 417).

1. Timeliness

[3] Intervenors initially contend that the trial court erred by ruling that Petitioner's appeal to the Board of Adjustment was not time-barred pursuant to City Code Section 18-27. We disagree.

> Section 18-28 provides, in pertinent part, as follows:
>
> Appeals to the board concerning interpretation or administration of this chapter by the City Manager may be taken by any person aggrieved or by any officer, department, commission or board of the city. Such appeal may be taken by filing a notice of appeal specifying the grounds thereof with the secretary to the board within ten (10) consecutive calendar days after the issuance of the City Manager's order. Upon proper filing of an appeal, the City Manager shall forthwith transmit to the board all papers then constituting the record upon which the action appealed from was taken as provided in the rules of procedure. The board shall fix a reasonable time for the hearing of appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. At the hearing, any party may appear in person or by agent or attorney.

As we have already noted, the applicable standard of review requires that we first determine whether the trial court utilized the appropriate standard of review in evaluating Intervenors' contention. *Overton*, 155 N.C. App. at 393-94, 574 S.E.2d at 160. In order to properly resolve this issue on the merits, we must determine the meaning of "issuance" and "order." Properly defining "issuance" and "order" involves a question of law. However, identifying the actual dates upon which the City Manager made his determination or upon which Petitioner filed its notice of appeal involves a question of fact. Thus, the extent to which Petitioner lodged a timely appeal to the Board of Adjustment presents a mixed question of law and fact.

We next must determine whether the superior court correctly applied the appropriate standard of review. In this case, the record

tends to show that Petitioner received a letter, which was transmitted in the form of an e-mail attachment, from Planner Prete on 7 August 2007 stating, "[a]s requested in our meeting on August 6, 2007, I am providing the following agency determination of the regulation of Conservation Resources on the Sidbury site. . . . [T]he wetland area delineated on the site in question is subject to the City COD controls." On the following day, Petitioner filed an "APPEAL FROM DETERMINATION OF THE CODE ENFORCEMENT OFFICER." The record does not reflect that any party objected to the timeliness of Petitioner's appeal from the TRC's determination to the Board of Adjustment pursuant to Section 18-28 of the City Code. Although Intervenors contended before the trial court and contend on appeal that Planner Prete's 7 August 2007 letter was preceded by several other letters to the same effect, that one or more of these earlier letters should have precipitated an appeal to the Board of Adjustment, and that Petitioner's failure to appeal within ten days after one of these earlier letters rendered its appeal untimely, this argument does not seem to have been advanced before the Board of Adjustment by any party, including the City staff from whose determination the appeal was taken. On the contrary, the findings of fact made by the Board of Adjustment tend to show that Petitioner's appeal was, in fact, timely.

> [O]ne of the functions of a Board of Adjustment is to interpret local zoning ordinances, and . . . [such interpretation] is given deference. Therefore, our task on appeal is not to decide whether another interpretation of the ordinance might reasonably have been reached by the board, but to decide if the board acted arbitrarily, oppressively, manifestly abused its authority, or committed an error of law in interpreting the ordinance.

Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust., 140 N.C. App. 99, 103, 535 S.E.2d 415, 417-18 (2000). The superior court's scope of review on *certiorari* is limited to errors alleged to have occurred before the local board. *See Godfrey v. Zoning Bd. of Adjust.*, 317 N.C. 51, 62-63, 344 S.E.2d 272, 279 (1986) (holding that, because the board of aldermen only decided whether to grant a variance under the zoning ordinance, the superior court erred by determining the question of the constitutionality of the zoning ordinance, which was never raised or considered by the board of aldermen). "[T]he superior court, and hence this Court through our derivative appellate jurisdiction, [only has] the statutory power to review" those issues presented to the board of adjustment. *Godfrey*, 317 N.C. at 63,

344 S.E.2d at 279. As a result, because the Board of Adjustment did not make any legal conclusions regarding whether an "agency determination" communicated by a "Senior Planner" constituted an "order" by the "City Manager," in compliance with Section 18-28 of the Wilmington City Code, and because the Board of Adjustment made no findings of fact with regard to the dates upon which an "order" as envisioned by Section 18-28 of the City Code was filed and appealed therefrom, it was impossible for the trial court to determine whether, after applying the "whole record test," there was sufficient evidence of record to support the Board of Adjustments's findings, "[whether] the board's decision was arbitrary and capricious," *Overton*, 155 N.C. App. at 393, 574 S.E.2d at 159-60, or whether the Board of Adjustment's decision rested upon an error of law. *See Westminster Homes*, 140 N.C. App. at 102, 535 S.E.2d at 417. As a result, we conclude that the trial court did not err by denying Intervenors' motion to dismiss Petitioner's appeal to the Board of Adjustment as untimely.

2. N.C. Gen. Stat. § 1A-1, Rule 60

[4] Secondly, Intervenors contend that the trial court erred by denying their motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60. We disagree.

As we have already noted, the first question we must address in reviewing an appeal stemming from a proceeding before a board of adjustment is whether the trial court utilized the appropriate standard of review. *See Overton*, 155 N.C. App. at 393, 574 S.E.2d at 159-60; *Westminster Homes*, 140 N.C. App. at 102, 535 S.E.2d at 417. In view of the fact that the specific issue that Intervenors raised before the trial court in seeking relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, involved a purely legal question, we believe that the trial court was required to exercise a *de novo* standard of review.

Intervenors claim that, subsequent to the entry of the Board of Adjustment's order, they discovered new evidence "that would justify [the trial court] remanding Petitioner's appeal to the [Board of Adjustment] for a new hearing and determination." In essence, Intervenors claim to have discovered evidence tending to show that Petitioner had previously submitted another application for the development of the property in question to the TRC in 2001; that the same individual signed the 2001 application and the present application; that Petitioner's 2001 application indicated, contrary to Petitioner's assertions in this proceeding, that the Conservation

Overlay District restrictions applied to the Property; and that the applicability of the Conservation Overlay District restrictions to the Property was discussed among members of the City staff prior to and on the date of a TRC meeting at which Petitioner's materials were reviewed. According to Intervenors, the 2001 site development application was named "Bridgeview Offices and Condominiums" rather than "The Sidbury."

N.C. Gen. Stat. § 1A-1, Rule 60, provides, in pertinent part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding [if there exists] . . . [n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[.]

N.C. Gen. Stat. § 1A-1, Rule 60(b)(2). As we have already noted, however, the trial court had jurisdiction over this proceeding on the basis of a petition for writ of *certiorari* seeking review of an order of the Board of Adjustment. "In reviewing the errors raised [by petitioner's] petition for writ of *certiorari*, the superior court was sitting as a court of appellate review[.]" *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 662 (1990). The Supreme Court has reasoned that, since the superior court is acting in such proceedings as an appellate court rather than a trial court, motions brought pursuant to the North Carolina Rules of Civil Procedure, such as motions for summary judgment, cannot be properly granted since they are "properly heard in the trial courts." *Batch*, 326 N.C. at 11, 387 S.E.2d at 662 (citing *Britt v. Allen*, 12 N.C. App. 399, 183 S.E.2d 303 (1971)). Instead, "[r]eview pursuant to writ of *certiorari* of an administrative decision is based solely upon the record as certified." *Id.*; *See also Godfrey*, 317 N.C. at 63, 344 S.E.2d at 279 (holding that an issue not raised before a board of aldermen could not be considered on *certiorari*). Since Intervenors did not seek relief from the Board of Adjustment based upon the information upon which they have predicated their motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, and since, for that reason, the Board of Adjustment never addressed the extent to which the information in question justified granting any sort of relief, the record does not contain any ruling by the Board of Adjustment which the trial court could have reviewed in accordance with the applicable standard of review. As a result, we conclude that the trial court did not err by denying Intervenors' motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60.

C. Judicial Estoppel

[5] Finally, Intervenors contend that the trial court erred by failing to hold that Petitioner was judicially estopped from denying that it was subject to the Conservation Overlay District restrictions by virtue of the fact that, at the time that it submitted its application for approval of the Bridgeview project in 2001, it admitted that the Property was subject to those restrictions. We disagree.

"Broadly speaking, 'estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth.' " *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 13, 591 S.E.2d 870, 879 (2004) (quoting 28 Am. Jur. 2d, *Estoppel and Waiver* § 1 (2000)). "[J]udicial estoppel seeks to protect courts, not litigants, from individuals who would play 'fast and loose' with the judicial system," *Whitacre P'ship*, 358 N.C. at 26, 591 S.E.2d at 887, by "prohibiting parties from deliberately changing positions [on factual assertions] according to the exigencies of the moment." *Id.*, 358 N.C. at 28, 591 S.E.2d at 888 (citations and internal quotation marks omitted). The Supreme Court described the following three factors as useful in determining whether the doctrine of judicial estoppel should be invoked, with only the first being essential for the doctrine's invocation:

> First, a party's subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id., 358 N.C. at 29, 591 S.E.2d at 889 (internal quotation marks and citations omitted); *see also Harvey v. McLaughlin*, 172 N.C. App. 582, 584, 616 S.E.2d 660, 662-63 (2005). Judicial estoppel is an "equitable doctrine invoked by a court at its discretion." *Wiley v. UPS, Inc.*, 164 N.C. App. 183, 188, 594 S.E.2d 809, 812 (2004) (quotation omitted). Ordinarily, "[t]he invocation of the doctrine of judicial estoppel is addressed to the sound discretion of the trial court, and our review of a trial court's application of the doctrine is limited to determining

whether the trial court abused its discretion." *McLaughlin*, 172 N.C. App. 582, 584, 616 S.E.2d 660, 663 (2005) (citation omitted). However, as we have repeatedly stated, the superior court's scope of review in proceedings, such as this one, which originate from boards of adjustment is limited to determining whether:

> 1) the [b]oard committed any errors in law; 2) the [b]oard followed lawful procedure; 3) the petitioner was afforded appropriate due process; 4) the [b]oard's decision was supported by competent evidence in the whole record; and 5) [whether] the [b]oard's decision was arbitrary and capricious.

Capital Outdoor, 152 N.C. App. at 475, 567 S.E.2d at 441. In other words, the superior court's scope of review on *certiorari* is limited to errors alleged to have occurred before the local board, *Godfrey*, 317 N.C. at 63, 344 S.E.2d at 279, with our review from the superior court's decision further limited to ascertaining "whether the superior court applied the correct standard of review, and . . . whether the superior court correctly applied that standard." *Overton*, 155 N.C. App. at 394, 574 S.E.2d at 160.

Intervenors argue that, having previously submitted an application to the TRC in September 2001 that depicted the Property as lying, at least in part, within the Conservation Overlay District, it is clear that Petitioner knew that the Property lay in a Conservation Overlay District in 2001 and that Petitioners should have been judicially estopped from arguing before the superior court in this case that the Property did not lie in a Conservation Overlay District. However, no evidence pertaining to the Bridgeview project was ever presented to the Board of Adjustment, so that the certified record did not contain any evidence pertaining to Bridgeview for the superior court to examine. The evidence upon which Intervenors rely materialized for the first time in the superior court, which is required to act in the capacity of an appellate court; such evidence was incompetent, since Petitioner had no chance to refute it before the Board of Adjustment, and its consideration would have exceeded the scope of the superior court's review, which is limited to errors alleged to have occurred before the local board. *See Godfrey*, 317 N.C. at 63, 344 S.E.2d at 279. Intervenor's failure to raise the issue of estoppel before the Board of Adjustment effectively precluded the trial court and precludes this Court from considering Intervenors' estoppel claim. Therefore, we conclude that the trial court did not err in failing to apply the doctrine of judicial estoppel.

Conclusion

As a result, for the reasons stated above, we conclude that Intervenors' appeal is not moot and that the trial court did not err by granting Intervenors' motion to intervene. In addition, we further conclude that the trial court did not err by failing to conclude that Petitioner's appeal to the Board of Adjustment should have been dismissed as untimely; by denying Intervenors' motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60; and by declining to hold that Petitioner was judicially estopped from contending the Conservation Overlay District restrictions did not apply to the Property.[3] As a result, the trial court's order is affirmed.

AFFIRMED.

Judges McGEE and JACKSON concur.

JUDY METCALF DILLINGHAM, PETITIONER v. CLARENCE DAVID DILLINGHAM, RESPONDENT

No. COA09-507

(Filed 2 February 2010)

Trusts— resulting trust—real property

Although the trial court did not err by holding that petitioner's interest in the Equipment Barn property was held in a resulting trust, genuine issues of fact existed as to whether petitioner held the remaining seven properties in a resulting trust for respondent. The trial court's ruling to the contrary is reversed.

Appeal by respondent from order entered 7 November 2008 by Judge Dennis J. Winner in Buncombe County Superior Court. Heard in the Court of Appeals 26 October 2009.

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3. Intervenors did not argue the issue of whether the trial court erred by reversing the Board of Adjustment's determination that the restrictions set out in former Section 18-215 did not apply to the Property. As a result, any such argument is deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

Robert J. Deutsch, P.A., by Robert J. Deutsch and Tikkun A.S. Gottschalk, for petitioner-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Tobias S. Hampson, and Edward Eldred, and C. Gary Triggs, P.A., by C. Gary Triggs, for respondent-appellant.

MARTIN, Chief Judge.

Judy Dillingham ("petitioner") and Clarence Dillingham ("respondent") were married on 31 December 1983. Prior to their marriage, on 30 December 1983, petitioner and respondent entered into a prenuptial agreement. As part of this agreement, both parties were allowed to "purchase, acquire, own, hold, possess, encumber, lease, dispose of, convey and deal in any and all classes and kinds of property, real, personal, or mixed, as though he or she were single and had never been married." The agreement also provided that "[n]othing contained in this Agreement shall be construed as preventing the parties from acquiring, owning, holding, selling and otherwise dealing in property . . . in their joint names . . . as tenants by the entirety."

On 23 July 1984, a son, David Drew Dillingham ("Drew"), was born of the marriage. Shortly thereafter, petitioner and respondent began to acquire various properties in Buncombe County, North Carolina, in order to put "back together the property that was Dillingham property." The first of these properties was a .78 acre lot ("Marital Home") which was conveyed to them by Lorene and Mabel Dillingham in 1986. That same year petitioner and respondent also acquired a 47.89 acre tract of land ("Foster Farm") from Vernice M. Gragg Foster and a 67.87 acre tract of land ("Dillingham Farm") from Lorene and Mabel Dillingham. In 1992, the parties acquired a .43 acre tract of land ("Fender Tract") from Josephine Gragg Fender and Fate Fender and a .92 acre tract of land ("Gragg Tract") from Rosa Lee Gragg. That same year, respondent deeded a 1.09 tract of land ("Equipment Barn"), which he owned prior to the marriage, to himself and petitioner as tenants by the entirety. In 1995, the parties acquired a one acre tract of land ("Randall Drive Property") from Doyle H. Frisbee, Jr. and Louise A. Frisbee. Finally, in 1996, respondent and petitioner acquired a 2.43 acre tract of land ("Rental Home") from respondent's father, C.B. Dillingham. All eight of these properties ("the properties") were deeded to petitioner and respondent as tenants by the entirety.

On 17 June 2004, petitioner and respondent separated. Following their separation, petitioner filed a complaint for, *inter alia*, post-separation support, alimony, writ of possession, attorney fees, equitable distribution, preliminary distribution, and injunctive relief. In respondent's answer, he asserted that the premarital agreement barred petitioner's claim, or, in the alternative, that he was entitled to equitable distribution. On 21 July 2005, a Consent Order: Post-Separation Support ("Consent Order") was filed, which acknowledged the validity of the parties' prenuptial agreement and awarded petitioner post-separation support and $1500 per month as an advance on her share of the marital estate. That same month, the parties were divorced. On 1 October 2007, petitioner filed a Motion to Dismiss Equitable Distribution Action ("Motion to Dismiss"), which was subsequently granted.

On 31 October 2007, petitioner filed a Petition for Partition of Real Property ("Partition Petition") in which she claimed that she was entitled to a partition in kind of the properties, which she then held as a tenant in common with respondent. On 26 November 2007, respondent filed an Answer to Petition for Partition, Affirmative Defenses, and Counterclaims ("Petition Answer"). In this Petition Answer, respondent asserted the equitable defenses of laches and estoppel. He also counterclaimed by requesting a declaratory judgment that he was the sole owner of the properties and a ruling that petitioner held the properties in a resulting or constructive trust for respondent. Respondent subsequently filed a Motion to Transfer the case to Buncombe County Superior Court, which was allowed on 11 January 2008.

Petitioner responded to respondent's Petition Answer by making a Motion to Strike Affirmative Defenses and a Motion to Dismiss Counterclaims. On 16 January 2008, respondent served an Amended Answer to Petition for Partition, Affirmative Defenses, and Counterclaims, alternatively, Motion to Amend Answer to Petition for Partition, Affirmative Defenses, and Counterclaims ("Amended Petition Answer"), and the following day he filed a Motion to Remand, and alternatively, Motion to Continue. The trial court subsequently denied petitioner's Motion to Strike Affirmative Defenses and Motion to Dismiss Counterclaims and respondent's Motion to Remand. The parties then conducted discovery.

Petitioner filed a Motion for Summary Judgment, which she later amended on 21 October 2008. In support of this motion, petitioner offered the pleadings, Respondent's Response to Petitioner's First Set

of Interrogatories and Request for Production of Documents ("Respondent's Response to Interrogatories"), Petitioner's First Request for Admissions to Respondent ("Request for Admissions"), deeds for the properties, the pre-trial depositions, petitioner's affidavit, and various documents from the parties' equitable distribution case. In her affidavit, petitioner swore that the parties intended for the properties to be deeded to the parties as tenants by the entirety and that she never agreed that respondent would be the sole owner. She also averred that the properties were purchased with either her personal funds or the parties' joint funds. In support of this contention, petitioner provided letters from Mabel and Lorene Dillingham gifting the down payment and first and second year mortgage payments on the Dillingham Farm to both respondent and petitioner. Petitioner also attached to her affidavit checks made out to mortgage companies from the parties' joint checking account as well as from her individual checking account.

In her deposition, petitioner reaffirmed the statements made in her affidavit by asserting that she too provided consideration for the properties. She also stated that the parties agreed that "[t]he Dillingham property that we got from [respondent's] aunts, that was going to go to Drew, had we stayed together as a couple," but otherwise the intention was for the properties to be titled in both parties' names. Contrary to petitioner's assertions, respondent stated in his deposition that he paid the full consideration for the Dillingham Farm, the Rental Home, the Fender Tract, and the Gragg Tract, either through services, inheritance, or his personal funds. He also stated it was the intent of the parties that the properties would "pass to [him], and ultimately be passed to [the parties'] son Drew."

Similar to respondent's assertion, Drew stated in his deposition that respondent told him numerous times that the properties had historically belonged to their family and that he eventually wanted them to go to Drew. Respondent's Response to Interrogatories also indicated that the parties entered into an agreement in 1985, which provided that the properties would "pass to [p]etitioner's and [r]espondent's only son and [r]espondent's only child, Drew Dillingham, with the intention of preserving the old Dillingham family farm legacy of a succession of properties that began in 1785."

Respondent filed his Reply to Amended Motion for Summary Judgment and Motion in Limine ("Summary Judgment Reply") on 31 October 2008. To support his contention that a genuine issue of fact

existed, respondent relied on the evidence supplied by petitioner as well as the Amended Respondent's Responses to Petitioner's First Request for Admissions ("Answers to Admissions") and three affidavits provided by his employee Joe Meyer ("Mr. Meyer"), and his sisters, Joyce Dillingham ("Ms. Dillingham") and Sara Dillingham Surrett Skowron ("Ms. Skowron"). Mr. Meyer swore in his affidavit that the consideration for the Dillingham Farm, the Fender Tract, the Gragg Tract, the Rental Home, the Randall Drive Property, and the Marital Home was provided solely by respondent. He also averred that the properties were titled to the parties as tenants by the entirety to keep them in "safekeeping in a constructive and/or resulting trust for [respondent] to be ultimately passed on to [the parties'] son Drew." Similarly, Ms. Dillingham and Ms. Skowron indicated in their affidavits that the consideration provided for the Dillingham Farm and the Rental Home, whether it be through services to the grantors or with actual money, came from respondent. Additionally, Ms. Dillingham averred that the respondent's intention in acquiring the properties was so that they could be passed on to Drew.

After considering the parties' submissions, the trial court issued its order granting petitioner's Motion for Summary Judgment with respect to both respondent's defenses and counterclaims on 7 November 2008. Respondent appeals.

On appeal from an order granting summary judgment, this Court conducts a *de novo* review. *Tiber Holding Corp. v. DiLoreto*, 170 N.C. App. 662, 665, 613 S.E.2d 346, 349, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). A motion for 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) (2009).

> [A]n issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. A question of fact which is immaterial does not preclude summary judgment.

Kessing v. Nat'l Mtge. Corp., 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). In determining whether a genuine issue exists, this Court must view all the evidence "in the light most favorable to the" non-

moving party. *Bruce-Terminex Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

Respondent first asserts summary judgment was improper because a genuine issue of material fact exists as to whether petitioner held seven of the eight properties at issue in a resulting trust for respondent. Respondent concedes that petitioner does not hold her interest in the Equipment Barn in a resulting trust. Therefore, we affirm the trial court's ruling with regard to this property. However, we find that genuine issues of fact exist as to whether petitioner holds the remaining seven properties in a resulting trust for respondent and reverse the trial court's ruling to the contrary.

"A resulting trust arises when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another." *Mims v. Mims*, 305 N.C. 41, 46, 286 S.E.2d 779, 783 (1982) (internal quotation marks omitted), *appeal after remand*, 65 N.C. App. 725, 310 S.E.2d 130, *disc. review denied*, 311 N.C. 305, 317 S.E.2d 681 (1984). Thus, "when one person furnishes the consideration to pay for land, title to which is taken in the name of another, a resulting trust commensurate with his interest arises in favor of the one furnishing the consideration." *Id.* at 46-47, 286 S.E.2d at 784.

> This being true, a resulting trust does not arise where a purchaser pays the purchase price of property and takes the title to it in the name of another unless it can be reasonably presumed from the attending circumstances that the parties intended to create the trust at the time of the acquisition of the property.

Lawrence v. Heavner, 232 N.C. 557, 559-60, 61 S.E.2d 697, 699 (1950). Thus, "[w]hether or not a resulting trust arises in favor of the person paying the consideration for a transfer of property to another, depends on the intention, at the time of transfer, of the person furnishing the consideration." *Waddell v. Carson*, 245 N.C. 669, 674, 97 S.E.2d 222, 226 (1957).

However, where the properties are titled in the name of a husband and wife together as tenants by the entirety, there is a presumption that the spouse paying the consideration intended to make a gift of the entirety interest to the other spouse. *Mims*, 305 N.C. at 47, 56, 286 S.E.2d at 784, 789. Thus, to establish a *prima facie* case, the spouse asserting a claim of a resulting trust must rebut this presumption by clear, cogent, and convincing evidence. *Id.* at 56-57, 286 S.E.2d at 789-90. That party may "rely on all the attendant facts and

circumstances of the transaction" to show no gift was intended. *Id.* at 58, 286 S.E.2d 790 (internal quotation marks omitted).

Respondent first argues that there exists a genuine issue as to whether he supplied the consideration for the properties. After a careful review of the record, we agree.

Petitioner asserts in her affidavit and deposition testimony that the properties were acquired with either her personal funds or the parties' joint funds. However, in his deposition, respondent states that the consideration for the Dillingham Farm, the Fender Tract, the Gragg Tract, and the Rental Home was provided solely by him. In his Answers to Admissions, respondent again denies that petitioner contributed any consideration for these four properties or for the Randall Drive Property. Additionally, Mr. Meyer states in his affidavit that respondent provided the entire consideration for the Dillingham Farm, the Fender Tract, the Gragg Tract, the Rental Home and the Randall Drive Property. Ms. Dillingham and Ms. Skowron present similar evidence in their affidavits with regard to the Rental Home and the Dillingham Farm. In light of this evidence, we hold that genuine issues of fact exist as to whether respondent paid the consideration for the Dillingham Farm, the Fender Tract, the Gragg Tract, the Rental Home, and the Randall Drive Property.

With regard to the Marital Home, petitioner claims that she provided at least $35,000 towards the construction of the house situated on the property. Respondent, in his Amended Petition Answer, indicates that petitioner did contribute at least some of the consideration. However, evidence from Mr. Meyer's affidavit and respondent's Answers to Admissions suggests that the entire consideration for this property and the house constructed on this property came from respondent's inheritance or his own personal funds. Because respondent has presented evidence in opposition to petitioner's summary judgment motion which tends to show that petitioner did not provide any of the consideration for the Marital Home, we find that a genuine issue exists as to this fact. *See Brice v. Moore*, 30 N.C. App. 365, 367, 226 S.E.2d 882, 883 (1976) (noting that, after the moving party has presented evidence showing no genuine issue of fact exists, the opposing party must then "respond, by affidavits or as otherwise provided, by setting forth specific facts showing a genuine issue").

Finally, the evidence in the record before this Court relating to the Foster Farm indicates that petitioner paid a portion of the consideration for its purchase. In fact, respondent, in his Answers to

Admissions, acknowledges that petitioner paid half of the $10,000 down payment for this property. However, there is also evidence in the record that additional consideration, in the form of a promissory note for $50,000, was paid for the Foster Farm, and a genuine issue still exists as to who paid the remaining $55,000 of the purchase price. If respondent can prove at trial that he alone furnished or promised to furnish the remaining consideration, he may be entitled to a resulting trust in the Foster Farm proportional to his contribution. *See Deans v. Deans*, 241 N.C. 1, 7, 84 S.E.2d 321, 325 (1954) (noting that a resulting trust is "limited in proportion to [the party asserting a resulting trust's] contribution to the whole purchase price"); *see also Miller v. Rose*, 138 N.C. App. 582, 591, 532 S.E.2d 228, 234 (2000) (stating that "[a]n enforceable promise to pay money toward the purchase price made prior to title passing, and subsequent payment made pursuant to that promise, may serve as adequate consideration to support a resulting trust"). Thus, we conclude that an issue of fact exists as to whether respondent provided the consideration for the properties.

However, as stated above, when the properties are deeded to a husband and wife as tenants by the entirety, the spouse asserting the existence of a resulting trust, in order to prevail, must not only show that he provided the consideration for the property, he must also rebut by clear, cogent, and convincing evidence the presumption that he intended a gift of the entirety interest. *Mims*, 305 N.C. at 56-57, 286 S.E.2d at 789-90. Thus, even though there may be a conflict in the evidence with regard to the source of consideration for the properties, the issue is not a material one enabling respondent to survive petitioner's summary judgment motion unless there is also a genuine issue of fact regarding the gift presumption. *See id.* at 57, 286 S.E.2d at 790. Therefore, we must now determine whether the evidence in the record creates a genuine issue regarding respondent's intent to gift the entirety interest in the properties, enough that he would be able, at trial, to rebut the presumption of a gift by clear, cogent and convincing evidence.

Respondent contends he has offered evidence to rebut the presumption that he intended a gift through evidence in the record that the parties entered into a verbal agreement in 1985 "to preserve the old Dillingham legacy." The evidence in the record surrounding this 1985 agreement reveals that it was the lifelong desire of respondent to put "back together the property that was Dillingham property." Thus, respondent alleges that, when the parties contemplated acquiring the properties in 1985, they, accordingly, agreed that the proper-

ties would "pass to [respondent]" and then ultimately "pass to [p]etitioner's and [r]espondent's only son and [r]espondent's only child, Drew Dillingham." Respondent testifies in his deposition that he had always intended to be the sole owner of the properties. Mr. Meyer, in his affidavit, states that it was understood between the parties that the properties were "held for safe keeping in a constructive and/or resulting trust for [respondent] to be ultimately passed on to son Drew." The party opposing summary judgment need not show that he can prevail on the issue, but only that an issue of fact exists. *Gregorino v. Charlotte-Mecklenburg Hosp. Auth.*, 121 N.C. App. 593, 595, 468 S.E.2d 432, 433 (1996). The weight and convincing force of the evidence is for the fact finder. *Rauchfuss v. Rauchfuss*, 33 N.C. App. 108, 115, 234 S.E.2d 423, 427 (1977). We believe respondent has forecast sufficient evidence to permit the fact finder to find that he has rebutted the presumption that he intended the entirety interest in the properties as a gift. *See Mims*, 305 N.C. at 59, 286 S.E.2d at 791 (concluding that a husband who presented evidence in opposition to his wife's summary judgment motion that he "supplied the entire purchase price for the property" and "at all times intended for the property to be his alone" was sufficient "to rebut the presumption of a gift"). Though petitioner denies that this agreement was ever made or that it was ever intended that respondent be the sole owner of the properties, it is not the role of "the court [,on summary judgment,] to *decide* an issue of fact." *Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E.2d 137, 140 (1980). Accordingly, we find that a genuine issue of fact exists as to whether petitioner holds her interest in the properties in a resulting trust for respondent, and we therefore reverse the trial court's grant of petitioner's summary judgment motion on this issue.

Petitioner, in urging a different result, first argues that respondent failed to timely provide his Answers to Admissions, making the matters contained therein "conclusively established." However, the settled record before this Court contains a document, filed 3 November 2008, in which respondent provided answers to petitioner's Request for Admissions. There is no indication in the record that the trial court considered respondent's answers untimely or that it deemed the facts set out in Petitioner's Request for Admissions conclusively established, and this Court "may not indulge in speculation" as to facts outside the record. *C. C. T. Equip. Co. v. Hertz Corp.*, 256 N.C. 277, 285, 123 S.E.2d 802, 808 (1962). Thus, as the parties have included respondent's Answers to Admissions in the settled record on appeal, we must consider them in our analysis.

Petitioner next argues that respondent's claim of a resulting trust is barred by the ten year statute of limitations. It is well established that a claim of a resulting trust is "governed by the ten year statute of limitations." *Howell v. Alexander*, 3 N.C. App. 371, 381, 165 S.E.2d 256, 263 (1969). However, the ten years do not begin to run until the party asserting a resulting trust has notice that the other party is "claiming the subject property adversely to them." *Brisson v. Williams*, 82 N.C. App. 53, 61, 345 S.E.2d 432, 437, *disc. review denied*, 318 N.C. 691, 350 S.E.2d 857 (1986). "Moreover it is established . . . that the statute of limitations does not run against a *cestui que trust* in possession." *Cline v. Cline*, 297 N.C. 336, 348, 255 S.E.2d 399, 406-07 (1979). Instead, "[t]he statute [of limitations for a resulting trust] begins to run only from the time the trustee disavows the trust and knowledge of his disavowal is brought home to the *cestui que trust*, who will then be barred at the end of the statutory period." *Id.* at 348, 255 S.E.2d at 407. Here, the record reveals that respondent has been in possession of the properties since the time they were acquired. Additionally, the first time petitioner asserted a claim to the properties adverse to respondent was on 22 July 2004 when petitioner filed her complaint for equitable distribution claiming an interest in the properties. Since respondent first asserted his claim of a resulting trust on 26 November 2007, he was well within the ten year statute of limitations, and petitioner's argument to the contrary fails.

Petitioner also suggests that respondent is barred from asserting the claim of a resulting trust by the doctrine of judicial estoppel. "Judicial estoppel requires proof of three elements: (1) the party's subsequent position is clearly inconsistent with an earlier position; (2) the earlier position was accepted by a court, thus creating the potential for judicial inconsistencies; and (3) the change in positions creates an unfair advantage or unfair detriment." *N.C. State Bar v. Gilbert*, 189 N.C. App. 320, 328, 663 S.E.2d 1, 7, *disc. review denied*, 362 N.C. 682, 670 S.E.2d 234 (2008). In the previous equitable distribution case, respondent asserted that petitioner had an "ownership interest" in the properties. However, this position is not clearly inconsistent with respondent's claim in the present partition action, as respondent even admitted in his Amended Partition Answer that petitioner was in fact listed on the deeds as a grantee. Thus, we find that respondent's claim of a resulting trust is not barred by the doctrine of judicial estoppel.

Finally, petitioner contends respondent cannot allege the existence of a resulting trust based on an oral agreement. Specifically

petitioner argues that since a resulting trust "does not . . . depend on any agreement between the parties," *Mims*, 305 N.C. at 46, 286 S.E.2d at 783, respondent cannot rely on the 1985 agreement to establish a resulting trust. We disagree with petitioner's view of respondent's argument concerning the 1985 agreement. We view the agreement as evidence of respondent's intent not to gift the entirety interests in the properties. Thus, petitioner's argument fails. Accordingly, we find that a genuine issue exists as to whether petitioner holds her interest in the properties in a resulting trust for respondent, and we reverse the trial court's holding to the contrary.

Respondent next argues that the trial court erred in granting petitioner's summary judgment motion with regard to his defense of estoppel. Specifically, respondent contends the evidence concerning the 1985 agreement creates a genuine issue of fact as to whether petitioner waived her right to partition. We agree.

In discussing the doctrine of estoppel as it relates to partition proceedings, our Supreme Court has explained that "[a]s a general rule it is a matter of right for a tenant in common to have partition. But it is well established that a cotenant may waive his right to partition by an express or implied agreement." *Chadwick v. Blades*, 210 N.C. 609, 612, 188 S.E. 198, 200 (1936) (internal quotation marks omitted). Thus, it has been said that "[e]quity will not award partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed on the estate by one through whom he claims." *Id.* (internal quotation marks omitted). "Such an agreement may be verbal, if it has been acted upon, and it need not be expressed, but will be readily implied, and enforced, if necessary to the protection of the parties." *Kayann Props., Inc. v. Cox*, 268 N.C. 14, 20, 149 S.E.2d 553, 557 (1966) (internal quotation marks omitted).

As stated above, when the evidence is viewed in the light most favorable to respondent, it reveals that the parties agreed, in 1985, to acquire the properties so that they would "pass to [respondent,]" and then ultimately "pass to [p]etitioner's and [r]espondent's only son and [r]espondent's only child, Drew Dillingham." Though this agreement does not contain an express promise not to seek partition, this fact alone is not fatal to respondent's claim. This Court, in *Kayann Properties, Inc. v. Cox*, was presented with an agreement between the parties that did not expressly prohibit partition. *Id.* at 20, 149 S.E.2d at 558. However, this Court found that it was "apparent . . . both from the instrument itself and from the circumstances surrounding its execution that neither party considered the possibility of

partition during the life of [the wife]." *Id.* In line with this reasoning, it is apparent from the language of the agreement in the present case that the parties intended the properties to go to their son, thus implying the parties' intention not to seek partition. Accordingly, although petitioner presents evidence indicating that the parties entered into no such agreement, our review of a grant of summary judgment, "does not authorize the court to *decide* an issue of fact." *Vassey*, 301 N.C. at 72, 269 S.E.2d at 140.

Petitioner argues that there is no genuine issue of material fact because the defense of estoppel cannot be based on an oral agreement that does not comply with the Statute of Frauds. However, as stated above, an agreement not to partition "may be verbal, if it has been acted upon, and it need not be expressed, but will be readily implied, and enforced, if necessary to the protection of the parties." *Kayann Props., Inc.*, 268 N.C. at 20, 149 S.E.2d at 557 (internal quotation marks omitted).

Finally, petitioner argues that summary judgment was proper because respondent did not "allege the existence of an oral agreement in his pleadings." After a careful review of the record, we find that this argument has no merit. In fact, in respondent's Amended Partition Answer, he alleges that "[t]he parties understood that, despite the title, these properties would remain the sole property of the [r]espondent and that they would pass, as a whole, to the parties' only son." We find that this statement sufficiently describes the alleged agreement between the parties, enough that petitioner would have notice of respondent's claim. *See* N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2009) (requiring pleadings to contain only "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved"). Accordingly, a genuine issue of fact exists as to respondent's equitable defense of estoppel.

Respondent finally argues that the trial court erred in granting summary judgment with regards to his equitable defense of laches. We disagree.

In defining the equitable defense of laches,

> our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of

each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

MMR Holdings, LLC v. City of Charlotte, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001). Though respondent cites this Court to the legal definition of the equitable defense of laches in his brief, he fails to provide any argument as to why this defense should apply to the present case. Thus, his assignment of error as it relates to the equitable defense of laches is deemed abandoned. N.C.R. App. P. 28(b)(6) (amended Oct. 1, 2009).

Therefore, we affirm the trial court's grant of petitioner's Motion for Summary Judgment dismissing respondent's counterclaim alleging that petitioner holds title to the Equipment Barn in a resulting trust and dismissing his equitable defense of laches. We reverse the grant of summary judgment dismissing respondent's counterclaims that petitioner holds title to the remaining properties in a resulting trust for him and dismissing his equitable defense of estoppel. We remand for further proceedings consistent with this opinion.

Affirmed in part, Reversed in part, and Remanded.

Judges JACKSON and ERVIN concur.

JOSIE McILWAN BLACKWELL, PLAINTIFF v. TIMOTHY ALLEN HATLEY, MIKE MAHALEY IN HIS OFFICIAL CAPACITY, D. REED LINN IN HIS OFFICIAL CAPACITY, STEVE ROWLAND IN HIS OFFICIAL CAPACITY, THE TOWN OF LANDIS, PARKDALE MILLS INCORPORATED, ALLIANCE REAL ESTATE III, INC., AND JOHN DOE, DEFENDANTS

No. COA09-298 and COA09-299

(Filed 2 February 2010)

1. Motor Vehicles— negligence—no genuine issue of material fact—summary judgment proper

In a negligence action arising out of an automobile accident, the trial court did not err in granting summary judgment in favor of defendant Hatley as there was no genuine issue of material fact

regarding whether Hatley was driving in excess of the legal speed limit at the time of the accident. A supplemental accident report offered by plaintiff to show Hatley's speed was inadmissible as neither of the officers who prepared the report witnessed the accident. Furthermore, testimony from plaintiff's "expert" witness regarding Hatley's speed was inadmissable as the witness did not observe the accident but based his opinion on the physical evidence at the scene of the accident. As the accident occurred prior to 1 December 2006, N.C.G.S. § 8C-1, Rule 702(i) did not apply.

2. Motor Vehicles— negligence—no genuine issue of material fact—summary judgment proper

The trial court did not err in granting summary judgment in favor of defendant Hatley on plaintiff's claim that Hatley negligently maintained his vehicle as there was no genuine issue of material fact regarding whether Hatley had functioning brakes on the trailer he was hauling at the time of the accident. A notation in a police report that the trailer did not have brakes was based on conjecture and speculation and was inadmissible.

3. Motor Vehicles— contributory negligence—no genuine issue of material fact—summary judgment proper

The Court of Appeals did not address plaintiff's argument that there were genuine issues of material fact concerning whether plaintiff was contributorily negligent as plaintiff failed to offer admissible evidence raising any genuine issue of material fact concerning defendant Hatley's negligence.

4. Motor Vehicles— negligence—legal duty—no genuine issue of material fact—summary judgment proper

The trial court did not err in granting summary judgment in favor of the Town of Landis and three municipal employees on plaintiff's negligence claim as plaintiff failed to produce any evidence that these defendants owed a legal duty to regulate the design, maintenance, site distance, speed limit, or any other features of S. Main Street, the site of the automobile accident at issue.

Appeal by Plaintiff from judgments entered 11 September 2008 by Judge Larry G. Ford in Rowan County Superior Court. Heard in the Court of Appeals 17 September 2009.

Gray, Johnson and Lawson, LLP, by Sharon M. Lawson-Davis, for Plaintiff.

York Williams & Lewis, L.L.P., by Thomas E. Williams, and David R. DiMatteo, for Defendant Timothy Allen Hatley.

BEASLEY, Judge.

Plaintiff (Josie Blackwell) appeals from entry of summary judgment on her claims against Defendants. We affirm.

This appeal arises from an automobile collision in 2004 in the Town of Landis, Rowan County, North Carolina. At around 1:30 p.m. on 21 May 2004, Plaintiff was driving west on E. Round Street. Her son, Gordon Blackwell (Gordon) was a passenger in the car. Defendant Timothy Hatley (Hatley) was driving north on S. Main Street in a pick-up truck hauling a trailer. At the intersection of E. Round Street and S. Main Street, a stop sign required traffic traveling on E. Round Street to stop. Plaintiff reached the intersection of E. Round Street and S. Main Street and stopped at the stop sign. Plaintiff looked to the left, while Gordon checked for traffic coming from the right. When Gordon told Plaintiff that the road was clear from the right, Plaintiff started to drive across S. Main Street. Plaintiff's car was struck by Hatley's vehicle as she drove across S. Main Street, and Plaintiff suffered serious injuries in the collision.

On 21 May 2007 Plaintiff filed suit against the following defendants: Hatley, the driver of the car that struck her; the Town of Landis; municipal employees Mike Mahaley, D. Reed Linn, and Steve Rowland, in their official capacities (Landis Defendants); Parkdale Mills Incorporated, Alliance Real Estate III, Inc., and "John Doe." In her complaint, Plaintiff generally alleged that (1) Hatley was negligent in his maintenance and operation of his vehicle; (2) Hatley was employed by "John Doe," who was liable for Hatley's negligence on a theory of *respondeat superior*; (3) Parkdale Mills and Alliance Real Estate negligently allowed vegetation to obscure Plaintiff's view of S. Main Street, and; (4) the Town of Landis and its employees negligently failed to enforce a town ordinance requiring property owners to keep vegetation trimmed, and negligently failed to establish the proper road design, speed limit, or traffic control devices on S. Main Street. On 28 August 2008 Plaintiff dismissed her claims against Parkdale Mills, and on 11 November 2008 Plaintiff dismissed her claims against John Doe and Alliance Real Estate.

On 23 January 2008 the Landis Defendants moved for summary judgment, and on 11 August 2008 Hatley moved for summary judgment. On 11 September 2008 the trial court granted summary judgment in favor of Hatley and the Landis Defendants. In COA09-298, Plaintiff appeals from summary judgment granted in favor of Hatley; in COA09-299, Plaintiff appeals summary judgment granted for the Landis Defendants. Because both appeals arise from a common set of facts, we consolidate the two cases on appeal to render this single opinion on all issues.

Standard of Review

The standard of review for summary judgment is well-settled:

> "Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows 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. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial."

Metcalf v. Black Dog Realty, LLC, —— N.C. App. ——, ——, —— S.E.2d ——, —— (COA08-1561, filed 3 November 2009) (quoting *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)).

Under N.C. Gen. Stat. § 1A-1, Rule 56(e) (2009):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

" 'The converse of this requirement is that affidavits or other material offered which set forth facts which would not be admissible in evidence should not be considered when passing on the motion for summary judgment.' " *Wein II, LLC v. Porter*, ––– N.C. App. ––, ––, 683 S.E.2d 707, 711 (2009) (quoting *Strickland v. Doe*, 156 N.C. App. 292, 295, 577 S.E.2d 124, 128 (2003)). " 'Similarly, a trial court may not consider that portion(s) of an affidavit which is not based on an affiant's personal knowledge.' " *Id.* (quoting *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 776 (1998)). Moreover:

> "Where both competent and incompetent evidence is before the trial court, we assume that the trial court, when functioning as the finder of facts, relied solely upon the competent evidence and disregarded the incompetent evidence." When sitting without a jury, the trial court is able to eliminate incompetent testimony, and the presumption arises that it did so.

In re Foreclosure of Brown, 156 N.C. App. 477, 487, 577 S.E.2d 398, 405 (2003) (quoting *In re Cooke*, 37 N.C. App. 575, 579, 246 S.E.2d 801, 804 (1978)).

Appeal from Summary Judgment for Hatley

[1] Plaintiff argues that the trial court erred by granting summary judgment for Hatley, on the grounds that there are genuine issues of material fact regarding Hatley's negligence. We disagree.

" 'The essential elements of any negligence claim are the existence of a legal duty or standard of care owed to the plaintiff by the defendant, breach of that duty, and a causal relationship between the breach of duty and certain actual injury or loss sustained by the plaintiff.' " *Harris v. Daimler Chrysler Corp.*, 180 N.C. App. 551, 555, 638 S.E.2d 260, 265 (2006) (quoting *Peace River Electric Cooperative v. Ward Transformer Co.*, 116 N.C. App. 493, 511, 449 S.E.2d 202, 214 (1994)).

It is undisputed that Hatley was driving north on S. Main Street when he collided with Plaintiff at the intersection of E. Round Street and S. Main Street, and that the speed limit at the intersection was 35 mph. Plaintiff first argues that the evidence raises genuine issues of material fact regarding whether Hatley was driving in excess of the legal speed limit at the time of the accident. We disagree.

"It is well settled in North Carolina that a person of ordinary intelligence and experience is competent to state his opinion as to the

speed of a vehicle when he has had a reasonable opportunity to observe the vehicle and judge its speed." *Insurance Co. v. Chantos*, 298 N.C. 246, 250, 258 S.E.2d 334, 336 (1979). In the instant case, Hatley testified that he was driving 35 mph as he approached the intersection. Adam Pethel and James Bouchard each testified that he did not know the parties, that he had been across the street and seen the accident, that Hatley was driving no more than 35 mph, and that Plaintiff pulled out in front of Hatley. This constitutes the only admissible evidence of Hatley's driving speed, and we conclude it does not raise an issue of fact regarding whether Hatley was speeding.

We have considered and rejected Plaintiff's arguments to the contrary. Plaintiff directs our attention to a supplemental accident report, which lists Hatley's speed as 48 mph, and asserts that this constitutes evidence of Hatley's speed. The supplemental report, which was prepared by Officer Kimball of the Landis Police Department, amended Kimball's original report which listed Hatley's speed at 35 mph. Kimball's revised estimate of Hatley's speed was based on calculations performed by Landis Police Department Officer Phillips. It is undisputed that neither of these officers saw the accident. Therefore, the estimates of Hatley's speed contained in the accident report are inadmissible:

> Our State Supreme Court has held in several cases that while it is competent for an investigating officer to testify as to the condition and position of the vehicles and other physical facts observed by him at the scene of an accident, his testimony as to his conclusions from those facts is incompetent.

State v. Wells, 55 N.C. App. 311, 314, 278 S.E.2d 527, 529 (1981). Plaintiff cites no authority supporting admission of the accident report's estimate of Hatley's speed, and we find none. This assignment of error is overruled.

Plaintiff also asserts that testimony from her "expert" witness, Ryan McMahan, created a genuine issue of material fact regarding Hatley's speed. We disagree.

McMahan was deposed before the summary judgment hearing, presumably as an expert in "accident reconstruction." However, when he was deposed, McMahan was never tendered as an expert witness and was not asked to identify an area of professional expertise. Nor did McMahan's testimony about his educational background—undergraduate degree in mechanical engineering with minors in graphic communications and business, and testimony that

he had passed a "fundamental" engineering exam—necessarily establish his expertise in any particular area. In addition, when asked whether he had performed an accident reconstruction, he replied that "[he] did to an effect, depending upon your definition of an accident reconstruction[,]" but did not provide a professional or expert definition of accident reconstruction. However, assuming, *arguendo*, that McMahan was properly tendered as an expert in accident reconstruction, we conclude that his testimony about Hatley's driving speed was inadmissible.

McMahan testified that Plaintiff hired him in 2007 to "look into the accident reconstruction, automobile side" of the collision between Hatley and Plaintiff. McMahan testified that he had assigned a "drag factor" to both vehicles, based on drag factors that are "[g]enerally accepted for an average of what a vehicle of that type will do" but gave no explanation of what he meant by a vehicle of "that type," or whether he meant vehicles of a certain make, year, weight, or otherwise. McMahan calculated the weight of Hatley's truck and trailer, using data "specifically for that truck" and "data on that specific trailer" as well as Hatley's deposition testimony about materials he was hauling. He reviewed the accident report and a video of the accident scene and used the images in the video and other photographs to calculate the length of the tire skid marks left in the accident. He also calculated a change in velocity of both vehicles, based on his estimated weights of each. He applied an acceleration factor to Plaintiff's vehicle that was a "generally accepted value for an average acceleration of your average vehicle."

McMahan testified that, in his opinion, Hatley was driving between 53 and 62 mph when he began to brake. However, McMahan did not witness the accident. He testified that his opinion as to Hatley's speed was based on photographic and video evidence of skid marks, his assigned acceleration and deceleration factors, estimated weights of the vehicles, assumptions about where Plaintiff stopped her car in relation to the intersection, and his estimates of the sight distance from the intersection. The Supreme Court of North Carolina stated in *Shaw v. Sylvester*, 253 N.C. 176, 180, 116 S.E.2d 351, 355 (1960):

> [O]ne who does not see a vehicle in motion is not permitted to give an opinion as to its speed. A witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved. From these, however, he cannot give an opinion

> as to its speed. The jury is just as well qualified as the witness to determine what inferences the facts will permit or require.

In *State v. Hazelwood*, 187 N.C. App. 94, 652 S.E.2d 63 (2007), the defendant appealed from a conviction arising from an accident occurring in October, 2004. This Court quoted *Shaw*, and noted that:

> The General Assembly recently enacted N.C. Gen. Stat. § 8C-1, Rule 702(i) . . . which overrules *Shaw* and allows [a] witness qualified as an expert in accident reconstruction . . . [to] give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving. This new evidentiary rule only applies to offenses committed on or after December 1, 2006. . . . Therefore, the new statute is inapplicable to the case before us, and the *Shaw* rule controls our decision here.

Id. at 100 n.1, 652 S.E.2d at 67 n.1 (internal quotations omitted). In the instant case, as in *Hazelwood*, the accident occurred prior to the change in Rule 702 and, accordingly, we apply the rule stated in *Shaw*, that " 'with respect to the speed of a vehicle, the opinion of a lay or expert witness will not be admitted where he did not observe the accident, but bases his opinion on the physical evidence at the scene.' " *Marshall v. Williams*, 153 N.C. App. 128, 135, 574 S.E.2d 1, 5 (2002) (quoting *Hicks v. Reavis*, 78 N.C. App. 315, 323, 337 S.E.2d 121, 126 (1985)). We conclude that, under *Shaw* and similar cases, McMahan's testimony about Hatley's driving speed was inadmissible.

Plaintiff, however, argues that the testimony was admissible under the holding of *Hoffman v. Oakley*, 184 N.C. App. 677, 647 S.E.2d 117, *disc. review denied*, 361 N.C. 692, 652 S.E.2d 264 (2007). We disagree. In *Hoffman*, the appellant argued that the trial court "erred by admitting the testimony of the . . . accident reconstruction expert, which, the [appellants] contend, constituted improper expert testimony regarding the speed [appellant] was traveling." *Id.* at 679, 647 S.E.2d at 119. The Court noted that "unless an accident reconstruction expert actually observed the accident, the expert may not testify as to the speed a vehicle was traveling." *Id.* at 681, 647 S.E.2d at 121 (citing *Van Reypen Assocs., Inc. v. Teeter*, 175 N.C. App. 535, 542, 624 S.E.2d 401, 405 (2006)). *Hoffman's* accident reconstruction expert performed several "skid tests" using a car of the same make and model as the one in the collision, which the expert considered to be a "sister or clone" of the one in the accident. Using this car, the expert determined the braking distance of such a car at varying

speeds. On appeal, Defendants argued that "this testimony, when viewed in conjunction with that of a responding police officer who found skid marks . . . 80 feet in length, was merely 'evidence of speed through the 'back door.' " *Id.* This Court held:

> [T]he restriction on expert testimony set out in *Shaw* "is limited to opinions regarding speed; it does not apply to opinions concerning other elements of an accident." Thus, an expert's testimony is properly admitted when he gives no opinion as to the actual speed of a vehicle. Here, [the witness] never gave an opinion as to the speed that [defendant] was traveling. He used his scientific expertise to perform an experiment that demonstrated stopping distances at various speeds. . . . The trial court, therefore, did not err in admitting [the expert's] testimony.

Id. at 682, 647 S.E.2d at 122 (quoting *State v. Purdie*, 93 N.C. App. 269, 276, 377 S.E.2d 789, 793 (1989)).

> The case of *Shaw v. Sylvester*, 253 N.C. 176, 116 S.E.2d 351 (1960), . . . stated: "The qualified expert, the nonobserver, may give an opinion in answer to a proper hypothetical question in matters involving science, art, skill and the like . . . . An automobile, like any other moving object, follows the laws of physics[.]" [The expert witness] properly answered hypothetical questions here and applied the laws of physics to the post-collision movement of the two cars.

McKay v. Parham, 63 N.C. App. 349, 353, 304 S.E.2d 784, 786-87 (1983).

The instant case is easily distinguished from *Hoffman.* McMahan repeatedly testified to his opinion of Hatley's driving speed, which was inadmissible. Moreover, unlike the expert in *Hoffman*, McMahan did not offer testimony about the results of tests on a similar vehicle; his testimony was specifically focused on Hatley's speed, not general principles. This assignment of error is overruled.

[2] Plaintiff also argues that the evidence raised a genuine issue of material fact regarding whether Hatley had functioning brakes on the trailer he was hauling. Hatley testified that on 21 May 2004 he was hauling a Butler brand trailer which was registered with the North Carolina Department of Motor Vehicles. The trailer had electric brakes that were connected to the truck's braking system by means of an electric plug in the truck. Hatley testified that as far as he knew the brakes were in good working order. He also testified that he could

tell whether the brakes were performing well because "you can feel it when you put on the brakes whether that trailer's stopping or not." We conclude that Hatley's testimony did not raise any issue of fact about the condition of the brakes on his trailer.

Plaintiff asserts that there was evidence that there were no brakes on the trailer, based on a notation in Officer Kimball's accident report that the trailer did not have brakes. However, Kimball testified that the only basis for this opinion was that he believed that "[u]sually, there's a little box up on the front end of the tongue, that's where the electric brakes are" and that, when Kimball did not see an external box, he assumed that the trailer lacked brakes. Kimball admitted that he did not go inside the truck cab, did not ask Hatley about the trailer's brakes, did not test the brake pedal, and did not look under the trailer for wiring. We conclude that the notation in Kimball's report was based on mere speculation and, as such, is inadmissible.

To prevail on their claim that Hatley negligently failed to maintain the brakes on his trailer, Plaintiff was " 'required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, [summary judgment] is proper.' " *Young v. Fun Services-Carolina, Inc.*, 122 N.C. App. 157, 162, 468 S.E.2d 260, 263 (1996) (quoting *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 68, 414 S.E.2d 339, 342, 345 (1992)) (other citations omitted). In the instant case, Plaintiff failed to produce any competent evidence raising a material issue of fact about the brakes on Hatley's trailer. This assignment of error is overruled.

Plaintiff also asserts that the evidence raised genuine issues of material fact regarding whether Hatley negligently failed to yield the right-of-way to Plaintiff, or failed to reduce his speed as he approached the intersection. However, these contentions rest upon McMahan's testimony about Hatley's driving speed, which we have already determined to be inadmissible. These assignments of error are overruled.

In addition, Plaintiff argues that issues of fact are raised by the testimony of Plaintiff and Gordon. Neither witness saw Hatley's truck before the accident. Gordon testified that when Plaintiff stopped at the stop sign, she looked left while he looked right. After assuring Plaintiff that the road was clear from the right, Gordon bent down to retrieve his wallet from the floor, and did not see the collision.

Plaintiff testified that she stopped at the corner, looked first to the left and then to the right, and proceeded into the intersection. She did not see Hatley before the crash, and remembered nothing after starting across the street. Accordingly, Plaintiff's and Gordon's testimony about such matters as Hatley's speed is based on conjecture and speculation, and is inadmissible.

Plaintiff asserts that there are issues of fact as to the credibility of Hatley, Pethel, and Bouchard. However, no competent evidence is in conflict, and thus no issues of fact depend on credibility determinations. This assignment of error is overruled.

[3] Finally, Plaintiff argues that there were genuine issues of material fact regarding whether Plaintiff was contributorily negligent. We have determined that Plaintiff failed to offer admissible evidence raising any genuine issue of fact regarding Hatley's negligence. Consequently, we have no need to resolve the issue of Plaintiff's contributory negligence. This assignment of error is overruled.

For the reasons discussed above, we conclude that the trial court did not err by granting summary judgment in favor of Hatley.

Appeal of Summary Judgment for Landis Defendants

[4] Plaintiff argues on appeal that the trial court erred by granting summary judgment for Landis Defendants, on the grounds that there are genuine issues of material fact regarding their negligence. We disagree and conclude that Plaintiff has failed to state any legal duty owed by the Landis Defendants to Plaintiff.

" 'The first prerequisite for recovery of damages for injury by negligence is the existence of a legal duty, owed by the defendant to the plaintiff, to use due care.' " If no duty exists, there logically can be neither breach of duty nor liability. *Peace River*, 116 N.C. App. at 511, 449 S.E.2d at 214 (quoting *Meyer v. McCarley and Co.*, 288 N.C. 62, 68, 215 S.E.2d 583, 587 (1975)). The respective legal duties of municipalities and of the North Carolina Department of Transportation (NCDOT) are addressed in several statutes. Regarding the duties of a municipality, N.C. Gen. Stat. § 160A-296(a) (2009) states in part:

> A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and bridges is vested in the Board of Transportation . . .

However, N.C. Gen. Stat. § 136-45 (2009) provides in part that the "general purpose of . . . the [NCDOT] is that [the NCDOT] shall take over, establish, construct, and maintain a statewide system of hard-surfaced and other dependable highways . . . and maintain said highways at the expense of the entire State, and to relieve the counties and cities and towns of the State of this burden." N.C. Gen. Stat. § 136-18 (2009) provides in part that NCDOT

> is vested with the following powers:
>
> . . . .
>
> (5) To make rules, regulations and ordinances for the use of, and to police traffic on, the State highways . . . and to provide ample means for the enforcement of same[.]
>
> . . . .
>
> (7) To assume full and exclusive responsibility for the maintenance of all roads other than streets in towns and cities, forming a part of the State highway system from date of acquiring said roads. . . .
>
> . . . .
>
> (16) [NCDOT] . . . shall have authority, under the power of eminent domain . . . to acquire title in fee simple to parcels of land for the purpose of . . . the establishment of rights-of-way or for the widening of existing rights-of-way or the clearing of obstructions that, in the opinion of the Department of Transportation, constitute dangerous hazards at intersections. . . .

N.C. Gen. Stat. § 136-66.1 (2009) addresses the status of roads in a municipality, and provides in part that:

> (1) The State highway system inside the corporate limits of municipalities shall consist of a system of major streets and highways necessary to move volumes of traffic efficiently and effectively from points beyond the corporate limits of the municipalities through the municipalities[.] . . . [NCDOT] shall be responsible for the maintenance, repair, improvement, widening, construction and reconstruction of this system. . . .
>
> (2) In each municipality the municipal street system shall consist of those streets and highways accepted by the munici-

> pality which are not a part of the State highway system. The municipality shall be responsible for the maintenance, construction, reconstruction, and right-of-way acquisition for this system.

Finally, N.C. Gen. Stat. § 160A-297(a) (2009) provides that:

> A city shall not be responsible for maintaining streets or bridges under the authority and control of the Board of Transportation, and shall not be liable for injuries to persons or property resulting from any failure to do so.

In the instant case, the following facts are not disputed: Just prior to the accident, Plaintiff traveled west on E. Round Street, a city street under the control and authority of the Town of Landis, to the intersection of E. Round Street with S. Main Street, a state highway under the control and authority of the North Carolina Department of Transportation. Plaintiff stopped at the stop sign placed at the intersection, then drove forward onto S. Main Street, and was driving on S. Main Street at the time of the collision.

Plaintiff argues that there is a genuine issue of material fact regarding whether the Landis Defendants were "negligent for failing to install appropriate traffic signaling devices, failing to inspect and maintain traffic control devices and failing to properly hire and train their employees." The parties agree that E. Round Street is within the corporate limits of the Town of Landis, which was responsible for it. However, it is undisputed that a stop sign had been placed at the intersection, and Plaintiff testified that she stopped at the stop sign and looked both ways before driving onto S. Main Street. This evidence establishes without contradiction that Plaintiff was able to see the stop sign in time to stop at the intersection. Plaintiff has failed to produce any evidence of a defect in the condition of E. Round Street, or any question about the adequacy of the stop sign to alert drivers of the need to stop.

Plaintiff also argues that there is an issue of fact regarding whether the Landis Defendants "were negligent for failing to maintain proper site distance for motorists on Round Street entering [the] intersection." It is undisputed that Plaintiff stopped at the corner of E. Round Street and S. Main Street, and there was no evidence that Plaintiff had a limited site distance on E. Round Street, or had any difficulty recognizing the stop sign at the intersection. Plaintiff finds fault with the site distance on S. Main Street, which is undisputably a

road under the authority of the North Carolina Department of Transportation (NCDOT). This assignment of error is overruled.

Plaintiff next argues that the trial court erred by granting summary judgment for the Landis Defendants, on the grounds that there was evidence that the Defendants were negligent "for failing to trim and/or maintain the trees/shrubbery" on the property at the corner of E. Round Street and S. Main Street. We disagree.

Plaintiff correctly notes that "municipalities have the positive duty to maintain their streets and sidewalks in a safe condition and keep them free of unnecessary obstructions and are civilly liable for negligently failing to discharge that duty[.]" *McDonald v. Village of Pinehurst*, 91 N.C. App. 633, 635, 372 S.E.2d 733, 734 (1988) (emphasis added). There is, however, no evidence that the view on E. Round Street was obstructed. If shrubbery obstructed the view down S. Main Street, the responsibility lies with NCDOT. This assignment of error is overruled.

Plaintiff next argues that there is a genuine issue of material fact regarding whether the Landis Defendants were negligent for failing to "reduce the speed limit at the intersection." The speed limit on E. Round Street is not at issue, as Plaintiff came to a stop when she reached the intersection. The speed limit on S. Main Street is not within the authority of these Defendants.

Plaintiff also cites testimony of her expert witness, Ernest Mallard, that the Defendants had certain duties as regards the safety of S. Main Street. However, the question of legal liability is a question of law for the court, and Mallard's personal opinions do not create any issue of fact. Nor was Mallard tendered as an expert in the law, statutory interpretation, or other relevant area. This assignment of error is overruled. Plaintiff also directs our attention to various avenues available to a municipality, such as requesting assistance from NCDOT in regulating traffic. However, Plaintiff identifies no authority for the proposition that these options are actually legal duties.

We conclude that:

> [w]hile plaintiffs recognize that G.S. 136-66.1 and 160A-297(a) absolve the Town of responsibility for maintaining and improving [State Highway] 1009, nevertheless, they contend the Town and [NCDOT] share a dual responsibility for erecting appropriate highway signs[,] . . . We disagree. . . . [W]hen a city street becomes

> a part of the State highway system, the Board of Transportation is responsible for its maintenance thereafter which includes the control of all signs and structures within the right-of-way. . . . [A] municipality has no liability for injuries resulting from a dangerous condition of such street unless it created or increased such condition.

Shapiro v. Motor Co., 38 N.C. App. 658, 661-62, 248 S.E.2d 868, 870 (1978). We conclude that Plaintiff failed to produce any evidence that the Landis Defendants owed a legal duty to regulate the design, site distance, speed limit, or any other features of S. Main Street, which is the undisputed site of the accident.

For the reasons discussed above, we conclude that the trial court did not err by entering summary judgment for Hatley and for the Landis Defendants, and that its judgments should be

Affirmed.

Judges STEPHENS and HUNTER, Jr. concur.

MOSS CREEK HOMEOWNERS ASSOCIATION, INC., DELORIS GAIL BENTON, JO ANNE K. BISHOP, JANICE HAMBY, DAVID L. HAMILTON, DAVID J. KNOCHE, AND CHARLES F. PEELER, PLAINTIFFS V. TED L. BISSETTE, MARY HOLLY BISSETTE, SCOTT W. RICH, LAURA K. RICH, AND PROVIDENT FUNDING ASSOCIATES, LIMITED PARTNERSHIP, DEFENDANTS V. TED L. BISSETTE AND MARY HOLLY BISSETTE, SCOTT W. RICH AND LAURA K. RICH, THIRD PARTY PLAINTIFFS V. TERRY MILLER, JIM BENTON, ANGELA PEELER, FRED BISHOP AND PEGGY HAMILTON, THIRD PARTY DEFENDANTS

No. COA08-1156-2

(Filed 2 February 2010)

1. Deeds— restrictive covenants—summary judgment

Enforcing a restrictive covenant through summary judgment is proper unless genuine issues of material fact exist showing that the contract is invalid, that the effect of the covenant impairs enjoyment of the estate, or that the term of the covenant is contrary to public interest.

2. Deeds— restrictive covenants—plain language—construed as written

Summary judgment was properly granted for a homeowners association where a restrictive covenant provided that lots could not be subdivided except by consent and defendants reduced the size of their lot. Although defendants argued that the language of the covenants must be interpreted through definitions in the General Statutes and the county subdivision regulations, a contract must be construed as written where it is plain and unambiguous.

3. Appeal and Error— preservation of issues—different argument presented below—supporting authority not cited

Defendants did not properly raise on appeal the question of whether the bankruptcy of the developer and an assignment of rights rendered a covenant unenforceable where a different argument was presented at trial. Moreover, defendants did not cite supporting authority.

4. Appeal and Error— preservation of issues—argument abandoned—facts not applied to law

An argument on appeal was deemed abandoned where facts from the record were not applied to the case law cited.

5. Costs— attorney fees—restrictive covenants—Planned Community Act

The trial court erred by awarding certain attorney fees in an action arising from a restrictive covenant where the Planned Community Act, which had not been incorporated into the Declaration of Covenants, did not apply.

6. Appeal and Error— preservation of issues—no legal authority cited—claim not reviewed

An argument concerning attorney fees was not reviewed on appeal where no legal authority was cited other than the statement that there was no basis for the award.

7. Costs— attorney fees—contempt—restrictive covenants

An award of attorney fees in a contempt order arising from a restrictive covenants action was reversed. Courts can award attorney fees in contempt proceedings only when specifically authorized by statute, except in family law claims.

8. Fiduciary Relationship— breach—sufficiency of pleadings

The trial court did not err by dismissing a claim for breach of fiduciary duty where the trial court's finding that the pleading was insufficient was not challenged on appeal.

Appeal by Ted and Mary Bissette (as defendants and third-party plaintiffs) from orders entered 3 May 2006 by Judge John O. Craig III, 29 December 2006 by Judge Ronald E. Spivey, 26 March and 12 June 2007 by Judge Steve A. Balog, 30 April 2007 by Judge Edgar B. Gregory, 28 November 2008 by Judge Paul C. Ridgeway, and 12 and 13 February and 4 March 2008 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 21 April 2009. Petition to Rehear allowed on 25 November 2009. This opinion supersedes opinion filed on 20 October 2009.

Robertson, Medlin & Blocker, PLLC, by John F. Bloss for defendants and third-party plaintiff-appellants.

Forman Rossabi Black, P.A., by T. Keith Black and Emily J. Meister; and Gregory A. Wendling, for plaintiffs and third-party defendant-appellees.

HUNTER, JR., Robert N., Judge.

Ted and Mary Bissette (the "Bissettes") appeal from orders: (1) granting plaintiffs' and third-party defendants' summary judgment motion, (2) dismissing their claim for breach of fiduciary duty, and (3) awarding attorneys' fees for contempt and enforcement of subdivision restrictions. We affirm in part and reverse in part.

FACTS

Moss Creek is a single-family residential development in Guilford County, North Carolina, developed by Moss Creek Land Development Company, Inc. ("Development Company"). On 18 June 1987, the Moss Creek Homeowners Association, Inc. (the "Association") was incorporated; and following incorporation, Development Company filed a Declaration of Covenants, Conditions, and Restrictions for Moss Creek (the "Declaration") and the Bylaws of Moss Creek Home Owners Association (the "Bylaws") with the Guilford County Register of Deeds.

The Declaration reserves to the Development Company, as "declarant," certain approval rights restricting purchasers of lots from locating buildings on lots, installing well and septic tanks, erect-

ing mailboxes, and altering landscaping on property without the Association's approval. Moreover, the Declaration gives to the Association a first right of refusal to purchase lots and provides the Declarant, the Association or any lot owner the right to sue to enforce the covenants. Section 5 of Article III of the Declaration provides in particular that "[n]o Lot covered by this Declaration may be subdivided by sale or otherwise as to reduce the total area of the Lot as shown on the maps and plats of any Sections of Moss Creek referred to above except by wrtten [sic] consent of the Declarant."

On 30 January 1990, Development Company transferred its rights as "declarant" to Byron Investments, Inc. ("Byron"). Byron filed for bankruptcy protection in 1991, and received its discharge from bankruptcy on 24 August 2005. On 23 December 1993, the Bissettes acquired title to Lot 6 in Moss Creek Development, and subsequently built a house on the lot.

On 5 July 2002, the Bissettes acquired title to the parcel of property adjoining their lot known as Lot 8, and on 10 November 2003, the Bissettes recorded an Instrument of Combination combining the two lots formally. The Bissettes thereafter recorded a plat on 5 December 2003 which (1) split former Lot 8 into two pieces and labeled the new parcels Lot 1 and Lot 2, and (2) recombined Lot 6 and Lot 2 to create a new L-shaped Lot 6 which expanded the backyard of the Bissettes. On 27 January 2004, the Bissettes placed a deed of trust on the combined property of Lot 6 and Lot 2 for $165,500.00 payable to Provident Funding Associates, L.P. ("Provident").

On 21 August 2004, the Association placed the Bissettes on notice that the Association would conduct a hearing on 31 August 2004 to determine whether the Bissettes were in violation of the subdivision covenant in the Declaration. The Bissettes failed to appear at the hearing, and were fined by the Association until such time as the violation was remedied.

Without prior notice to the Association, the Bissettes sold Lot 1 to Scott and Laura Rich (the "Riches") on 28 April 2005. The sale of Lot 1 and the architectural plans of the Riches' home to be constructed thereon were not approved by the Association prior to the beginning of the construction of their house on 2 May 2005.

PROCEDURAL HISTORY

The Association, Deloris Gail Benton, Jo Anne K. Bishop, Janice Hamby, David L. Hamilton, David J. Knoche, and Charles F. Peeler

(collectively "plaintiffs") filed a complaint for the present action on 18 May 2005. The Bissettes filed an answer, counterclaim, and third-party complaint against Terry Miller, Jim Benton, Angela Peeler, Fred Bishop and Peggy Hamilton (the "board members") on 25 July 2005. The Bissettes filed a motion for summary judgment on 17 November 2005.

Plaintiffs filed their amended complaint on 7 June 2006, and sought declaratory and injunctive relief against the Bissettes and Riches for violating the restrictive covenants. Plaintiffs further asked the trial court to void the deed of trust executed by the Bissettes to Provident.

On 7 July 2006, the Bissettes filed an answer to the amended complaint while renewing their counterclaim and third-party complaint. The Bissettes' amended pleading denied liability as to plaintiffs' amended complaint; affirmatively pled laches, waiver, and estoppel; and sought damages for slander and breach of fiduciary duty against the board members.

Provident filed an answer and cross-claim against the Bissettes on 11 July 2006; and on 17 July 2006, the Association filed a motion for summary judgment on all claims pending against the Bissettes. On 1 August 2006, plaintiffs and the board members (collectively "appellees") filed a Rule 12 motion to dismiss, motion for judgment on the pleadings, motion for more definite statement, motion to strike, and motion for Rule 41 sanctions including involuntary dismissal against the Bissettes.

On 29 December 2006, Judge Ronald E. Spivey entered an order granting summary judgment to appellees: (1) denying the Bissettes' summary judgment motion; (2) finding that the Bissettes had violated the restrictive covenants; and (3) denying all the Bissettes' defenses "including but not limited to[:]"

> laches, waiver, estoppel, improper election of [the Association's board of directors,] that Defendant Mary Holly Bissette and/or [Byron] constitute the Declarant [in the Declaration], and approval/ratification of [the Bissettes'] actions by any person or entity.

The order further provided that the Bissettes pay: $16,290.00 in fines to the Association, $6,673.66 in costs of the action, and $60,026.07 in "partial" attorney fees to plaintiffs.

Judge Spivey entered a simultaneous second order with regard to appellees' motions under Rules 12 and 41 of the North Carolina Rules of Civil Procedure, and awarded appellees an additional $11,656.25 in attorneys' fees and $240.79 in costs to be paid by the Bissettes within 45 days. The second order also denied appellees' requested Rule 41 motion, granted appellees' motion for a more definite statement on the issue of breach of fiduciary duty, and directed the Bissettes to file a more definite statement no later than 30 days from 29 December 2006.

On 29 January 2007, the Bissettes filed a more definite statement. On 14 February 2007, appellees renewed their Rules 12 and 41 motions to dismiss, and moved further for sanctions contending that the Bissettes had failed to comply with Judge Spivey's prior orders. On 15 February 2007, plaintiffs filed a show cause motion for contempt claiming that the Bissettes had failed to timely pay the costs awarded in the first 29 December 2006 order. On 7 March 2007, appellees filed a show cause motion on the Bissettes' failure to pay the costs assessed in the second 29 December 2006 order.

Contempt hearings were held on 6 and 30 March 2007, and Judge Steve A. Balog found the Bissettes in willful contempt. Despite multiple opportunities to purge themselves of contempt, the Bissettes failed to do so, additional legal fees were awarded, and Mary Holly Bissette was briefly incarcerated.

On 17 January 2008, the Bissettes moved for summary judgment arguing that the Declaration should be rescinded or reformed. Judge James M. Webb denied their motion on 4 March 2008, and granted plaintiffs' motion for summary judgment on "any remaining claims not previously adjudicated." Notice of appeal was properly given, and this Court has jurisdiction to hear the matter. N.C. Gen. Stat. § 1-279.1 (2007).

STANDARD OF REVIEW

The standard of review on a summary judgment motion is whether there is a genuine issue of 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); *Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E.2d 252, 256, *disc. review denied*, 295 N.C. 733, 248 S.E.2d 862 (1978). "In ruling on the motion, the court must consider the evidence in the light most favorable to the nonmovant, who is entitled to

the benefit of all favorable inferences which may reasonably be drawn from the facts proffered." *Averitt v. Rozier*, 119 N.C. App. 216, 218, 458 S.E.2d 26, 28 (1995). Summary judgment may be properly shown by a party: " '(1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense.' " *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 10, 652 S.E.2d 284, 292 (2007) (quoting *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003)), *appeal dismissed, disc. review denied*, 362 N.C. 177, 658 S.E.2d 485 (2008).

DISCUSSION

[1] In reviewing litigation involving restrictive covenants, this Court has held that restrictive covenants are contractual in nature, and that acceptance of a valid deed incorporating covenants implies the existence of a valid contract with binding restrictions. *See Rodgerson v. Davis*, 27 N.C. App. 173, 178, 218 S.E.2d 471, 475, *disc. review denied*, 288 N.C. 731, 220 S.E.2d 351 (1975). Restrictive covenants, "clearly and narrowly drawn," are recognized as a valid tool for achieving a common development scheme. *Hobby & Son v. Family Homes*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981). Parties to a restrictive covenant may use almost any means they see fit to develop and enforce the restrictions contained therein. *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 401, 584 S.E.2d 731, 735, *reh'g denied*, 357 N.C. 582, 588 S.E.2d 891 (2003). Restrictive covenants are to be strictly construed and "all ambiguities will be resolved in favor of the unrestrained use of land." *Hobby & Son*, 302 N.C. at 70, 274 S.E.2d at 179. Nonetheless, a restrictive covenant "must be reasonably construed to give effect to the intention of the parties, and the rule of strict construction may not be used to defeat the plain and obvious purposes of a restriction." *Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 85, 362 S.E.2d 619, 621 (1987), *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988). Therefore, enforcing a restrictive covenant through summary judgment is proper unless genuine issues of material fact exist showing either: (1) the contract is invalid; (2) the effect of the covenant "impair[s] enjoyment of the estate"; or (3) a term of the covenants "is contrary to the public interest." *Page v. Bald Head Ass'n*, 170 N.C. App. 151, 155, 611 S.E.2d 463, 466, *disc. review denied*, 359 N.C. 635, 616 S.E.2d 542, *disc. review denied*, 359 N.C. 852 (2005).

Summary Judgment

On appeal, the Bissettes first contend that the trial court erred in awarding summary judgment because there existed material issues of fact sufficient to show that: (1) the restrictions in the Declaration are sufficiently ambiguous to require jury interpretation; (2) the bankruptcy of Byron rendered the restrictions unenforceable; and (3) the forecast of evidence of their affirmative defenses raised sufficient factual issues to overcome summary judgment. We disagree.

[2] As to the Bissettes' first argument, the restrictive covenant at issue in this case provides:

> No Lot covered by this Declaration may be subdivided by sale or otherwise as to reduce the total area of the Lot as shown on the maps and plats of any Sections of Moss Creek referred to above except by wrtten [sic] consent of the Declarant.

Section 12 of Article I of the Declaration defines "Lot" as "a portion of the Properties other than the Common Area intended for any type of independent ownership and use as may be set out in this Declaration and as shall be shown on the plats of survey filed with this Declaration or amendments thereto."

The Bissettes attempt to create ambiguity by contending that the obvious language of these terms must be interpreted through definitions contained in North Carolina's General Statutes and Guilford County's subdivision regulations.[1] However, this Court has consistently stated that " '[w]here the language of a contract is plain and unambiguous . . . [a] court may not ignore or delete any of its provisions, nor insert words into it, *but must construe the contract as written*[.]' " *Hemric v. Groce*, 169 N.C. App. 69, 76, 609 S.E.2d 276, 282 (citation omitted) (emphasis added), *cert. denied and disc. review dismissed*, 359 N.C. 631, 616 S.E.2d 234 (2005).

The Instrument of Combination filed in the Register of Deeds on 10 November 2003 by the Bissettes undisputedly reduced the size of Lot 8 from 2.352 acres of land to 1.211 acres of land. As such, this action clearly "reduce[d] the total area of [Lot 8] as shown on the maps and plats" incorporated in the Declaration. This assignment of error is overruled.

[3] The Bissettes next argue that the assignment of rights of the Declaration and the subsequent bankruptcy of Byron renders the

1. The Bissettes cite N.C. Gen. Stat. §§ 153A-335, 160A-376 (2007) and Guilford County, NC, Dev. Ordinance § 2-1.7 (2009).

covenant unenforceable. This argument is not properly before this Court and is otherwise without merit.

"This Court has long held that issues and theories of a case not raised below will not be considered on appeal[.]" *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) (citing *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (where theory argued on appeal was not raised before the trial court, "the law does not permit parties to swap horses between courts in order to get a better mount" before an appellate court)).

Here, the Bissettes introduced evidence at trial showing that the original declarant assigned its interest in Moss Creek to Byron on 30 January 1990, and that Byron exited bankruptcy on 24 August 2005. The Bissettes then claimed in their amended July 2006 answer that Byron quitclaimed its interest in Moss Creek to themselves personally, and that Byron had approved their recombination deed.[2] This maneuver, whatever legal effect it might have had on the common stock of the bankruptcy, did not answer the issue of how the assets (including the realty interests of Byron) were allocated in bankruptcy and whether these interests remained with Byron afterward. More importantly for our review, the Bissettes' argument that the recombination was ratified or approved is not the argument raised here, which is whether the bankruptcy of Byron voided the restrictive covenants.

Yet, even if this issue is properly before this Court, the Bissettes fail to cite any authority which supports their contention. The Bissettes cite *DeLaney v. Hart*, 198 N.C. 96, 150 S.E. 702 (1929) for the proposition that the bankruptcy of a declarant holding the ability to enforce deed restrictions will prohibit their future enforcement. However, *DeLaney* is factually distinct from this case, because in that case the Court found there was no general plan of development and that the covenants could therefore be enforced by no one. *DeLaney*, 198 N.C. at 97, 150 S.E. at 703. Here, there is clearly an extensive development plan bolstered by restrictive covenants, and the Bissettes' argument is without merit. This assignment of error is overruled.

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2. The amended answer does not include the alleged approval by Byron in its exhibits. However, the record shows that Herbert B. Parks purported to assign Byron's interest in the Declaration on 13 October 2005, and that Mary Bissette approved the recombination on behalf of Byron on 1 November 2005.

[4] Lastly, the Bissettes argue that even if the restrictive covenants were violated, their affirmative defenses of waiver, estoppel, and laches present issues of fact which preclude summary judgment. We disagree.

The Bissettes cite case law holding that: landowners in violation of restrictive covenants may not themselves enforce such covenants in equity;[3] waiver, estoppel, or laches may provide a defense to the enforcement of a covenant unless the covenant is no longer valid;[4] and no North Carolina superior court judge may overrule another.[5] However, the Bissettes apply no facts from the record to the case law cited. Accordingly, this argument is deemed abandoned. N.C. R. App. P. 28(b)(6) (2009).

Fines, Costs, and Attorneys' Fees

[5] The Bissettes next argue that: (1) there was no violation of the restrictive covenants upon which to base the award of attorneys' fees, fines, and costs; and (2) no statutory bases exist to award attorneys' fees in this case. As previously discussed, the Bissettes' first contention has no merit; however, we reverse in part based on the second.

The first order filed by Judge Spivey on 29 December 2006 imposed attorneys' fees of $60,016.07 "stemming from [the Bissettes'] violations of the restrictive covenants." In his second order, Judge Spivey awarded $11,656.25 in attorneys' fees as sanctions in response to appellees' motion to dismiss under Rules 12 and 41 of the North Carolina Rules of Civil Procedure. On 12 June 2007, Judge Balog ordered the Bissettes to pay $10,000 to plaintiffs for legal fees incurred by them in the contempt proceedings. On 3 March 2006, Judge Webb ordered the Bissettes to pay $80,563.15 in legal fees stemming from defendants' violations of the restrictive covenants. None of the orders awarding fees cite the statutory authority upon which they are based.

With regard to the awards of 29 December 2006 of $60,026.07 and 3 March 2006 of $80,563.13, our Supreme Court has held that a prevailing party may not recover attorneys' fees "[e]ven in the face of a

3. *Rodgerson*, 27 N.C. App. 173, 218 S.E.2d 471.

4. *Medearis v. Trustees of Meyers Park Baptist Church*, 148 N.C. App. 1, 558 S.E.2d 199 (2001), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 190 (2002).

5. *Adams Creek Assocs. v. Davis*, 186 N.C. App. 512, 652 S.E.2d 677 (2007), *disc. review denied*, 362 N.C. 354, 662 S.E.2d 900 (2008).

carefully drafted contractual provision indemnifying a party for such attorneys' fees . . . *absent statutory authority therefor." Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814-15 (1980) (emphasis added). While appellees correctly contend that N.C. Gen. Stat. § 47F-1-101, *et seq.*, otherwise known as North Carolina's Planned Community Act ("PCA"), now provides a basis for an award of attorneys' fees, the PCA does not justify the trial court's order in this case.

In *McGinnis Point Owners Ass'n v. Joyner*, 135 N.C. App. 752, 522 S.E.2d 317 (1999), this Court noted that N.C. Gen. Stat. § 47F-3-120 authorizes the recovery of attorneys' fees in an action to enforce restrictive covenants brought pursuant to Chapter 47F. *McGinnis Point Owners*, 135 N.C. App. at 757, 522 S.E.2d at 321. At that time, N.C. Gen. Stat. § 47F-3-120 did not apply to planned communities created prior to February 1999 unless a community's declaration of covenants was amended to specifically incorporate Chapter 47. *Id.*

In 2005, several revisions were made to Chapter 47F, and N.C. Gen. Stat. § 47F-1-102 (2007) was revised to make N.C. Gen. Stat. § 47F-3-120 applicable "to all planned communities created in this State on or after January 1, 1999[.]" N.C. Gen. Stat. § 47F-1-102(a); 2005 N.C. Sess. Laws ch. 214, § 1. This revision made section 47F-3-120 effective as to all claims commenced on or after 20 July 2005. 2005 N.C. Sess. Laws ch. 214, § 2.

In this case, Moss Creek was created in 1987, and the record does not show that the Declaration in this case has been amended to incorporate revised Chapter 47. Moreover, the Association commenced this action on 18 May 2005,[6] and thus the PCA's provisions allowing attorneys' fees in actions to enforce the restrictive covenants do not apply in the absence of an express incorporation of Chapter 47F in the Declaration. As a result, the PCA provides no statutory basis for an award of attorneys' fees to plaintiffs. We therefore reverse Judge Spivey's 29 December 2006 award of $60,026.07 in attorneys' fees and Judge Webb's 3 March 2006 award of $80,563.13 in attorneys' fees.

[6] In awarding $11,656.25 in attorneys' fees in his second order, the record shows that Judge Spivey was considering the award of attorneys' fees as he was ruling on appellees' motion to dismiss the

6. Plaintiffs' argument that the date of their amended complaint should be the date by which our Court measures the date the action commenced has no statutory basis. *See* N.C. Gen. Stat. § 1A-1, Rule 15(c) (2007).

Bissettes' various counterclaims and defenses under Rules 12 and 41 of the North Carolina Rules of Civil Procedure. This included a ruling as to punitive damages.

N.C. Gen. Stat. § 1D-45 (2007) provides:

> The court shall award reasonable attorneys' fees, resulting from the defense against the punitive damages claim, against a claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious. The court shall award reasonable attorney fees against a defendant who asserts a defense in a punitive damages claim that the defendant knows or should have known to be frivolous or malicious.

Id. Therefore, since the trial court dismissed the Bissettes' punitive damages claim under Rule 12, N.C. Gen. Stat. § 1D-45 supports this award of attorneys' fees.

In their brief, the Bissettes make no argument regarding this award of fees other than stating that "there is simply no basis under any statute or Rule of Civil Procedure for such an award." Under our appellate rules, it is the duty of appellate counsel to provide sufficient legal authority to this Court, and failure to do so will result in dismissal. N.C. R. App. P. 28(b)(6). Thus, because the Bissettes have failed to cite any legal authority whatsoever in support of their argument as to these attorneys' fees, we conclude this issue does not warrant appellate review. *Pritchett & Burch, PLLC v. Boyd*, 169 N.C. App. 118, 123, 609 S.E.2d 439, 443 (assignment of error abandoned for failure to cite authority in support of argument), *disc. review dismissed*, 359 N.C. 635, 616 S.E.2d 543 (2005); *Hatcher v. Harrah's N.C. Casino Co., LLC*, 169 N.C. App. 151, 159, 610 S.E.2d 210, 214-15 (2005).

[7] The Bissettes lastly challenge the award of attorneys' fees under Judge Balog's 12 June 2007 order for contempt in failing to pay fees and costs in Judge Spivey's prior orders. As a general rule, "[a] North Carolina court has no authority to award damages to a private party in a contempt proceeding[,]" because "[c]ontempt is a wrong against the state, and moneys collected . . . go to the state alone." *Glesner v. Dembrosky*, 73 N.C. App. 594, 599, 327 S.E.2d 60, 63 (1985). Courts can award attorneys' fees in contempt matters only when specifically authorized by statute. *Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000). However, this Court has acknowledged certain exceptions to this general rule such as child support and equitable

distribution actions. *Blair v. Blair*, 8 N.C. App. 61, 173 S.E.2d 513 (1970) (awarding attorneys' fees in a contempt action to enforce child support); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990) (awarding attorneys' fees in a contempt action to enforce equitable distribution award), *aff'd*, 328 N.C. 729, 403 S.E.2d 307 (1991).

Appellees' current action did not arise in either of these contexts; and the cases cited by appellees[7] in defense of the fee award support our case law that outside of the family law field, statutory authority is required for enforcement of contempt. Therefore, we reverse the $10,000 award in attorneys' fees to appellees incurred by enforcing the trial court's contempt orders.

Breach of Fiduciary Duty Claim

[8] The Bissettes finally argue that the trial court erred in dismissing their claim for breach of fiduciary duty because they substantially complied in providing a more definite statement of their claim.

The trial court granted summary judgment to appellees on the Bissettes' breach of fiduciary duty claim on 8 March 2007. In its order, the trial court found

> that the allegations set forth within the pleading at issue *were not sufficient to show a right to relief*, do not provide the specificity and detail required[,] nor provide compliance with the previously entered Order of [Judge Spivey.]

(Emphasis added.) The Bissettes here do not challenge the trial court's finding that their pleading was insufficient "to show a right to relief." Accordingly, this finding is binding on review in this Court. *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) ("Where findings of fact are challenged on appeal, each contested finding of fact must be separately assigned as error, and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding."). This assignment of error is overruled.

Based on the foregoing, we reverse the trial court's award of $60,026.07 and $80,563.15 in attorneys' fees stemming from the violations of the restrictive covenants, reverse the award of $10,000.00 for

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7. *Watson v. Watson*, 187 N.C. App. 55, 652 S.E.2d 310 (2007), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008); *Baxley v. Jackson*, 179 N.C. App. 635, 634 S.E.2d 905, *disc. review denied*, 360 N.C. 644, 638 S.E.2d 462 (2006).

attorneys' fees enforcing the trial court's contempt orders, and otherwise affirm the orders of the trial court.

Affirmed in part and reversed in part.

Judges WYNN and JACKSON concur.

HAYLURI BECKLES-PALOMARES, ADMINISTRATOR OF THE ESTATE OF JOSHUA FRANKLIN BECKLES-PALOMARES, PLAINTIFF v. MICHAEL ANDREW LOGAN, JR., CITY OF WINSTON-SALEM, FLOW 425 SILAS CREEK PARKWAY, LLC, FLOW COMPANIES, INC., NORMAN L. MOORE, DEFENDANTS

No. COA09-567

(Filed 2 February 2010)

1. Appeal and Error— interlocutory orders—governmental immunity—public duty doctrine

The denial of summary judgment for a city affected a substantial right and was immediately appealable under the doctrine of governmental immunity and the public duty doctrine.

2. Immunity— governmental—ordinances requiring vegetation to be trimmed

The trial court correctly denied the City's motion for summary judgment in an automobile accident case where the motion was grounded on the public duty doctrine. That doctrine was not applicable to a negligence allegation involving the failure to require a resident to trim vegetation next to a street, which was not a negligent failure on the part of a law enforcement agency exercising its general duty to protect the public. The public duty doctrine was also not applicable to allegations concerning the City's failure to comply with its own ordinances.

3. Immunity— governmental—roadside vegetation—issues of fact

In an action arising from an automobile collision on City's street in which the City claimed it was immune because there was no genuine issue of fact about breach of the City's statutory duties, there were material issues of fact about whether vegetation and parked cars constituted obstructions, whether the City had actual or implied notice of the obstructions, and whether the

obstructions were the proximate cause of the accident and of decedent's death.

4. Negligence— auto accident—roadside vegetation—intervening cause—drunken driving—issue of fact

A genuine issue of fact existed in an automobile accident case as to whether a city's failure to control roadside vegetation was the proximate cause of plaintiff's injury or whether defendant Logan's driving after drinking and being on the wrong side of the road were intervening causes.

5. Appeal and Error— preservation of issues—abandonment of argument

In an automobile accident case where it was alleged that the City had allowed vegetation to become overgrown, a statute of repose argument was abandoned on appeal where it was pled, assigned as error, and raised in the reply brief, but not in the principal brief. Even if the argument had been properly raised, it had no merit as the City has a duty to exercise continuing supervision of its streets.

Appeal by defendant City of Winston-Salem from order entered 9 December 2008 by Judge Jerry Cash Martin in Forsyth County Superior Court. Heard in the Court of Appeals 16 November 2009.

Walter C. Holton, Jr., PLLC, by Walter C. Holton Jr., for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by James R. Morgan, Jr., for defendant-appellant.

MARTIN, Chief Judge.

On 20 May 2006, seven-year-old Joshua Beckles-Palomares[1] ("Joshua") was riding his bicycle south on Freeman Street in Winston-Salem, down a slight grade and approaching a "T" intersection with Wells Street. The intersection is controlled by a stop sign requiring vehicles on Freeman Street to stop before entering Wells Street. Michael Logan ("defendant Logan") was driving his sport utility vehicle east on Wells Street toward the intersection with Freeman Street, and was driving left of the center of Wells Street. Joshua entered the intersection, turning right onto Wells Street possibly

1. The decedent is referred to alternatively in the record and pleadings as Joshua Franklin Beckles-Palomares and Joshua Franklin Palomares-Beckles.

without stopping, and was struck and killed by defendant Logan's vehicle. Defendant Logan's blood alcohol level shortly after the collision was above the legal limit. Defendant Logan pled guilty to involuntary manslaughter.

Norman L. Moore ("defendant Moore") owns the property located on the northwest corner of the intersection of Freeman Street and Wells Street. On this corner, there is a retaining wall, a bank, and evergreen ground cover.

Flow 425 Silas Creek Parkway, LLC, and Flow Companies, Inc., (collectively "the Flow defendants") own property located at 455 Wells Street, on the south side of Wells Street, and operate an automobile body repair business. At his deposition, defendant Logan stated that he was driving down the center of the road because the vehicles belonging to the Flow defendants were parked "on down into the side of" Wells Street.

Plaintiff, who is Joshua's mother and the administrator of his estate, brought suit against: defendant Logan for his alleged negligence in driving under the influence and on the wrong side of the road; defendant Moore for his alleged negligence in failing to keep his property free from vegetation that could obstruct the view of persons using the intersection of Wells Street and Freeman Street; the Flow defendants for their alleged negligence in parking their cars in such a way as to obstruct the flow of traffic on Wells Street; and the City of Winston-Salem ("defendant City") for its alleged negligence in violating various safety statutes and municipal ordinances regulating the maintenance of its streets, obstructions to vision and traffic, and parking regulations. All defendants except defendant Moore pled the affirmative defense of contributory negligence on Joshua's part for failing to stop at the stop sign and on the part of plaintiff for failing to supervise her minor child. The record contains no answer from defendant Moore.

Defendants Flow, Moore, and City moved for summary judgment. In its motion, defendant City asserted, among other things, that plaintiff's suit was barred by governmental immunity and the public duty doctrine. Plaintiff moved for summary judgment against all defendants with respect to their defenses of contributory negligence. The trial court denied plaintiff's motions for summary judgment and defendant City's motion for summary judgment. Plaintiff submitted to voluntary dismissals with prejudice with respect to her claims against defendant Moore and the Flow defendants. Defendant City of

Winston-Salem appeals from the order denying its motion for summary judgment.

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[1] An appeal from the denial of a motion for summary judgment is interlocutory. *Estate of Hewett v. County of Brunswick*, ––– N.C. App. ––, ––, 681 S.E.2d 531, 533 (2009). However, defendant City asserts the denial of its motion affects its substantial rights, so that the order is immediately appealable pursuant to N.C.G.S. § 1-277(a) under the doctrine of both governmental immunity and the public duty doctrine. This Court has recognized that the denial of dispositive motions based upon both doctrines affect a defendant's substantial right and are immediately appealable. *Estate of McKendall v. Webster*, ––– N.C. App. ––, ––, 672 S.E.2d 768, 769 (2009); *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).

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). The standard of review of an order granting or denying a motion for summary judgment is *de novo*. *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009).

I.

[2] Defendant City first contends it is entitled to summary judgment because the alleged negligent acts relied upon by plaintiff in her claim against it involved defendant City's failure "to protect [Joshua] from the wrongful, criminal acts of others" and such claims are barred by the public duty doctrine.

The North Carolina Supreme Court first adopted the public duty doctrine in North Carolina in *Braswell v. Braswell*, 330 N.C. 363, 371, 410 S.E.2d 897, 902 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992). In *Braswell*, the plaintiff sought to recover damages from the sheriff of Pitt County, alleging that he negligently failed to protect plaintiff's mother from being murdered by her estranged husband, who was a deputy sheriff. *Id.* at 366, 410 S.E.2d at 899. The Court affirmed a directed verdict for the defendant sheriff, and in so doing, adopted the public duty doctrine, which is a common law rule pro-

viding that "a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals." *Id.* at 370, 410 S.E.2d at 901. The rationale for the rule is a recognition of "the limited resources of law enforcement" and a refusal "to judicially impose an overwhelming burden of liability for failure to prevent every criminal act." *Id.* at 370-71, 410 S.E.2d at 901. The Court also adopted two recognized exceptions to the public duty doctrine, generally called the "special duty" exception and the "special relationship" exception. *Id.* at 371, 410 S.E.2d at 902. Neither exception is applicable to the facts of this case and we do not discuss them.

Although the holding in *Braswell* was explicitly limited to the facts of that case, application of the doctrine was subsequently expanded to bar liability of municipalities for negligent performance of public duties beyond those related to law enforcement departments. *See Simmons v. City of Hickory*, 126 N.C. App. 821, 826, 487 S.E.2d 583, 587 (1997) (holding that the public duty doctrine applied to bar claim against city for negligence in housing inspections); *Davis v. Messer*, 119 N.C. App. 44, 54-57, 60, 457 S.E.2d 902, 908-12 (holding that the public duty doctrine applied to claims against the town and fire chief for negligence in responding to a fire call, although plaintiff presented sufficient evidence to show the "special duty" exception applied), *disc. reviews denied*, 341 N.C. 647, 462 S.E.2d 508 (1995); *Prevette v. Forsyth Cty.*, 110 N.C. App. 754, 757-58, 431 S.E.2d 216, 218 (holding that the public duty doctrine applied to the county's animal control departments) *disc. review denied*, 334 N.C. 622, 435 S.E.2d 338 (1993). In addition, the North Carolina Supreme Court has applied the doctrine to bar claims against State agencies under the Tort Claims Act, *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 482, 495 S.E.2d 711, 716, *reh'g denied*, 348 N.C. 79, 502 S.E.2d 837, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998), and "to state agencies required by statute to conduct inspections for the public's general protection." *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654, *reh'g denied*, 352 N.C. 157, 544 S.E.2d 225 (2000). However, in *Isenhour v. Hutto*, 350 N.C. 601, 517 S.E.2d 121 (1999), the Supreme Court declined to apply the doctrine to a claim against the City of Charlotte for the negligence of a school crossing guard, noting a very real distinction between the provision of law enforcement protection to the general public and the duties of a crossing guard. *Id.* at 608, 517 S.E.2d at 126. And, in *Lovelace*, the Court reiterated that its holding in *Braswell* was limited to the facts of that case and specifically noted that it had never expanded "the

public duty doctrine to *any local government* agencies other than *law enforcement departments when they are exercising their general duty to protect the public . . . .*" *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654 (emphasis added).

More recently, the Supreme Court stated, "The public duty doctrine is a rule grounded in common law negligence and provides that 'when a governmental entity owes a duty to the general public, particularly a statutory duty, individual plaintiffs may not enforce the duty in tort.' " *Watts v. N.C. Dep't of Env't & Natural Res.*, 362 N.C. 497, 498, 666 S.E.2d 752, 753 (2008) (quoting *Myers v. McGrady*, 360 N.C. 460, 465-66, 628 S.E.2d 761, 766 (2006)). Although the Court used the broad term "governmental entity," we do not believe the Court intended by its language to *sub silentio* overrule *Lovelace* and expand the application of the public duty doctrine with respect to local government entities beyond law enforcement.

With those principles in mind, we turn to defendant City's argument with respect to the application of the public duty doctrine to the allegations of plaintiff's complaint, i.e., that plaintiff's claims were that "the City failed to prevent the criminal acts of Logan, Flow, and Moore and/or failed to protect [Joshua] from the criminal acts of Logan, Flow, and Moore." Our examination of the plaintiff's allegations with respect to the negligence of defendant City, however, reveals that plaintiff has asserted no claims based upon defendant City's negligent failure to prevent the criminal acts of Logan, Flow or Moore, or protect Joshua from such acts. With respect to defendant City, plaintiff alleged:

> 19. The defendant City of Winston-Salem breached this duty of care on May 20, 2006, and was negligent in that:
>
> a. The defendant failed to keep the public streets of Freeman and Wells Streets in proper repair in violation of safety statute N.C. Gen. Stat. § 160A-296(a)(1), constituting negligence per se.
>
> b. The defendant failed to establish an appropriate policy and procedure to inspect and to keep its streets in a safe and proper condition, free from unnecessary obstruction due to overgrown vegetation and to vehicles parked in prohibited areas, in violation of safety statute N.C. Gen. Stat. § 160A-296(a)(l) and (2), constituting negligence per se.

b.[2] The defendant failed to keep the public streets of Freeman and Wells Streets free from unnecessary obstructions, including untrimmed vegetation, shrubs and bushes within the right-of-way, that obstruct the vision of motorists, pedestrians and bicyclists in violation of safety statute N.C. Gen. Stat. § 160A-296(a)(2) and Section 74-19 of the Winston-Salem Municipal Code, constituting negligence per se.

c. The defendant failed to enforce the safety statutes of the Municipal Code in that the defendant failed to require the property owner, defendant Moore, to remove or trim the vegetation, shrubs and bushes located on his property within the right-of-way that could obstruct the view of motorists, pedestrians and bicyclists in violation of safety statute N.C. Gen. Stat. § 160A-296(a)(2) and Section 74-19 of the Winston-Salem Municipal Code, constituting negligence per se.

d. The defendant failed to keep the public streets of Freeman and Wells Streets free from unnecessary obstructions, including cars parked within an intersection, cars parked within 25 feet of intersecting curb lines, and cars parked within a lane designated for moving traffic in such a way as to obstruct the movement of traffic in that lane, in violation of safety statute N.C. Gen. Stat. § 160A-296(a)(2) and Section 42-153(a) of the Winston-Salem Municipal Code, constituting negligence per se.

e. The defendant failed to erect and maintain appropriate signs on Wells Street giving proper notice to motorists of the parking limitations and prohibitions on Wells Street, in violation of safety statute N.C. Gen. Stat. § 160A-296(a)(5) and Section 42-160(b) of the Winston-Salem Municipal Code, constituting negligence per se.

f. The defendant failed to insure that cars parked along Wells Street were parked facing the appropriate direction in violation of safety statute N.C. Gen. Stat. § 160A-296(a)(5) and Sections 42-152 and 42-162 of the Winston-Salem Municipal Code, constituting negligence per se.

g. The defendant knew or should have known that the vegetation at the intersection of Wells and Freeman Streets

2. Duplicative numbering is consistent with that of plaintiff's original complaint.

caused a "blind intersection," creating a dangerous and hazardous condition for the public, including Joshua. The defendant failed to take any action to warn the public, including Joshua, of the existence of the dangerous condition caused by the overgrowth of vegetation on the property in violation of safety statute N.C. Gen. Stat. § 160A-296(a)(5), constituting negligence per se.

h. Upon information and belief, the defendant failed to require the issuance of a permit for the construction of a parking area in the right-of-way of Wells Street by the defendants Flow and failed to review properly the existing connections to the street as a result of said construction in violation of safety statute N.C. Gen. Stat. § 160A-296(a)(5) and Section 74-213 of the Winston-Salem Municipal Code, constituting negligence per se.

i. The defendant was otherwise negligent in such other ways as will be shown at trial.

Only one of these allegations, paragraph 19(c), implicates a negligent failure by defendant City to enforce its municipal code by failing to require defendant Moore to remove or trim the vegetation on his property. The Winston-Salem Municipal Code Section 74-19 places the burden of removing vegetation on the owner, tenant or occupant of the lot bordering the street and if the owner, tenant, or occupant fails to remove the vegetation, the burden falls on the "assistant city manager/public works or his designee." Winston-Salem, N.C., Code of Ordinances § 74-19 (2006). Thus, the allegation does not allege a negligent failure on the part of a law enforcement agency exercising its general duty to protect the public and, under *Lovelace*, the public duty doctrine does not apply to shield defendant City from liability for this claim. The remaining allegations of paragraph 19 of plaintiff's complaint allege defendant City's negligent failure to comply with its own municipal safety ordinances and various provisions of N.C.G.S. § 160A-296(a) and the public duty doctrine is inapplicable to these allegations as well. The trial court correctly denied defendant City's summary judgment motion grounded on the public duty doctrine.

II.

[3] Defendant City next contends that it is immune from suit under the doctrine of governmental immunity for the claims brought by plaintiff, and that it has not waived its governmental immunity pur-

suant to N.C.G.S. 160A-485 because it has not purchased liability insurance covering the claims. However, plaintiff has alleged defendant City was negligent in violating N.C.G.S. § 160A-296, which gives a municipality the authority to regulate the use of its streets and sidewalks and, in addition, imposes a positive duty upon the municipality to keep them in proper repair, in a reasonably safe condition, and free from unnecessary obstructions. N.C. Gen. Stat. § 160A-296(a)(1),(2), and (5) (2009); *Stancill v. City of Washington*, 29 N.C. App. 707, 710, 225 S.E.2d 834, 836 (1976). The statute creates an exception to the doctrine that a municipality will have immunity from liability for negligence in the performance of a governmental function, *Sisk v. City of Greensboro*, 183 N.C. App. 657, 659, 645 S.E.2d 176, 179, *disc. reviews denied and dismissed*, 361 N.C. 569, 650 S.E.2d 812 (2007), and, by reason thereof, the doctrine of governmental immunity has no application to protect a city from liability for a negligent breach of the statutory duties so imposed. *McDonald v. Village of Pinehurst*, 91 N.C. App. 633, 635, 372 S.E.2d 733, 734 (1988).

Defendant City argues that it is entitled to summary judgment because, as a matter of law, there were no genuine issues of fact as to (1) the existence of any obstruction, (2) that defendant City had any notice of a dangerous condition at the intersection of Wells and Freeman Streets, or (3) that any obstruction was a proximate cause of the collision and Joshua's death. Therefore, defendant City argues, there was no genuine issue of fact with respect to any negligent breach of any of the duties imposed upon it by N.C.G.S. § 160A-296 and it is immune from suit.

Defendant City first contends plaintiff presented no evidence to create an issue of fact with respect to its breach of the statutory requirement to keep its streets and sidewalks clear of obstructions because there were no obstructions. Defendant City argues the vegetation could not be considered an obstruction because it is "undisputed" that a driver traveling down Freeman Street who obeyed the traffic laws would have nothing obstructing his view of the traffic on Wells Street. However, plaintiff's expert witness, Sean Dennis, stated "that corner," which includes the retaining wall, the bushes, and the ground underneath, "presented a sight obstruction both for traffic . . . on Wells looking to the right of Freeman [and] . . . on Freeman looking to the right of Wells and same for traffic traveling east on Freeman looking left to look up Wells." In *Cooper v. Town of Southern Pines*, 58 N.C. App. 170, 293 S.E.2d 235 (1982), this Court defined an obstruction as "anything, including vegetation, which ren-

ders the public passageway less convenient or safe for use." *Id.* at 174, 293 S.E.2d at 237. Plaintiff's expert stated that the vegetation was an obstruction and defendant Logan in his deposition stated that the position of the parked cars caused him to drive down the center of the road. Under the *Cooper* definition, both the vegetation and parked cars could constitute obstructions which might violate the requirements of N.C.G.S. § 160A-296.

Defendant City further argues that it is entitled to summary judgment because there was no evidence that it had notice of the alleged obstructions. *See Bowman v. Town of Granite Falls*, 21 N.C. App. 333, 334-35, 204 S.E.2d 239, 240-41 (1974) (holding "notice of the defect, actual or constructive, and a failure to act on the part of the municipality to remedy the situation are prerequisites to recovery in an action involving a municipality"). Plaintiff counters there are genuine issues of fact as to whether defendant City had actual or implied notice of the obstructions. First, plaintiff argues that defendant City had actual notice of the vegetation because it had planted the vegetation in the 1970s. Plaintiff also directs us to a curb usage study performed by defendant City's Traffic Engineering Division in 1987 which indicated that parking on both sides of Wells Street obstructed the travel lanes to a point such that emergency vehicles would not be able to use the road. Moreover, plaintiff also claims that if defendant City did not have actual notice, the evidence gives rise to an inference that it had implied notice based on the length of time the alleged obstructions had been present. *See Fitzgerald v. Concord*, 140 N.C. 110, 113, 52 S.E. 309, 310 (1905) (holding "when observable defects in a highway have existed for a time so long that they ought to have been observed, notice of them is implied, and is imputed to those whose duty it is to repair them"). We agree with plaintiff and conclude there are genuine issues of material fact as to whether or not defendant City had actual or implied notice of the obstructions.

Defendant City also argues that it is entitled to summary judgment because there is no genuine issue of fact that the alleged obstructions were a proximate cause of Joshua's death and that such a conclusion would, at most, be purely speculative. We disagree. In defendant Logan's deposition, he stated that he was driving down the center of Wells Street because of the cars parked illegally in the street. Sean Dennis, plaintiff's expert witness, testified in his deposition that the position of defendant Logan's vehicle, left of the center of the street, was a contributing factor to the accident. With regard to the vegetation, defendant Logan stated that he could only see the top

of Joshua's helmet over the bushes and that by the time he saw Joshua it was only a split second before he was in front of the vehicle. He also stated, "If [the shrubbery] wasn't there, you know, maybe I could of seen him before he got—got through the stop sign or whatever." Sean Dennis also testified that the vegetation would have been a sight obstruction for both Joshua and defendant Logan.

Defendant City also argues that any negligence on its part in failing to keep the roads clear of obstructions was not a proximate cause of the accident and Joshua's death because such consequences were not reasonably foreseeable. With regard to reasonable foreseeability, our Supreme Court has stated,

> It is not necessary that a defendant anticipate the particular consequences which ultimately result from his negligence. It is required only that a person of ordinary prudence could have reasonably foreseen that such a result, *or some similar injurious result*, was probable under the facts as they existed. However, we have also said that a defendant is liable for the consequences of his negligence if he might have foreseen that some injury would result from his act or omission or that *consequences of a generally injurious nature* might have been expected.

Sutton v. Duke, 277 N.C. 94, 107, 176 S.E.2d 161, 169 (1970) (citations and internal quotation marks omitted). We conclude that a genuine issue of fact exists as to whether it was reasonably foreseeable that obstructions to defendant Logan's and Joshua's vision, as well as obstructions necessitating a driver to drive in other than the intended travel lane, could cause a traffic accident of some sort.

III.

[4] Defendant City also argues that the criminal acts of defendant Logan in driving while under the influence and on the wrong side of the road were intervening causes which severed the causal chain between its negligence and the accident, thus relieving it of responsibility. It points to the Traffic Fatality Accident Reconstruction created by the Winston-Salem Police Department, which concluded "that the primary causative factor in this crash is Mr. Logan's alcohol concentration level and the fact that he was on the wrong side of the road when he was approaching the intersection." However, defendant Logan testified at his deposition, "They [sic] was nothing I could do to avoiding [sic] that accident. If I would of not [sic] any alcohol in me, that accident would of still happened . . . . In other words, there is no way that it was not going to happen, alcohol-related or not." He

also testified that he did not think the alcohol slowed his reflexes or reaction time. From the evidence, there is a genuine issue of fact as to what a reasonable person would have done under the circumstances. *Federal Paper Bd. Co. v. Kamyr, Inc.*, 101 N.C. App. 329, 333, 399 S.E.2d 411, 414 ("Summary judgment may not be used to resolve factual disputes which are material to the disposition of the action."), *disc. review denied*, 328 N.C. 570, 403 S.E.2d 510 (1991). If a reasonable and sober person would have moved left of center to avoid the parked cars and could not have stopped in time to avoid the accident, then Mr. Logan's actions in driving while intoxicated and driving left of center would not be an intervening cause. *See id.* (holding that with regard to intervening causes, except when reasonable minds could not differ, "the question should be left for the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act"). Therefore, we conclude there is a genuine issue of material fact as to whether defendant City's actions were the proximate cause of plaintiff's injury or whether defendant Logan's acts were an intervening cause.

IV.

[5] Finally, in its Reply Brief, defendant City asserts that plaintiff's claim is barred by the six-year statute of repose provided by N.C.G.S. § 1-50(a)(5). Although defendant City pleaded the bar of the "applicable statute of limitations and/or statutes of repose," and assigned error to the denial of its motion for summary judgment on the ground of N.C.G.S. § 1-50(a)(5), it did not raise the issue in its principal brief, but raised it only in its reply brief, filed pursuant to Appellate Rule 28(h)(3). The rule limits the reply brief "to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief." N.C.R. App. P. 28(h)(3) (amended Oct. 1, 2009). Thus, we hold defendant City, by its failure to advance the issue in its principal brief, has abandoned its assignment of error relating to the denial of its motion for summary judgment on the ground of N.C.G.S. § 1-50(a)(5). *See* N.C.R. App. P. 28(b)(6) (amended Oct. 1, 2009) ("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."). Even so, we observe that the contention has no merit in that, as our Supreme Court has noted, "It is the duty of the city to exercise a reasonable and *continuing* supervision over its streets in order that it may know their con-

dition and it is held to have knowledge of a defect which such inspection would have disclosed to it." *Mosseller v. Asheville*, 267 N.C. 104, 108-09, 147 S.E.2d 558, 562 (1966) (emphasis added). Because of this continuing duty, the statute of repose is not a bar to plaintiff's action.

In summary, we hold that, because neither the public duty doctrine nor governmental immunity bars plaintiff's claims and there are genuine issues of material fact, the trial court correctly denied defendant City's motion for summary judgment.

Affirmed.

Judges ELMORE and GEER concur.

THE COVENTRY WOODS NEIGHBORHOOD ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION, JOHN F. BORDSEN AND WIFE, PATRICIA BRESINA, MARTHA L. MCAULAY, AND JOAN E. PROVOST, EVA COLE MATTHEWS, CHRIS JOHNSON AND WIFE, SHANNON JONES, REBECCA S. GARDNER, JOHN WHITE, RONALD MATTHEWS AND WIFE, EVELYN MATTHEWS AND SHIRLEY JONES, AND THOMAS R. MYERS, PLAINTIFFS V. CITY OF CHARLOTTE, NORTH CAROLINA, A MUNICIPAL CORPORATION, CHARLOTTE-MECKLENBURG PLANNING COMMISSION, AN AGENCY OF THE CITY OF CHARLOTTE, AND INDEPENDENCE CAPITAL REALTY, LLC, A NORTH CAROLINA LIMITED LIABILITY CORPORATION, DEFENDANTS

No. COA09-611

(Filed 2 February 2010)

1. Statutes of Limitation and Repose— subdivision ordinance—summary judgment

The trial court erred by granting summary judgment in favor of defendants in a case challenging a subdivision ordinance on the ground that plaintiffs' claims were barred by the statute of limitations.

2. Constitutional Law— procedural due process—notice—aggrieved parties

In the absence of a constitutionally protected property interest, plaintiffs have not established that their procedural due process rights have been violated as a result of the fact that a subdivision ordinance for adjoining tracts of property did not provide for notice to aggrieved parties of decisions by a planning staff to approve preliminary plans for proposed subdivisions.

Appeal by Plaintiffs from order entered 6 August 2008 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 October 2009.

Davies and Grist, LLP, by Kenneth T. Davies, for plaintiff-appellants.

Robert E. Hagemann, for defendant-appellees City of Charlotte and Charlotte-Mecklenburg Planning Commission.

Robinson, Bradshaw, & Hinson, P.A., by Richard A. Vinroot and Richard C. Worf, Jr., for defendant-appellee Independence Capital Realty, LLC.

ERVIN, Judge.

I. Factual Background

The individual Plaintiffs either own property located in or reside within the Coventry Woods or Cedars East subdivisions, both of which are located in Charlotte. Coventry Woods and Cedars East abut an approximately 16-acre tract of land owned by Independence Capital Realty, LLC.

On 10 July 2003, Independence Capital sought to have the 16-acre tract rezoned from R-4 to R-12MF. Plaintiff Coventry Woods Neighborhood Association (CWNA) opposed the proposed rezoning on behalf of the residents of Coventry Woods and Cedars East. On 23 August 2004, after conducting a public hearing, the Charlotte City Council denied Independence Capital's rezoning request.

On 14 February 2005, Independence Capital sought preliminary approval of a subdivision plan for a development to be located on the 16-acre tract known as "Independence Woods." The proposed subdivision plan included a request for a "density bonus" that allowed up to seventy-two single-family homes in the proposed subdivision as opposed to the fifty-eight residences typically allowed in areas zoned R-4. Plaintiffs were not notified of the submission of the proposed subdivision plan for Independence Woods to the Planning Commission.

The planning staff of the Planning Commission preliminarily approved the Independence Woods subdivision plan on 13 December 2006. Plaintiffs did not receive notice that the Independence Woods subdivision plan had been approved at that time. Under the relevant provisions of the Subdivision Ordinance, only the developer receives

notice of planning staff decisions concerning preliminary plan approvals. On 5 January 2007, notice of the preliminary approval of the Independence Woods subdivision plan was posted on the Planning Commission website.

Representatives of Plaintiffs actually learned that a subdivision plan for the Independence Woods subdivision had been approved in July 2007. On 7 August 2007, CWNA's president, John F. Bordsen, and others met with the planning staff, at which point they learned that the ten-day window within which aggrieved parties could appeal the planning staff's decision had expired.

Plaintiffs challenged the Zoning Administrator's opinion that no pre-approval hearing was required for the Independence Woods subdivision before the Zoning Board of Adjustment on 28 September 2007. After a hearing held before the Zoning Board of Adjustment on 29 January 2008, Plaintiffs' challenge to the Zoning Administrator's opinion was rejected.

A number of the individual Plaintiffs and CWNA attempted to appeal the preliminary plan approval to the Planning Commission on 15 February 2008. The Planning Commission declined to accept or process this appeal on timeliness grounds on 21 February 2008.

On 18 February 2008, Plaintiffs obtained the issuance of an order extending the time within which they were entitled to file a complaint against Defendants until 10 March 2008 and the issuance of summonses directed to the City of Charlotte, the Planning Commission, and Independence Capital. On 10 March 2008, Plaintiffs filed a complaint against the City of Charlotte, the Planning Commission, and Independence Capital in which they alleged that the approval of the preliminary plan for Independence Woods violated their substantive and procedural due process rights and that the enactment of the Subdivision Ordinance exceeded the authority delegated to the City of Charlotte pursuant to N.C. Gen. Stat. § 160A-371 *et seq*. Based upon those allegations, Plaintiffs requested a declaration that Charlotte's Subdivision Ordinance "was unlawful, both facially and as applied;" that "the Independence Woods preliminary plan approval is invalid;" and that Independence Capital be preliminarily enjoined from engaging in further construction activities in Independence Woods. On 31 March 2008, Plaintiffs filed an amended complaint.

On 8 April 2008, the City of Charlotte and the Planning Commission filed an answer in which they denied the material allegations of Plaintiffs' complaint and asserted a number of affirmative

defenses. On the same date, Independence Capital filed an Answer and Counterclaim in which it denied the material allegations of Plaintiffs' complaint, raised numerous affirmative defenses, and asserted a counterclaim for abuse of process. On 15 April 2008, Judge James W. Morgan entered an Order Denying Motion for Temporary Restraining Order and Scheduling [Hearing]. On 17 April 2008, Judge Karl Adkins entered an Order Denying Plaintiffs' Motion for Preliminary Injunction. On 9 June 2008, Plaintiffs filed a reply to Independence Capital's counterclaim.

On 11 July 2008, Independence Capital and the City and the Planning Commission filed motions seeking the entry of summary judgment in their favor. Defendants' summary judgment motions came on for hearing before the trial court at the 21 July 2008 civil session of the Mecklenburg County Superior Court. On 6 August 2008, the trial court entered an Order Granting Summary Judgment. Based upon the materials presented for its consideration, the trial court concluded that the record revealed the existence of the following undisputed facts:

1. On December 13, 2006, staff for [the City] granted preliminary subdivision plan approval for [Independence Capital's] development of [Independence Woods,] which is adjacent to the Coventry Woods neighborhood in Charlotte, represented by [CWNA]. Several of the individual plaintiffs live in the Coventry Woods neighborhood.

2. The staff approved Independence Capital's plans for Independence Woods pursuant to the City's Subdivision Ordinance. Under the terms of that Ordinance, appeals of decisions concerning plan approval must be filed within ten days of such decisions. The Ordinance did not require that the City give notice to CWNA or the individual plaintiffs of such decisions. However, it appears that the plaintiffs became aware of the approval of the plans on or about July 1 or 2, 2007.

3. The plan approval for Independence Woods permitted Independence Capital to develop that property in accordance with the provisions of the City's Zoning Ordinance.

4. Prior to filing this action the plaintiffs first filed a petition with the Charlotte Zoning Board of Adjustment on September 28, 2007 challenging such plan approval (more than nine months after the plans were approved and more than two months after plaintiffs became aware of the approval), which was denied.

Subsequently they also filed an appeal to [the Planning Commission] on February 15, 2008 (14 months after the plans were approved and more than seven months after plaintiffs became aware of the approval), which appeal was also denied.

5. The plaintiffs initiated this action when they filed a Summons Without Complaint on February 18, 2008, followed by a Complaint on March 16, 2008. The plaintiffs also have contested the approval of the subdivision plans in two other civil actions filed in the Superior Court of Mecklenburg County (see Civil Actions Nos. 08 CVS 7582 and 9821).

6. In this action the plaintiffs contend that the failure of the City's Subdivision Ordinance to require that they be given notice of the December 13, 2006 plan approval for Independence Woods rendered that Ordinance unconstitutional by denying their "due process rights."

. . . .

9. In his April 22, 2008 deposition CWNA's president, John Bordsen, admitted that only 80% of CWNA's members actually lived in the Coventry Woods neighborhood, represented by CWNA.

Based upon these undisputed facts, the trial court made the following conclusions of law:

10. There was no requirement in the City's Subdivision Ordinance or in the laws of the State of North Carolina requiring that the plaintiffs be given notice of the City's December 13, 2006 approval of the Independence Woods Subdivision plans in behalf of Independence Capital. *See Nazziola v. Landcraft Properties, Inc.*, 143 N.C. 564 (2001) and N.C. Gen. Stat. § 160A-373. The City was within its discretion to adopt the Ordinance without requiring such notice. The plaintiffs have not shown that the adoption of the Ordinance by the Charlotte City Council was an abuse of discretion or an arbitrary or unreasonable act. *See Suddeth v. Charlotte*, 223 N.C. 630 (1943), *In re Appeal of Parker*, 214 N.C. 55 (1938), *Schloss v. Jamison*, 262 N.C. 108 (1964) and 83 Am. Jur. 2d *Zoning and Planning*, § 42.

11. There was no constitutional requirement that the City give notice to the plaintiffs of the December 13, 2006 approval of

the Independence Woods subdivision plans. The City's failure to give notice to the plaintiffs did not violate any of the plaintiffs' rights under the Constitution of the United States or the Constitution of the State of North Carolina.

12. The plaintiffs' filing of this action more than 14 months after the Planning Commission's December 13, 2006 plan approval, rather than within 10 days of such approval, as required by the City's Subdivision Ordinance, was too late.

13. N.C. Gen. Stat. § 1-54.1 and 160A-364.1 require that actions contesting the provisions of Zoning and Subdivision Ordinances, adopted by cities, be filed within two (2) months of their adoption. In this litigation the plaintiffs are essentially challenging the provisions of the City's Zoning and Subdivision Ordinances. The plaintiffs did not file this action within two months after the adoption of the ordinances. Thus the plaintiffs' claims regarding the provisions of the ordinances are also time-barred.

14. By their failure to timely appeal the December 13, 2006 plan approval as required by the City's Subdivision Ordinance, the plaintiffs failed to exhaust their administrative remedies and thus lack standing to file the claims set forth in this action.

15. Because CWNA has admitted that only 80% of its members actually reside in the Coventry Woods neighborhood that it purports to represent, CWNA lacks standing in this action. *Northwest Concord Citizens, Inc. v. City of Hickory*, 143 N.C. App. 272, 277 (2001).

16. With regard to the individual plaintiffs' claims that they are "aggrieved parties" entitled to prosecute their claims, notwithstanding CWNA's lack of standing, the Court expresses no opinion. However, assuming *arguendo* that plaintiffs are "aggrieved parties", the plaintiffs were required to appeal the Planning Commission's December 13, 2006 plan approval within 10 days of the approval and having failed to do so, they lack standing to proceed. *See Allen v. Buncombe County Board of Adjustment*, 100 N.C. App. 615 (1990), and *Town and Count[r]y Civic Org. v. Winston-Salem Bd. of Adjustment*, 83 N.C. App. 516 (1986).

After deferring ruling upon the City's contention that Plaintiffs were guilty of laches "unless and until further proceedings may be required

herein" and upon Independence Capital's request for sanctions against Plaintiffs pursuant to N.C. Gen. Stat. § 1A-1, Rule 11 "until a later time," the trial court granted Defendants' summary judgment motions.

On 13 February 2009, Independence Capital voluntarily dismissed the abuse of process counterclaim it had asserted against Plaintiffs. On the same day, Plaintiff noted an appeal to this Court from the trial court's summary judgment order.

II. Legal Analysis

On appeal, Plaintiffs argue that they are "aggrieved parties" entitled to challenge approval of the preliminary plan for Independence Woods, that they have a constitutionally-protected property right "in the use and enjoyment of their properties and from the diminution in value of their properties" that has been adversely affected by the approval of the preliminary plan for Independence Woods, that the procedures set out in Charlotte's Subdivision Ordinance relating preliminary plan approval did not adequately protect their due process right to notice and an opportunity to be heard with respect to the issue of subdivision plan approval, and that their action was not barred by N.C. Gen. Stat. § 1-54.1 or N.C. Gen. Stat. § 160A-364.1. After careful consideration of Plaintiffs' arguments, we conclude that the trial court did not err by granting Defendants' summary judgment motions.

A. Standard of Review

"We review a 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.' " *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421 (2007) (quoting *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citing N.C.G.S. § 1A-1, Rule 56(c)). In ruling on a summary judgment motion, the trial court is required to consider " 'the pleadings, depositions, answers to interrogatories, and admissions on file[.]' " *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). "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." *Id.* However, given that no party has claimed that the record reveals the presence of any disputed issue of material fact, the ultimate issue that we must decide in order to address the issues raised by Plaintiffs' appeal is whether the trial court correctly concluded that Defendants were entitled to judgment as a matter of law.

B. Statute of Limitations

[1] Prior to addressing the merits of Plaintiffs' claim, we must first address the issue of whether the trial court correctly concluded that their challenge to the constitutionality of the Subdivision Ordinance was time-barred by N.C. Gen. Stat. § 1-54.1 or N.C. Gen. Stat. § 160A-364.1. According to N.C. Gen. Stat. § 1-54.1, "an action contesting the validity of any zoning ordinance, or amendment thereto adopted . . . by a city under Chapter 160A of the General Statutes" shall be brought within two months. Similarly, N.C. Gen. Stat. § 160A-364.1 provides that "[a] cause of action as to the validity of any zoning ordinance, or amendment thereto, adopted under this Article or other applicable law shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within two months as provided in [N.C. Gen. Stat. §] 1-54.1." As a result of the fact that Plaintiffs filed the present action more than two months after the adoption of the provisions of the Subdivision Ordinance which they seek to contest, the trial court held that Plaintiffs' claims were time-barred pursuant to N.C. Gen. Stat. § 1-54.1 and N.C. Gen. Stat. § 160A-364.1. We disagree.

The particular local ordinance provisions that Plaintiffs have attempted to challenge in this case were included in the City's subdivision, rather than its zoning, ordinance. "Although this Court has recognized that the legal principles involved in review of zoning applications are similar and relevant to review of the denial of subdivision applications, we have also stated that 'zoning statutes do not limit how a subdivision applicant may seek judicial review.' " *Meares v. Town of Beaufort*, ––– N.C. App. –––, –––, 667 S.E.2d 239, 244 (2008) (quoting *Hemphill-Nolan v. Town of Weddington*, 153 N.C. App. 144, 147, 568 S.E.2d 887, 889 (2002)). The regulation of subdivisions and zoning are addressed in separate provisions of Chapter 160A of the General Statutes. *Town of Nags Head v. Tillett*, 314 N.C. 627, 630, 336 S.E.2d 394, 397 (1985). As a result, the limitations period relating to challenges to "zoning ordinances" set out in N.C. Gen. Stat. § 1-54.1 and N.C. Gen. Stat. § 160A-364.1 simply does not apply to challenges to the constitutionality of subdivision ordinance provisions of the type at issue here. *Hemphill-Nolan*, 153 N.C. App. at 146-49, 568 S.E.2d at 889-90 (holding that the 30-day limitation prescribed in N.C. Gen. Stat. § 160A-388(e) "does not apply to judicial review of decisions of boards of adjustment based on" the authority of municipalities to adopt subdivision ordinances).

Independence Capital also argues that, if Plaintiffs' claims are not time-barred under N.C. Gen. Stat. § 1-54.1 and N.C. Gen. Stat. § 160A-364.1 and if Plaintiffs are correct in contending that the applicable statute of limitations is the three-year statute of limitations set out in N.C. Gen. Stat. § 1-52(5), then Plaintiffs' claims are still time-barred. In advancing this assertion, Independence Capital relies upon the logic of *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), and *Capitol Outdoor Advertising, Inc. v. City of Raleigh*, 337 N.C. 150, 446 S.E.2d 289 (1994), which held, in the context of a challenge to a "billboard moratorium" ordinance, that the challengers' claim accrued at the time of the enactment of the disputed ordinance, an event which had occurred some five years previously. However, the Supreme Court seems to have reached this result because the "billboard moratorium" ordinance was part of Raleigh's zoning ordinance and because N.C. Gen. Stat. § 160A-364.1 provides that challenges to municipal zoning ordinances accrue as of the date that the challenged ordinance was enacted or became effective. *Capitol Outdoor Advertising*, 337 N.C. at 163, 446 S.E.2d at 297. In addition, the Supreme Court's opinion in *Capitol Outdoor Advertising* makes it abundantly clear that the challengers were fully aware of the enactment of the "billboard moratorium" ordinance and strongly suggests that they waited until the last possible minute before challenging the ordinance in order to take advantage of its amortization process. *Capital Outdoor Advertising*, 337 N.C. at 164, 446 S.E.2d at 298. This case, on the other hand, involves a challenge to a subdivision ordinance rather than a zoning ordinance. In addition, the Plaintiffs filed suit within three years of the date upon which they learned of the approval of the subdivision plan for Independence Woods. *Allen v. City of Burlington Board of Adjustment*, 100 N.C. App. 615, 618-19, 397 S.E.2d 657, 660 (1990). As a result, we are unable to conclude that the trial court correctly granted summary judgment in favor of Defendants on the grounds that Plaintiffs' claims were barred by the applicable statute of limitations and proceed to consider Plaintiffs' procedural due process claims on the merits.

C. Procedural Due Process

[2] Pursuant to § 20-88(a) of the Charlotte City Code, "[a] notice of appeal . . . must be filed with the planning director within ten days of the day a subdivision preliminary plan approval is issued . . . ." A "[f]ailure to timely file such notice and fee will constitute a waiver of any rights to appeal under this section." § 20-88(a). As a result of the fact that Plaintiffs did not appeal the planning staff's decision to grant

preliminary approval of a subdivision plan for Independence Woods within ten days, they lost whatever right they may have had to contest the planning staff's decision under the Subdivision Ordinance. For that reason, their principal substantive argument on appeal is that the Subdivision Ordinance, which "wholly fails to afford aggrieved persons any notice of staff decisions, whereby such person could avail him or herself of such [appeal] rights," results in a "fundamental denial of due process" as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution.

"The threshold question in any due process claim is whether 'a constitutionally protected property interest exists.' " *Reese v. Charlotte-Mecklenburg Bd. of Educ. & Mecklenburg*, —— N.C. App. ——, ——, 676 S.E.2d 481, 492 (2009) (citing *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 447, 450 S.E.2d 888, 890 (1994)).

> Invocation of constitutional protection against takings without just compensation or without due process requires a property interest on the part of the person seeking such protection. Where there is no property interest, there is no entitlement to constitutional protection. To have a property interest that is subject to [constitutional] protection, the individual must be entitled to a benefit created and defined by a source independent of the Constitution, such as state law. *Huang v. Board of Governors of University of North Carolina*, 902 F.2d 1134 (4th Cir. 1990).

State ex rel. Utilities Comm'n v. Carolina Utility Customers Ass'n, 336 N.C. 657, 678, 446 S.E.2d 332, 344 (1994). Although Plaintiffs contend that they "have a constitutionally protected property interest[] in the use and enjoyment of their properties and from the diminution in value of their properties," they have not cited any authority in support of the proposition that they are entitled to constitutional protection against changes in the treatment of adjoining tracts of property under properly-adopted zoning or subdivision ordinances.

Admittedly, Plaintiffs have cited a number of decisions of the United States Supreme Court and the Supreme Court of North Carolina in support of their contention that they are entitled to challenge the Subdivision Ordinance on due process grounds. However, none of the decisions upon which the Plaintiffs appear to base their claim to the existence of a constitutionally-protected property interest establish that they have the required property interest. For exam-

ple, the decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 77 L. Ed. 2d 180 (1983), sheds no significant light on the "property interest" issue, because the constitutionally-protected nature of a mortgagee's interest in mortgaged property bears no resemblance to the property interest claimed by Plaintiffs in this case. Despite the fact that Plaintiffs included an extensive discussion of the Supreme Court of North Carolina's decision in *Mangum v. Raleigh Board of Adjustment*, 362 N.C. 640, 669 S.E.2d 279 (2008), in their brief, that decision is simply not relevant to the "property interest" issue since it addresses the circumstances under which an adjoining property owner is "aggrieved" for purposes of statutory and ordinance provisions allowing challenges to local land use decisions rather than the completely separate issue of whether neighboring landowners have a constitutionally-protected property interest in the way that adjoining tracts of property are treated under local land use ordinances. Although the Supreme Court of North Carolina's decision in *Bowie v. Town of West Jefferson*, 231 N.C. 408, 57 S.E.2d 369 (1950), does address procedural due process issues, it sheds little light on the proper disposition of the present case given that the tax statute at issue there clearly impacted the private property rights of the affected taxpayers by subjecting them to taxation on the value of their property without notice or any right to a hearing on the valuation issue. As a result, none of the decisions upon which Plaintiffs rely support their assertion that a change in the treatment of an adjoining tract of property under local land use ordinances that affects the use and enjoyment of their property implicates a constitutionally-protected property interest.

Although we have not found any authority in this jurisdiction that directly addresses the issue raised by Plaintiffs' claim, we believe that the relevant decisions of the United States Supreme Court and the Supreme Court of North Carolina clearly indicate that Plaintiffs do not have a constitutionally-protected property interest in the treatment afforded the 16-acre tract under the Subdivision Ordinance.

> Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a pur-

> pose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Board of Regents v. Roth, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 561 (1972). In other words, as the Supreme Court of North Carolina has said:

> A vested right, entitled to protection from legislation, must be something more than a *mere expectation* based upon an anticipated continuance of the existing law; *it must have become a title*, legal or equitable, *to the present or future enjoyment of property*, *a demand*, *or legal exemption for a demand by another*.

Armstrong v. Armstrong, 322 N.C. 396, 402, 368 S.E.2d 595, 598 (1988) (emphasis in original) (quoting *Godfrey v. State*, 84 Wash. 2d 959, 963, 530 P.2d 630, 632 (1975)). For this reason, "[t]here is no such thing as a vested right in the continuation of an existing law." *Armstrong*, 322 N.C. at 401, 368 S.E.2d at 598 (citing *Spencer v. McDowell Motor Co.*, 236 N.C. 239, 72 S.E.2d 598 (1952); *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979); *Byrd v. Johnson*, 220 N.C. 184, 16 S.E.2d 843 (1941). In light of this logic, the Supreme Court of North Carolina declined to hold that natural gas customers had a property interest in interstate pipeline refunds despite the fact that such refunds had generally been returned to customers in the past because "past history is not determinative of the nature or existence of the customers' interest in the refunds" and, "[u]ntil the Commission makes a decision to remit these supplier refunds to . . . customers, the interest of these customers in the refunds is nothing more than a mere expectation of receiving them." *Carolina Utility Customers Ass'n*, 336 N.C. at 679, 446 S.E.2d at 345. Thus, if all that Plaintiffs have is an expectation that existing land use rules will continue unchanged, they do not have a constitutionally-protected property interest sufficient to support a due process claim.

A careful examination of Plaintiffs' attempt to establish the existence of a constitutionally-protected property interest demonstrates that they are essentially relying on a belief that they are entitled to freedom from the inconvenience that they believe would result in the event that Independence Capital was allowed to develop Independence Woods consistently with the approved preliminary plan. At bottom, Plaintiffs have asserted nothing more than a reliance on the continued existence of the existing legal situation coupled with a mere expectation that no change to which residents and prop-

erty owners in Coventry Woods and Cedars East object would be made in the use of the 16-acre tract of property. Such expectations are simply not, in light of basic principles of federal and state law, sufficient to establish the existence of a constitutionally-protected property interest of the type needed to support Plaintiffs' due process challenge to the Subdivision Ordinance. Thus, the trial court correctly granted summary judgment in favor of Defendants with respect to Plaintiffs' procedural due process claim.[1]

III. Conclusion

As a result, we conclude that, given the absence of a constitutionally-protected property interest, Plaintiffs have not established that their procedural due process rights have been violated as a result of the fact that the Subdivision Ordinance does not provide for notice to aggrieved parties of decisions by the planning staff to approve preliminary plans for proposed subdivisions. For that reason, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge McGEE concur.

STATE OF NORTH CAROLINA v. BRIAN MICHAEL BLAKEMAN

No. COA09-699

(Filed 2 February 2010)

1. Evidence— motion to suppress statements—plain error analysis

The trial court did not commit plain error in a statutory sexual offense and multiple indecent liberties case by denying defendant's motion to suppress his statements to law enforcement

1. The parties spent considerable time debating the impact of two decisions of this Court in their briefs. However, we do not find either of those decisions determinative. *Nazziola v. Landcraft Properties, Inc.*, 143 N.C. App. 564, 545 S.E.2d 801 (2001), did not involve a procedural due process claim. Although *Town & Country Civic Organization v. Winston-Salem Zoning Board of Adjustment*, 83 N.C. App. 516, 518-19, 350 S.E.2d 893, 894-95 (1986), does address procedural due process issues, at least in *dicta*, it does not discuss the extent to which the organization and individuals objecting to the radio towers at issue in that proceeding had a constitutionally-protected property interest sufficient to support a procedural due process claim.

officers. Defendant failed to renew his objection at trial, and on cross-examination he elicited extensive testimony about these same statements. Further, defendant failed to argue that the jury probably would have reached a different verdict absent this alleged error.

2. Appeal and Error— preservation of issues—failure to argue or assign as plain error

The trial court did not err in a statutory sexual offense and multiple indecent liberties case by admitting certain cross-examination testimony concerning a prior incident with defendant's niece because defendant neither objected to this testimony nor assigned it as plain error.

3. Criminal Law— prosecutor's argument—personal experience—arguments outside record

The trial court did not err in a statutory sexual offense and multiple indecent liberties case by failing to intervene *ex mero motu* during certain parts of the State's closing argument that injected personal experience and made arguments outside the record because each of these issues was pertinent to evidence introduced at trial, to defense counsel's closing argument, or to both.

4. Sentencing— aggravating factor—took advantage of position of trust or confidence

The trial court erred in a statutory sexual offense and multiple indecent liberties case by denying defendant's motion to dismiss the aggravating factor under N.C.G.S. § 15A-1340.16(d)(15) that defendant took advantage of a position of trust or confidence because there was no evidence that defendant had any role in the minor victim's life other than being her friend's stepfather. The evidence showed only that the minor victim trusted defendant in the same way she might trust any adult parent of a friend.

Appeal by Defendant from judgments entered 25 and 26 September 2008 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 17 November 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert M. Curran, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, and Kirby H. Smith, III, for Defendant.

BEASLEY, Judge.

Defendant (Brian Blakeman) appeals from judgments entered upon his convictions of one count of statutory sexual offense, five counts of indecent liberties, and habitual felon status. We concluded that there was no error at trial but remand for resentencing.

In October 2007 Defendant was indicted on five counts of taking indecent liberties with a child, in violation of N.C. Gen. Stat. § 14-202.1; one count of statutory sexual offense in violation of N.C. Gen. Stat. § 14-27.7A(a); and for habitual felon status, in violation of N.C. Gen. Stat. § 14-7.1. The charges included two counts alleging sexual offenses committed against "Kathy" and four sexual offenses committed against "Ann."[1] The trial court denied the State's motion to join charges alleging sexual abuse of both victims for trial. The trial court first held the trial where Defendant was charged with sexual offense and indecent liberties committed against Kathy.

Defendant was tried before a Johnston County jury in September 2008. Kathy testified that she was born in 1993 and that in April 2007 she was thirteen-years-old. Kathy and Ann were "very close." Ann lived with her mother, the Defendant, and her younger sister Barbara[2]. Kathy testified that Defendant touched her inappropriately during an April 2007 overnight visit to Ann's house. When Kathy arrived on Friday afternoon, Defendant asked her for a hug. Ann's family had recently found a baby squirrel. When Kathy and Ann went with Defendant to buy squirrel food, Kathy rode in the front seat and Defendant held Kathy's hand during the drive.

Kathy spent Friday night at Ann's house. On Saturday morning Kathy awoke before Ann, and went to the living room. Defendant was sitting on the couch and Barbara was on the floor playing with the baby squirrel. Defendant told Barbara to take the squirrel to her room, and asked Kathy to sit next to him on the couch. When Kathy sat down, Defendant put his arm around her shoulder, then reached down under her shirt and beneath her bra, and squeezed her breast. After fondling her breast, Defendant stuck his hand down her pants, inserted his fingers in her vagina and moved his fingers "in and out, probably about four times." Defendant also pulled Kathy close and stuck his tongue in her mouth. Kathy was curled up in a corner of the couch and Defendant was leaning over her, when Ann came into the

1. To protect their privacy and for ease of reading, the minor victims are referred to in this opinion by the pseudonyms Kathy and Ann.

2. Barbara is used as a pseudonym for Ann's younger sister.

living room. Defendant moved away and Kathy got up from the couch. She followed Ann out of the living room, and told her that Defendant had touched her.

Later that day, Defendant took Barbara, Ann, and Kathy fishing at a nearby lake and Ann and Kathy talked privately. When Kathy told Ann the details of her encounter with Defendant, Ann started crying and told Kathy that Defendant had "been touching her" since she was seven-years-old. Ann made Kathy promise not to reveal the incident to anyone, because she feared that disclosure of Defendant's behavior would "ruin" her family. Kathy went home after the fishing trip. Before she left, Defendant told Kathy not to tell anyone what had happened and tried to kiss her.

Kathy wrote a note to her boyfriend David[3] about the incident and about a month later, David's grandmother found the note. David's grandmother showed the note to David's mother, who called Kathy's mother. Kathy and her mother went to David's house, where David's mother showed Kathy's mother the note. Kathy told her mother that Defendant had molested her. Kathy's mother called the police and Kathy talked with several law enforcement officers and a social worker from Johnston County Department of Social Services (DSS). After Kathy's mother reported the incident to the police, Ann's family moved to Connecticut, and Kathy had no further contact with Ann before the trial. Kathy testified that when Defendant molested her she felt scared, disgusted, and "stuck." She was reluctant to reveal that Defendant had touched her, because she felt scared and embarrassed. After she was molested by Defendant, Kathy began to feel self-conscious about her body. Kathy's trial testimony was corroborated by that of other witnesses for the State.

Johnston County Sheriff's Department Detective Brian Johnson testified that in May 2007 he was an investigator assigned to the property crimes division. On 30 May 2007 Detective Johnson was working with Detective Ryan Benson, an investigator assigned to the Johnston County Sheriff's Department major crimes division. They were dispatched to Kathy's house to investigate alleged sexual abuse. After interviewing Kathy and her mother, the officers went to Defendant's house. Detective Johnson recalled that Defendant first said he might have touched Kathy's breast when the squirrel was running around on the couch, and later admitted "he did touch her tit." Defense counsel cross-examined Detective Johnson extensively regarding Defendant's

3. David is also a pseudonym.

statements to the law enforcement officer, and questioned Detective Johnson about Defendant's exact language and whether Defendant might have said breast instead of "tit."

Detective Benson arrived at Defendant's house at around 11:30 p.m. The detectives interviewed Defendant on his front porch. Defendant corroborated Kathy's testimony that she sat in the front seat on their trip to buy squirrel food. He denied holding her hand, but admitted he might have "accidentally" touched her hand while shifting gears. Defendant told the officers that he had always gotten along with Kathy, who "would come up to him and open her arms up for a hug." Defendant corroborated Kathy's testimony that she sat with him on the couch on Saturday morning, but told the officers that Barbara and the baby squirrel had been in the living room with them. Defendant told the officers that he knew he was accused of "touching" Kathy, and initially said he "had never touched" Kathy. Later he said that he "may have touched [Kathy's] breast while the squirrel was running around the couch."

After the initial interview with Defendant, Detective Benson spoke with Ann and her mother, while Defendant remained on the porch with Detective Johnson. Thereafter, Detective Benson told Defendant "I believe you touched her" and "I need to know exactly how you touched her." Defendant responded by saying "[a]ll right, I touched her tits." Detective Benson asked Defendant to explain, and Defendant then told the officers that, as he and Kathy sat on the couch, Kathy "took his left hand and placed it between her tits." Defendant said that he removed his hand from Kathy's breasts, and denied any other inappropriate contact with Kathy.

Following the presentation of evidence, the jury found Defendant guilty of statutory sexual offense and indecent liberties. The jury also found the existence of the aggravating factor that Defendant "took advantage of a position of trust or confidence to commit the offense." Defendant then pled guilty to attaining habitual felon status, and entered an "Alford" plea[4] to committing four counts of indecent liberties against Ann, reserving the right to appeal the denial of his pretrial motion to suppress his statements to law enforcement officers. Defendant was sentenced to consecutive prison terms of 360 to 441 and 108 to 139 months imprisonment for statutory sex offense and

4. "The Alford plea permitted defendant to 'consent to the imposition of a prison sentence even if he was unwilling or unable to admit his participation in the acts constituting the crime.' " *State v. Meynardie*, 172 N.C. App. 127, 134, 616 S.E.2d 21, 26 (2005) (quoting *North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970)).

indecent liberties against Kathy, and a consolidated sentence of 21 to 26 months for the indecent liberties against Ann, to be served concurrently with the sentences for his offenses against Kathy. From these judgments and convictions, Defendant appeals.

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[1] Defendant first argues that the trial court erred by denying his motion to suppress his statements to law enforcement officers. Defendant moved to suppress his statements on the grounds that, at the time he admitted touching Kathy's breast, he was effectively in custody and was entitled to a warning of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Defendant acknowledges that he failed to renew his objection at trial, but contends that the admission of his statements constituted reversible plain error. We disagree.

"A reversal for plain error is only appropriate in the most exceptional cases." *State v. Raines*, 362 N.C. 1, 16, 653 S.E.2d 126, 136 (2007) (internal quotations and citation omitted). "Plain error is error 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Wilkerson*, 363 N.C. 382, 412, 683 S.E.2d 174, 193 (2009) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)). Accordingly, " '[t]o prevail, the defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.' " *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602 (2003) (quoting *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (2000)).

As discussed above, Defendant filed a pretrial motion to suppress his statements to law enforcement officers, but failed to renew his objection at trial. Moreover, on cross-examination, Defendant elicited extensive testimony about these same statements. In *State v. Quick*, 329 N.C. 1, 31, 405 S.E.2d 179, 197 (1991), the Supreme Court of North Carolina held:

> "[t]he general rule is that when evidence is admitted over objection and the same evidence is thereafter admitted without objection, the benefit of the objection is lost. . . . The absence of a motion to strike or a request for curative instructions, coupled with the fact that defendant elicited evidence of the same or similar import on cross-examination, waived the benefit of the objection."

(quoting *State v. Smith*, 290 N.C. 148, 163, 226 S.E.2d 10, 19 (1976)). Similarly, in *State v. Coley*, —— N.C. App. ——, ——, 668 S.E.2d 46, 52 (2008), *disc. review denied*, 363 N.C. 132, 673 S.E.2d 664 (2009), this Court held that " '[e]rroneous admission of evidence may be harmless . . . where defendant elicits similar testimony on cross-examination.' " (quoting *State v. Weldon*, 314 N.C. 401, 411, 333 S.E.2d 701, 707 (1985)). We conclude that, even had Defendant renewed his suppression motion, his own cross-examination would have rendered harmless any error in admission of his statements.

Defendant also bases his contention on an incorrect legal standard. Defendant asserts that the trial court's "failure to reconsider this issue" . . . constitutes plain error, in that a different verdict may have resulted, but for this error. A different verdict was possible[.]" (emphasis added). As discussed above, " 'defendant has the burden of showing that . . . a different result probably would have been reached but for the error or . . . that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.' " *Coley*, —— N.C. App. at ——, 668 S.E.2d at 52 (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)) (emphasis added). This Court has held:

> [p]rejudicial error [occurs] "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443 [(2007)]. A "reasonable possibility" of a different result at trial is a much lower standard than that a different result "probably" would have been reached at trial, which is what this Court must find for there to be plain error.

State v. Pate, 187 N.C. App. 442, 448-49, 653 S.E.2d 212, 217 (2007) (citing *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80 (1986)). Defendant does not argue that, had his statement been excluded, the jury probably would have reached a different verdict, and we discern no such probability. This assignment of error is overruled.

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[2] Defendant next argues that the trial court committed reversible error by admitting certain cross-examination testimony. On cross-examination, Defendant was asked about an incident alleged to have occurred between Defendant and his niece more than twenty years earlier. The prosecutor asked Defendant whether, when he was twenty-one-years-old and his niece was thirteen-years-old, Defendant

had inserted his finger in his niece's vagina. Defendant denied that this incident occurred and the matter was dropped. Defendant did not object to the introduction of this testimony at trial, but argues on appeal that its admission was reversible error. We disagree.

Defendant asserts that "N.C. Gen. Stat. § 15A-1446(d)(6) provides errors based upon the Constitution of the United States or the Constitution of North Carolina require no objection at trial and are reviewed *de novo* on appeal." Defendant misstates the statute, which actually provides that:

> (d) Errors based upon any of the following grounds . . . may be the subject of appellate review even though no objection, . . . has been made in the trial division. . . . (6) The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina. (emphasis added).

N.C. Gen. Stat. § 15A-1446(d)(6) (2007). Because Defendant does not allege that he was convicted under an unconstitutional statute, N.C. Gen. Stat. § 15A-1446(d)(6) is irrelevant to our review.

Defendant neither objected to the cross-examination testimony at issue, nor assigned it as plain error. On appeal, Defendant makes a conclusory allegation that admission of this testimony was plain error. However, he does not argue that admission of this evidence had a probable effect on the trial's outcome and our own review of the evidence reveals no likelihood that this brief cross-examination affected the jury's verdict.

> Defendant's empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule. By simply relying on the use of the words 'plain error' as the extent of his argument in support of plain error, defendant has effectively failed to argue plain error and has thereby waived appellate review.

State v. Cummings, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000). This assignment of error is overruled.

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[3] Next, Defendant argues that the trial court committed plain error by failing to intervene *ex mero motu* during certain parts of the State's closing argument. We disagree.

Defendant correctly cites the general rule that

> [d]uring a closing argument to the jury an attorney may not become abusive, inject his personal experiences, . . . or make arguments on the basis of matters outside the record[.] . . . An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2007). However:

> "We will not find error in a trial court's failure to intervene in closing arguments *ex mero motu* unless the remarks were so grossly improper they rendered the trial and conviction fundamentally unfair." "[O]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting ex mero motu an argument that defense counsel apparently did not believe was prejudicial when originally spoken."

State v. Garcell, 363 N.C. 10, 61, 678 S.E.2d 618, 650 (2009) (quoting *State v. Raines*, 362 N.C. 1, 14, 653 S.E.2d 126, 134 (2007); and *State v. Mann*, 355 N.C. 294, 307, 560 S.E.2d 776, 785 (2002)).

In the instant case, Defendant asserts that the trial court "allow[ed] the State to inject personal experiences and to make arguments outside of the record during its closing argument." We disagree.

Defense counsel made the first closing argument to the jury, and argued to the jury that:

> [t]here was no physical evidence that Kathy had been sexually abused and no witnesses to the alleged sexual abuse, effectively reducing the trial to conflicting testimony by "an alleged victim" and Defendant.
>
> Defendant was surprised when he was confronted with allegations that he had "touched" Kathy, and told law enforcement officers that he "never" touched Kathy because he knew he had done nothing inappropriate.
>
> Detective Benson's summary of his interview with Defendant may have included errors or typos.
>
> Defendant told the officers he might have touched Kathy's breast while moving the squirrel, to explain an inadvertent touching.

The State's evidence contained significant inconsistencies, including whether Kathy's note expressly stated that she had been molested, whether she told Deputy Ackley that Defendant made her touch his penis outside or inside his pants, whether Defendant held her hand during the entire car ride or just part of the time, and whether Ann asked Kathy not to tell anyone or for a "promise" not to tell. Ann's testimony contained "big differences" from her earlier statements, including whether she and Kathy made an explicit "promise" not to tell anyone, and whether it was physically possible for Defendant to hold Kathy's hand "the whole time" while operating a manual gear shift. These inconsistencies were "new things that walked in this courtroom" and were "things that I believe you'd have heard about."

It was significant that Kathy delayed a month before reporting the alleged sexual abuse. Kathy's testimony that she delayed because of a promise to Ann was contradicted by the absence of the word "promise" in her interviews with law enforcement officers and others.

Ann did not tell her mother the details of her alleged abuse by Defendant. The State's evidence about Ann's reluctance to come forward contained significant inconsistencies.

Defendant was "a simple guy, a laborer, doing the best he can" and never abused either girl. Discrepancies between Defendant's statements to law enforcement officers and his trial testimony were minor, and resulted from the officers' failure to ask him about specific issues during the interview. Discrepancies in Defendant's statements were minor, and the "really important thing in [Defendant's] story" was that he consistently denied digitally penetrating Kathy, kissing her, or putting his hand under her bra.

At the beginning of the prosecutor's closing argument he told the jury that he had planned a speech for them but that, after hearing Defendant's closing argument, he felt the need to "talk to you about his obstacles to the truth, the myths that are associated with child sexual abuse." He characterized certain issues raised at trial and in Defendant's closing argument as "myths" and attempted to persuade the jury not to accept them.

The prosecutor first told the jury that the belief that "this kind of stuff just doesn't happen" was inaccurate, and that during his experience as a prosecutor specializing in child sexual abuse cases he had

heard "child after child" who "had experienced the same thing that these children have experienced." Although Defendant did not object to this, the trial court warned the prosecutor *ex mero motu* to "confine your arguments to matters in the record in this case." The prosecutor then addressed the following issues, which he characterized as "myths" about child sexual abuse:

> That sexual abusers are recognizable and are "usually a stranger" to the abused child.
>
> That "children who are sexually abused will immediately disclose [the abuse]."
>
> That a victim of child sexual abuse "will yell and scream and fight."
>
> That there will be physical evidence if the vagina of a thirteen year old victim is digitally penetrated.
>
> That a child who is repeatedly abused will remember details of specific incidents and will use the same language every time she recounts an incident of abuse.

"The prosecutor may . . . respond to comments critical of the State's investigation and witnesses made by defense counsel in closing argument in order to restore the credibility of the State's witnesses[.]" *State v. Trull*, 349 N.C. 428, 453, 509 S.E.2d 178, 194 (1998) (citations omitted). For example, in *State v. Best*, 342 N.C. 502, 517, 467 S.E.2d 45, 55 (1996), the prosecutor in closing argument "used the term 'cock-and-bull mess' to refer to the contention made by defense counsel in closing argument that the investigators should have [conducted a certain forensic examination.]" The Supreme Court of North Carolina held that "the prosecutor was merely responding to the [Defendant's] contention[.]"

We conclude that each of these issues was pertinent to evidence introduced at trial, to defense counsel's closing argument, or to both. This assignment of error is overruled.

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[4] Finally, Defendant argues that the trial court erred by denying his motion to dismiss the aggravating factor submitted to the jury. We agree.

Under N.C. Gen. Stat. § 15A-1340.16(a) and (a1) (2007):

> (a) The court shall consider evidence of aggravating or mitigating factors present in the offense . . . but the decision to

> depart from the presumptive range is in the discretion of the court. The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists[.]
>
> (a1) The defendant may admit to the existence of an aggravating factor[.] . . . If the defendant does not so admit, only a jury may determine if an aggravating factor is present in an offense. . . .

In this case, the jury found beyond a reasonable doubt that Defendant "took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense." Under N.C. Gen. Stat. § 15A-1340.16(d)(15) (2007), this constitutes an aggravating factor.

> [D]efendant contends that . . . the record lacked sufficient evidence to support the trial court's finding as an aggravating factor that he took advantage of a position of trust or confidence. N.C.G.S. § 15A-1340.16(d)(15) [(2007)]. We are constrained to agree."

State v. Mann, 355 N.C. 294, 318, 560 S.E.2d 776, 791 (2002).

The evidence showed the following regarding Defendant's relationship to Kathy: Kathy testified that in April 2007 she and Ann were close friends and that, after her mother "got to know [Ann] and her parents" Kathy visited Ann's house "a lot." Defendant "seemed like a very nice guy" and when she visited Ann, Defendant would ask her for a hug. Kathy testified that she trusted Defendant because there "was no reason for me not to trust him." Kathy's mother testified that she and Ann's mother worked together and that, after she "felt comfortable" with Ms. Rallis and Defendant, she allowed Kathy to visit at Ann's house. Defendant "seemed like a nice guy" so Ms. Rallis trusted him. Defendant testified that Kathy visited overnight "about eight or ten times" and that he never had any problems with Kathy.

We conclude that this evidence is insufficient to establish that Defendant "took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense." The evidence was undisputed that Kathy required her mother's permission to spend the night with Ann, and had spent the night there no more than ten times. There was no evidence that Kathy's mother had arranged for Defendant to care for Kathy on a regular basis, or that Defendant had any role in Kathy's life other than being her friend's stepfather. There was no evidence suggesting that Kathy, who was thirteen-years-old and lived nearby, would have relied on Defendant for help

in an emergency, rather than simply going home. There was no evidence of a familial relationship between Kathy and Defendant, and no evidence that Kathy and Defendant had a close personal relationship or that Kathy depended or relied on Defendant for any physical or emotional care. The evidence showed only that Kathy "trusted" Defendant in the same way she might "trust" any adult parent of a friend.

The State cites *State v. McGriff*, 151 N.C. App. 631, 566 S.E.2d 776 (2002), and *State v. Bingham*, 165 N.C. App. 355, 598 S.E.2d 686 (2004), in support of its position that there was sufficient evidence to support a finding beyond a reasonable doubt of the existence of this aggravating factor. We find these cases easily distinguishable. In *McGriff*, there was evidence that:

> prior to the incidents leading to these convictions, . . . [the victim] visited [her friend's] house every day after school to babysit, often when there were no adults but defendant in the house. [The victim] had known defendant for approximately two months when he began calling her on the phone, touching her inappropriately, and writing letters to her.

McGriff, 151 N.C. App. at 640, 566 S.E.2d at 781-82. In *Bingham*, the victim and her mother had lived with the defendant for months before he began to abuse her. Moreover, both of these cases were decided before the decision of the United States Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). "[A]fter *Blakely*, trial judges may not enhance criminal sentences beyond the statutory maximum absent a jury finding of the alleged aggravating factors beyond a reasonable doubt." *State v. Blackwell*, 361 N.C. 41, 45, 638 S.E.2d 452, 455 (2006).

"The existence of this aggravating factor is premised on a relationship of trust between defendant and the victim which causes the victim to rely upon defendant." *State v. Farlow*, 336 N.C. 534, 542, 444 S.E.2d 913, 918 (1994). In *State v. Mann*, the Supreme Court of North Carolina discussed the evidence required to establish the existence of this aggravating factor:

> In *State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (1987), this Court considered the 'trust or confidence' factor.] . . . We held that "such a finding depended instead upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." Our courts have up-

> held a finding of the "trust or confidence" factor in very limited factual circumstances.

Mann, 355 N.C. at 318-19, 560 S.E.2d at 791 (citing *Daniel*, 319 N.C. 308, 311, 354 S.E.2d 216, 218 (1987)). We also note that in *Lyons v. Weisner*, 247 Fed. Appx. 440 (4th Cir. 2007), the Fourth Circuit Court of Appeals reviewed this Court's holding in *State v. Lyons*, 162 N.C. App. 722, 592 S.E.2d 294 (2004 N.C. App. LEXIS 1485) (unpublished):

> [T]he State asserts that a position of trust must exist when a minor is left in the care of the defendant overnight. But all of the cases on which the States relies involve very different facts. For, in each of them the minor victim had a familial or other close relationship with the abuser, or was very young and so extremely dependent on the defendant, or both. . . . In the case at hand . . . the victim was not an infant, not six, not nine, but fifteen-years old; moreover, he was neither related in any way to [defendant] nor did he have a particularly close relationship with [defendant].

Lyons v. Weisner, 247 Fed. Appx. at 445-46. The Court also noted that:

> [t]he North Carolina Court of Appeals in this case concluded that the facts were "sufficient" to support a finding of the aggravating factor; but that court operated under a pre-*Blakely* regime where the trial judge needed to find the facts supporting the aggravating factor only by a preponderance of the evidence. That holding does not affect our conclusion that we have grave doubt whether a jury could have found the facts supporting the aggravating factor beyond a reasonable doubt.

Id. at 446 n.3. Although we are not bound by the holding of *Lyons v. Weisner*, we find it persuasive. We conclude that the trial court erred by denying Defendant's motion to dismiss the aggravating factor.

For the reasons discussed above, we find no error in Defendant's convictions and remand for resentencing.

No error at trial; Remanded for resentencing.

Judges WYNN and CALABRIA concur.

RANDY B. FREEMAN, EMPLOYEE, PLAINTIFF v. J.L. ROTHROCK, EMPLOYER, AND NORTH AMERICAN SPECIALTY, CARRIER, AEQUICAP CLAIMS SERVICES, INC. (FORMERLY CLAIMS CONTROL, INC.) ADMINISTRATOR, DEFENDANTS-APPELLANTS

No. COA07-269-2

(Filed 2 February 2010)

1. Workers' Compensation— disability established

Defendant's argument that the Full Commission erred in concluding that plaintiff was entitled to ongoing total disability compensation was overruled. The Full Commission's challenged findings of fact were supported by competent evidence, and the findings supported the conclusion of law that plaintiff established his disability pursuant to the second and third tests set forth in *Russell v. Lowe's Prod. Distrib.*, 108 N.C. App. 762, and that defendant failed to rebut the presumption of disability.

2. Workers' Compensation— no credit for earlier payments received—clincher settlement agreements

The Full Industrial Commission did not err in concluding that defendant was not entitled to credit pursuant to N.C.G.S. § 97-33 for payments plaintiff received under "clincher" settlement agreements for workers' compensation claims with previous employers. The amounts paid pursuant to the clincher agreements were not accelerated payments of compensation for total disability and the record was void of any evidence that would support apportionment.

On remand to the Court of Appeals from an order of the Supreme Court of North Carolina reversing and remanding the decision in *Freeman v. J.L. Rothrock, Inc.*, 189 N.C. App. 31, 657 S.E.2d 389 (2008), for consideration of the remaining assignments of error. Appeal by defendants from Opinion and Award of the Full Commission of the North Carolina Industrial Commission entered 9 November 2006. Originally heard in the Court of Appeals 18 September 2007.

Jay Gervasi, P.A., by Jay A. Gervasi, Jr., for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Joy H. Brewer, for defendants-appellants.

JACKSON, Judge.

This case is heard upon remand from our Supreme Court, *see Estate of Freeman v. J.L. Rothrock, Inc.*, 363 N.C. 249, 676 S.E.2d 46 (2009), reversing the prior opinion of this Court for the reasons set forth in the dissenting opinion. *See Freeman v. J.L. Rothrock, Inc.*, 189 N.C. App. 31, 48-49, 657 S.E.2d 389, 399-400 (2008) (Wynn, J., dissenting) (rejecting the adoption of the Larson test as a bar to recovery of worker's compensation benefits when an employee made misrepresentations at the time of hiring about his physical condition) (citations omitted) ("*Freeman I*"). Pursuant to our Supreme Court's opinion, we address the remaining assignments of error not discussed in *Freeman I*. *Estate of Freeman*, 363 N.C. at 249, 676 S.E.2d at 46. For the reasons set forth below, we affirm.

A more complete presentation of the facts appears in *Freeman I*. *See Freeman I*, 189 N.C. App. at 33-35, 657 S.E.2d at 390-92. Following, however, is a brief recitation of the material history.

In June 2000, Randy B. Freeman ("plaintiff") obtained employment as a truck driver with J.L. Rothrock, Inc. ("defendant"). On 11 March 2002, plaintiff alleged an injury to his neck, right shoulder, and back that occurred as a result of cranking a dolly on a trailer. On 12 March 2002, plaintiff began receiving ongoing total disability payments of $431.32 per week. On 23 December 2002, defendant filed an application to terminate payment of worker's compensation benefits to plaintiff, which was denied on 3 February 2003.

On 5 March 2003, defendant filed a motion to reconsider the denial, alleging that discovery had produced evidence of plaintiff's misrepresentations made during the initial hiring process that would require the termination of defendant's compensation to plaintiff. On 22 April 2003, Special Deputy Commissioner Chrystina S. Franklin entered an order noting an inability to reach a decision upon defendant's motion and referring the matter for a formal hearing.

On 25 July 2003, the matter came on for hearing before Deputy Commissioner Bradley W. Houser ("Deputy Commissioner Houser"). By opinion and award entered 17 June 2005, Deputy Commissioner Houser concluded in relevant part that (1) North Carolina law did not provide a defense to worker's compensation claims on the basis of an employee's providing false information in obtaining employment; (2) plaintiff produced sufficient evidence to establish ongoing disability and that he is unable to obtain gainful employment without vocational rehabilitation; and (3) clincher settlement agreements are not

equivalent to accelerated payments of compensation for total disability, and therefore, defendant is not entitled to a credit for the compensation already paid to plaintiff. Upon these conclusions, Deputy Commissioner Houser awarded plaintiff ongoing total disability compensation at the rate of $431.32 per week and ordered defendant to provide for all medical and vocational rehabilitation expenses incurred as a result of plaintiff's compensable accident on 11 March 2002. On 9 November 2006, the Full Commission affirmed Deputy Commissioner Houser's opinion and award over Chairman Buck Lattimore's dissent.

Upon remand from our Supreme Court from our prior reversal of the Full Commission's opinion and award, we address defendant's remaining assignments of error. *Estate of Freeman*, 363 N.C. at 249, 676 S.E.2d at 46.

Initially, we address defendant's argument that the Full Commission erred in denying the release of plaintiff's prior files with the Industrial Commission. Defendant argues that these records were necessary to determine the full extent of the misrepresentations plaintiff made in obtaining employment with defendant. In view of our Supreme Court's rejection of the Larson test for the reasons set forth in the dissenting opinion of *Freeman I*, we hold that this assignment of error is moot, and we need not address it. *See id.*; *Freeman I*, 189 N.C. App. at 48-49, 657 S.E.2d at 399-400.

[1] Next, defendant argues that the Full Commission erred in concluding that plaintiff is entitled to ongoing total disability compensation. We disagree.

Pursuant to our well-settled standard of review of opinions and awards of the Full Commission, we inquire "(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) (citation omitted). The "Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony[;]" however, "findings of fact by the Commission 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) (internal citations and quotation marks omitted). The Full Commission may refuse to believe certain evidence and may accept or reject the testimony of any witness. *Pitman v. Feldspar Corp.*, 87 N.C. App. 208, 216, 360 S.E.2d 696, 700 (1987) (citing *Harrell v.*

Stevens & Co., 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. rev. denied*, 300 N.C. 196, 269 S.E.2d 623 (1980)), *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). Furthermore, "[t]he Commission's findings of fact are conclusive on appeal if supported by competent evidence. This is so even if there is evidence which would support a finding to the contrary." *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 121, 334 S.E.2d 392, 394 (1985) (citing *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981)). We review the Commission's conclusions of law *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

Pursuant to the North Carolina Workers' Compensation Act, "the term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2005). "The employee seeking compensation under the Act bears 'the burden of proving the existence of [her] disability and its extent.' " *Clark*, 360 N.C. at 43, 619 S.E.2d at 493 (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986)).

The employee bears the burden "to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Russell v. Lowe's Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citing *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.

Id. (internal citations omitted).

Once an employee establishes disability, the burden shifts to the employer "to show not only that suitable jobs are available, but also

that the [employee] is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990). An employer may rebut the presumption of disability by providing evidence that

> (1) suitable jobs are available for the employee; (2) that the employee is capable of getting said job taking into account the employee's physical and vocational limitations; (3) and that the job would enable employee to earn some wages.

Franklin v. Broyhill Furniture Indus., 123 N.C. App. 200, 209, 472 S.E.2d 382, 388 (Walker, J., concurring), *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996), *overruled on other grounds*, *Saums v. Raleigh Comm. Hosp.*, 346 N.C. 760, 487 S.E.2d 746 (1997).

In the case *sub judice*, defendant challenges the following findings of fact made by the Full Commission:

> 14. The Full Commission finds that, as of the time of the hearing before the Deputy Commissioner, plaintiff was in need of retraining in employment that he has not done before, because he is unable to do anything he has previously done for a living and will be unable to work without first getting that training. Accordingly, and based upon the totality of the credible medical and lay evidence of record, the Full Commission finds that plaintiff is currently unable to return to work and will require training and vocational assistance before he will be able to perform other work. It follows that a job search now would be futile.
>
> 15. Despite the likely futility of a job search, plaintiff has been searching for jobs within the areas in which he has experience, to wit, truck driving. Plaintiff's search so far has been unsuccessful.
>
> 16. Defendants assert that plaintiff's job search has been unreasonable. However, while plaintiff suspected that he might be unable to perform the trucking jobs he was seeking, he was not certain, and he was willing to try. In fact, such an attitude following plaintiff's prior back problems led to nearly two years of successful employment with defendant-employer, until plaintiff's unrelated March 2002 injury. Furthermore, the reason that plaintiff focused his job search on trucking jobs was that those were the only ones in which he had any experience or qualifications. Plaintiff has sought employment in fields in which he does have the skills and has been unable to obtain a job because of his com-

pensable injury. Rather than rendering plaintiff's job search "unreasonable," plaintiff's actions instead demonstrate his ongoing disability.

17. Based upon the totality of the credible medical and lay evidence of record, defendants have failed to produce sufficient evidence upon which to find that plaintiff's ongoing benefits should be suspended or terminated.

Based upon these findings, the Full Commission concluded in relevant part that

[p]laintiff has satisfied prongs (2) and (3) of the test set forth in *Russell* by demonstrating that (a) he has been unsuccessful in his efforts to obtain employment in the areas in which he has work skills and experience, to wit, truck driving; and (b) a job search for work outside the area of truck driving would be futile without vocational re-training, because of plaintiff's lack of relevant training and work experience. Accordingly, Plaintiff has produced sufficient evidence upon which to conclude that his disability continues and that he is currently unable to secure gainful employment absent the previously recommended vocational re-training. . . .

(Italics added).

Plaintiff was born on 9 October 1953, which made him forty-nine years old at the time of the hearing before the Full Commission. At the hearing, plaintiff testified that since the time of his injury he had been looking for trucking jobs because "that's what I know." Notwithstanding, plaintiff explained that he had been unable to find employment. Plaintiff further testified that he was unable to perform those jobs at that time due to his limited ability to sit. Defendant offered plaintiff a position in which he was to be paid $6.66 per hour to drive for approximately four hours per day and to perform "general office duties" the remainder of the time. However, plaintiff submitted an affidavit in response to defendant's application to terminate compensation in which plaintiff stated that (1) he had been paid more than $12.00 per hour as well as overtime compensation; (2) he was unaware of any truck driver anywhere who drove that little; (3) he has "no experience or skills in office work[;]" and (4) he does not know how to use a computer, do any filing, or use an office telephone system. Furthermore, Richard Ramos, M.D. ("Dr. Ramos"), who treated plaintiff for symptoms related to his injury beginning in

August 2002, testified that plaintiff was unable to perform his job with defendant based upon his evaluations of plaintiff and plaintiff's 1996 functional capacity evaluation.

In view of the foregoing, and because the Full Commission is "the sole judge of credibility," *Young*, 353 N.C. at 230, 538 S.E.2d at 914, we hold that the Full Commission's challenged findings of fact are supported by competent evidence. Furthermore, we hold that the challenged findings of fact support the challenged conclusion of law. *See Clark*, 360 N.C. at 43, 619 S.E.2d at 492. Accordingly, we affirm the Full Commission's conclusion that plaintiff established his disability pursuant to the second and third tests set forth in *Russell* and that defendant failed to rebut the presumption of disability. *See Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457; *Franklin*, 123 N.C. App. at 209, 472 S.E.2d at 388.

[2] Next, defendant argues that the Full Commission erred in concluding that defendant is not entitled to a credit pursuant to North Carolina General Statutes, section 97-33 for payments plaintiff received pursuant to "clincher" settlement agreements for worker's compensation claims with previous employers. We disagree.

" 'A "clincher" or compromise agreement is a form of voluntary settlement' recognized by the Commission and used to finally resolve contested or disputed workers' compensation cases." *Chaisson v. Simpson*, 195 N.C. App. 463, 474, 673 S.E.2d 149, 158 (2009) (quoting *Ledford v. Asheville Hous. Auth.*, 125 N.C. App. 597, 599, 482 S.E.2d 544, 546, *disc. rev. denied*, 346 N.C. 280, 487 S.E.2d 550 (1997)).

Section 97-33 states that

> [i]f any employee is an epileptic, or has a permanent disability or has sustained a permanent injury in service in the army or navy of the United States, or in another employment other than that in which he received a subsequent permanent injury by accident, such as specified in G.S. 97-31, he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed.

N.C. Gen. Stat. § 97-33 (2005).

In the case *sub judice*, the Full Commission found as fact that

> [c]lincher settlement agreements call for payment of undifferentiated lump sums of money for purposes of resolving all issues in

> claims. The amounts paid cannot realistically be considered the equivalent of accelerated payments of compensation for total disability. Accordingly, defendants' argument that they are entitled to credit against the compensation for which they are liable, based on payments that were made to plaintiff in prior settlements of prior claims, is rejected.

Based upon this finding of fact, the Full Commission concluded that

> [b]ecause clincher settlement agreements call for payment of undifferentiated lump sums of money for purposes of resolving all issues in claims, and because the amounts paid cannot realistically be considered the equivalent of accelerated payments of compensation for total disability, defendants' contention that they are entitled to credit against the compensation for which they are liable, based on payments that were made to plaintiff in prior settlements of prior claims, is rejected. N.C. Gen. Stat. § 97-33.

Plaintiff testified that he sustained an injury to his back in 1992 when he lifted heavy rolls of black plastic during his employment with Four Seasons. He received workers' compensation for that injury for approximately two years, and subsequently executed a settlement agreement[1] to resolve the claim. The total claim settled for $52,000.00 of which plaintiff received $39,000.00.

Plaintiff further testified that he sustained another injury to his back in 1996 while employed as a truck driver for B.B. Walker. Plaintiff received workers' compensation benefits for approximately one and one half years following the injury until he executed a clincher settlement agreement with B.B. Walker on 13 May 1999. In relevant part, the 1999 clincher agreement states that

> [i]t is stipulated by the parties that the sum paid is substantially less than would be due in the event that the Employee were to recover full benefits for permanent and total disability and represents a compromise resulting from controversy with respect to material issues. Said sum is subject to an attorney's fee of $20,000.00, as approved by the Industrial Commission. The remaining $70,000.00 is attributed as being pro-rated over the

1. The settlement agreement relating to plaintiff's 1992 back injury is not included in the record on appeal.

period of 33.8 years[2] following the last payment of compensation prior to this agreement, for an attributed rate of approximately $39.83 per week.

Although the attributed compensation rate ($39.83), plaintiff's life expectancy (33.8 years), and amount to be paid to plaintiff ($70,000.00) all appear in the agreement, the agreement does not disclose how the parties arrived at the compensation rate beyond an expression of the parties' mutual assent that the agreement "represents a compromise resulting from controversy with respect to material issues." Furthermore, the 1999 clincher agreement expressly states that the compensation amount agreed upon was substantially less than would be due for permanent and total disability benefits. Even less information is available in the record on appeal with respect to the clincher agreement executed regarding plaintiff's 1992 injury.

Additionally, although defendant assigned error to the Full Commission's finding of fact number 18, defendant failed to preserve the assignment of error for appellate review, and the finding is presumed to be supported by competent evidence. *See* N.C. R. App. P. 28(b)(6) (2005); *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). In finding of fact number 18, the Full Commission found that:

> The Full Commission specifically rejects defendants' contention that, because Dr. Ramos released plaintiff to work in October 2002 with physical restrictions based on plaintiff's 1996 FCE[3], it follows that plaintiff was no more disabled in October 2002 than he had been when he began working for defendant-employer in 2000. Defendants' contention is belied by the fact that, *at the time plaintiff was employed by defendant-employer in 2000, plaintiff was clearly able to exceed the physical restrictions set forth in the 1996 FCE, since plaintiff performed without difficulty job requirements exceeding those restrictions for nearly two years, until suffering the unrelated March 2002 injury.* As Dr. Ramos testified, and as the Full Commission has found as fact, plaintiff is no longer able to perform his erstwhile job duties following his March 2002 injury. It follows that, despite Dr. Ramos's adoption of the restrictions set forth in the 1996 FCE, plaintiff's

2. This number represents plaintiff's life expectancy at the time of the 1999 agreement.

3. Functional Capacity Evaluation.

> ability to work has plainly been impacted negatively by his March 2002 injury.

(Emphasis added).

Accordingly, we agree with the Full Commission's finding that

> [c]lincher settlement agreements call for payment of undifferentiated lump sums of money for purposes of resolving all issues in claims. The amounts paid [in plaintiff's prior clincher agreements] cannot realistically be considered the equivalent of accelerated payments of compensation for total disability. Accordingly, defendants' argument that they are entitled to credit against the compensation for which they are liable, based on payments that were made to plaintiff in prior settlements of claims, is rejected.

We hold that the Full Commission's finding of fact number 19 supports its conclusion of law number 3. Furthermore, because of the undifferentiated nature of plaintiff's clincher settlement payments in prior claims as well as the Full Commission's unchallenged finding of fact that plaintiff's March 2002 injury resulted in total disability causally unrelated to plaintiff's previous back injuries, we conclude that section 97-33 is inapplicable in these circumstances. Moreover, other than the fact that plaintiff settled prior claims for injuries and disability unrelated to the present claim, the record is void of any evidence that would support an apportionment pursuant to section 97-33 of "degree[s] of disability" between plaintiff's earlier injuries and the March 2002 injury.

Accordingly, we affirm the Full Commission's opinion and award.

Affirmed.

Judges WYNN and HUNTER, Robert C. concur.

BROWN BROTHERS HARRIMAN TRUST CO., N.A., AS TRUSTEE OF THE BENSON TRUST, PLAINTIFF v. ANNE P. BENSON, AS GRANTOR OF THE BENSON TRUST; JOHN H. BENSON, AS BENEFICIARY UNDER THE BENSON TRUST; ANNE H. BENSON, AS BENEFICIARY UNDER THE BENSON TRUST; LINLEY C. BENSON, AS BENEFICIARY UNDER THE BENSON TRUST; RUTH PRINGLE PIPKIN FRANKLIN, AS CONTINGENT BENEFICIARY UNDER THE BENSON TRUST; AND THE UNBORN AND UNASCERTAINED ISSUE AND HEIRS OF ANNE P. BENSON, AS CONTINGENT BENEFICIARIES UNDER THE BENSON TRUST, DEFENDANTS

No. COA09-474

(Filed 2 February 2010)

Trusts— perpetual trust—rule against perpetuities inapplicable—constitutionality

A trust which complied with the requirements of N.C.G.S. § 41-23 by granting the trustee the power to transfer title to trust property was valid and did not violate art. I, § 34 of the North Carolina Constitution. The statute is consistent with the constitutional prohibition of perpetuities because it prohibits suspension of the power of alienation for longer than the provided period. The North Carolina Constitution does not require application of the rule against perpetuities.

Appeal by Defendant John H. Benson, individually and as legal representative of Anne H. Benson and Linley C. Benson, from order entered 26 February 2009 by Special Superior Court Judge Albert Diaz in Superior Court, Mecklenburg County. Heard in the Court of Appeals 15 October 2009.

Culp Elliott & Carpenter, P.L.L.C., by William R. Culp, Jr., for Defendant-Appellant John H. Benson.

Smith Moore Leatherwood LLP, by Lynn F. Chandler and Tanya N. Oesterreich, for Defendant-Appellee Anne P. Benson.

Essex Richards P.A., by Edward G. Connette, for Defendant-Appellee Ruth Pringle Pipkin Franklin.

Blanco Tackabery & Matamoros, P.A., by James E. Creamer, Jr., for Defendants-Appellees the Unborn and Unascertained Issue and Heirs of Anne P. Benson.

Johnston, Allison & Hord, P.A., by Paul A. Kohut, Martin L. White, and Carrington M. Angel, for Plaintiff-Appellee Brown Brothers Harriman Trust Co., N.A.

Ward and Smith, P.A., by E. Knox Proctor V and Cheryl A. Marteney, for North Carolina Bankers Association, amicus curiae.

STEPHENS, Judge.

The sole issue before the Court in this case is whether the North Carolina Constitution requires application of the common law rule against perpetuities' restriction of the remote vesting of future interests in property. We conclude that it does not.

I. Factual Background and Procedural History

On 27 November 2007, Defendant Anne P. Benson executed a trust ("Benson Trust") naming Brown Brothers Harriman Trust Company, N.A. ("Brown Brothers") as Trustee, naming her children, John H. Benson, Anne H. Benson, and Linley C. Benson, as primary beneficiaries, and naming her unborn and unascertained heirs and her sister, Ruth Pringle Pipkin Franklin, as contingent beneficiaries. Defendant Anne P. Benson instructed Brown Brothers to administer the Benson Trust as a valid trust under N.C. Gen. Stat. § 41-23.[1] In accordance with the provisions of N.C. Gen. Stat. § 41-23, the Benson Trust is intended to be perpetual, that is, not subject to the rule against perpetuities,[2] but grants Brown Brothers, as Trustee, the power to dispose of any trust property.

Alleging that the Benson Trust violates the common law rule against perpetuities, the primary beneficiaries instructed Brown Brothers to terminate the Benson Trust and distribute its assets. To resolve the conflicting demands of Defendant Anne P. Benson and the primary beneficiaries, Brown Brothers filed an action for declaratory relief seeking to determine its ability to administer the Benson Trust as valid under N.C. Gen. Stat. § 41-23.

On 27 October 2008, Brown Brothers filed a motion for summary judgment seeking a declaration of the constitutionality of

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1. N.C. Gen. Stat. § 41-23 was enacted in 2007 to repeal the common law and statutory rules against perpetuities as applied to trusts and alternatively require preservation of the power of alienation. Act of Aug. 19, 2007, ch. 41, 2007-391 N.C. Sess. Laws 1148.

2. "Under this rule [against perpetuities], no devise or grant of a future interest in property is valid unless title thereto must vest, if at all, not less than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest." *McQueen v. Branch Banking & Trust Co.*, 234 N.C. 737, 741, 68 S.E.2d 831, 835 (1952).

N.C. Gen. Stat. § 41-23. Defendant Anne P. Benson, Defendant Franklin, and Defendants Unborn Issue and Heirs joined in the relief sought by Brown Brothers. On 1 December 2008, Defendant John H. Benson, individually and as legal representative of Anne H. Benson and Linley C. Benson,[3] filed a cross-motion for summary judgment, arguing that N.C. Gen. Stat. § 41-23 violates the North Carolina Constitution.

On 26 February 2009, the Honorable Albert Diaz, Special Superior Court Judge for Complex Business Cases, entered an order upholding N.C. Gen. Stat. § 41-23 as constitutional, finding that the prohibition of "perpetuities" contained in the North Carolina Constitution applies only to unreasonable restraints on alienation and not to the vesting of remote interests. The trial court thus granted Brown Brothers' motion for summary judgment and denied Defendants' cross-motion for summary judgment. Defendant John H. Benson, individually and in his representative capacity, filed notice of appeal from the trial court's order on 5 March 2009.

II. Discussion

Summary judgment is proper when a party is entitled to judgment as a matter of law. *Integon Indem. Corp. v. Universal Underwriters Ins. Co.*, 131 N.C. App. 267, 270, 507 S.E.2d 66, 68 (1998). Defendant John H. Benson concedes that the facts of the present case are undisputed and that the case presents only questions of law, rendering summary judgment an appropriate remedy. On appeal, this Court reviews a trial court's order granting summary judgment in a declaratory judgment action under the same standard as for other actions, *id.*, which is *de novo*. *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007).

Defendant John H. Benson argues that the trial court erred in upholding the constitutionality of N.C. Gen. Stat. § 41-23 because section 41-23 supersedes the common law rule against perpetuities, which Defendant John H. Benson contends is a rule mandated by the North Carolina Constitution. Specifically, Defendant John H. Benson contends that section 41-23 violates section 34 of the Declaration of Rights, which provides, "[p]erpetuities and monopolies are contrary to the genius of a free state and shall not be allowed." N.C. Const. art. I, § 34. We disagree.

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3. John H. Benson serves as legal representative of his minor sisters, Anne H. Benson and Linley C. Benson. John H. Benson's legal representation of his sisters is uncontested.

A reviewing court "gives acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute." *In re Spivey*, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997). The basic principle of constitutional construction is to give effect to the intent of the framers. *State v. Webb*, 358 N.C. 92, 94, 591 S.E.2d 505, 509 (2004). Thus,

> "[c]onstitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption. To ascertain the intent of those by whom the language was used, we must consider the conditions as they then existed and the purpose sought to be accomplished."

Id. (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953)).

A. Intent of the Framers

In 1820, the North Carolina Supreme Court described the meaning of the word "perpetuity" as follows:

> The meaning which the law annexes to this term is that of an estate tail so settled that it cannot be undone or made void. As when if all the parties who have interest join they cannot bar or pass the estate, but if, by the concurrence of all having the estate tail, it may be barred, it is not a perpetuity. It is in reference to estates tail that the word is used in the bill of rights[.] . . . [A] perpetuity which the law would deem void must be an estate so settled for private uses that by the very terms of its creations there is no *potestas alienandi* in the owner.

Griffin v. Graham, 8 N.C. (1 Hawks) 96, 130-32 (1820). Two years later, our Supreme Court held that the term "perpetuity" as used in the "clause of the Declaration of Rights which condemns monopolies and perpetuities . . . imports property locked up from the uses of the public, and which no person has power to alienate." *Yadkin Navigation Co. v. Benton*, 9 N.C. (2 Hawks) 10, 13 (1822). Thus, in the historical context of the passage of the North Carolina Constitution, "[a] perpetuity is the attempt to forbid the alienation of lands under any circumstances, and to provide for their descent or disposition in a fixed, unchangeable way." *United States v. Boyd*, 68 F. 577, 580 (C.C.W.D.N.C. 1895).

Defendant John H. Benson acknowledges that section 34 of the Declaration of Rights was adopted to prohibit unreasonable re-

straints on alienation of property, specifically in the context of estate entails[4] that kept property within one family for generations. Indeed, the 1776 North Carolina Constitution also required "[t]hat the future Legislature of this State shall regulate Entails, in such a Manner as to prevent Perpetuities." N.C. Const. of 1776 § 43 (as reprinted in Iredell's revisal 1791). The Legislature abolished estates in tail in 1784 through passage of N.C. Gen. Stat. § 41-1, which converted fee tail estates into fee simple estates.[5] N.C. Gen. Stat. § 41-1 (2007).

B. Incorporation of the Common Law Rule Against Perpetuities

Despite abolition of the estate tail, the ability to keep property continually out of the marketplace remained through creation of future interests that perpetually shift among devisees. *See McQueen*, 234 N.C. at 741, 68 S.E.2d at 834. The common law rule against perpetuities developed to prevent shifting future interests from effecting an unreasonable restraint on alienation. *Id.* The rule attempts to prevent the creation of a fixed succession of future interests that will cause ownership of property to shift perpetually among devisees who have no power to alienate the property. To achieve this purpose, the common law rule invalidates any future interests that are not certain to vest or terminate within 21 years and a gestational period after a life or lives in being at the time of the devise.[6] *Id.* at 741, 68 S.E.2d at 835. The common law rule thus determines when a restraint on alien-

4. "Estate entails" refers to estates in property that operate to limit inheritance of the property to particular descendants of the owner, specifically by preventing alienation of the property so that it must descend according to the original devise. *See Strickland v. Jackson*, 259 N.C. 81, 85, 130 S.E.2d 22, 25 (1963) ("An estate tail is defined . . . as an estate of inheritance which is to pass by lineal descent.") (internal citation and quotation marks omitted).

5. Unlike fee tail estates, which provide for inheritance of property in a fixed manner by preventing alienation, fee simple estates always belong to the current owner (and pass to the current owner's heirs) and are freely alienable absent specific restrictions. *See Seawell v. Hall*, 185 N.C. 80, 84, 116 S.E. 189, 191 (1923) ("An estate given to a man and the heirs of his body was called a fee simple on condition that the grantee had issue, and . . . a fee conditional limited to the heirs of one's body was denominated a fee tail.").

6. A period for gestation is added to the time period in which a future interest must vest only if "gestation is in fact then taking place." *Farnan v. First Union Nat'l Bank*, 263 N.C. 106, 110, 139 S.E.2d 14, 17-18 (1964). This allows for the beginning of another life in being at the time of the devise within which the interest may vest even though birth occurs shortly after the devise. *See Stellings v. Autry*, 257 N.C. 303, 323, 126 S.E.2d 140, 156 (1962) (noting that the time period in which a future interest must vest includes "the period of gestation when the inclusion [thereof] is necessary to cover cases of posthumous birth," or, in the case of an executory devise, birth after "the effective date of the instrument creating the future interest") (internal citation and quotation marks omitted).

ation becomes unreasonable by providing an arbitrary stopping point for the creation of restrictive future interests. *Id.*

Defendant John H. Benson argues that North Carolina courts have recognized the common law rule against perpetuities, and specifically, its restriction of the remote vesting of future interests, as constitutionally required to preserve the alienability of property. In *Mercer v. Mercer*, 230 N.C. 101, 52 S.E.2d 229 (1949), our Supreme Court stated that the rule against perpetuities "is not one of construction but a positive mandate of law to be obeyed irrespective of the question of intention." *Id.* at 103, 52 S.E.2d at 230 (citing N.C. Const. art. I, § 3[4]).[7] This Court has also noted that "[t]he common-law rule against perpetuities has been long recognized and enforced in this jurisdiction, and its application has the continuing sanction of Article I, Section 34 of our State Constitution." *N.C. Nat'l Bank v. Norris*, 21 N.C. App. 178, 180, 203 S.E.2d 657, 658 (1974).

We interpret the foregoing cases not as recognizing a constitutional mandate for the application of the rule against perpetuities, but rather as recognizing the common law rule as a tool utilized to implement the constitutional prohibition of perpetuities by preventing restrictions on alienation from lasting for an unreasonably long period. Citation of the North Carolina Constitution in *Mercer* is consistent with this interpretation; indeed, the Court went on to state that the rule's "primary purpose is to restrict the permissible creation of future interests and prevent undue restraint upon or suspension of the right of alienation." *Mercer*, 230 N.C. at 103, 52 S.E.2d at 230. The *Mercer* Court's characterization of the rule as "not one of construction but a positive mandate of law to be obeyed irrespective of the question of intention," *id.*, merely recognizes its bright-line application. Further, this Court's recognition in *Norris* of the constitutional sanction of the rule against perpetuities is consistent with an interpretation of the rule as one acceptable method for implementing the constitutional prohibition of perpetuities, without suggesting that the rule itself is mandated by the State Constitution.

The General Assembly's modification of the common law rule against perpetuities through passage of the Uniform Statutory Rule Against Perpetuities ("USRAP") in 1995 supports our interpretation of the rule as one acceptable method for regulating unreasonable restraints on alienability rather than as a constitutionally required

7. The Supreme Court erroneously cited section 31 of the Declaration of Rights, which addresses the quartering of soldiers. The relevant constitutional provision addressing perpetuities is section 34.

rule. The USRAP established a "wait-and-see" approach to future interests under which an interest is valid if it "either vests or terminates within 90 years after its creation." N.C. Gen. Stat. § 41-15 (2007). Thus, instead of finding a future interest invalid at the time of its creation if it is not certain to vest or terminate within the prescribed period, as was required under the common law rule, a future interest is invalid under the USRAP only if it has not vested or terminated within 90 years of its creation.

As recently as 2002, our Supreme Court has recognized the authority of the General Assembly to modify the common law rule, noting that "the General Assembly has seen fit to exclude certain kinds of transactions from the statutory rule's application," which "is contrary to the common law, but reflects a decision by the General Assembly that the rule 'is a wholly inappropriate instrument of social policy to use as a control over such arrangements.' " *Rich, Rich & Nance v. Carolina Constr. Corp.*, 355 N.C. 190, 194, 558 S.E.2d 77, 79-80 (2002) (quoting N.C. Gen. Stat. § 41-18 cmt. A (2007)). We agree with the General Assembly that the common law rule against perpetuities is more appropriately characterized as an "instrument of social policy," N.C. Gen. Stat. § 41-18 cmt. A (2007), rather than as a rule whose application is required by the North Carolina Constitution.

C. Plain Meaning

Defendant John H. Benson also contends that incorporation of the common law rule's restriction of the vesting of remote future interests into the constitutional meaning of "perpetuity" is supported by the plain meaning of "perpetuity," which now refers to the vesting of remote interests rather than the inalienability of property. Black's Law Dictionary provides an historical definition of "perpetuity" as "[a]n inalienable interest" and a current definition as "[a]n interest that does not take effect or vest within the period prescribed by law." Black's Law Dictionary 1256 (9th ed. 2009).

While a reviewing court may consider the plain meaning of language in interpreting the State Constitution, *Webb*, 358 N.C. at 97, 591 S.E.2d at 511, a plain meaning analysis is not controlling in the present case. First, the presence of multiple definitions for the word "perpetuity" suggests that the word's meaning is not plain. Second, because the controlling standard for constitutional interpretation is intent of the framers, *id.* at 94, 591 S.E.2d at 509, the historical definition of the term is the most relevant. In this case, the historical definition of "perpetuity" is consistent with our historical analysis of the meaning of the term as it is used in the State Constitution. *See id.* at

97, 591 S.E.2d at 510 ("The results yielded by our historical review is [sic] consistent with a plain meaning analysis."). Thus, we hold that the North Carolina Constitution's prohibition of perpetuities prohibits unreasonable restraints on alienation without requiring a rule specifying a time period within which a future interest must vest.

D. Constitutionality of N.C. Gen. Stat. § 41-23

The General Assembly again modified both the common law rule and the USRAP as each applies to trusts by adopting N.C. Gen. Stat. § 41-23, which expressly supersedes both the common law rule against perpetuities and the USRAP. N.C. Gen. Stat. § 41-23(h) (2007). N.C. Gen. Stat. § 41-23 contains no requirement regarding the time period in which a remote future interest must vest, but maintains the marketability of property by providing:

> (a) A trust is void if it suspends the power of alienation of trust property, as that term is defined in G.S. 36C-1-103, for longer than the permissible period. The permissible period is no later than 21 years after the death of an individual then alive or lives then in being plus a period of 21 years.
>
> . . . .
>
> (d) The power of alienation is suspended only when there are no persons in being who, alone or in combination with others, can convey an absolute fee in possession of land, or full ownership of personal property.
>
> (e) Notwithstanding subsection (a) of this section, there is no suspension of the power of alienability by a trust or by equitable interests under a trust if the trustee has the power to sell, either expressed or implied, or if there exists an unlimited power to terminate the trust in one or more persons in being.

N.C. Gen. Stat. § 41-23 (2007). N.C. Gen. Stat. § 41-23 adopts the distinct approach of requiring existence of the power of alienation rather than requiring that remote future interests vest or terminate within a certain time period. Thus, under section 41-23, a trust may remain valid in perpetuity as long as the appropriate rights of sale or termination are held.

Because we hold that section 34 of the Declaration of Rights does not require application of the common law rule against perpetuities, N.C. Gen. Stat. § 41-23 does not violate the North Carolina Constitution as a result of its repeal of the common law rule. Section 41-23 is

also consistent with the constitutional prohibition of perpetuities because it provides a mechanism for preventing unreasonable restraints on alienation. Rather than addressing alienability of property indirectly by regulating the vesting of remote interests, as does the common law rule, section 41-23 directly preserves alienability of property by prohibiting suspension of the power of alienation for longer than the period provided. N.C. Gen. Stat. § 41-23(a) (2007). Thus, we hold that N.C. Gen. Stat. § 41-23 is a constitutional, valid exercise of the General Assembly's authority.

III. Conclusion

Because the Benson Trust complies with the statutory requirements of N.C. Gen. Stat. § 41-23 by granting Brown Brothers, as Trustee, the power to transfer title to trust property, the Benson Trust is valid and does not violate the North Carolina Constitution. The trial court's order is

AFFIRMED.

Judges STROUD and BEASLEY concur.

STATE OF NORTH CAROLINA v. JEFFREY RAY JENKINS

No. COA09-546

(Filed 2 February 2010)

Criminal Law— jury instructions—self-defense

In a prosecution resulting in defendant's conviction for voluntary manslaughter, the trial court committed reversible error by instructing the jury that defendant could not avail himself of the benefit of self-defense if he was the aggressor. Because there was no evidence presented at trial that defendant was the aggressor, the trial court should not have instructed on that element of self-defense.

Appeal by Defendant from judgment and sentence entered 26 September 2008 by Judge Timothy L. Patti in Superior Court, Mecklenburg County. Heard in the Court of Appeals 15 October 2009.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for Defendant.

Attorney General Roy Cooper, by Assistant Attorney General Leonard G. Green, for the State.

STEPHENS, Judge.

On 26 September 2008, a jury found Jeffrey Ray Jenkins ("Defendant") guilty of voluntary manslaughter. The trial court sentenced Defendant to a term of 103 months to 133 months imprisonment. From judgment entered upon the jury's verdict, Defendant appeals.

I. Factual Background and Procedural History

The evidence presented at trial tended to show the following: Defendant and Charles Lee Melton ("Melton") had known each other for approximately 12 years. Melton lived about a block from Defendant's home in Matthews, North Carolina. Melton frequently showed up at Defendant's home unannounced and often brought "a case of beer . . . wanting to drink." On Friday, 10 February 2006 at approximately 5:00 p.m., Melton arrived at Defendant's house wanting to "hang out." Defendant showered, changed clothes, and did laundry while Melton watched television and played video games.

At approximately 6:00 p.m., Melton went to a store and returned carrying a 24-ounce beer. At approximately 7:00 p.m., Defendant and Melton left Defendant's house and went to a nearby restaurant, where they had dinner and each had one beer. During dinner, Defendant and Melton discussed their plans for the evening. Defendant and Melton decided to go to a bar called the "Double Door" with Defendant's friend, Ericka Rickman ("Rickman"). Defendant and Melton returned to Defendant's house, and at approximately 8:30 p.m., Rickman and Crystal Jenkins[1] ("Ms. Jenkins") arrived at Defendant's house to take them to the bar. Rickman testified that neither Defendant nor Melton appeared to be intoxicated and they were friendly toward each other.

The group arrived at the Double Door at approximately 10:00 p.m. where they met up with a few of Rickman's co-workers whom she introduced to Defendant and Melton. Rickman and Defendant danced, played pool, and talked for most of the evening, while Melton remained at the bar. While they were at the Double Door, Rickman had "a couple of mixed drinks[,]" Defendant had three to four beers, and Melton drank a few shots of liquor and drank beer.

1. Crystal Jenkins is not related to the Defendant.

At approximately 11:30 p.m., Melton got into an argument with another patron and was escorted out of the bar. Rickman, Defendant, and Ms. Jenkins went outside to find Melton. Rickman testified that Melton was very angry and that he tried to start a fight with the bouncers. She said she and Defendant tried to calm Melton down, but that Melton did not respond and "just wanted to stare at the bouncers" and was "sizing up the bouncers at the door."

The group left the Double Door, and Ms. Jenkins drove Defendant, Melton, and Rickman to Defendant's house at approximately 1:00 a.m. Defendant asked Melton if he was able to walk home, and Melton said that he was. Defendant told Melton goodbye and went into the bathroom. Rickman went into Defendant's bedroom and laid down on the bed.

When Defendant exited the bathroom, he found Melton standing in the doorway to Defendant's bedroom. Melton told Rickman "that he was sorry that he had to interrupt [Defendant] for a few minutes because he had something he had to do." Defendant testified that Melton grabbed Defendant's arm and started pushing Defendant into the bedroom. Defendant told Melton that he was tired and did not want to play, and Defendant asked Melton to leave. Melton ignored Defendant's request, pushed Defendant against the bedroom dresser, knocking it over, and wrestled Defendant to the floor. Defendant told Melton to get off of him, but Melton persisted. Melton held one of Defendant's arms and pushed his forearm into Defendant's neck, turning his head sideways.

Defendant struck Melton twice with his hand, and Melton loosened his grip. Defendant pushed Melton off of him and started to get up, but Melton tackled Defendant back to the ground. Melton put both of his hands around Defendant's neck and started choking him. Defendant tried to remove Melton's arms but was unable to get out of his grip. Defendant reached with one hand and tried to gouge Melton's eye, but Melton stopped him. Defendant was eventually able to push Melton off with his feet.

As Defendant was getting up, he was standing beside his desk, where he kept a loaded handgun. Defendant reached for the gun, and as he turned to see Melton coming toward him, Defendant fired the gun at Melton one time. Melton fell backward clutching his chest. Defendant ran to his roommate's bedroom and told him to call 911.

Defendant placed the gun on the kitchen counter. Defendant testified that he was "panicked[,]" "[s]cared[,]" and "confused." Defend-

ant stepped outside with the gun and threw the gun toward some bushes near the edge of the driveway. Defendant testified that if Melton had put his hands around Defendant's neck again, he would have killed Defendant.

Rickman testified that she sat up when she heard the gun shot, and she saw Melton stumble backwards and fall. Rickman immediately ran over to Melton and called 911. Rickman testified that when she called 911, the operator tried to advise her on how to administer CPR. Defendant's roommate checked Melton's vital signs, told Melton to "hang on[,]" and tried to administer CPR. Rickman testified that Defendant was "completely panicked" and that she "had never seen him in that state" in the 13 years she had known him.

Sergeant Barry Price and Detective Brian Ridge (collectively "the officers") of the Matthews Police Department responded to the call at Defendant's home, which came in at 1:22 a.m. on 11 February 2006. The officers were less than a quarter of a mile away when they received the call, and they arrived at Defendant's house in less than 30 seconds. When they arrived, the officers saw Defendant run out from behind the house. Sergeant Price pulled his gun and told Defendant to stop. Defendant held his hands in the air and said, "[H]e's in there. Someone go in and help him." Defendant told the officers that he shot Melton and that he threw the gun into some brush.

Neither Detective Ridge nor EMS personnel were able to revive Melton. After learning that Melton had passed away, Sergeant Price read Defendant his *Miranda* rights and asked if he understood those rights, to which Defendant responded that he did. Sergeant Price put Defendant in the patrol car and advised Defendant that he was under arrest for homicide.

The officers found Defendant's gun about an hour later in a tree beside Defendant's house. One shell casing found in Defendant's bedroom matched the handgun. Thomas Owens ("Owens"), a medical examiner for Mecklenburg County, testified as an expert in clinical, anatomical, and forensic pathology. Owens testified that the cause of Melton's death was one gunshot wound to the chest. The characteristics of the gunshot wound showed that the muzzle of the gun was about one foot to one and a half feet from Melton when the gun was fired. Owens also testified that toxicology tests showed that Melton's blood contained 240 milligrams of alcohol per deciliter of blood, which translated to a 0.24 blood alcohol level on a breathalyzer test.

Melton's mother, Wanda Pigg, testified that Melton was happy and in good health when she spoke to him on the evening of 10 February 2006. Defendant testified that Melton had a reputation for violence and stated that he had "a short fuse." Defendant testified about several violent incidents that he was aware of involving Melton. The first incident occurred when Melton was 16 years old and Defendant had just met him. Defendant was at a friend's house and he heard a commotion in the living room. Defendant walked in the living room to find Melton straddling Melton's child's mother, Jessica, and choking her. Melton had to be physically pulled off of Jessica.

Defendant testified about a second incident which happened six weeks before Melton's death. On that occasion, Defendant, Melton, and a few other friends were at Jesse Rushing's ("Rushing") house. Rushing and Melton began wrestling. Melton put his hands around Rushing's throat, strangling him, and Rushing's face turned purple. Defendant testified that he and two others had to pull Melton off of Rushing, and that Melton was then asked to leave.

Defendant testified that he "would not wrestle [Melton] under [his] own free will" because he knew Melton was violent and strong and he "just wasn't going to put [himself] in that situation." Defendant further testified that he knew Melton had been arrested for pulling a gun on someone, that Melton had a conviction for assault on a female, and that Melton had served four months in jail for slashing someone's tires and fought the police when they came to arrest him. David Ingram and Erin Bozeman testified on behalf of Defendant that they knew Melton had a reputation for violence, that he was known to get out of hand, and that he was known to be aggressive.

During the charge conference, defense counsel requested that the trial court alter the pattern instruction for self-defense because there was no evidence that Defendant was the aggressor. The trial court denied this request and gave the pattern instruction for self-defense which provides that Defendant is not entitled to the benefit of self-defense if he was the aggressor.

II. Discussion

Defendant raises three issues for appellate review: Defendant first argues that the trial court committed reversible error by prohibiting certain witnesses from testifying to specific instances of violence by Melton. Defendant also argues that the trial court committed plain error by allowing Melton's mother to testify because "her testi-

mony was irrelevant, contained improper character and victim impact evidence, was substantially more prejudicial than probative, and was marked by questions that assumed facts not in evidence[.]" Finally, Defendant argues the trial court committed reversible error by instructing the jury that to receive the benefit of self-defense, Defendant could not have been the aggressor. We agree with Defendant's final argument. Because we award Defendant a new trial for error in the trial court's instruction, this issue is dispositive and it is, thus, unnecessary to address Defendant's remaining arguments.

During the charge conference, defense counsel requested that the trial court alter the pattern instruction for self-defense so that the language regarding whether Defendant was the aggressor be stricken. The State objected, arguing that the definition of "aggressor" included "willing combat, willing affray." The State contended that there was evidence that Defendant and Melton entered into a friendly wrestling match, and thus, that Defendant could be deemed to have been the aggressor because he voluntarily entered into the affray. The trial court denied defense counsel's request and instructed the jury in part as follows:

> The defendant would not be guilty of any murder or manslaughter if he acted in self-defense as I have just defined it to be and if he was not the aggressor in bringing on the fight and did not use excessive force under the circumstances.
>
> If the defendant voluntarily and without provocation entered the fight he would be considered the aggressor unless he thereafter attempted to abandon the fight and gave notice to the deceased that he was doing so.
>
> One enters a fight voluntarily if he uses toward his opponent abusive language which considering all of the circumstances is calculated and intended to bring on a fight.
>
> A defendant uses excessive force if he uses more force than reasonably appeared to him to be necessary at the time of the killing.

Our Court reviews a trial court's decisions regarding jury instructions *de novo*. *State v. Osorio*, —— N.C. App. ——, ——, 675 S.E.2d 144, 149 (2009). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). "[A] trial judge should not give instructions to the jury which are not

supported by the evidence produced at the trial." *Id.* Moreover, "[w]here jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995).

This Court has held that where the evidence does not indicate that the defendant was the aggressor, the trial court should not instruct on that element of self-defense. For example, in *State v. Tann*, 57 N.C. App. 527, 291 S.E.2d 824 (1982), our Court awarded the defendant a new trial where, although it was undisputed that the defendant was not the aggressor, the trial court instructed the jury that the defendant "could not avail himself of the doctrine of self[-]defense if 'he . . . used excessive force *or was the aggressor*.' " *Id.* at 531, 291 S.E.2d at 827; *see also State v. Temples*, 74 N.C. App. 106, 109, 327 S.E.2d 266, 268 (1985) (holding the trial court erred by instructing the jury that " '[o]ne enters a fight voluntarily if she uses toward her opponent abusive language which considering all the circumstances is calculated and intended to bring on a fight' " where there was no evidence tending to show the defendant voluntarily entered a fight with the deceased based on her use of abusive language).

Furthermore, in *State v. Ward*, 26 N.C. App. 159, 163, 215 S.E.2d 394, 396-97 (1975), this Court awarded the defendant a new trial after the trial court instructed the jury that "the burden was on the defendant to satisfy it that he was not the aggressor and that if the jury believed that he was the aggressor or used excessive force in repelling an assault, though it found he was otherwise acting in self-defense, he would be guilty of manslaughter." *Id.* at 163, 215 S.E.2d at 396. In *Ward*, there was no evidence that the defendant was the aggressor, and in fact, all of the evidence "tend[ed] to show that the deceased was the aggressor up to the instant the defendant fired the fatal shot." *Id.* at 163, 215 S.E.2d at 397. Our Court further held that

> [s]ince the jury found the defendant guilty of manslaughter, it seems likely, under the circumstances in this case, that the jury believed the defendant acted in self-defense but used excessive force or that he, the defendant, was the aggressor. We cannot assume that the jury was more discriminating than the judge and ignored the erroneous instruction while applying the correct one. Thus, the error in giving the instruction complained of was prejudicial.

Id.

In the present case, the evidence presented at trial tended to show that Melton had a reputation for violence and that he had been argumentative earlier in the evening on 10 February 2006. Melton initiated the fray by grabbing Defendant's arm and pushing Defendant into the bedroom. Defendant told Melton that he did not want to play and asked Melton to leave. Melton ignored Defendant's request, pushed Defendant, and wrestled Defendant to the floor. Defendant told Melton to get off of him, but Melton continued to fight. Only when Melton was holding one of Defendant's arms and pushing his forearm into Defendant's neck did Defendant strike back at Melton. Melton nevertheless tackled Defendant back to the floor and began choking Defendant with both of his hands. Defendant struggled to escape Melton's grip and was unsuccessful when he attempted to gouge Melton's eye. Defendant was finally able to push Melton off of him, and immediately reached for a gun located on a nearby desk and fired the gun one time at Melton.

The State argues on appeal that the following facts constitute substantial and competent evidence that Defendant was the aggressor: (1) that Melton was stumbling when they left the bar and Defendant had to help Melton into the car; (2) that Defendant had grown tired of Melton coming to his home and that Defendant asked Melton to leave on the evening of 10 February 2006; (3) that Defendant and Melton had wrestled in the past and that at first, Rickman did not think their wrestling that night was out of the ordinary; (4) that Rickman stepped over Defendant and Melton when she exited Defendant's bedroom, that Rickman heard Defendant tell Melton to be careful with his new tattoo, and that Rickman heard Defendant laughing when Melton knocked things over in the bedroom; (5) that while Melton and Defendant were wrestling, Defendant struck Melton twice; (6) that Melton had bruises on his face, head, arms, and hands, while Defendant did not display any injuries to his head or neck despite his testimony that Melton attempted to choke him; and (7) that Defendant shot Melton at close range. Of the State's seven identified facts in support of its argument, only number four gives us pause. The remaining factual assertions are either irrelevant to the events that occurred when Defendant and Melton arrived home from the bar or do not support the State's argument that Defendant voluntarily entered into the affray.

Although we are not persuaded by the State's fourth factual assertion, we nevertheless address this claim. Rickman testified that at first, she did not believe the wrestling between Melton and Defendant

was out of the ordinary, and that she heard Defendant tell Melton to be careful with a new tattoo Defendant had recently gotten on his neck. When asked by the State if Rickman told the police that Defendant was laughing about Melton knocking things over in the bedroom, Rickman replied, "In my mind I think he was trying to reel [Melton] back in to let's not take this so serious." Thus, despite the State's contention that Defendant "joined in a friendly wrestling match" with Melton, Rickman's testimony actually serves to further establish that Defendant attempted to calm Melton and prevent the fray from escalating to the point that it did. There is no evidence that Defendant initiated the altercation or that he provoked Melton to continue to wrestle once the fighting began. As was true in *Ward*, all of the evidence "tends to show that the deceased was the aggressor up to the instant the defendant fired the fatal shot." *Id.*

As we held in *Tann*, *Temples*, and *Ward* where there was no evidence that the defendant was the aggressor, it was error in the present case to instruct the jury that Defendant could not avail himself of the benefit of self-defense if he was the aggressor. Moreover, as was the case in *Ward*, the jury found Defendant guilty of voluntary manslaughter, and thus, the jury likely believed Defendant either used excessive force or was the aggressor. *See id.* Accordingly, the trial court's error was prejudicial and Defendant is entitled to a

NEW TRIAL.

Judges STROUD and BEASLEY concur.

STATE OF NORTH CAROLINA v. DAVID JOSEPH RILEY

No. COA09-643

(Filed 2 February 2010)

1. Evidence— cross-examination—guilty plea to lesser charge—plea bargain—harmless error

Although defendant contends the trial court erred by allowing the prosecutor to cross-examine defendant concerning pleading guilty to a lesser charge as part of a plea bargain, defendant failed to meet his burden of showing that a different result would have been reached at trial absent the alleged error.

2. Criminal Law— prosecutor's argument—improper remarks

The trial court did not abuse its discretion in a first-degree burglary and impersonating a law enforcement officer case by overruling defendant's objection to a portion of the prosecutor's closing argument regarding defendant's intent to steal because even though the remarks were improper, they did not rise to the level of depriving defendant of a fair trial.

3. Probation and Parole— sentencing—special probation—violation of statute

The trial court erred in a first-degree burglary and impersonating a law enforcement officer case by sentencing defendant to a 30-month term of special probation because it violated the provisions of N.C.G.S. § 15A-1351(a). The case was remanded for resentencing.

4. Probation and Parole— sentencing—length of probation—failure to make required findings

The trial court erred in a first-degree burglary and impersonating a law enforcement officer case by sentencing defendant to a 60-month term of probation without making the findings required by N.C.G.S. § 15A-1343.2(d)(4). The case was remanded for resentencing on the length of the term of probation.

5. Sentencing— extraordinary mitigation—sufficiency of findings

The trial court abused its discretion in a first-degree burglary and impersonating a law enforcement officer case by concluding that its findings of two normal statutory mitigating factors, without any additional facts, were sufficient to support a determination of extraordinary mitigation. The case was remanded for resentencing based on whether there existed factor(s) of extraordinary mitigation.

Appeal by defendant and cross-appeal by the State from judgment entered 18 September 2008 by Judge Russell J. Lanier, Jr. in Pender County Superior Court. Heard in the Court of Appeals 28 October 2009.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

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

STEELMAN, Judge.

While the prosecutor improperly cross-examined defendant about pleading guilty to a lesser charge as part of a plea bargain, defendant failed to show that any error was prejudicial. While a portion of the prosecutor's closing argument was improper, it did not rise to the level of denying defendant a fair trial. Pursuant to N.C. Gen. Stat. § 15A-1351, the maximum period of special probation that could have been imposed was one-fourth of defendant's maximum sentence. When the trial court makes no findings in support of its imposition of a term of probation that exceeds the presumptive term, the matter must be remanded to the trial court for resentencing. Factors of extraordinary mitigation are those of a kind significantly greater than in the normal case. The normal mitigating factors as set forth in N.C. Gen. Stat. § 15A-1340.16(e) are not sufficient to support a finding of extraordinary mitigation.

I. Factual and Procedural Background

In the early morning hours of 6 July 2007, David Joseph Riley (defendant) and Robert Jordan (Jordan) went to a trailer located in Burgaw that was occupied by Nathan Morgan (Morgan) and his girlfriend Brittney Wells (Wells). They obtained entry to the trailer by representing themselves to be law enforcement agents. A firearm was displayed, and defendant and Jordan demanded that Morgan and Wells produce drugs and money. They proceeded to ransack the trailer, taking some change that was stored in a jar. The men then left the trailer and drove away.

Defendant was indicted for the felony of first degree burglary and the misdemeanor of impersonating a law enforcement officer. On 17 September 2008, a jury found defendant guilty of both charges, but found in a special interrogatory that defendant had not displayed or threatened to use a firearm during the burglary. The trial court found two factors in extraordinary mitigation: (1) that "defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense;" and (2) that "defendant aided in the apprehension of another felon." Defendant was sentenced to a term of 46 to 65 months, which was suspended. As an intermediate sanction, defendant was to serve a term of special probation of 30 months.

Defendant appeals. The State appeals the trial court's finding of extraordinary mitigation and the sentence imposed.

II. Defendant's Appeal

A. Cross-examination of Defendant Concerning Conviction Obtained as a Result of a Plea Bargain.

[1] In his first argument, defendant contends that the trial court erred in allowing the prosecutor to cross-examine defendant concerning pleading guilty to a lesser charge as part of a plea bargain. We disagree.

Defendant testified in this case. Rule 609 of the Rules of Evidence permits a witness to be cross-examined concerning prior felony and misdemeanor convictions, with the exception of Class 3 misdemeanors, committed within the time limits set forth in subsection (b), for the purpose of attacking the credibility of the witness. N.C. Gen. Stat. § 8C-1, Rule 609.

The following exchange took place between the prosecutor and defendant:

CROSS-EXAMINATION BY MR. FENNELL:

Q. Your prior conviction was—actually started off as a felony financial card theft—

MR. HALL: Objection.

THE COURT: Sustained.

Q. You were also charged with fraud; isn't that correct?

MR. HALL: Objection.

THE COURT: Sustained.

MR. HALL: Your Honor, move to strike.

THE COURT: Motion to strike is allowed. Ladies and gentlemen, disregard the district attorney's question. He is allowed to ask a man about convictions, not charges.

MR. FENNELL: Your Honor, I would contend it goes directly to his willingness to tell the truth. He was charged with fraud.

THE COURT: No, sir, you're not going to do that.

Q. You were charged [with] misdemeanor larceny as the result of a plea bargain; is that correct?

MR. HALL: Objection.

THE COURT: That's what he pled to. Is that what he pled to?

MR. FENNELL: Yes, sir.

THE COURT: All right.

Q. Is that correct?

A. Yes, sir.

Defendant complains of the last question where the State asked if he pled guilty to misdemeanor larceny as a result of a plea bargain. N.C. Gen. Stat. § 15A-1025 provides: "The fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings." N.C. Gen. Stat. § 15A-1025 (2007). We hold that the question complained of was improper and violated the provisions of N.C. Gen. Stat. § 15A-1025. The State does not dispute that the question was improper. However, this does not end our analysis. Defendant still bears the burden of showing that the error was prejudicial. N.C. Gen. Stat. § 15A-1443(a) (2007).

The trial court sustained defendant's objections during the first part of the above-recited examination, and made it clear that the State was only "allowed to ask a man about convictions, not charges." In ruling on the objection to the question, the trial court again focused upon the conviction, not the charge: "That's what he pled to. Is that what he pled to?" The only cases cited by defendant in support of his argument are *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994) and *State v. Jones*, 329 N.C. 254, 404 S.E.2d 835 (1991), which stand for the proposition that it is improper to examine a witness concerning mere charges of crimes. The trial court's rulings were consistent with the holdings in these cases.

The trial court specifically gave a limiting instruction to the jury that evidence of a prior criminal charge was not to be used as evidence of defendant's guilt in the instant case. "[Y]ou may consider this evidence for one purpose only. Again, if, considering the nature of the crime, you believe that it bears on truthfulness, then you may consider it together with all other facts and circumstances bearing upon the witness' truthfulness . . . ." "The law presumes that the jury heeds limiting instructions that the trial judge gives regarding the evidence." *State v. Shields*, 61 N.C. App. 462, 464, 300 S.E.2d 884, 886 (1983) (citation omitted). Any error in the prosecutor's cross-

examination of defendant concerning a prior criminal charge was cured by the trial court's limiting instruction to the jury.

We hold that defendant has failed to meet his burden of showing that had the error in question not been committed, a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1443(a) (2007).

This argument is without merit.

B. Closing Arguments of Prosecutor

[2] In his second argument, defendant contends that the trial court erred in overruling his objection to a portion of the prosecutor's closing argument. We disagree.

Defendant gave a statement to Officer Croom in July 2007, in which he acknowledged that he and Jordan went to the Morgan trailer with the intent to steal. Subsequent statements of defendant and his trial testimony contradicted his first statement as to why they went to the Morgan trailer.

The prosecutor argued in closing argument:

> MR. FENNELL: It says—we're talking so much about inconsistent statements, Scott Croom's very first statement a month after he got home, he said, We went there to steal. The word is in the statement, folks. That's what he told him. We went there to steal.
>
> That was probably because—probably before he had a conversation with his lawyer, and his lawyer told him if you go into a house and steal, you committed burglary, which is a ten-year offense, as opposed to misdemeanor larceny, which is not.
>
> MR. HALL: Objection
>
> THE COURT: Overruled.
>
> MR. FENNELL: Now he realizes he can't have gone in there to steal, like he told Scott Croom. The only person—look at what they did when they went in there. The very first thing he said is, Give me your money and your dope. The very first thing he said was, Where's the money? Where's the dope?
>
> What did they do? Where did they look? They looked in the wallet. They looked in the pocketbook. They looked in the safe. You don't keep pounds of pot in wallets. You don't keep pounds of pot in pocketbooks.

Defendant contends that the argument was improper because it attacked the integrity of defense counsel, and was based upon pure speculation that defendant changed his story after speaking with his attorney. The State acknowledges that the argument "was inappropriate, contrary to Rule 12 of the General Rules of Practice in Superior and District Court, and even improper." The State further argues that the improper argument was a single, isolated incident, and does not rise to the level required for defendant to be entitled to a new trial.

The North Carolina General Assembly has set specific guidelines for closing arguments:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2007).

When opposing counsel timely objects to improper closing arguments, the standard of review is whether the trial court abused its discretion by failing to sustain the objection. *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations omitted). "Trial counsel are granted wide latitude in the scope of jury argument, and control of closing arguments is in the discretion of the trial court." *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992) (citations omitted). Trial counsel are permitted to argue the facts that have been presented, as well as any reasonable inferences which can be drawn from those facts. *State v. McCollum*, 334 N.C. 208, 223, 433 S.E.2d 144, 152 (1993) (citing *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986)), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). "In order for a defendant to receive a new sentencing proceeding, the prosecutor's comments must have 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Id.* at 223-24, 433 S.E.2d at 152 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986)). It is not enough that the prosecutor's remarks were undesirable or even universally condemned. *Darden*, 477 U.S. at 181, 91 L. Ed. 2d at 157 (citations and quotations omitted).

As the State concedes in the instant case, the prosecutor's remarks in the closing argument were improper, but they did not rise to the level of depriving defendant of a fair trial. "The prosecutor['s] argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id.* at 181-82, 91 L. Ed. 2d at 157-58. The trial court instructed the jurors that their decision was to be made on the basis of their recollection of the evidence alone, and not on the recollection of the evidence as argued by the attorneys. The weight of the evidence against defendant with respect to his intent to steal was substantial, and defendant's own statement to Officer Croom acknowledged that he went to the Morgan trailer for the purpose of stealing. Defendant drove to the Morgan trailer in the early hours of the morning, wore dark clothing and an earpiece, pretended to be a police officer, and flashed a fake police badge. "All of these factors reduced the likelihood that the jury's decision was influenced by these portions of the prosecutor's closing argument. Therefore, the prosecutor's closing argument did not deny the defendant due process." *McCollum*, 334 N.C. at 224-25, 433 S.E.2d at 152-53 (citation omitted). We hold that the prosecutor's comments, while undesirable, did not so infect the trial with unfairness as to make defendant's conviction a denial of due process. *Darden*, 477 U.S. at 181, 91 L. Ed. 2d at 157.

This argument is overruled.

C. Improper Term of Special Probation

[3] In his third argument, defendant contends that the trial court improperly sentenced defendant to a 30 month term of special probation. We agree.

The trial court sentenced defendant to a term of 46 to 65 months, suspended the sentence, and then imposed a term of special probation of 30 months. N.C. Gen. Stat. § 15A-1351 provides that: "the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense . . . ." N.C. Gen. Stat. § 15A-1351(a) (2007)[1]. The maximum period of special probation that could have been imposed was one-fourth of the maximum sentence of 65 months or 16.25 months.

1. We note that Chapter 151 of the 2003 Session Laws amended N.C. Gen. Stat. § 15A-1351(a) to remove a cap of six months for a term of special probation. However, this amendment left intact the other cap of one-fourth of the maximum sentence imposed for the offense.

Because the term of special probation imposed by the trial court violated the provisions of N.C. Gen. Stat. § 15A-1351(a), this matter must be remanded to the trial court for resentencing.

D. Imposition of a Term of Probation for 60 Months

[4] In his fourth argument, defendant contends that the trial court improperly imposed a 60 month term of probation, without making the findings required by N.C. Gen. Stat. § 15A-1343.2(d)(4). We agree.

N.C. Gen. Stat. § 15A-1343.2 provides that unless the trial court makes specific findings supporting a longer or shorter period of probation, the term of probation for a felon sentenced to intermediate punishment shall be no more than 36 months. N.C. Gen. Stat. § 15A-1343.2(d)(4) (2007). If the trial court finds that a longer period of probation is necessary, it shall not exceed five years, as set forth in N.C. Gen. Stat. § 15A-1342 and N.C. Gen. Stat. § 15A-1351. In the instant case, the trial court made no findings in support of its imposition of a term of probation of 60 months.

This matter must be remanded to the trial court for resentencing on the length of the term of probation. *State v. Cardwell*, 133 N.C. App. 496, 509, 516 S.E.2d 388, 397 (1999). Upon remand, the trial court may consider whether a term of probation of greater than 36 months is appropriate.

III. State's Appeal

[5] In its first argument, the State contends that the trial court's findings were not sufficient to support a determination of extraordinary mitigation. We agree.

A. Standard of Review

The decisions of a trial court on extraordinary mitigating factors are reviewed under an abuse of discretion standard. *State v. Melvin*, 188 N.C. App. 827, 830, 656 S.E.2d 701, 703 (2008). An abuse of discretion occurs only when the trial court's ruling is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citation omitted).

B. Extraordinary Mitigation Under Felony Structured Sentencing

The felony sentencing grid contained in N.C. Gen. Stat. § 15A-1340.17 provides for three possible sentencing dispositions: (a) "C" being community punishment as defined in N.C. Gen. Stat.

§ 15A-1340.11(2); (b) "I" being intermediate punishment as defined in N.C. Gen. Stat. § 15A-1340.11(6); and (c) "A" being active imprisonment in the Department of Corrections as defined in N.C. Gen. Stat. § 15A-1340.11(1). Where a cell in the sentencing grid contains only an "A" as the sentencing disposition, the trial court is required to impose an active prison sentence. The only exception to the imposition of an active sentence is where the trial court finds the existence of a factor in extraordinary mitigation as provided in N.C. Gen. Stat. § 15A-1340.13(g).

> [A] factor of extraordinary mitigation must be of a "kind significantly greater than in the normal case." The statutory mitigating factors set forth in N.C. Gen. Stat. § 15A-1340.16(e) are mitigating factors found in a normal case. While the trial court is not precluded from making a finding of extraordinary mitigation based upon the same facts as would support one of the mitigating factors listed in the statute, in order to be extraordinary mitigation there must be additional facts present, over and above the facts required to support a normal statutory mitigation factor.

Melvin, 188 N.C. App. at 831, 656 S.E.2d at 703.

In the instant case, the trial court found two statutory mitigating factors: (1) "The defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense." (N.C. Gen. Stat. § 15A-1340.16(e)(3)); and (2) "The defendant aided in the apprehension of another felon." (N.C. Gen. Stat. § 15A-1340.16(e)(7)). Under the rationale of *Melvin*, the normal mitigating factors set forth in N.C. Gen. Stat. § 15A-1340.16(e) are not in and of themselves sufficient to support a finding of extraordinary mitigation. "[T]here must be additional facts present, over and above the facts required to support a normal statutory mitigation factor." *Melvin*, 188 N.C. App. at 831, 656 S.E.2d at 703. It was an abuse of discretion for the trial court to hold that a normal mitigating factor, without additional facts being present, constituted an extraordinary mitigating factor.

The fact that the trial court found two normal mitigating factors does not alter our conclusion. It is the quality and not the quantity of mitigating factors that qualify them as factors of extraordinary mitigation. *Melvin*, 188 N.C. App. at 831, 656 S.E.2d at 703.

This case is remanded to the trial court for resentencing as to whether there exists a factor or factors of extraordinary mitigation.

NO PREJUDICIAL ERROR AS TO THE TRIAL, REMANDED TO THE TRIAL COURT FOR RESENTENCING.

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

IN THE MATTER OF: E.K., K.K., & E.G., MINOR CHILDREN

No. COA09-1057

(Filed 2 February 2010)

1. Child Abuse and Neglect— permanency planning order— secondary placement with grandmother—sufficiency of conclusions

A portion of a permanency planning order granting secondary placement of juveniles with their grandmother was reversed where the conclusions were not supported by the findings and were contradictory of each other.

2. Child Abuse and Neglect— permanency planning order— delays—remedy

An assignment of error to a permanency planning order based on failure to adhere to the time line required by the juvenile code was overruled where the proper remedy for DSS was to file a petition for writ of *mandamus* rather than raising the issue after additional delay on appeal. However, the significant delay before entry of the permanency planning order was not condoned, even with the case load demands imposed by the budget crisis.

Appeal by the Caldwell County Department of Social Services from order entered 10 June 2009 by Judge C. Thomas Edwards in Caldwell County District Court. Heard in the Court of Appeals 28 December 2009.

Lauren Vaughan for petitioner-appellant Caldwell County Department of Social Services.

Pamela Newell Williams for guardian ad litem.

Betsy J. Wolfenden for respondent-appellee mother.

Joyce L. Terres for respondent-appellee father.

STEPHENS, Judge.

The Caldwell County Department of Social Services ("DSS" or "Caldwell DSS") appeals from a juvenile permanency planning review order entered 10 June 2009, implementing a permanent plan of joint custody of juveniles E.K., K.K., and E.G. (collectively "the juveniles") with their foster parents (referred to by the pseudonym "the Barnes") and their maternal grandmother ("the grandmother"). The permanent plan also designates the Barnes as the primary placement and the grandmother as the secondary placement for the juveniles. On appeal, DSS contends that the trial court abused its discretion by designating the grandmother as a joint custodian and secondary placement because the court's order was not supported by sufficient findings of fact or conclusions of law, and failed to follow the applicable statutory time lines when it entered the permanency planning order. We reverse in part and affirm in part.

I. Procedural History

Caldwell DSS first became involved with the family in October of 2004 when E.G. accused her stepfather[1] of sexually abusing her. That claim was later substantiated. Respondent-mother relocated to Davie County, and in February 2005, the Davie County Department of Social Services ("Davie DSS") received a report that K.K. had bruises on her legs. E.G. later accused respondent-mother's new boyfriend of molesting her. On 9 May 2005, Davie DSS obtained non-secure custody of the juveniles and placed them in foster care with the Barnes. Davie DSS also filed petitions alleging that the juveniles were abused and neglected.

On 4 October 2005, the district court entered an order adjudicating E.G. abused and neglected and E.K. and K.K. neglected. The court ordered the children to remain in the custody of Davie DSS and further ordered that the permanent plan for the juveniles be reunification with respondent-parents. On 3 January 2006, however, the district court ordered that Davie DSS cease reunification efforts with respondent-fathers. The permanent plan remained reunification with respondent-mother.

On 29 February 2006, the grandmother filed a motion to intervene and to be considered as a placement option, and the district court allowed the motion. On 4 August 2006, the district court entered a review order placing the juveniles in the physical custody of the

1. E.G.'s stepfather, who is not a party to this appeal, is the father of E.K. and K.K. E.G.'s biological father is a party to this appeal.

grandmother, pending the completion of her new home in Caldwell County. The permanent plan remained reunification with respondent-mother, and the case was transferred to Caldwell DSS.

On 23 August 2006, the Barnes filed a motion seeking to intervene and to gain guardianship over the juveniles. The juveniles were moved into the grandmother's care on 25 August 2006. In an order entered 7 December 2006, the district court allowed the Barnes' motion to intervene and set the case for a permanency planning review hearing. The case was continued numerous times throughout the rest of 2006 and the first half of 2007.

On 12 March 2008, the district court entered a permanency planning order, based on evidence received in partial hearings conducted in 2006 and 2007. The district court continued custody of the juveniles with Caldwell DSS, authorized Caldwell DSS to arrange for foster care, and approved placement with the Barnes. The district court also ordered Caldwell DSS to cease reunification efforts with respondent-mother, and ordered that respondent-fathers have no visitation with the juveniles. Finally, the district court ordered that a permanent plan be established within thirty days, and set the matter for a permanency planning hearing on 9 April 2008.

Following the 12 March 2008 order, the case was again continued for more than a year before it came on for hearing on 6 May 2009.[2] At the hearing, the trial court heard testimony from a social worker, the grandmother, and other family members. The Barnes did not testify. On 3 June 2009, the trial court entered a new permanency planning order, and entered an amended order on 10 June 2009. The trial court changed the permanent plan to shared custody of the juveniles between the Barnes and the grandmother, with primary placement with the Barnes and secondary placement with the grandmother, in spite of its conclusion that "[t]here are no relatives who are willing and able to provide proper care and supervision of the juveniles in a safe home." The trial court also ordered visitation for the grandmother, and set numerous rules of conduct for both the Barnes' and the grandmother's family. Caldwell DSS filed written notice of appeal. On 16 June 2009, this Court allowed Caldwell DSS's motion for temporary stay, and on 8 July 2009, this Court allowed Caldwell DSS's petition for writ of supersedeas, staying the 10 June 2009 permanency planning order pending the outcome of this appeal.

2. The reasons cited for the numerous continuances included a Notice of Appeal which was filed and later withdrawn by the grandmother, the unavailability of the Barnes' attorney, and the court's need for more time to render a decision.

II. Discussion

A. Conclusions of Law Unsupported by Findings of Fact

[1] We first address Caldwell DSS's argument that the trial court's order designating the grandmother as a secondary placement is not supported by its findings of fact and conclusions of law. We agree, and accordingly reverse this portion of the trial court's order.

" 'The purpose of a permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time.' " *In re D.C.*, 183 N.C. App. 344, 355, 644 S.E.2d 640, 646 (2007) (quoting N.C. Gen. Stat. § 7B-907(a) (2005)). The Juvenile Code enumerates several factors that the trial court is required to consider at a permanency planning hearing, including:

> Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents[.]

N.C. Gen. Stat. § 7B-907(b)(2) (2009). "Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and [whether] the findings support the conclusions of law." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004).

In its permanency planning order, the trial court incorporated the findings of fact from the order entered 12 March 2008, which included findings that the minor children's grandmother was not involved with the children, "and in fact, absent from the State of North Carolina, for the period from summer of 2005, through February, 2006, while [the minor children] were in [DSS's] custody[;]" that as of 15 March 2006, DSS had attempted reasonable efforts to place the juveniles with family members, but DSS did not recommend the grandmother's home as a placement because DSS did not believe the grandmother was an appropriate placement for the children; that the Kinship Care Initial Assessment of 20 June 2005 did not approve the grandmother's home for placement of the juveniles due to concerns that the grandmother had very little involvement with her daughter and the children prior to their coming into DSS's custody; that after the Kinship Care Initial Assessment, DSS did not hear from the grandmother until September 2005, at which time Davie County Juvenile Court ordered a home study of the grandmother; that despite numerous efforts by DSS from

September through December 2005 to complete a home study on the grandmother's home, no contact was made; and that the grandmother had no further contact with DSS until February 2006. The incorporated order of 12 March 2008 also included findings that

> [p]lacement with [the grandmother and her husband] is not in the best interest of [the juveniles] for the following reasons, among others: i) [the grandmother and her husband] were originally disapproved as a placement for [the children] in 2004 when an initial home study was conducted, and were not recommended for placement again in March, 2006, and in April, 2006, after a Kinship Care Assessment with the grandmother . . . was conducted. [DSS] in March and in April, 2006, recommended that [the grandmother] not be considered for placement and that [DSS] be relieved of efforts to unify the juveniles with [the grandmother]; ii) [the grandmother and her husband] had no contact with [the juveniles] for approximately eight months from the Summer of 2005 through March, 2006, while the three juveniles were in [DSS's] custody; iii) [the juveniles] had no substantial relationship with [the grandmother's] new husband, . . . whom she married after her Motion to Intervene was filed; iv) [the grandmother] had a strained relationship with her minor daughter, . . . who vacated [the grandmother's] residence during the pendency of this action; and v) [the juveniles] have resided with the [Barnes] for 29 of the last 34 months. . . . Relative placement of the juveniles with their maternal grandmother . . . is not in the best interest of the juveniles. Relative placement is not indicated based on the foregoing findings of fact.

In addition to the incorporated findings of the 12 March 2008 order, the trial court made the following pertinent findings of fact in its 10 June 2009 order:

> 7. [DSS's] concerns included among [other] things, the want of a toothbrush in the home of the [grandmother]; the discussion of the court case by the [grandmother and her husband] with the minor children; and concerns about [the grandmother's daughter] living in the home. [DSS] also expressed concerns that [the grandmother] did not exercise independent judgment separate and apart from her new husband, . . . [an] uncommon phenomenon in the 21st century. [DSS] also expressed concerns with [the grandmother's daughter's] desire to live with her biological father.

8. That the October, 2006, report of [DSS] suggests that the minor children, after approximately 2 months with the [grandmother and her husband], appeared more reserved and withdrawn. That, [DSS] also expressed concerns of [the grandmother's] reports of some prior history involving domestic violence with a former husband. That another area suggested of concern by [DSS] was the recent marriage of [the grandmother to her husband] and [the fact that her husband is not] biologically related to the minor children. As a consequence of [the grandmother's husband's] recent induction as a member of the family, [DSS] was also concerned with a lack of significant relationship with the three minor children. In addition, [DSS] expressed concerns associated with [the grandmother], the known maternal grandmother, not becoming involved with the children until late winter-early spring of 2006, despite the pendency of the Davie County action from the spring of 2005.

. . . .

15. That [DSS] reasonably attempted to locate [the grandmother] in late summer or early fall of 2005, and [the grandmother] was not located. [The grandmother] moved to South Carolina in November, 2005, and thereafter, she . . . moved to intervene in the spring of 2006. That, [the grandmother and her husband], resided in Kings Creek, South Carolina, during their time there. [The grandmother] returned to North Carolina. [The grandmother and her husband] visited on several occasions in Davie County between April, 2006 and August, 2006. That [the grandmother] suggested that the failure to contact [DSS] was her responsibility and that she did not contact [DSS] to allow for a home study to be effectually completed.

. . . .

26. A bonding assessment was completed in the winter of 2009[3] . . . . The relationship between [the grandmother] and the minor children was more tentative [than their relationship with the Barnes], again consistent with the circumstances then existing and existing prior thereto. The minor children each again were found to interact effectively and efficiently with the [Barnes]. The minor children were noted to be more reserved

3. Although the record does not specify the exact date on which the bonding assessment was completed, we presume that this assessment was completed in the beginning of 2009.

> with [their grandmother]. . . . [The grandmother] did a very good job of offering encouragement and validation through the activities. [The Barnes and the grandmother] did a good job making the activities age appropriate, offering encouragement and assistance to achieve success, and validating the children's successes. The only difference noted was that the children appeared eager to receive validation from [Mr. and Mrs. Barnes] but did not respond to [their grandmother's] words of validation. . . . There was no evidence of bonding with [the grandmother] and the minor children's responses were limited at best.

The trial court also made the following pertinent conclusions of law:

> 9. There are no relatives who are willing and able to provide proper care and supervision of the juveniles in a safe home.
>
> 10. Custody with [Mr. and Mrs. Barnes] and with [the grandmother], with primary placement of the juveniles being with the [Barnes] and that secondary placement of the juveniles being with [their grandmother] is in the best interest of the juveniles.

We hold that the above conclusions of law are not supported by the findings of fact. Both the incorporated findings from the order entered on 12 March 2008 and the trial court's additional findings of fact support a conclusion that placement with the grandmother was not in the children's best interests. The trial court's oral findings of fact, delivered in open court, are essentially identical to the written findings, and thus shed no additional light on the viability of the grandmother as a placement option.

Furthermore, the trial court's conclusions of law are contradictory of each other. In conclusion number nine, the trial court states that "there are no relatives who are able to provide proper care and supervision of the juveniles in a safe home." Yet, conclusion number ten provides that secondary placement of the children with their grandmother—a relative—would be in the children's best interests. Because the trial court's conclusions of law are not supported by the findings of fact, we reverse that portion of the trial court's order granting secondary placement of the juveniles with the grandmother.

B. Failure to Adhere to Proper Time Line

[2] Caldwell DSS's remaining argument is that the trial court's permanency planning order is invalid because the trial court failed to adhere to the time line required by the juvenile code.

"In any case where custody is removed from a parent, guardian, custodian, or caretaker, the judge shall conduct a review hearing designated as a permanency planning hearing within 12 months after the date of the initial order removing custody[.]" N.C. Gen. Stat. § 7B-907(a) (2009). "In cases such as the present one in which the trial court fails to adhere to statutory time lines, mandamus is an appropriate and more timely alternative than an appeal." *In re T.H.T.*, 362 N.C. 446, 455, 665 S.E.2d 54, 60 (2008).

We agree with Caldwell DSS that the significant delay before the trial court entered its 2009 permanency planning order is deplorable. Only five substantive hearings occurred over the four years that the juveniles were in foster care, and all of those hearings occurred outside of the time frames mandated by the juvenile code. The trial court ordered fifteen continuances prior to the Permanency Planning Review held on 24 October 2007. Thereafter, the trial court ordered ten more continuances before the permanency planning review order was finally entered on 6 May 2009. Of these twenty-five continuances, the majority were not ordered for the purpose of "receiv[ing] additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery." N.C. Gen. Stat. § 7B-803 (2009). Furthermore, it does not appear that any "extraordinary circumstances" were present so as to make a continuance "necessary for the proper administration of justice or in the best interests of the juvenile[s]." N.C. Gen. Stat. § 7B-803. While we are cognizant of the demands of the district court's case load and recognize the strains on staffing that the budget crisis has imposed in all sectors, we cannot condone such astonishing disregard for the best interests of the juveniles and the interests of the parties in this matter. However, the proper remedy for Caldwell DSS was to file a petition for writ of mandamus during the delay, rather than raise the issue after additional delay on appeal. Accordingly, we overrule this assignment of error.

For the foregoing reasons, the order of the trial court is

AFFIRMED in part; REVERSED in part.

Judges CALABRIA and STROUD concur.

TRUSTEE SERVICES, INC., PETITIONER v. R.C. KOONTS AND SONS MASONRY, INC., ROY CLIFTON KOONTS, III, DAVID CRAIG KOONTS AND EDITH L. KOONTS, RESPONDENTS

No. COA09-406

(Filed 2 February 2010)

1. Jurisdiction— subject matter—superior court—transferred from clerk of superior court

The superior court had subject matter jurisdiction over defendant's appeal from the clerk of superior court's order authorizing petitioner to proceed with a foreclosure. When a civil action or special proceeding begun before the clerk of a superior court is sent to a superior court judge, the judge has jurisdiction.

2. Deeds— trust—order dismissing petition to foreclose

The trial court did not err in ruling that petitioner was not authorized to proceed with a foreclosure as the promissory notes under which petitioner was attempting to foreclose did not give petitioner the right to foreclose on property referenced in a prior deed of trust.

Appeal by Petitioner from order entered 19 December 2008 by Judge Richard L. Doughton in Davidson County Superior Court. Heard in the Court of Appeals 1 October 2009.

Biesecker, Tripp, Sink & Fritts, L.L.P., by Joe E. Biesecker and Christopher A. Raines, for Petitioner-Appellant.

Nachamie & Whitley, PLLC, by W. Darrell Whitley, for Respondents-Appellees.

BEASLEY, Judge.

Trustee Services, Inc. (Petitioner) appeals an order dismissing a petition to foreclose upon a deed of trust. For the following reasons, we affirm.

In November 1999, grantors, Roy Clifton Koonts, Jr. (Junior) and his wife, Edith L. Koonts (Edith), executed a deed of trust (Deed of Trust) for $130,000.00 in favor of Lexington State Bank (LSB). The trustee was named as Trustee Services, Inc. The Deed of Trust contained the following language, in pertinent part:

> [T]he Grantor is indebted or expects to become indebted to the Note Holder for future obligations which may be incurred from time to time for money loaned or debt guaranteed[.]
>
> [T]he amount of present obligations secured by this Deed of Trust is One Hundred Thirty Thousand Dollars . . . and the maximum amount which may be secured by this Deed of Trust at any one time is One Hundred Thirty Thousand Dollars . . . which future obligations may be incurred within a period of fifteen (15) years from the date of this instrument[.]
>
> Grantor has agreed to secure the present obligations and future obligations which may from time to time be incurred by the conveyance of the premises hereinafter described;

Also in November 1999, Roy Clifton Koonts, III (Roy), David Craig Koonts (David), and Danny Glenn Koonts (Danny), as partners of R.C. Koonts and Sons Masonry, a North Carolina general partnership, executed a promissory note for $130,000.00 in favor of LSB. Junior and Edith also signed the promissory note as cosigners. This note was eventually paid off, but LSB did not cancel the November 1999 Deed of Trust because it had a future advances clause, allowing for the Deed of Trust property to serve as collateral for future loans.

In April 2002, Roy and David, as president and vice president, respectively, of R.C. Koonts and Sons Masonry, Inc., executed a promissory note to LSB in the amount of $382,381.74. Edith signed a commercial guaranty, guaranteeing the debts of R.C. Koonts and Sons Masonry, Inc. The commercial guaranty stated the following, in pertinent part:

> The amount of this Guaranty is Unlimited.
>
> For good and valuable consideration, Edith L. Koonts ("Guarantor") absolutely and unconditionally guarantees and promises to pay to [LSB] ("Lender") or its order . . . the indebtedness . . . of R.C. Koonts and Sons Masonry, Inc. ("Borrower") to Lender on the terms of conditions set forth in this Guaranty. Under this Guaranty, the liability of Guarantor is unlimited and the obligations of Guarantor are continuing.

In November 2004, R.C. Koonts and Sons Masonry, Inc. executed a promissory note in favor of LSB for $417,306.14. A portion of the money from the November 2004 note was used to pay off the April 2002 note. In July 2005, the November 2004 note for $417,306.14 was renewed by R.C. Koonts and Sons Masonry, Inc.

R.C. Koonts failed to make payments as was required by the terms of the July 2005 promissory note. In response, Petitioner filed a petition for order of foreclosure, requesting to "exercise the power of sale contained in the deed of trust for the purpose of satisfying the indebtedness." In November 2008, the Clerk of Davidson County Superior Court authorized Petitioner to proceed with the foreclosure. David, in his individual capacity, filed a notice of appeal to Davidson County Superior Court.

In December 2008, the Davidson County Superior Court filed an Order, dismissing the foreclosure. The trial court found that Petitioner did not have a right to foreclose under the terms of the promissory note or under the Deed of Trust executed in November 1999. From this Order, Petitioner appeals.

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[1] Petitioner first argues that the trial court did not have subject matter jurisdiction over the appeal of the Clerk's order, permitting foreclosure, and therefore, had no jurisdiction to enter its order dismissing the foreclosure proceeding. Petitioner contends that "there was no appealing party before it who had standing to challenge the Clerk's order permitting foreclosure."

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (internal quotations omitted). " '[I]f a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction.' " *In re Miller*, 162 N.C. App. 355, 359, 590 S.E.2d 864, 866 (2004) (quoting *State v. Linemann*, 135 N.C. App. 734, 739, 522 S.E.2d 781, 785 (1999)). " '[W]hether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*.' " *Childress v. Fluor Daniel, Inc.*, 172 N.C. App. 166, 167, 615 S.E.2d 868, 869 (2005) (quoting *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004)).

Petitioner contends that "in any case or controversy before the North Carolina courts, subject matter jurisdiction exists only if a plaintiff has standing." *Casper v. Chatham Cty.*, 186 N.C. App. 456, 459, 651 S.E.2d 299, 302 (2007) (internal quotation omitted). Petitioner also argues that "only a 'party aggrieved' has standing to appeal and may appeal an adverse ruling." Although we agree with the Petitioner on these points, we are not convinced by Petitioner's

argument that the trial court did not have jurisdiction to enter its order dismissing the foreclosure proceeding.

"When a proceeding before the clerk is brought before the superior court, the court's jurisdiction is not appellate or derivative; it is original." *Hassell v. Wilson*, 301 N.C. 307, 311, 272 S.E.2d 77, 80 (1980) (citations omitted). In *Redevelopment Comm.*, the North Carolina Supreme Court held that, "when a proceeding is *erroneously* transferred to the superior court, and the judge takes 'jurisdiction' pursuant to [N.C. Gen. Stat. § 1-276], he may in his discretion make new parties, allow them to answer, and hold the case for jury determination before further proceedings are held." 277 N.C. 634, 638, 178 S.E.2d 345, 347 (1971) (citation omitted). Also, *Redevelopment Comm.* states the following:

> Whenever a civil action or special proceeding begun before the 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.

Id. at 638, 178 S.E.2d at 347 (quoting N.C. Gen. Stat. § 1-276).

N.C. Gen. Stat. § § 1-272 through 1-276 were repealed in January 2000 and replaced by N.C. Gen. Stat. § 1-301.1 *et seq.*, all of which address appeals and transfers from the clerk of superior court to the trial courts. N.C. Gen. Stat. § 1-301.1(c) (2009) states that:

> [u]pon appeal, 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.

Assuming *arguendo* that the present case was erroneously transferred to the superior court, "nevertheless, the judge of superior court had full power to consider and determine all matters in controversy as if the cause was originally before him." *Redevelopment Comm.*, 277 N.C. at 639, 178 S.E.2d at 348. We conclude that the trial judge had the discretion to add any necessary parties and did not err by taking jurisdiction pursuant to N.C. Gen. Stat. § 1-301.1. This assignment of error is overruled.

[2] Next, Petitioner argues that even if the trial court had proper jurisdiction, the trial court erred in ruling that Petitioner was not authorized to proceed with the foreclosure. We disagree.

"The applicable standard of review on appeal where, as here, the trial court sits without a jury is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings." *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 50, 535 S.E.2d 388, 392 (2000). The trial court, in an appeal of a foreclosure action, was:

> to conduct a *de novo* hearing to determine the same four issues determined by the clerk of court: (1) the existence of a valid debt of which the party seeking foreclosure is the holder, (2) the existence of default, (3) the trustee's right to foreclose under the instrument, and (4) the sufficiency of notice of hearing to the record owners of the property.

Id. at 50, 535 S.E.2d at 392.

In its Order, the trial court found the following facts, in pertinent part:

> [Edith] executed a promissory note [in November 1999], and secured that promissory note by executing a Deed of Trust[.] Said Deed of Trust contained a future advance clause.
>
> [In April 2002, Edith] executed a "Commercial Guaranty" guaranteeing the debts of R.C. Koonts and Sons Masonry, Inc. Said guaranty did not convey a security interest in real estate, nor did the guaranty reference a security instrument, nor did the guaranty contain the right to foreclose in the event of a default by R.C. Koonts and Sons Masonry, Inc.
>
> [In April 2002], the Promissory Note secured by the Deed of Trust . . . was paid and subsequently was marked paid by the Note Holder.
>
> R.C. Koonts and Sons Masonry, Inc. . . . did, [in November 2004] execute a promissory note in the sum of $417,306.14[.] Said promissory note was renewed by R.C. Koonts and Sons Masonry, Inc[. in July 2005].
>
> [Edith] did not execute the [November 2004] promissory note, nor did she execute the [July 2005] renewal of that note.

> R.C. Koonts and Sons Masonry, Inc. failed to make payments [as] required by the terms of the [July 2005] promissory note and are in default[.] Petitioner commenced this action to foreclose on the [July 2005] note and [November 1999] Deed of Trust.
>
> Pursuant to the terms of the Promissory Note executed [July 2005], the Note Holder does not have a right to foreclose under the terms of the promissory note or under the Deed of Trust executed [November 1999], and the Trustee cannot proceed under the instrument to foreclose the property described in the Deed of Trust.

There is competent evidence that Edith executed a promissory note in 1999, securing it with a Deed of Trust in November 1999. The language in the future advances clause of the November 1999 Deed of Trust specifically states that "[u]pon the request of *Grantor*, Note Holder . . . [may] make future advances to *Grantor*, permit *Grantor* to secure future obligations . . . and permit future advances and obligations[.]" (emphasis added). Because the Grantor under the Deed of Trust was Junior and Edith, any future advances would have had to been made to either Junior or Edith in order for them to be secured by the Deed of Trust.

The 1999 promissory note required that R.C. Koonts and Sons Masonry, as well as the cosigners, which included Junior and Edith, pay LSB until the note was paid in full. The 1999 promissory note was marked "paid" in April 2002. The security interest, which is "an interest in personal property or fixtures which secures payment or performance of an obligation[,]" became null and void once the obligation to pay the promissory note was fulfilled. N.C. Gen. Stat. § 25-1-201(a)(35) (2009).

The promissory note under which Petitioner is attempting to foreclose are the 2004 and 2005 promissory notes. However, both of these notes were made only to R.C. Koonts and Sons Masonry, Inc. There is no evidence that either Edith or Junior made any other future advances, using the 1999 Deed of Trust as a security interest. In April 2002, Edith did execute a Commercial Guaranty, "absolutely and unconditionally guarantee[ing] . . . to pay to [LSB] . . . the indebtedness of R.C. Koonts and Masonry, Inc." A review of the Commercial Guaranty shows us that there is in fact no conveyance of a security interest in real estate, no reference to a security instrument, nor mention of a right to foreclose in the event of a default by R.C. Koonts and Sons Masonry, Inc. Therefore, Petitioner did not have a right to fore-

close on the property referenced in the Deed of Trust under the Commercial Guaranty, nor the 2004 and 2005 promissory notes.

Based on the evidence before us, we conclude that the trial court's findings of fact were supported by competent evidence. The trial court did not err in concluding that Trustee did not have authorization to proceed with the foreclosure. This assignment of error is overruled.

For the foregoing reasons, we affirm the trial court's order.

Affirmed.

Judges STEPHENS and HUNTER, JR. concur.

BUILDERS MUTUAL INS. CO., PLAINTIFF v. GLASCARR PROPERTIES, INC., DEFENDANT

No. COA09-486

(Filed 2 February 2010)

Declaratory Judgment— insurance policy—anti-concurrent causation clause—summary judgment

In a declaratory judgment action to determine the respective rights and obligations of the parties under an insurance policy with respect to defendant's claim for mold remediation, the trial court did not err in granting judgment on the pleadings in favor of plaintiff insurance company because an anti-concurrent causation clause in the insurance policy unequivocally excluded reimbursement for the cost of mold remediation.

Appeal by Defendant from order entered 6 February 2009 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 15 October 2009.

Pinto Coates Kyre & Brown, PLLC, by John I. Malone, Jr., and David G. Harris, II, for Plaintiff-Appellee.

Wyatt Early Harris Wheeler LLP, by Allison M. Meade, for Defendant-Appellant.

BEASLEY, Judge.

Defendant (Glascarr Properties, Inc.) appeals from judgment on the pleadings entered in favor of Plaintiff (Builders Mutual Ins. Co.). We affirm.

Plaintiff corporation is a North Carolina insurance company, and Defendant is a North Carolina property development corporation. Defendant purchased a builders risk insurance policy (the policy) from Plaintiff, effective 18 May 2007 to 18 May 2008. Defendant developed a property in Kernersville, North Carolina, completing construction of a house on the property (the house) in September 2006. In August 2007 Defendant learned that vandals had broken into the house and left water taps running, causing extensive damage. Defendant submitted a claim under the policy for $102,161.44 in losses arising from the vandalism, and in October, 2007, Plaintiff paid $101,661.44 in settlement of Defendant's claim. Defendant later discovered mold in the house, caused by the vandals' water damage, and submitted an additional claim for approximately $39,000.00 for mold remediation. Plaintiff denied this claim, on the grounds that the policy excluded coverage for losses caused by mold.

On 17 June 2008 Plaintiff filed a declaratory judgment action, seeking a declaration that the policy excluded coverage for Defendant's claim for mold remediation. On 16 December 2008 Defendant filed a motion for judgment on the pleadings, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c). On 6 February 2009 the trial court denied Defendant's motion and entered judgment on the pleadings in favor of Plaintiff. The trial court ruled in relevant part that the policy "does not provide coverage to [Defendant] for its claim for mold remediation for [the house]." From this order, Defendant appeals.

Standard of Review

Defendant appeals from an order granting judgment on the pleadings. "Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (internal quotations and citations omitted). "In deciding such a motion, the trial court looks solely to the pleadings. The trial court can only consider facts properly pleaded and documents referred to or attached to the pleadings." *Reese v. Mecklenburg County*, —— N.C. App. ——, ——, 685 S.E.2d 34, 37-38 (2009) (citing *Wilson v. Development Co.*, 276

N.C. 198, 206, 171 S.E.2d 873, 878 (1970)). In the instant case, Plaintiff attached the policy, designated Exhibit A, to its complaint. In its answer, Defendant "admitted that Exhibit A attached to Plaintiff's complaint appears to be a copy of [the policy]." We conclude that the trial court properly considered the policy in its ruling.

"This Court reviews *de novo* a trial court's ruling on motions for judgment on the pleadings. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese*, —— N.C. App. at ——, 685 S.E.2d at 38 (citing *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005)).

"Generally, questions involving the liability of an insurance company under its policy are a proper subject for a declaratory judgment." *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E.2d 654, 657 (1964) (citation omitted). This is true in the present case, where the parties agree that resolution of their dispute depends upon determination of their respective legal obligations and rights under the policy. The parties agree that the policy generally covers Defendant's losses from water damage caused by vandalism. However, the water damage led to the formation of mold, and the parties disagree about whether the policy covers reimbursement for the cost of mold remediation.

The policy includes, as relevant to our decision, the following provisions:

> A. Coverage. We will pay for direct physical "loss" . . . from any Covered Cause of Loss[.]
>
> . . . .
>
> 3. Covered Cause of Loss means risks of direct physical loss . . . except those causes of loss listed in the Exclusions.
>
> B. Exclusions. 1. We will not pay for a "loss" caused directly or indirectly by any of the following. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss".
>
> . . . .
>
> f. The presence, growth, proliferation, spread or any activity of "Fungi", wet or dry rot or "microbes."

(emphasis added). This kind of exclusionary language is referred to as an "anti-concurrent causation" clause, because it excludes coverage for certain losses, regardless of whether the loss arises from more than one cause or sequence of events. *Magnolia Mfg. of N.C., Inc. v. Erie Ins. Exch.*, 361 N.C. 213, 639 S.E.2d 443 (2007) (*per curiam*), 179 N.C. App. 267, 278, 633 S.E.2d 841, 847-48 (2006) (Tyson, J. dissenting). The parties agree that the policy's definition of "Fungi" includes mold. Plaintiff argues that the policy's anti-concurrent causation clause excludes coverage for mold remediation. We agree.

In reaching this conclusion, we are mindful that "in North Carolina [the] insurance policies are construed strictly against insurance companies and in favor of the insured." *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 546, 350 S.E.2d 66, 73 (1986). However, "an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto." *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986) (citation omitted). Therefore:

> if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Woods v. Insurance Co., 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978). In the instant case, the plain language of the policy unequivocally excludes payment for losses "caused directly or indirectly by" mold, and this exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the 'loss' ". We conclude that the policy clearly excludes payment of a claim for the cost of mold remediation.

Defendant, however, makes several arguments to the contrary. Defendant first argues that:

> [t]he exclusion [for losses caused by mold] does not exclude the cost of removing mold where the mold is caused by a covered cause of loss such as vandalism. . . . [T]he exclusion applies only where mold itself "caused" the loss. Here, mold was not the "cause" of the "loss"[.]

Defendant submitted a claim seeking reimbursement or payment for mold remediation in the house, and the "loss" at issue is the financial cost of mold remediation. Defendant's argument, that the presence of

mold did not "cause" this particular loss, is unavailing. This assignment of error is overruled.

Defendant correctly states that vandalism is a covered cause of loss under the policy, and posits that vandalism caused water damage which, in turn, caused the formation of mold. Defendant alleges that vandalism (a covered cause of loss) caused its loss for the cost of mold remediation (a non-covered cause). Defendant argues that, because the policy covers claims arising from vandalism, it also covers losses caused by mold, provided the mold itself was caused by a covered cause of loss. Defendant cites the holding of *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 350 S.E.2d 66, and similar cases, that:

> when an accident has more than one cause, one of which is covered by an . . . insurance policy and the other which is not, the insurer must provide coverage. . . . "As a general rule, coverage will extend when damage results from more than one cause even though one of the causes is specifically excluded."

Id. at 547, 350 S.E.2d at 74 (quoting *Avis v. Hartford Fire Insurance Co.*, 283 N.C. 142, 150, 195 S.E.2d 545, 549 (1973)). These cases have held that a loss may be covered if it is caused in part by a covered cause of loss. However, the North Carolina cases cited by Defendant are all ones in which the policy did not contain an anti-concurrent clause that specifically excluded coverage for certain types of loss, regardless of the interplay of covered and non-covered causes of loss. In the instant case, Defendant's position directly contradicts the policy's express exclusion of coverage for losses "caused directly or indirectly by" mold, "regardless of any other cause or event that contributes concurrently or in any sequence to the "loss". Vandalism is an "indirect" cause of mold, or an "other cause or event" that contributed "concurrently or in any sequence" to the financial loss for which Defendant seeks reimbursement. We conclude that this is precisely the scenario described by the exclusion. Defendant also cites various cases from other jurisdictions. These cases are not binding authority for this Court, and we decline to follow them. This assignment of error is overruled.

Defendant also argues that exclusion of losses caused by mold is inconsistent with Plaintiff's having covered losses arising from the water damage caused by vandalism, noting that losses caused by certain types of water damage are also excluded. However, even assuming, *arguendo*, that Defendant has correctly identified an inconsis-

tency in Plaintiff's position on coverage, Defendant cites no authority suggesting that this alleged inconsistency would bar application of the mold exclusion. This assignment of error is overruled.

Defendant asserts that "to the extent that there is any ambiguity in the Fungus Exclusion endorsement," such ambiguity must be interpreted in favor of the insured. Defendant also argues that Plaintiff failed to use "language that was clear, unambiguous and easily understood" to "exclude coverage for any and all losses consisting of or otherwise relating to mold, even where the mold was caused by a covered peril[.]" Defendant contends that it is not clear whether the exclusion applies to losses for mold if the mold arose from a covered cause of loss. We conclude that the policy's language excluding coverage for "a 'loss' caused directly or indirectly by [mold] . . . regardless of any other cause or event that contributes concurrently or in any sequence to the 'loss' " is clear and unambiguous. Nor does Defendant explain how "any other cause" might reasonably be interpreted as meaning "only non covered causes." This assignment of error is overruled.

Defendant next suggests that, in order to enforce the policy as written, we would have to hold that the anti-concurrent clause "overrules" prior cases interpreting policies without anti-concurrent exclusions. It is undisputed that the earlier cases cited by Defendant interpreted policies that did not contain anti-concurrent exclusionary clauses. Consequently, those cases did not consider or interpret anti-concurrent causation clauses. Defendant fails to offer a reason that this Court's enforcement of the terms of this policy would "overrule" earlier cases addressing the proper interpretation of policies with different language. This assignment of error is overruled.

We conclude that, under the plain language of the policy, Defendant was not entitled to recover for its claim for loss caused by mold, and that the trial court's order should be

Affirmed.

Judges STEPHENS and STROUD concur.

STATE OF NORTH CAROLINA v. HOSEA NORMAN

No. COA09-564

(Filed 2 February 2010)

Appeal and Error— results of post-conviction DNA testing— no right of appeal

Defendant's appeal from an order denying him relief following a hearing on the results of postconviction DNA testing was dismissed even though the DNA results neither conclusively identified nor excluded defendant because defendant had no right of appeal from the trial court's ruling. N.C.G.S. § 15A-270.1 limits appeals to the denial of testing, and not the denial of relief after testing.

Appeal by Defendant from judgment entered 12 December 2008 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 October 2009.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Mark Montgomery, for Defendant.

BEASLEY, Judge.

Defendant (Hosea Norman) appeals from an order denying him relief, following a hearing on the results of post-conviction DNA testing. We dismiss Defendant's appeal.

In 1989 Defendant was tried on two counts of crime against nature, two counts of first-degree sexual offense, and two counts of first-degree kidnapping. The evidence tended to show that:

> two young boys informed a patrol officer that the defendant had forced them at gunpoint to walk into a wooded area and to commit certain sexual acts. The boys identified the defendant by name as the perpetrator, and stated that they knew him from their neighborhood. . . . [T]he boys alleged that the defendant repeatedly sodomized them and forced one of them to engage in an act of oral sex with the defendant.

State v. Norman, 100 N.C. App. 660, 662, 397 S.E.2d 647, 648 (1990). Defendant was convicted of one count of crime against nature, two counts of first-degree sexual offense, and two counts of first-degree kidnapping. The trial court sentenced Defendant to life imprison-

ment for the two convictions of first-degree sexual offense, a consecutive term of three years for crime against nature, and arrested judgment on the kidnapping convictions. Defendant appealed and, in *State v. Norman*, this Court concluded that there was no error in his convictions.

In April 2007, Defendant filed a motion for post-conviction DNA testing, pursuant to N.C. Gen. Stat. § 15A-269. In May, 2007, the trial court appointed counsel for Defendant and ordered defense counsel to "determine if he/she finds grounds to request post-conviction DNA testing under [N.C. Gen. Stat.] § 15A-269." In September 2007, Defendant filed a motion for post-conviction DNA testing, seeking DNA testing of pubic hair samples and semen from anal swabs taken during investigation of the case. Defendant's motion was granted[1] and testing was performed by the Charlotte-Mecklenburg Police Department (CMPD). On 1 February 2008 the trial court entered an order stating that the results of this testing had been "minimal due to degraded samples" and ordering additional testing using a "new technology[.]" The additional testing was performed by Laboratory Corporation of America (LabCorp), which later reported that its "attempts to isolate DNA . . . failed to yield sufficient quantities to develop a [DNA] profile that meets reporting standards for comparison purposes[.]"

Under N.C. Gen. Stat. § 15A-270(a) (2009), "upon receiving the results of the DNA testing conducted under G.S. 15A-269, the court shall conduct a hearing to evaluate the results and to determine if the results are unfavorable or favorable to the defendant." Such a hearing was conducted on 12 December 2008, before Judge Yvonne Evans. A CMPD employee testified that CMPD tested slides made from anal smears. Testing confirmed the presence of spermatozoa on the slide. DNA analysis showed a mixture of DNA from at least two individuals. The DNA analysis neither identified Defendant as the source of the DNA profile, nor excluded Defendant as a possible contributor of the DNA profile. Instead, testing showed that:

> the Combined Probability of Inclusion, or the expected frequency of individuals who could contribute to a portion of the mixture . . . is approximately 1 in 8 for Caucasions, 1 in 5 for African-Americans,[2] and 1 in 7 for Hispanics.

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1. A copy of the order granting Defendant's motion for DNA testing is not included in the Record.

2. The judgment entered upon Defendant's 1989 convictions indicates that Defendant is African-American.

Following the hearing, the trial court entered an order on 12 December 2008, ruling in relevant part that:

> The court reviewed the DNA test results and considered the testimony provided by an expert witness from the [CMPD]. The test results do not exclude Defendant as the perpetrator of these crimes. Therefore the Court concludes pursuant to N.C. Gen. Stat. § 15A-270(b) that the DNA testing results are unfavorable to Defendant and his motion is denied.
>
> From this order, Defendant has appealed.

Defendant argues on appeal that the trial court erred by ruling that the DNA test results were unfavorable, on the grounds that the trial court erroneously defined "favorable" DNA testing results as only those results that definitively excluded defendant as the source of the DNA. In the instant case, the DNA results neither conclusively identified Defendant nor conclusively ruled him out. Defendant argues that the DNA test results, indicating that twenty percent of the African-American population might have been the source of the DNA profile, were favorable to Defendant.

N.C. Gen. Stat. § 15A-270 (2009) provides in pertinent part that, following a hearing to evaluate the results of DNA testing:

> (b) If the results of DNA testing conducted under this section are unfavorable to the defendant, the court shall dismiss the motion[.]
>
> (c) If the results of DNA testing conducted under this section are favorable to the defendant, the court shall enter any order that serves the interests of justice, including an order that does any of the following:
>
> (1) Vacates and sets aside the judgment.
>
> (2) Discharges the defendant, if the defendant is in custody.
>
> (3) Resentences the defendant.
>
> (4) Grants a new trial.

We note that the statute does not define a standard for the determination of whether DNA results are "favorable" or "unfavorable." Nor does the statute provide any guidance for the trial court in a case such as this one, where the results fail to conclusively identify or exclude a defendant as the source of DNA. Further, it is unclear what

"motion" the court is to "dismiss," inasmuch as the hearing conducted under N.C. Gen. Stat. § 15A-270 presupposes that a defendant's motion for DNA testing has been granted. However, we do not reach the merits of Defendant's appeal, because we conclude that Defendant has no right of appeal from the trial court's ruling.

" 'In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute.' " *State v. Evans*, 184 N.C. App. 736, 738, 646 S.E.2d 859, 860 (2007) (quoting *State v. Jamerson*, 161 N.C. App. 527, 528, 588 S.E.2d 545, 546 (2003)) (internal citation omitted). "Our state Constitution mandates that the General Assembly prescribe by general law the scope of the jurisdiction of the Court of Appeals. N.C. Const. art. IV, § 12. Therefore, 'appeal[s] can be taken only from such judgments and orders as are designated by the statute regulating the right of appeal.' " *State v. Hooper*, 358 N.C. 122, 124, 591 S.E.2d 514, 515-16 (2004) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). "Generally, there is no right to appeal in a criminal case except from a conviction or upon a plea of guilty." *State v. Shoff*, 118 N.C. App. 724, 725, 456 S.E.2d 875, 876 (1995).

In *State v. Brown*, 170 N.C. App. 601, 613 S.E.2d 284 (2005), this Court held that a defendant has no right to appeal from the denial of his motion to seek post-conviction DNA testing. The General Assembly thereafter enacted N.C. Gen. Stat. § 15A-270.1, "Right to appeal denial of defendant's motion for DNA testing," effective 1 March 2008, which provides that a "defendant may appeal an order denying the defendant's motion for DNA testing under this Article, including by an interlocutory appeal." Defendant does not appeal from an order denying his motion for DNA testing, but from an order denying relief following a hearing to evaluate the test results. If the legislature intended to provide a right to appeal from the trial court's ruling on the results of DNA testing, we presume that it would have stated as such. *See, e.g.*, *Sara Lee Corp. v. Carter*, 351 N.C. 27, 35, 519 S.E.2d 308, 315 (1999) ("Had the legislature intended [a certain procedure] it would have said so; 'the absence of any express intent and the strained interpretation necessary to reach the result urged upon us by [defendant] indicate that such was not [the legislature's] intent.' ") (quoting *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 425, 276 S.E.2d 422, 436 (1981)).

On 17 June 2009 the State filed a motion to dismiss Defendant's appeal. In his response to the State's motion, Defendant concedes that "[a] literal reading of the statute [N.C. Gen. Stat. § 15A-270.1]

would seem to limit appeals to the denial of testing, not the denial of relief after testing." Defendant contends that "[i]t is cold comfort indeed for a defendant to have the right to be heard . . . after the denial of testing but not be heard at all . . . if an individual Superior Court judge denies relief." We recognize Defendant's frustration and we acknowledge the lack of proper guidance in the statute itself. However, "[t]he General Assembly simply has not provided for appeals from [a court's ruling under § 15A-270] and under those circumstances, harsh as the result may seem, we must hold that [this Court is] without subject matter jurisdiction to entertain [Defendant's] appeal[.]" *Palmer v. Wilkins*, *Com'r of Motor Vehicles*, 73 N.C. App. 171, 173, 325 S.E.2d 697, 698 (1985).

Defendant argues that this Court has the authority to review the merits of his appeal by issuing a writ of *certiorari*. We disagree. In *Bailey v. State*, 353 N.C. 142, 540 S.E.2d 313 (2000), the appellant urged the Supreme Court of North Carolina to issue a writ of *certiorari* where no appeal was permitted. The Court held:

> Rule 21 provides that a writ of *certiorari* may be issued to permit review of trial court orders under three circumstances: (1) when the right to an appeal has been lost by failure to take timely action, (2) when no right of appeal from an interlocutory order exists, or (3) when a trial court has denied a motion for appropriate relief. N.C. R. App. P. 21(a). Here, we have no interlocutory order or motion for appropriate relief to consider. Moreover, as it has been determined that the [appellant] has no right to an appeal . . . no such right could be lost by a failure to take timely action. Therefore, no circumstances exist that would permit the Court to issue a writ of certiorari pursuant to Rule 21.

Id. at 157, 540 S.E.2d at 322. Defendant also asks this Court to exercise our discretion under N.C. R. App. P. 2 to entertain his appeal. Rule 2 provides:

> To prevent manifest injustice to a party, . . . either court of the appellate division may, except as otherwise expressly provided in these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

However, "suspension of the appellate rules under Rule 2 is not permitted for jurisdictional concerns." *Bailey*, 353 N.C. at 157, 540 S.E.2d

at 323 (citations omitted). *See also* N.C.R. App. 1(b) (Rules of Appellate Procedure "shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law"). "We are therefore without authority to suspend our Appellate Rules pursuant to Rule 2 in order to entertain defendant's appeal that is not properly before this Court." *State v. Wilson*, 151 N.C. App. 219, 224, 565 S.E.2d 223, 227 (2002). However, the Supreme Court of North Carolina has held:

> this court is authorized to issue "any remedial writs necessary to give it general supervision and control over the proceedings of the other courts" of the state. N.C. Constitution, Article IV, Section 12 (1). . . . [T]his court will not hesitate to exercise its general supervisory authority when necessary to promote the expeditious administration of justice.

In re Brownlee, 301 N.C. 532, 547-48, 272 S.E.2d 861, 870 (1981) (citation omitted). We conclude that there is no right of appeal from the trial court's denial of relief following post-conviction DNA testing, and that Defendant's appeal must be

Dismissed.

Judges STEPHENS and STROUD concur.

NORTH CAROLINA CONCRETE FINISHERS, INC. D/B/A S&R CONCRETE, PLAINTIFF V. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., DEFENDANT

No. COA09-687

(Filed 2 February 2010)

1. Appeal and Error— appellate rules violations—documents attached to brief not part of record on appeal—motion to strike granted

Plaintiff violated N.C. R. App. P. 9, 11, and 28 by attaching two documents to its brief that were not part of the record on appeal, and defendant's motion to strike these documents was granted.

2. Appeal and Error— preservation of issues—new factual allegations improper

Plaintiff's new factual allegations in its statement of facts that were not included in its complaint were not properly asserted on appeal.

3. Contracts; Insurance— breach of contract—judgment on pleadings—failure to state claim

A *de novo* review revealed the trial court did not err in a breach of contract case by granting judgment on the pleadings in favor of defendant insurer because the allegations failed to state a claim for coverage for damages caused by a flood under the pertinent insurance policy.

4. Appeal and Error— preservation of issues—failure to include order denying motion in record

Although plaintiff contends the trial court erred by failing to allow plaintiff's motion for leave to amend its complaint, this assignment of error was dismissed because plaintiff failed to preserve this issue for appellate review under N.C. R. App. P. 10. The record did not include an order denying plaintiff's motion nor an appeal from such order.

Appeal by Plaintiff from order entered 18 March 2009 by Senior Resident Superior Court Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 29 October 2009.

Lewis, Deese & Nance, LLP, by James R. Nance, Jr., for Plaintiff-Appellant.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Michael R. Porter, for Defendant-Appellee.

BEASLEY, Judge.

Plaintiff (North Carolina Concrete Finishers, Inc., d/b/a S&R Concrete) appeals from judgment on the pleadings entered in favor of Defendant (North Carolina Farm Bureau Mutual Insurance Company). We affirm.

Plaintiff is a North Carolina corporation. In 2008 Plaintiff purchased from Defendant "an Inland Marine Policy insuring a 2006 Bobcat Track Loader" that "provided coverage for the Track Loader

effective March 30, 2008 through March 30, 2011[.]" In July 2008 Plaintiff filed a claim under the policy for damages to the Bobcat. The parties agree that the policy was in effect on 17 July 2008, the date that Plaintiff alleges the Loader was damaged, and that the "perils covered" under the policy include, in relevant part, coverage for "direct physical loss to covered property caused by . . . Flood. This means the overflow of a river, stream or other body of water." However, the parties disagree about whether the policy coverage for damage caused by "flood" includes the factual circumstances alleged by Plaintiff.

Defendant denied Plaintiff's claim, and on 15 September 2008 Plaintiff filed suit against Defendant, alleging breach of contract and seeking damages. Defendant answered on 18 November 2008, denying the material allegations of Plaintiff's complaint, asserting a counterclaim for declaratory judgment, and moving for judgment on the pleadings. On 13 March 2009 Plaintiff moved to amend its complaint. Following a hearing on Defendant's motion for judgment on the pleadings, the trial court on 18 March 2009 entered an order granting judgment on the pleadings for Defendant. From this order, Plaintiff appeals.

Standard of Review

Defendant appeals from an order granting judgment on the pleadings. "A motion for judgment on the pleadings is authorized by Rule 12(c) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12(c) [2009]. 'The rule's function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit.' " *Garrett v. Winfree*, 120 N.C. App. 689, 691, 463 S.E.2d 411, 413 (1995) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)). Judgment on the pleadings is properly entered only if "all the material allegations of fact are admitted[,] . . . only questions of law remain" and no question of fact is left for jury determination. *Ragsdale*, 286 N.C. 137, 209 S.E.2d at 499.

"In deciding such a motion, the trial court looks solely to the pleadings. The trial court can only consider facts properly pleaded and documents referred to or attached to the pleadings." *Reese v. Mecklenburg County*, —— N.C. App. ——, ——, 685 S.E.2d 34, 37-38 (2009) (citing *Wilson v. Development Co.*, 276 N.C. 198, 206, 171 S.E.2d 873, 878 (1970)). "This Court reviews *de novo* a trial court's ruling on motions for judgment on the pleadings. Under a *de novo* standard of review, this Court considers the matter anew and freely

substitutes its own judgment for that of the trial court." *Reese*, ––– N.C. App. at –––, 685 S.E.2d at 38 (citing *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005)).

Scope of Review

[1] The trial court entered judgment on the pleadings on 18 March 2009, and Plaintiff filed notice of appeal on 1 April 2009. Plaintiff served Defendant with its proposed Record on Appeal on 20 April 2009. On 22 May 2009 the parties "stipulate[d] that the documents submitted to the court constitute the full and complete Record on Appeal to the North Carolina Court of Appeals in this action." Plaintiff filed its appellant brief in this Court on 13 July 2009. Plaintiff attached to its brief two documents that are not part of the record: (1) a copy of an unfiled memorandum prepared by the trial court, and (2) photocopies of two photographs. On 11 August 2009 Defendant filed a "Motion to strike documents improperly attached to plaintiff-appellant's brief." Defendant argues that Plaintiff violated N.C. R. App. P. 9, 11, and 28 of the North Carolina Rules of Appellate Procedure by attaching documents that "were not a part of the Record on Appeal which was settled between the parties." We agree.

> N.C. R. App. P. 9 provides in relevant part:
>
> (a) In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, . . . and any [other] items filed with the record on appeal pursuant to Rule 9© and 9(d). Parties may cite any of these items in their briefs and arguments before the appellate courts.

"Pursuant to the North Carolina Rules of Appellate Procedure, our review is limited to the record on appeal . . . and any other items filed with the record in accordance with Rule 9(c) and 9(d)." *Kerr v. Long*, 189 N.C. App. 331, 334, 657 S.E.2d 920, 922 (2008).

> The Court of Appeals can judicially know only what appears of record. . . . Matters discussed in a brief but not found in the record will not be considered by this Court. It is incumbent upon the appellant to see that the record is properly made up and transmitted to the appellate court.

West v. Reddick, Inc., 48 N.C. App. 135, 137, 268 S.E.2d 235, 236 (1980), *rev'd on other grounds*, 302 N.C. 201, 274 S.E.2d 221 (1981) (citation omitted). In the instant case, the documents attached as

appendices to Plaintiff's brief are not part of the Record on Appeal. Accordingly we grant Defendant's motion and do not consider these documents in our review of the trial court's order.

[2] We also observe that Plaintiff adds new factual allegations in its statement of facts and its arguments that were not a part of its complaint. Specifically, in its statement of facts Plaintiff asserts that water from a retention pond "overflowed into the construction site." Plaintiff cites its proposed Amendment to its complaint as the basis for this allegation. However, the court did not grant Plaintiff's motion to amend its complaint. Plaintiff's complaint does not allege that any river, creek, or other body of water overflowed. Nor does Plaintiff allege that customarily dry land was covered or "inundated" with water. Nonetheless, in its brief, Plaintiff alleges that:

> the construction site itself is not typically covered with water, but became so covered, or inundated with water, on the date of the covered event. The overtopping of the retention pond that flows onto other properties, as seen in Appendix B, fits within the definition of a flood.

Plaintiff's new allegations, that the construction site became covered or "inundated" with water due to the "overtopping" of a retention pond that flowed onto other properties, were not included in Plaintiff's complaint and are not properly asserted on appeal. In our review of the trial court's order, we consider only those allegations contained in Plaintiff's complaint.

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[3] Plaintiff argues that the trial court erred by entering judgment on the pleadings for Defendant, on the grounds that the allegations of its complaint are sufficient to withstand a challenge under Rule 12(c). We disagree.

Plaintiff's complaint alleged, in relevant part, the following regarding the circumstances under which its Bobcat was damaged:

> 5. That on or about July 17, 2008, the Plaintiff's Bobcat was being utilized on a job in Cumberland County, North Carolina, and became mired in the mud, sinking down to where the equipment could not be readily removed; while mired down in said condition, water from a retention pond seeped around said equipment while the Plaintiff and others were in the process of trying to extricate the equipment from its location.

6. That the seeping water surrounded the vehicle causing damage to the engine and equipment to the extent that the Plaintiff suffered damages in a sum in excess of $10,000.00.

The issue presented by Defendant's motion for judgment on the pleadings was whether these allegations state a claim for damages caused by a flood, as defined in the policy. We conclude that Plaintiff's allegations fail to state a claim for coverage under the policy.

Plaintiff argues that the trial court "went beyond the plain language of the policy" and applied an erroneous "construction" of the term "flood." This argument is based upon Plaintiff's assertions regarding the legal significance of the memorandum attached to its brief. As discussed above, we have stricken this memorandum from Plaintiff's brief. Therefore, we do not consider Plaintiff's arguments regarding the memorandum.

Plaintiff acknowledges that the policy defines a flood as "the overflow of a river, stream or other body of water," but asserts that the proper "legal" definition of a flood is that found in BLACK'S LAW DICTIONARY (5th ed. 1979): "[a]n innundation of water over land not usually covered by it." Plaintiff cites no authority for the use of a definition of "flood" other than the definition in the policy. Moreover, Plaintiff's complaint does not allege "an innundation of water over land not usually covered by it." Plaintiff alleges only that (1) its Bobcat Loader got stuck or "mired" in mud and (2) that before Plaintiff could haul it out of the mud, water "seeped" around the loader. We conclude that Plaintiff failed to allege facts that would permit recovery for a loss caused by flood.

Plaintiff correctly notes that, in ruling on a motion for judgment on the pleadings, the factual allegations of Plaintiff's complaint are assumed to be true. On this basis, Plaintiff contends that the trial court was required to accept as true its assertion that its claimed loss was caused by "one of the perils covered under the policy." In ruling on a motion for judgment on the pleadings, "[a]ll allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion." *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499 (emphasis added). Plaintiff's allegation, that its loss was covered by the policy, is a legal conclusion which the court properly determined *de novo*.

We conclude that the trial court did not err by determining that Plaintiff's complaint did not state a claim for a loss covered by the policy. This assignment of error is overruled.

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[4] Plaintiff also argues that the trial court erred by failing to allow Plaintiff's motion for leave to amend its complaint. The record does not include an order denying Plaintiff's motion, nor an appeal from such order.

N.C. R. App. P. 10 provides in part that:

> (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[.] . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

We conclude that Plaintiff failed to preserve this issue for appellate review. This assignment of error is dismissed.

For the reasons discussed above, we conclude that the trial court did not err by granting judgment on the pleadings for Defendant and that its order should be

Affirmed.

Judges STEPHENS and STROUD concur.

ANGELIQUE THOMPSON, PETITIONER v. NORTH CAROLINA RESPIRATORY CARE BOARD, RESPONDENT

No. COA09-599

(Filed 2 February 2010)

Administrative Law— petition for judicial review of final agency decision—subject matter jurisdiction—aggrieved party—standing

The superior court erred by granting petitioner's petition for judicial review because the court did not have subject matter jurisdiction to make its determinations. Petitioner did not have standing since she was not an "aggrieved party" under N.C.G.S. § 150B-43.

Appeal by Respondent from judgment entered 17 December 2008 by Judge Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 17 November 2009.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Tobias S. Hampson, and Edward Eldred, for Petitioner-Appellee.

Poyner Spruill LLP, by William R. Shenton and Jessica M. Lewis, for Respondent-Appellant.

BEASLEY, Judge.

North Carolina Respiratory Care Board (Board) appeals an order affirming in part and modifying in part, the Board's Final Agency Decision and Order. For the following reasons, we reverse.

Angelique Thompson (Thompson) is a licensed respiratory care practitioner in North Carolina who obtained her licence to practice in July 2004. In September 2005, she began working at Kight's Medical Corporation, a durable medical equipment company that provides home care. Some of Thompson's duties included setting up patients on various types of respiratory equipment, such as CPAPs, BiPAPS, ventilators, and apnea monitors.

On 16 July 2006, Thompson's license to practice respiratory care expired, but she did not renew it until 10 August 2006. During this time, she continued to work for Kight's Medical Corporation. In September 2006, upon receiving the application for Thompson's license renewal, the Board sent Thompson a letter stating that they had "received a complaint concerning [her] practice of Respiratory Care." The letter informed Thompson that the Board believed that there was "sufficient credible information to begin an investigation" concerning a possible violation for practicing without a license. In January 2007, Thompson attended a meeting with the Board's Investigation and Informal Settlement Committee.

Thompson signed a Consent Order with the Board acknowledging that she had practiced Respiratory Care without a license and agreed to pay civil penalties and costs related to the disciplinary action. Thereafter, Thompson did not pay the fines or costs and appealed the consent order. Thompson stated that "due to a mistake in information[,]" she had realized after the meeting that she did not provide any respiratory care during the applicable time period.

The Board referred the matter to the Office of Administrative Hearings and an Administrative Law Judge (ALJ) conducted a hearing in January 2008. The ALJ made the following conclusions of law, in pertinent part:

> Since the Reprimand and the $250.00 in civil penalties and $100.00 in costs were based on [Thompson's] mistaken agreement to the Consent Order, the Consent Order is not a sufficient basis for upholding those sanctions.
>
> [Thompson's actions] on July 17, 2006 . . . did constitute the practice of respiratory care, as defined in the Board's Rules, because it constituted "patient instruction in respiratory care, functional training in self-care and home respiratory care management, and the promotion and maintenance of respiratory care fitness, health, and quality of life. . . .
>
> Other than the apnea monitor service which [Thompson] provided on July 17, 2006, the Board has not met its burden to show by a preponderance of the evidence that [Thompson] provided respiratory care to patients while her license was lapsed from July 17, 2006 to August 10, 2006. The evidence in this case shows that the apnea monitor incident on July 17, 2006 was an isolated incident, not committed with knowledge by [Thompson] that it did or could constitute the practice of respiratory care. The evidence does not demonstrate a pattern of conduct on the part of [Thompson] warranting discipline.

The administrative law judge made a Proposal for Decision, concluding that:

> the [Board] reverse its previous decision to order [Thompson] to pay $250.00 in civil penalties and $100.00 in costs, remove any record or indication of this action from [Thompson's] record with the Board, including but not limited to the public web page reference to same, and also take all necessary measures to remove any record or indication of this action with any other entity, including but not limited to the Healthcare Integrity and Protection Data Bank and the National Databank maintained by the National Board for Respiratory Care.

The Board issued a Final Agency Decision, adopting the ALJ's Proposal for Decision. Subsequently, Thompson filed a Petition for Judicial Review of the Board's Final Agency Decision. Thompson only requested review of the Board's conclusions of law numbers 4 and 5,

which addressed Thompson's delivery, set up, and instruction on the use of an apnea monitor. Conclusions of law 4 and 5 determined that Thompson had practiced respiratory care, but that the "evidence [did] not demonstrate . . . conduct on the part of [Thompson] warranting discipline." The Board responded to Thompson's Petition for Judicial Review by requesting that the trial court dismiss Thompson's claims on the grounds that Thompson failed to show that she was a person aggrieved under N.C. Gen. Stat. § 150B-43 and argued, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, that she failed to state a claim.

Following a hearing in December 2008, the trial court issued an Order allowing Thompson's Petition for Judicial Review and affirming the Board's Final Agency Decision. However, the trial court made two modifications of the Board's conclusions of law. First, the trial court concluded that the delivery of the apnea monitor and associated instructions that Thompson gave on 17 July 2006 did not constitute the practice of respiratory care. Secondly, the trial court concluded that because the Board had not met its burden, showing that Thompson provided respiratory care to patients while her license lapsed, Thompson's conduct did not warrant discipline. From this Order, the Board appeals.

"When the petitioner contends the agency decision was affected by error of law . . . *de novo* review is the proper standard[.]" *Skinner v. N.C. Dep't of Corr.*, 154 N.C. App. 270, 273, 572 S.E.2d 184, 187 (2002) (internal quotations omitted). " '*De novo*' review requires a court to consider a question anew, as if not considered or decided by the agency." *Id.* at 279, 572 S.E.2d at 191 (internal quotations omitted).

The Board argues that the trial court erred by determining that Thompson had standing to file a Petition for Judicial Review. The Board contends that Thompson is not a person aggrieved because she was not required to pay any civil penalty or costs to the Board, was not reprimanded by the Board, and her "person, property, or employment" was not substantially affected. We agree.

Under N.C. Gen. Stat. § 150B-43 (2009), "[a]ny person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article[.]" In order to have standing under this statute, " '(1) the petitioner *must be an aggrieved party*; (2) there must be a

final agency decision; (3) the decision must result from a contested case; (4) the petitioner must have exhausted all administrative remedies; and (5) there must be no other adequate procedure for judicial party.' " *Steward v. Green*, 189 N.C. App. 131, 136, 657 S.E.2d 719, 722 (2008) (quoting *In re Rulemaking Petition of Wheeler*, 85 N.C. App. 150, 153, 354 S.E.2d 374, 376 (1987)) (emphasis added). A " '[p]erson aggrieved' means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C. Gen. Stat. § 150B-2(6) (2009). Our Court has defined standing as a " 'distinct and palpable injury likely to be redressed by granting the requested relief.' " *Love v. Tyson*, 119 N.C. App. 739, 744, 460 S.E.2d 204, 206 (1995) (quoting *Landfall Group v. Landfall Club, Inc.*, 117 N.C. App. 270, 273, 450 S.E.2d 513, 515 (1994)).

Thompson argues that under *Smith v. Smith*, 145 N.C. App. 434, 549 S.E.2d 912 (2001), the determination by the Board that Thompson practiced respiratory care without a license would substantially affect her person, property, or employment. In *Smith*, a domestic violence protective order against the defendant expired prior to the time of his appeal. Our Court held that because the defendant "may suffer collateral legal consequences as a result of the entry of the order[,]" that his appeal had "continued legal significance and [was] not moot." *Id.* at 436-37, 549 S.E.2d at 914. Our Court also held that:

> [i]n addition to the collateral legal consequences, there are numerous non-legal collateral consequences to entry of a domestic violence protective order that render expired orders appealable. For example, a Maryland appellate court in addressing an appeal of an expired domestic violence protective order, noted that "a person applying for a job, a professional license, a government position, admission to an academic institution, or the like, may be asked about whether he or she has been the subject of a [domestic violence protective order]." *Piper v. Layman*, 726 A.2d 887, 891 (Md. Ct. Spec. App. 1999). The *Piper* court, therefore, held appeals from expired domestic violence protective orders are not moot because of the "stigma that is likely to attach to a person judicially determined to have committed [domestic] abuse." *Id.*

Id.

In the present case, however, Thompson's interest in her person, property, or employment have not been affected substantially by the

action of the Board. She was not required to pay any monetary penalties as the Board's Final Agency Decision reversed its previous decision, which had ordered Thompson to pay civil penalties and costs. There is also no indication that Thompson's present employment was substantially affected by the Board's decision. The Final Agency Decision not only specified that "any record or indication of the previous decision" with the Board would be removed, but that any record or indication of the previous decision with "any other entity" would be removed as well. In contrast to the *Smith* case, there would be no record of the Board's decision to substantially affect Thompson's future employment. The "non-legal collateral consequences" and "stigma" referred to in *Smith* does not apply to our present case.

Because Thompson is not an "aggrieved party" under N.C. Gen. Stat. § 150B-43, she did not have standing to petition the Superior Court for judicial review under the statute. Therefore, the Superior Court erred by granting Thompson's Petition for Judicial Review and did not have subject matter jurisdiction to make its determinations. Accordingly, we do not reach the Board's remaining arguments.

For the foregoing reasons, we reverse the Superior Court's order, granting Thompson's Petition for Judicial Review.

Reversed.

Judges WYNN and CALABRIA concur.

STATE OF NORTH CAROLINA v. BRANDI ANN HAAS

No. COA09-647

(Filed 2 February 2010)

1. Evidence— best evidence rule—no error

The trial court's admission into evidence of a transcript of defendant's prior testimony at a juvenile hearing did not violate the best evidence rule where an audio recording of the prior juvenile proceeding was available to all parties and the contents of the recording were not in question.

2. Evidence— best evidence rule—no prejudice

Even if the trial court erred by admitting into evidence a transcript of defendant's prior testimony at a juvenile proceeding when an audio recording of the proceeding existed, defendant failed to show prejudice where defendant did not request that the jury be permitted to hear the audio recording and did not include the audio recording in the record on appeal.

Appeal by defendant from judgment entered 6 October 2008 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 4 November 2009.

Attorney General Roy Cooper, by Assistant Attorney General Angenette R. Stephenson, for the State.

Michael J. Reece, for defendant-appellant.

STEELMAN, Judge.

Where an audio recording of a prior juvenile proceeding was available to all parties and the contents of the recording were not in question, the best evidence rule was not violated by the admission of a written transcript of the proceeding.

I. Factual and Procedural Background

Brandi Ann Haas (defendant) and Patrick Haas (Patrick) are the parents of J.P.H., a minor child. J.P.H. was born in 2003. In 2004, following the separation of defendant and Patrick, defendant entered into a relationship with Jeffrey Hill (Hill).

On 22 December 2004, defendant, Hill, and J.P.H. arrived at their residence between 9:00 and 9:30 p.m. Hill then left to buy a ferret for defendant as a Christmas gift, while defendant remained at home with J.P.H. Defendant fed J.P.H. and put him to sleep in her bed, vacuumed the residence, and washed dishes. At approximately 11:00 p.m., Hill returned home.

Defendant gave conflicting accounts of the events that subsequently transpired. On 23 December 2004, defendant gave a statement to police in which she stated that when Hill returned home, he gave her the ferret. While defendant and Hill were talking, J.P.H. started "screaming at the top of his lungs." Hill and defendant ran into the bedroom where J.P.H. was laying on the bed. J.P.H.'s "legs were locked out, stiff, and his arms were down by his side with clenched fists." Defendant held J.P.H. while Hill called 911. An EMS unit trans-

ported J.P.H. to Randolph Hospital. Defendant stated that J.P.H. had just learned to walk and had fallen often prior to this date. Hill's statement to police was virtually identical to defendant's statement.

While being treated at the hospital, medical tests revealed a large blood blister on J.P.H.'s brain. Because of swelling of the brain, J.P.H.'s condition was life-threatening. The treating physicians diagnosed that J.P.H.'s injuries were the result of non-accidental trauma, caused by abusive head trauma or shaken impact syndrome. Doctors contacted the Department of Social Services to investigate the possibility of child abuse.

In 2005, defendant and Hill testified concerning the incident in juvenile court. This testimony was recorded using four-track audio equipment. A court reporter subsequently transcribed the hearing. The testimony of defendant and Hill was consistent with their statements on 23 December 2004.

On 18 April 2005, defendant was indicted for the offense of felony child abuse.[1] On 8 June 2007, police took a second statement from defendant at the request of her attorney. In this statement, defendant recanted a portion of her 23 December 2004 statement. Defendant stated that after she and Hill heard J.P.H. scream, they entered the bedroom and observed J.P.H. "sitting up in the middle of the bed, holding his bottle." J.P.H. starting calling for defendant, so she picked him up, sat down on the bed, and started rocking him. Hill sat down on the other side of the bed and told defendant that he would stay in the room with J.P.H. while defendant finished the dishes. Thereafter, Hill emerged from the bedroom and stated that J.P.H. was asleep. A few minutes later, J.P.H. started to cry again. Hill re-entered the bedroom and partially closed the door. Defendant started to vacuum, heard a "thump", and J.P.H. started to cry. Defendant went into the bedroom and Hill was cradling J.P.H. Defendant asked what was wrong and Hill stated that J.P.H. must have gotten scared.

Defendant started to vacuum again. Defendant then heard another thump "that sounded like a car door slamming." Defendant turned off the vacuum and saw Hill walk out of the bedroom and close the door. Defendant heard J.P.H. screaming and asked Hill what was wrong with J.P.H. Hill did not respond. Defendant found J.P.H. nude in the center of the bed in convulsions. Hill stated that defendant had "a retarded young'un [sic] and there's something wrong with hi[m]." Hill then called 911.

1. The record indicates that Hill was not charged with felony child abuse.

Prior to trial, defendant filed a motion *in limine*, objecting to the admission of the transcript from the juvenile hearing. Defendant contended that the best evidence rule required the actual recording of her testimony be presented to the jury rather than a transcript. The trial court denied the motion, but stated that neither party would be precluded from having the jury listen to the recording in addition to reading the transcript.

Defendant's trial began on 29 September 2008. Hill testified as a witness for the State. His testimony regarding the events of 22 December 2004 was consistent with his previous statements. The State also requested that the transcript of defendant's testimony at the 2005 juvenile hearing be read into the evidence. Defendant objected and the trial court overruled the objection. Copies of the transcript were distributed to the jury and the transcript was read verbatim into the record.

Defendant presented evidence at trial and testified that she had not initially informed the police of Hill's presence in the bedroom with J.P.H. because she was intimidated by Hill and that he had threatened to hurt her if she did not "leave his name out of it[.]" Defendant never offered the recording of the juvenile hearing as evidence nor made a request that the jury hear the tape.

On 6 October 2008, the jury found defendant guilty of felony child abuse. The trial court found defendant to be a prior record level II for felony sentencing purposes. Defendant was sentenced to twenty-nine to forty-four months imprisonment. This sentence was suspended and defendant was placed on supervised probation for thirty-six months. Defendant was also sentenced to a six-month term of special probation. Defendant appeals.

II. Best Evidence Rule

[1] In her sole argument on appeal, defendant contends the trial court erred in admitting the transcript of defendant's prior testimony at a juvenile hearing when the original recording was available. We disagree.

Rule 1002 of the North Carolina Rules of Evidence provides that in order "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." N.C. Gen. Stat. § 8C-1, Rule 1002 (2007). This rule generally requires that secondary evidence offered to prove the contents of a recording be

excluded whenever the original is available. *State v. York*, 347 N.C. 79, 91, 489 S.E.2d 380, 387 (1997). However, it is well-settled that Rule 1002 applies only when the content of a writing, recording, or photograph is in question. *State v. Martinez*, 149 N.C. App. 553, 560, 561 S.E.2d 528, 532 (2002). In *Martinez*, the defendant argued the trial court had violated Rule 1002 by allowing a witness to testify regarding the contents of a recorded telephone conversation. *Id.* at 559, 561 S.E.2d at 532. This Court held that the admission of the testimonial summary of the recorded conversation did not violate Rule 1002 because the contents of the recording were not being disputed by the defendant and the defendant never moved at any time to have the tape played for the jury. *Id.* at 560, 561 S.E.2d at 532.

In the instant case, defendant does not contend that there is any question as to the accuracy of the transcript submitted to the jury at trial and concedes in her brief that the recording of the juvenile hearing was authentic: "There is no reason at all that the original recording could not have been played for the jury. It was available and *both parties clearly considered it authentic* (the Defendant argued for playing it; the State relied upon it for preparation of its 'transcript.')" (Emphasis added). Defendant bases her argument solely on the existence of the recording and alleges it was error to admit the transcript. Because the contents of the recording of defendant's prior testimony in the juvenile hearing are not in question, Rule 1002 is not applicable. *Martinez*, 149 N.C. App. at 560, 561 S.E.2d at 532.

[2] Even assuming *arguendo* that the trial court erred in admitting the transcript prior to the recording, the admission of the transcript did not prejudice defendant. N.C. Gen. Stat. § 15A-1443(a) requires that in order to establish reversible error, a defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a) (2007). Defendant argues that the admission of the transcript prejudiced defendant in that the jury was unable to consider her "tone, inflection, and demeanor" as she testified at the juvenile hearing.

However, the trial court clearly stated that neither the State nor defendant was precluded from presenting the recording to the jury in addition to reading the transcript. It is undisputed that the original recording had been provided to defendant and could have been offered into the evidence if defendant so desired. Defendant never offered the recording as evidence and did not request that the jury be permitted to hear the recording. As stated above, there is no dispute

as to the accuracy of the transcript of the juvenile hearing. Further, we note that defendant has failed to include the recording as part of the record on appeal. Therefore, this Court is precluded from evaluating the recording and any of defendant's arguments pertaining to prejudice.

Defendant has failed to show that if the recording had been played, the jury would have reached a different verdict. N.C. Gen. Stat. § 15A-1443(a). This argument is without merit.

Defendant failed to argue her remaining assignments of error and they are deemed abandoned. N.C.R. App. P. 28(b)(6).

NO ERROR.

Judges ELMORE and HUNTER, JR., Robert N. concur.

STATE OF NORTH CAROLINA v. JAMES WILLIAM JACOBS, DEFENDANT

No. COA09-762

(Filed 2 February 2010)

1. Appeal and Error— issue not preserved for appellate review—failure to object

In a felony breaking or entering a motor vehicle prosecution, defendant waived his objection to the admission of a copy of the vehicle's registration, offered to prove ownership of the vehicle and the owner's lack of consent to defendant's breaking or entering the vehicle, by failing to object to other evidence admitted for the same purpose. The evidence was sufficient to submit the element of lack of consent to the jury.

2. Sentencing— prior record level—proof of prior convictions

The trial court erred in finding defendant to be a level VI offender for felony sentencing purposes because the State's submission of a Felony Sentencing Worksheet did not meet the requirements of N.C.G.S. § 15A-1340.14(f) for proving a defendant's prior convictions and defendant did not stipulate to the convictions listed on the worksheet.

Appeal by defendant from judgment entered 28 January 2009 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General T. Lane Mallonee, for the State.

Kimberly P. Hoppin for defendant-appellant.

STEELMAN, Judge.

When defendant failed to object to evidence admitted at trial, he cannot argue that it was error to admit such evidence for the first time on appeal. The State presented sufficient evidence to submit the felony of breaking or entering a motor vehicle to the jury. Submission of a felony sentencing worksheet to the trial court does not meet the requirements of N.C. Gen. Stat. § 15A-1340.14(f), and thus, the State failed to produce before the trial court sufficient proof of defendant's prior convictions.

I. Factual and Procedural History

In order to combat auto theft in a pro-active manner, the Charlotte-Mecklenburg Police Department uses "bait" vehicles. One such vehicle was a 1993 Toyota 4-Runner, which was specially equipped so that the engine could be left running, but the transmission was locked so that a thief could not drive the vehicle away.

On 27 February 2008, Detective Matt Pitcher (Detective Pitcher) drove the Toyota to the parking lot of the Days Inn on West Sugar Creek Road in Charlotte and went into the hotel office. The vehicle was left running. The Toyota was watched by Officer Staton Fischbach (Officer Fischbach) from a "take-down van." Officer Fischbach observed James William Jacobs (defendant) approach the Toyota, look inside the vehicle, and carefully look around the area. Defendant got into the vehicle and made twenty-five to thirty unsuccessful attempts to jerk the vehicle into the drive gear.

Defendant was arrested and charged with the felony of breaking or entering a motor vehicle, and with having attained the status of habitual felon. On 28 January 2009, a jury found defendant guilty of breaking or entering a motor vehicle and of being an habitual felon. The trial court found defendant to be a felony level VI and imposed an active sentence of 160 to 201 months imprisonment.

II. Sufficiency of Evidence on Element of Lack of Consent

[1] In his first argument, defendant contends that the trial court erred in admitting into evidence a photocopy of the Toyota's registration over defendant's objection. In his second argument, he challenges the sufficiency of the State's evidence to submit the case to the jury as to the element of lack of consent. We disagree. Because these two arguments are inexorably intertwined, we address them together.

Defendant argues that the admission of the photocopy of the Toyota's registration card violated the "best evidence rule." N.C. Gen. Stat. § 8C-1, 1002 (2007). He further argues that the registration card was inadmissible hearsay as to the ownership of the Toyota. Without this evidence, defendant asserts that the State failed to produce sufficient evidence of an essential element of the felony of breaking or entering a motor vehicle—that the breaking or entering was without the consent of the owner.

We first note that the photocopy of the Toyota's registration card was not the only evidence presented at trial by the State on the ownership of the vehicle and the owner's lack of consent to the breaking or entering by defendant. Sergeant Richard Tonsberg, head of the Auto Theft Unit of the Charlotte-Mecklenburg Police Department, testified that the Toyota was donated to the City of Charlotte by an insurance company, and it was owned by the City of Charlotte. Officer Fischbach testified that the Toyota was owned by the City of Charlotte, and it had not consented to defendant's breaking and entering the vehicle. Detective Pitcher, the person who operated the vehicle on the date in question, testified that he had no contact with defendant, and thus could not have consented to defendant's actions. Further, the very nature of the operation conducted on 27 February 2008 gives rise to an inference that the owner of the vehicle did not consent to defendant's conduct. Defendant objected on grounds of relevancy as to the portion of Sergeant Tonsberg's testimony concerning ownership of the "bait" vehicle, but defendant did not object to any of the other testimony.

In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent. N.C.R. App. P. 10(b)(1) (2007). Appellate courts "will not consider arguments based upon matters not presented to or adjudicated by the trial court." *State v. Haselden*,

357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003) (citing *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991)), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003). While defendant did object to Sergeant Tonsberg's testimony as to ownership of the vehicle, he did not object to Officer Fischbach's testimony as to ownership of the vehicle. "It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979) (citations omitted). Thus, defendant's objection to Sergeant Tonsberg's testimony is deemed waived.

The above-recited testimony was sufficient to submit the element of lack of consent to the jury, even excluding the photocopy of the Toyota's registration. It is therefore unnecessary for us to address defendant's arguments concerning the best evidence rule and hearsay. Defendant attempts on appeal to raise constitutional issues in connection with his first argument. These issues were not raised before the trial court and cannot be raised for the first time on appeal. N.C.R. App. P. 10(b)(1); *State v. Walters*, 357 N.C. 68, 85, 588 S.E.2d 344, 354 (2003) (citations omitted), *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003). The constitutional argument is not preserved and is dismissed.

Defendant's first and second arguments are without merit.

III. Sentencing Defendant as a Prior Record Level VI

[2] In his third and fourth arguments, defendant contends that the trial court erred in finding him to be a level VI for purposes of felony sentencing. We agree. These sentencing arguments are addressed together.

At felony sentencing hearings, the "State bears the burden of proving, by a preponderance of the evidence" the prior convictions of defendant by any of the following methods:

(1) Stipulation of the parties.

(2) An original or copy of the court record of the prior conviction.

(3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.

(4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f) (2007).

In the instant case, the prosecutor submitted a Felony Sentencing Worksheet (AOC-CR-600) to the trial court and read the convictions shown thereon. There was no stipulation, either in writing on the worksheet or orally by defendant. The prosecutor failed to submit to the trial court any of the documentation described in N.C. Gen. Stat. § 15A-1340.14(f)(2) and (3). No other material was submitted to the trial court pursuant to subsection (4). The worksheet showed forty-two prior record points. Defendant acknowledged at the sentencing hearing that he had been found to be an habitual felon on two prior occasions.

The appellate courts of this State have repeatedly held that the submission of a felony sentencing worksheet to the trial court does not meet the requirements of N.C. Gen. Stat. § 15A-1340.14(f). *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005); *State v. Spellman*, 167 N.C. App. 374, 392, 605 S.E.2d 696, 707 (2004) (quoting *State v. Riley*, 159 N.C. App. 546, 557, 583 S.E.2d 379, 387 (2003)), *appeal dismissed and disc. review denied*, 359 N.C. 325, 611 S.E.2d 845 (2005); *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002) (citation omitted). The mere recitation of the convictions shown on the worksheet into the record does not meet any of the requirements set forth in N.C. Gen. Stat. § 15A-1340.14(f). Following the above-noted decisions of the appellate courts, the Administrative Office of the Courts amended form AOC-CR-600 in October 2005 to include signature lines for the prosecutor and either the defendant or defense counsel to acknowledge their stipulation as to defendant's prior conviction and felony sentencing level. Unfortunately, this change to the sentencing worksheet seems to have gone largely unnoticed at felony sentencing hearings.

It is the responsibility of the State to attempt to procure a stipulation from defendant as to defendant's prior convictions and record level. If defendant refuses to so stipulate, then it is incumbent upon the State to produce before the trial court proof of defendant's prior convictions pursuant to N.C. Gen. Stat. § 15A-1340.14(f)(2), (3), or (4). In the absence of such proof, as in the instant case, the appellate courts must remand the case for resentencing.

NO ERROR AS TO TRIAL, REMANDED FOR RESENTENCING.

Judges McGEE and STEPHENS concur.

HENRY V. JOHNSON, JR., PLAINTIFF v. THE UNIVERSITY OF NORTH CAROLINA AND WINSTON-SALEM STATE UNIVERSITY, DEFENDANTS

No. COA09-783

(Filed 2 February 2010)

Administrative Law— judicial review—failure to exhaust administrative remedies

The trial court did not err by concluding it lacked jurisdiction and by granting defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(1) plaintiff's action for breach of an employment contract based on wrongful discharge. Plaintiff elected to pursue his administrative remedies in connection with his discharge and failed to exhaust his administrative remedies.

Appeal by plaintiff from order entered 5 March 2009 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 30 November 2009.

Morgan, Herring, Morgan, Green, & Rosenblutt, L.L.P., by Todd J. Combs, for plaintiff-appellant.

Roy Cooper, Attorney General, by Brian R. Berman, Assistant Attorney General, for the State.

MARTIN, Chief Judge.

Plaintiff Henry V. Johnson, Jr. appeals from the Wake County Superior Court's order granting defendants' motion to dismiss plaintiff's action. We affirm.

Our recitation of the facts is limited to those relevant to the issue before us on appeal. In November 2004, plaintiff was employed under a one-year probationary term appointment as an assistant professor by defendant Winston-Salem State University ("defendant WSSU"), one of the constituent institutions of defendant University of North Carolina ("defendant UNC"). On 16 November 2004, the provost and vice chancellor of defendant WSSU sent plaintiff a letter advising him that he had been recommended for a two-year term appointment as assistant professor for two nine-month academic years, beginning 15 August 2005 and ending 16 May 2007. The contract for plaintiff's two-year term appointment specified that the agreement was "subject to and governed by pertinent provisions of the Winston-Salem

University Tenure Policies and Regulations [("Tenure Regulations")] and Chapter Six of the Code of The University of North Carolina [("UNC Code")], as written and as may be revised and [wa]s hereby incorporated by reference."

On 4 December 2006, defendant WSSU sent plaintiff a letter notifying him that he was suspended with pay effective immediately pending further investigation "because of the unprofessional conduct [plaintiff] displayed on November 27, 2006 . . . and because of concerns about [his] classroom behavior." On 3 April 2007, defendant WSSU notified plaintiff that it intended to discharge him "because of [his] job performance" and that he had "the right to request the written specification of the reasons for the intended discharge" within ten business days pursuant to Section IV of the Tenure Regulations. On 20 April 2007, presumably in response to a request from plaintiff, defendant WSSU sent a letter to plaintiff enumerating the reasons for defendant WSSU's intention to discharge him. In this letter, the provost and vice chancellor for defendant WSSU cited eight grounds to support its determination that plaintiff neglected his duty as an assistant professor, and two grounds to support its determination that plaintiff committed misconduct. The letter continued that, upon receiving the reasons for his discharge, plaintiff could request a hearing to contest the stated reasons for his discharge. Plaintiff admits that he requested a hearing on the matter.

On 31 May 2007, defendant WSSU sent plaintiff a letter indicating that a hearing had been conducted and that the Committee on Discharge, Non-Reappointment and Non-Promotion ("the Committee") "unanimously concluded that the administration established its case on counts of neglect of duty and misconduct." On 26 June 2007, defendant WSSU notified plaintiff that, since he failed to give notice that he would appeal from the decision to discharge him—which, according to the Tenure Regulations, must have been filed within ten days after he was informed of the final decision to do so—plaintiff was dismissed as a faculty member and was to be removed from payroll as of 30 June 2007.

In August 2008, plaintiff filed a complaint against defendants in superior court, alleging that defendants "breached the contract of employment by wrongfully discharging [p]laintiff" because defendants "never had authority to discharge [p]laintiff for alleged neglect of duty or alleged misconduct under the terms of the parties[']contract." On 11 September 2008, defendants moved to dismiss the action pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1), (2), and (6). After a hear-

ing, the trial court granted defendants' motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) on the grounds that "plaintiff elected to pursue his administrative remedies in connection with his discharge and failed to exhaust his administrative remedies in connection with his discharge." Consequently, the trial court dismissed plaintiff's claims. Plaintiff appeals.

Plaintiff contends the trial court has subject matter jurisdiction over the action because plaintiff "exhausted his administrative remedies according to the procedures set forth in the [Tenure Regulations]" prior to filing the present action. We disagree.

"An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies." *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999). An appellate court's review of such a dismissal is *de novo*. *See Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397, *appeal dismissed*, 348 N.C. 284, 501 S.E.2d 913 (1998).

"The actions of [defendant UNC], of which [defendant WSSU] is a part, are specifically made subject to the judicial review procedures of N.C.G.S. § 150B-43," *see Huang v. N.C. State Univ.*, 107 N.C. App. 710, 713, 421 S.E.2d 812, 814 (1992), which provides, in part:

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article . . . .

N.C. Gen. Stat. § 150B-43 (2009). However, defendant UNC is "exempt from all administrative remedies outlined in the APA." *See Huang*, 107 N.C. App. at 713, 421 S.E.2d at 814. Thus, "[b]ecause no statutory administrative remedies are made available to employees of [defendant UNC], those who have grievances with [defendant UNC] have available only those administrative remedies provided by the rules and regulations of [defendant UNC] and must exhaust those remedies before having access to the courts." *Id.* at 713-14, 421 S.E.2d at 814. Therefore, before a party may ask the courts for relief pursuant to N.C.G.S. § 150B-43 from a decision of a constituent institution of defendant UNC: "(1) the person must be aggrieved; (2) there must be a contested case; and (3) the administrative remedies provided by [defendant UNC] must be exhausted." *See id.* at 714, 421 S.E.2d at 814. Since the parties in the present case dispute only whether plain-

tiff has exhausted the administrative remedies provided by defendants, we limit our review to this issue.

As indicated above, the parties agree that the contract for plaintiff's two-year term appointment was subject to the Tenure Regulations and the UNC Code. According to Section IV of the Tenure Regulations and Section 603 of the UNC Code, entitled "Due Process Before Discharge or the Imposition of Serious Sanctions," although plaintiff's two-year term appointment was not a tenured position, plaintiff was "regarded as having tenure until the end of [his] term," and so was guaranteed that he could be "discharged or suspended from employment or diminished in rank only for reasons of incompetence, neglect of duty, or misconduct of such a nature as to indicate that [plaintiff was] unfit to continue as a member of the faculty."

Plaintiff admits that he received defendant WSSU's letter dated 3 April 2007 notifying him that it intended to discharge him and that he had "the right to request the written specification of the reasons for the intended discharge" pursuant to Section IV of the Tenure Regulations. Plaintiff further admits that he notified defendant WSSU that he "challenged its decision" and requested a hearing on the matter.

After plaintiff's case was heard by the Committee and it "unanimously concluded that the administration established its case on counts of neglect of duty and misconduct," plaintiff does not dispute that he did not appeal to the Board of Trustees from the Committee's decision to discharge him. Instead, plaintiff suggests that, because the administrative procedures provide that a faculty member "may" appeal an adverse decision to the Board of Trustees but do not provide that a faculty member "shall" appeal, plaintiff was not *required* to appeal from the decision to discharge him to the Board of Trustees before filing the present action in order to have exhausted his administrative remedies. While we agree that plaintiff was not *required* to pursue *any* appeal from defendant WSSU's decision to discharge him, as we stated above, before a party may seek judicial review of a decision by a constituent institution of defendant UNC, that party must exhaust "the administrative remedies *provided by* [defendant UNC]." *See Huang*, 107 N.C. App. at 714, 421 S.E.2d at 814 (emphasis added). Here, defendants provided plaintiff with "several levels of appeal," "first to the Committee [on Discharge, Non-Reappointment and Non-Promotion], then to the Trustees, and finally to the Board [of Governors]." *See id.* at 714, 421 S.E.2d at 815. Plaintiff elected to appeal to the Committee, but chose not to pursue the other levels of

appeal provided by defendants. This Court has concluded that "the policy of requiring the exhaustion of administrative remedies prior to the filing of court actions does not require merely the initiation of prescribed administrative procedures, but that they should be pursued to their appropriate conclusion and their final outcome awaited before seeking judicial intervention . . . ." *See id.* at 715, 421 S.E.2d at 815 (omission in original) (internal quotation marks omitted). Since plaintiff elected not to pursue each level of appeal provided by defendants, we conclude that plaintiff did not exhaust his remedies prior to filing the present action in superior court. Accordingly, we hold the trial court correctly concluded that it lacked jurisdiction to consider whether defendants wrongfully discharged plaintiff for neglect of duty and misconduct.

Affirmed.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA v. ENRIQUE HERNANDEZ

No. COA09-947

(Filed 2 February 2010)

1. **Evidence— hearsay—state of mind exception—prior crimes or bad acts**

   The trial court did not err in a first-degree murder case by allowing the State to introduce alleged hearsay testimony about defendant's other bad acts because the pertinent statements concerned defendant's previous violence toward the victim, were not offered to prove the facts asserted, and were introduced only to show the victim's state of mind. Even if admission of the testimony was error, defendant failed to show prejudice given the overwhelming evidence of defendant's guilt.

2. **Homicide— first-degree murder—short form indictment**

   A short form indictment was sufficient to charge defendant with first-degree murder.

Appeal by defendant from judgment entered 12 February 2009 by Judge Richard L. Doughton in Alleghany County Superior Court. Heard in the Court of Appeals 12 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General Leonard G. Green, for the State.

Russell J. Hollers, III, for defendant-appellant.

BRYANT, Judge.

During the 9 February 2009 criminal session of Alleghany County Superior Court, a jury found defendant Enrique Hernandez guilty of first-degree murder. The trial court sentenced defendant to life in prison without the possibility of parole. Defendant appeals. As discussed herein, we find no error.

Facts

The evidence at trial tended to show the following. In early July 2006, eighteen-year-old Amy Reese of Cleveland, Ohio came to Alleghany County to visit her mother, Norma Musick. Accompanying her on this visit was her boyfriend, defendant. On 14 July 2006, defendant angrily confronted Reese over her plans to visit Statesville without him. Defendant told Reese that if she "was going to see somebody that he would kill me." Reese did not go to Statesville and, later that day, told her mother that defendant was wanted in Chicago for an attempted knife assault on his baby's mother and that she wanted him to leave their house. Reese also told her mother that she had previously tried to leave defendant but that he had stalked her and dragged her by her hair. That evening, defendant and Reece argued after defendant found a letter Reece had written to him, telling him to leave. Musick last saw her daughter at about 5:00 a.m. the following morning, 15 July 2006, when defendant and Reese's stepfather helped another person with a wrecked car, and Musick went to bed. Defendant and Reece's stepfather returned home at about 7:00 a.m. Around 9:00 a.m., Reese's sister saw defendant carrying two bags out of the home. At approximately 11:00 a.m., Musick went to look for her daughter in the basement and saw a blanket covering a pool of blood. She immediately called the sheriff, who discovered Reese's body under the blanket. Reese had been stabbed to death.

Law enforcement officials stopped defendant later that day at a bus stop in Virginia. After questioning, defendant admitted having stabbed Reese. Defendant stated that Reese had pretended to be sleeping that morning and then attacked him with a knife. Defendant stated that he grabbed the knife from Reese and then "snapped" and stabbed her multiple times. Defendant then threw the knife and his

bloody shoes away in the woods. Defendant claimed that he had loved Reese and had not meant to kill her.

Defendant made three assignments of error but brings forward only two in his brief to this Court: the trial court erred in (I) allowing the State to introduce hearsay testimony about defendant's other bad acts, and (II) denying his motion to dismiss the "short-form" murder indictment against him. As discussed below, we find no error.

I

[1] Defendant first argues the trial court erred in allowing the State to introduce hearsay testimony about defendant's other bad acts. We disagree.

Here, the prosecutor asked Musick, the victim's mother, to tell the jury what Reese had said about defendant. Musick replied, "That she wanted to leave him and that he was wanted in Chicago—for attempting to cut his baby's mama." Defendant objected and requested a limiting instruction; the trial court told the jury that this testimony could only be considered evidence of Reese's "mental, emotional or physical condition, state of mind of the alleged victim." Later, the prosecutor asked Musick about "an occurrence in Cleveland" between Reese and defendant, and she replied, "That they had been working in a store together, that he had been stalking her, she was leaving to get away from him. That she was across the street from where he lived, that he came over there and he was dragging her back by the hair." Defendant again objected and the trial court gave the same limiting instruction as before.

Defendant contends that because these statements by Reese to her mother were mere factual recitations unaccompanied by emotion, they could not be admitted under the "state of mind" hearsay exception in Rule 803(3). N.C. Gen. Stat. 8C-1, Rule 803(3) (2009). In support of his contention, defendant cites *State v. Marecek*, 130 N.C. App. 303, 502 S.E.2d 634, *disc. review denied*, 349 N.C. 532, 526 S.E.2d 473 (1998), but we find that case distinguishable. In *Marecek*, we reversed and remanded, holding that certain hearsay "statements were inadmissible because they were not statements of emotion, but were mere recitation of facts and were totally without emotion, and were offered to prove the facts asserted, i.e. that the defendant was having an affair with his cousin, that the defendant was spending too much money, that the defendant had purchased a life insurance pol-

icy that they did not need, etc." 130 N.C. App. at 306-07, 502 S.E.2d at 636 (internal citation and quotation marks omitted). The statements at issue here concern defendant's previous violence toward the victim and were not offered to prove the facts asserted but only to show that Reese was afraid of defendant and what he might do if she tried to leave him.

The facts before us here are more analogous to those in *State v. Carroll*, 356 N.C. 526, 543, 573 S.E.2d 899, 910 (2002), *cert. denied*, 539 U.S. 949, 156 L. Ed. 2d 640 (2003). In *Carroll*, the victim's mother was allowed to testify about statements the victim made to her:

> [The] Defendant and Whitted [the victim] were living together in her trailer. The statements demonstrated that Whitted was upset and wanted [the] defendant to leave because Whitted was tired of defendant taking her money to buy drugs. Although she had asked him to leave, [the] defendant remained. One day after Whitted's second statement to McNeil and six days after her first statement to McNeil, [the] defendant beat and strangled Whitted in her home. Viewed in this context, the statements clearly indicate difficulties in the relationship prior to the murder. Accordingly, the statements are admissible not as a recitation of facts but to show the victim's state of mind.

Id. Similarly, here, defendant was living with Reese at her mother's home and, on the very day he threatened to kill her, she told her mother that she wanted defendant to leave because he had tried to harm his baby's mother. Reese also told her mother that she had previously tried to leave defendant, but that defendant had stalked and physically attacked her. Defendant admitted to police that, the morning following these statements, he stabbed Reese to death. As in *Carroll*, viewed in context, "the statements clearly indicate difficulties in the relationship prior to the murder. Accordingly, the statements are admissible not as a recitation of facts but to show the victim's state of mind." *Id.*

Even if the admission of Musick's testimony was error, defendant has failed to show prejudice.

> Evidence tending to show a declarant's state of mind is an exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(3) (1986). The evidence is admissible when the state of mind of the declarant is relevant and its probative value is not outweighed by the potential for prejudice. *Griffin v. Griffin*, 81 N.C. App. 665, 344 S.E. 2d

> 828 (1986). However, the failure of a trial court to admit or exclude this evidence will not result in the granting of a new trial absent a showing by defendant that a reasonable possibility exists that a different result would have been reached absent the error. *State v. Hickey*, 317 N.C. 457, 346 S.E. 2d 646 (1987).

State v. Weeks, 322 N.C. 152, 170, 367 S.E.2d 895, 906 (1988). Defendant's entire argument about prejudice is that the testimony "must have had some effect on the jury's decision to discount Mr. Hernandez's claims of self-defense and lack of specific intent to kill." We disagree. In his statement to law enforcement officers, defendant admitted that he stabbed Reese after he grabbed the knife from her and snapped. The medical examiner testified that Reese was stabbed six times. Defendant did not attempt to aid Reese after the stabbing and, instead, fled the home and left her in a pool of blood under a blanket. Defendant did not testify at trial, but even his statement to officers does not support his claims of self-defense and a lack of specific intent. The evidence against defendant was overwhelming, and we see no reasonable possibility that, absent the two sentences of challenged testimony by Musick, the jury would have reached a different result. This assignment of error is overruled.

II

[2] Defendant next contends the trial court erred in denying his motion to dismiss the "short-form" murder indictment against him. However, as defendant acknowledges, our Supreme Court has consistently rejected this argument. *See*, *e.g.*, *State v. Duke*, 360 N.C. 110, 141, 623 S.E.2d 11, 31 (2005), *cert. denied*, 549 U.S. 855, 166 L. Ed. 2d 96 (2006). This assignment of error is overruled.

No error.

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

CATHY BERARDI, PLAINTIFF; EMPLOYEE v. CRAVEN COUNTY SCHOOLS, EMPLOYER, KEY RISK MANAGEMENT SERVICES, THIRD PARTY ADMINISTRATOR; CARRIER, DEFENDANTS

No. COA09-702

(Filed 2 February 2010)

Appeal and Error— interlocutory orders—workers' compensation—expedited medical treatment

An appeal by defendants in a workers' compensation case from an order for expedited medical treatment was from an interlocutory order and did not affect a substantial right. Rulings in compliance with N.C.G.S. § 97-78(f) and (g) must necessarily be expedited, are interlocutory, and are entered without prejudice to the subsequent resolution of the contested issues in the case.

Appeal by defendants from order filed 20 February 2009 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 18 November 2009.

Lennon & Camak, PLLC, by Michael W. Bertics, for the plaintiff-appellee.

Prather Law Firm, by J.D. Prather, for defendants-appellants.

STEELMAN, Judge.

Where defendants appeal from an order of the North Carolina Industrial Commission issued under the Expedited Medical Motions Procedure, such appeal is interlocutory and not properly before this Court.

I. Factual and Procedural Background

On 23 October 2003, Cathy Berardi (plaintiff) suffered an injury to her lower back in the course and scope of her employment with the Craven County Schools (defendant). On 11 May 2004, Key Risk Insurance Company, defendant's carrier, executed an IC Form 60 admitting plaintiff's right to compensation pursuant to N.C. Gen Stat. § 97-18(b). Plaintiff was paid temporary total disability benefits.

On 16 September 2005, defendants filed an application with the Industrial Commission to terminate temporary total disability benefits. This application was denied by the Industrial Commission on 4 April 2008. This Court affirmed the decision of the Industrial Commis-

sion by an unpublished opinion, *Berardi v. Craven County School District*, —— N.C. App. ——, 675 S.E.2d 154 (2009) (unpublished).

Plaintiff's authorized treating physician is Dr. Kirk Harum (Dr. Harum), a pain management specialist. Dr. Harum treated plaintiff for pain with medication, facet block injections and radiofrequency ablations. Dr. Harum prescribed additional radiofrequency ablation procedures, which defendants refused to authorize. On 9 October 2008, plaintiff filed an IC Form 33 requesting that defendants be compelled to authorize the treatments under the expedited procedures for handling medical treatment requests authorized under N.C. Gen. Stat. § 97-78(f) and (g). On 20 February 2009, the Industrial Commission filed an order approving the radiofrequency ablation procedure and directing defendants to authorize the treatment within ten days.

Defendants appeal.

II. Interlocutory Order

We must first consider plaintiff's motion to dismiss defendants' appeal as being interlocutory. We hold that the order of the Industrial Commission is interlocutory, and dismiss defendants' appeal.

A. Appeals from the Industrial Commission

An appeal from an Opinion and Award of the Industrial Commission is subject to the "same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." N.C. Gen. Stat. § 97-86 (2007). " 'Parties have a right to appeal any final judgment of a superior court. Thus, an appeal of right arises only from a final order or decision of the Industrial Commission.' " *Cash v. Lincare Holdings*, 181 N.C. App. 259, 263, 639 S.E.2d 9, 13 (2007) (quoting *Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002)). A decision of the Industrial Commission that determines one but not all of the issues in a case is interlocutory, as is a decision which on its face contemplates further proceedings or "does not fully dispose of the pending stage of the litigation." *Id.* (quoting *Perry v. N.C. Dep't. of Corr.*, 176 N.C. App. 123, 129, 625 S.E.2d 790, 794 (2006)). However, immediate review of an interlocutory decision is proper where it affects a substantial right. *Id.* at 263, 639 S.E.2d at 13.

B. Provisions of G.S. 97-78(f)&(g) and Expedited Motion Procedure

Prior to the adoption of the Expedited Medical Motion Procedure by the Industrial Commission on 22 July 2008, a dispute over medical

treatment could be resolved through a full evidentiary hearing under N.C. Gen. Stat. § 97-83 or by filing a Motion to Compel Medical Treatment pursuant to Rule 609(a)(1) of the Workers' Compensation Rules of the North Carolina Industrial Commission. Either of these routes involves a lengthy and protracted process, during which time the employee could be deprived of necessary medical treatment. This process could be further delayed by appeal to the Court of Appeals as a result of N.C. Gen. Stat. § 97-86, which provides for supersedeas as to the decision of the Commission, except as provided in N.C. Gen. Stat. § 97-86.1.

To deal with this problem, the General Assembly enacted 2007 N.C. Sess. Laws ch. 323, § 13.4A.(a), which added subsections (f) and (g) to the provisions of N.C. Gen. Stat. § 97-78. These amendments required the Industrial Commission to prepare and implement a strategic plan for "expeditiously resolving requests for, or disputes involving, medical compensation under G.S. 97-25, including selection of a physician, change of physician, the specific treatment involved, and the provider of such treatment." N.C. Gen. Stat. § 97-78(f)(2). Subsection (g) requires the Industrial Commission to include certain data in its annual report concerning medical compensation disputes, including the number of disputes not resolved "within 45 days of the filing of the motion." N.C. Gen. Stat. § 97-78(g)(2).

In response to this directive from the General Assembly, the Industrial Commission adopted the Expedited Medical Motions Procedure. This provides for an initial administrative review of the motion, with an appeal to a Deputy Commissioner, and a further appeal to the Full Commission. Time periods for conducting discovery, filing briefs, and the filing of orders are abbreviated. The Medical Motions Procedure contains an estimate of 30 days to complete an appeal before the Deputy Commissioner and 30 to 45 days to complete an appeal before the Full Commission.

C. Application

The ruling of the Industrial Commission under the Medical Motions Procedure was not a final ruling that determined all issues in the case and was therefore interlocutory. *Cash*, 181 N.C. App. at 263, 639 S.E.2d at 13. Defendants seek a determination by this Court that the medical conditions of which plaintiff complains were not caused by a compensable injury, and therefore, that the radiofrequency ablation treatment should not have been authorized by the Industrial Commission. This issue has yet to be ruled upon by the Industrial

Commission. Further, this Court has already affirmed the ruling of the Industrial Commission that denied defendants' motion to terminate plaintiff's temporary total disability benefits.

We hold that defendants' appeal does not affect a substantial right. The enactment of N.C. Gen. Stat. § 97-78(f) and (g) by the General Assembly mandates that medical treatment issues be handled expeditiously. In order to comply with these statutory amendments, rulings must necessarily be expedited, are interlocutory, and entered without prejudice to the subsequent resolution of the contested issues in the case.

Defendants' appeal is dismissed.

APPEAL DISMISSED.

Judges McGEE and STEPHENS concur.

COMMUNITY ONE BANK, N.A. F/K/A FIRST GASTON BANK, PLAINTIFF V. WILLIAM GUY BOWEN AND JERRY L. KELLAR, DEFENDANTS

No. COA09-972

(Filed 2 February 2010)

1. Estoppel— equitable—guarantor of loan—assumption that fire insurance in place

Plaintiff was not equitably estopped from claiming damages from defendant Kellar, the guarantor of a loan, for a mobile home which burned where Kellar and plaintiff contracted for a provision stating that Kellar's liability would not be affected by Kellar's failure to insure or enforce any collateral security, and Kellar assumed that fire insurance was in place but gave no indication that plaintiff promoted such an assumption.

2. Uniform Commercial Code— negotiable instruments— impairment of collateral

The trial court did not err by granting plaintiff's motion for summary judgment on a claim against Kellar, the guarantor of a loan on a mobile home which burned, where Kellar argued that the obligation was discharged to the extent that lapsed fire insurance impaired the value of the property. The coverage lapsed

before the contract between Kellar and plaintiff, and there was no indication that plaintiff acted to void the policy.

Appeal by defendant from judgment entered 12 March 2009 by Judge Richard D. Boner in Gaston County Superior Court. Heard in the Court of Appeals 2 December 2009.

Gray, Layton, Kersh, Soloman, Furr, & Smith, P.A., by Ted F. Mitchell, for defendant Jerry L. Kellar, appellant.

Kellam & Pettit, P.A., by William Walt Pettit, for plaintiff-appellee.

BRYANT, Judge.

Defendant Jerry L. Kellar appeals from a trial court order entered 12 March 2009 granting plaintiff Community One Bank, N.A.'s motion for summary judgment. For the reasons stated herein, we affirm.

Facts

On 11 November 1994, William Bowen executed and delivered to plaintiff a promissory note for the principal sum of $115,000.00 and a deed of trust granting a lien on the real property located at 115 Lee Ballenger Road, Kings Mountain in Gaston County. Bowen also executed and delivered a security agreement which granted plaintiff a lien on Bowen's 1982 mobile home.[1]

On 15 December 2006, Bowen executed a second promissory note to renew the promissory note executed 11 November 1994 for the principal sum of $93,257.09. Per Kellar's affidavit, plaintiff would not initially renew or extend the loan contract past its maturity date of 15 June 2007. But, prior to 15 December 2006, Kellar examined the tax value of the real property and mobile home and determined the value for the 2003 tax year to be $96,640.00. As a result, on 15 December 2006, Kellar agreed to guarantee Bowen's loan: in the event Bowen could not make the payments, Kellar agreed to purchase Bowen's real property and mobile home and take over the loan.[2]

Unknown to Kellar, prior to entering into a guaranty of Bowen's loan, the fire insurance coverage on Bowen's mobile home

1. Thereafter, plaintiff First Community Bank, N.A. changed its name to FB Bank, a Division of First National Bank and Trust Company.

2. Thereafter, plaintiff changed its name to Community One Bank.

lapsed.[3] And, on 15 May 2007, Bowen's property caught fire. At no time prior to the fire, did Bowen or plaintiff inform Kellar the fire insurance coverage lapsed. Per Kellar's affidavit, the fair market value of Bowen's property after the fire was $20,000.00. On 15 June 2007, the promissory note matured and the outstanding balance became due and payable.

On 3 July 2007, plaintiff filed a complaint requesting a declaratory judgment, a judicial sale of real property, and a monetary judgment against defendants, Bowen and Kellar, jointly and severally, for the principal sum of $94,755.60 as well as interest of $23.87 per diem from 30 May 2007 until paid. Kellar answered and counterclaimed on grounds of negligent misrepresentation and negligent concealment as well as unfair and deceptive trade practices. Both parties filed motions for summary judgment. In an order filed 12 March 2009, the trial court granted plaintiff's motion for entry of default judgment and summary judgment and denied Kellar's counterclaim. Kellar appeals.

Summary judgment "shall be rendered forthwith 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. R. Civ. P. 56(c) (2007). We review an order granting summary judgment de novo. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006) (citation omitted).

On appeal, Kellar presents one question: did the trial court err in granting plaintiff's motion for summary judgment. In support, Kellar raises two arguments: A) because plaintiff was aware of the lapse in Bowen's fire insurance coverage prior to Kellar becoming a guarantor of Bowen's loan, plaintiff is equitably estopped from claiming damages from Kellar; and B) Kellar's obligation under the guaranty is discharged to the extent plaintiff impaired the value of the collateral securing the loan. We disagree.

A

[1] Equitable estoppel arises when one party, by his acts, representations, or silence when he should speak, intentionally, or through culpable negligence, induces a person to believe certain facts exist, and that person reasonably relies on and acts on

3. The record indicates the last fire insurance policy covering the property expired 15 April 2004.

> those beliefs to his detriment. There need not be actual fraud, bad faith, or an intent to mislead or deceive for the doctrine of equitable estoppel to apply.

Gore v. Myrtle/Mueller, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007) (internal citations omitted). However, here, the contract between Kellar, as guarantor of Bowen's debt, and plaintiff stated the following:

> The liability of the [guarantor] shall not be affected or impaired by . . . (vi) any failure to obtain collateral security . . . or to see to the proper or sufficient creation and perfection thereof . . . or to protect, insure, or enforce any collateral security . . . .

Moreover, Kellar gave the following testimony during his deposition:

> Q [Counsel]: How do you know that someone at [plaintiff] . . . would provide supplemental insurance coverage prior to the fire loss?
>
> A [Kellar]: I don't know that. I know that the bank requires insurance on any collateral they've got a loan on, and I presumed it was in place.
>
> . . .
>
> [Defendant] Bowen would have been the one to have paid the premium or [plaintiff] would have been the one to have put the forced insurance in place and paid it because this is standard operating procedure. It wasn't something that I would go in asking about.

Where the parties contracted for the provision which states Kellar's liability to plaintiff would not be affected by Kellar's failure to "insure[] or enforce any collateral security[,]" and Kellar assumed that fire insurance coverage was in place but gave no indication that plaintiff promoted such an assumption, plaintiff is not equitably estopped from claiming damages from Kellar.

B

[2] Next, Kellar argues that his obligation is discharged to the extent plaintiff impaired the value of Bowen's property. In support of his argument, he cites North Carolina General Statutes, section 23-3-605(e).

> If the obligation of a party to pay an instrument is secured by an interest in collateral and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of an endorser or accommodation party having a right of recourse against the obligor is discharged to the extent of the impairment.

N.C. Gen. Stat. § 25-3-605(e) (2007). However, here, the fire insurance coverage lapsed prior to the contract between Kellar and plaintiff. Moreover, there is no indication plaintiff acted to void the fire insurance policy. Therefore, we hold the trial court did not err in granting plaintiff's motion for summary judgment.

Affirmed.

Judges HUNTER, Robert C. and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 FEBRUARY 2010)

CLARK v. TYCO INT'L, INC. No. 08-1041	Harnett (05CVS01546)	Affirmed
COLEMAN v. MOON No. 09-292	Pender (04CVS727)	Affirmed in part, vacated in part
COVENTRY WOODS v. CITY OF CHARLOTTE No. 09-537	Mecklenburg (08CVS7582)	Affirmed
DEMBINSKI v. STAGE RIGGING SERVS., INC. No. 09-895	Guilford (07CVS11428)	Dismissed
IN RE C.J.R. No. 09-1179	Randolph (06JT231)	Affirmed
IN RE G.M.H., S.L.C., A.M.H. No. 09-1066	Randolph (07JT21-23)	Affirmed
IN RE H.D. No. 09-1102	Alexander (08J42-46)	Affirmed
IN RE H.R.S. No. 09-1201	Perquimans (09JT1)	Affirmed
IN RE H.R.S. AND R.F.S. No. 09-1115	Iredell (06JT240-241)	Affirmed
IN RE J.A.G. No. 09-462	Orange (08JB77)	Vacated
IN RE J.A.O., T.W.O. No. 09-1249	Rockingham (07JA82-83)	Affirmed
IN RE M.I.W. No. 09-1088	Harnett (08J177)	Affirmed
IN RE N.W.F. AND A.C.F. No. 09-1082	Person (05J8-9)	Affirmed
IN RE R.S. AND A.S. No. 09-1114	Graham (06JA17-18)	Affirmed
MARTIN v. MARTIN No. 09-984	Buncombe (82CVD871)	Affirmed
NEWPORT v. NEWPORT No. 09-738	Alamance (06CVD2932)	Dismissed
S. PRESTIGE v. INDEPENDENCE PLATING No. 09-888	Iredell (08CVS3684)	Affirmed

STATE v. ANDERSON No. 09-614	Iredell (08CRS50561) (08CRS2560)	No Error
STATE v. BELL No. 09-516	Anson (08CRS50029) (08CRS50030) (08CRS50028) (08CRS50031)	No Error
STATE v. DAVIS No. 09-659	Pitt (07CRS63156) (07CRS63221) (07CRS63151)	No Error
STATE v. EARLY No. 09-389	Rockingham (07CRS53629) (07CRS53835)	No Error
STATE v. GERMAIN No. 09-727	Jackson (06CRS51490) (06CRS51484) (07CRS486) (06CRS51499) (06CRS51493) (06CRS51488) (07CRS2579-2597) (06CRS51502) (06CRS51497) (06CRS51491) (06CRS51485) (07CRS487) (06CRS51500) (06CRS51494) (06CRS51489) (06CRS51483) (06CRS51503) (06CRS51498) (06CRS51492) (06CRS51487) (07CRS488) (06CRS51501) (06CRS51496)	No Error
STATE v. GRIER No. 09-359	Forsyth (06CRS62073)	No Error
STATE v. HAMMONDS No. 09-604	Robeson (07CRS56134) (07CRS56137) (07CRS56135) (08CRS12090) (07CRS14322) (07CRS56136)	No Error

STATE v. HOOKER No. 09-190	Wake (07CRS17816) (07CRS17817) (07CRS17814)	No Error
STATE v. JAMES No. 09-730	Guilford (07CRS100422) (08CRS23175) (07CRS100421)	No Error
STATE v. JENKINS No. 09-457	Brunswick (07CRS7735)	No Error
STATE v. KEENER No. 09-771	Martin (08CRS156)	No Error
STATE v. LEWIS No. 09-662	Orange (07CRS56605) (07CRS56603) (07CRS56612) (07CRS56608) (07CRS56613) (07CRS56602) (07CRS56611)	No Error
STATE v. MAY No. 09-175	Beaufort (07CRS52737) (07CRS53215) (07CRS52736) (07CRS53216)	No Error
STATE v. McCOLLIE No. 09-658	Mecklenburg (07CRS249978) (08CRS4431) (07CRS249977)	No Error
STATE v. NESMITH No. 09-849	Nash (08CRS6176)	Reversed
STATE v. PEPPERS No. 09-772	Wake (07CRS68181)	Affirmed
STATE v. REEL No. 09-736	Wake (07CRS101690)	Affirmed
STATE v. REICH No. 09-679	Rutherford (06CRS54985)	No Error
STATE v. TAYLOR No. 09-915	Forsyth (08CRS53544) (08CRS30801) (08CRS53543)	No Error
STATE v. THOMAS No. 09-826	Cumberland (07CRS67290)	No Error

STATE v. TROUTMAN No. 09-667	Moore (07CRS53191) (07CRS52575)	No Error
STATE v. YARBOROUGH No. 09-651	Alamance (07CRS52925)	No Error
STATE v. YOUNG No. 09-510	Guilford (08CRS24422) (08CRS24423) (06CRS80423) (08CRS24455)	No Error
STATE v. ZEIGLAR No. 09-814	Guilford (06CRS86998) (06CRS87000) (06CRS86997)	No error in part; dismissed in part
WARD v. JETT PROPS., LLC No. 08-1508	Forsyth (08CVS5189)	Affirmed in part; reversed and remanded in part

STATE OF NORTH CAROLINA v. KIM HESTER BATTLE, DEFENDANT-APPELLANT

No. COA09-201

(Filed 16 February 2010)

1. Search and Seizure— probable cause—motion to suppress

Defendant's argument that the trial court erred in denying her motion to suppress evidence discovered as the result of a strip search because the officer lacked probable cause to conduct the search was overruled. Defendant's argument contained multiple violations of the rules of appellate procedure and was subject to dismissal. Furthermore, even if defendant's argument had been that the search exceeded the scope of the stop, and that argument was properly before the Court, that fact would not serve as a basis upon which to find error with the trial court's order, as the trial court based its order on its determination that probable cause existed.

2. Search and Seizure— strip search—Fourth Amendment violation—motion to suppress

The trial court erred in denying defendant's motion to suppress evidence found as a result of a road-side strip search, during which a police officer unbuttoned, unzipped, and lowered defendant's pants, pulled the waistband of defendant's underpants out, and reached into her underpants to retrieve contraband. The search violated defendant's Fourth Amendment rights as it was an unnecessary intrusion into defendant's privacy and was unreasonable under the totality of the circumstances. There was nothing in the trial court's order stating that there were exigent circumstances justifying the search.

Judge STEELMAN concurs with a separate opinion.

Appeal by Defendant from judgment entered 7 October 2008 by Judge Paul C. Ridgeway in Superior Court, Granville County. Heard in the Court of Appeals 2 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Sofie W. Hosford for Defendant.

McGEE, Judge.

Kim Hester Battle (Defendant) was indicted on 1 October 2007 for possession of heroin and drug paraphernalia. Defendant filed a motion to suppress on 6 October 2008. This motion was heard on 7-8 October 2008, and following the presentation of the evidence, the trial court denied Defendant's motion. Following the denial of Defendant's motion to suppress, Defendant entered into a plea agreement with the State whereupon Defendant admitted guilt to both charges. Defendant was given a sentence of five to six months' imprisonment, which was suspended, and Defendant was placed on supervised probation for twenty-four months. Defendant preserved her right to appeal the denial of her motion to suppress pursuant to the plea agreement. Defendant appeals.

The State's evidence at the suppression hearing tended to show the following: Granville County Sheriff's Department detectives Kevin Dickerson and Christa Lynn Curl (the detectives), members of a special drug unit, received a tip from a confidential informant concerning drug activity on 31 August 2007. Detective Curl was Detective Dickerson's supervisor at that time. Detective Dickerson testified that the informant had proven reliable in the past, and the informant's tips had led to "thirty plus" arrests. The informant had told Detective Dickerson that "Glen Murfree [(Murfree)] would be picking up Antonio Evans [(Evans)] and [Murfree's] girlfriend, [Defendant], would also be in the vehicle." The informant further stated that Murfree would be driving his father's green Oldsmobile, and that they would be heading to Durham to purchase an ounce to an ounce and a half of cocaine.[1] The informant indicated that following the trip to Durham, the threesome would return by "coming up 85. They would get off at the Linden Avenue exit and come into town on Linden Avenue." Detectives Curl and Dickerson, traveling in a black Chevrolet Tahoe (the Tahoe), drove to a Shell service station where they set up surveillance of the Linden Avenue exit for Interstate 85 North. Detectives Curl and Dickerson discussed how they would handle the situation if they were to spot the subject vehicle. The detectives had recently received an SBI report indicating that a substance seized from Murfree on a prior occasion had tested positive for cocaine. Based upon this new information, the detectives decided to "place

1. Detective Dickerson initially testified that the informant had told him Murfree would be purchasing heroin, but when shown the police report he had filed which indicated the informant had told Detective Dickerson Murfree would be purchasing cocaine, Detective Dickerson stated, "I stand corrected."

[Murfree] under arrest immediately." Detective Curl testified that her "intent was to stop the vehicle and if we found—located drugs in the car, to make an arrest." The detectives did in fact spot a green Oldsmobile, "driven by [Murfree]. [Evans was] seated in the back seat. [Defendant was] seated in the front seat." The Oldsmobile was determined to be registered to Murfree's father. The detectives followed the Oldsmobile for a distance, then activated the blue light and initiated a stop. The detectives approached the Oldsmobile, and Detective Dickerson asked Murfree for his license and registration, which Murfree provided.

Detective Dickerson called in the information from the Tahoe, and also called for "an additional unit" for backup. When asked why he had called for backup, Detective Dickerson testified: "Because I knew we were about to arrest [Murfree] and search the . . . vehicle[.]" Two additional officers arrived at the scene in response to Detective Dickerson's call. Murfree, upon being asked, told Detective Dickerson that there were no drugs in the Oldsmobile. Detective Dickerson requested that Murfree exit the vehicle, and Murfree complied. Detective Dickerson "took possession of [Murfree] and Detective Curl noticed some green, small baggies [in the driver's side door of the Oldsmobile.]" Both detectives testified that there were "over fifty total" small Ziplock bags contained within one larger Ziplock bag. Both detectives testified that, based on their training and experience, the bags constituted "drug paraphernalia." Detective Dickerson then placed Murfree in handcuffs and escorted him to the Tahoe, opened both the front and rear passenger doors, placed Murfree between the doors, informed him that he was under arrest for the prior cocaine charge, and searched Murfree. No contraband was recovered from that search. Evans was also searched and, because no contraband was found on him, he was released.

Detective Curl, who is female, asked Defendant if Defendant was carrying any drugs, to which Defendant responded that she was not. Detective Curl then told Defendant that she "was [going to] check [Defendant] first for weapons and then . . . was [going to] search her." Detective Curl then escorted Defendant to the Tahoe, and conducted a search of Defendant. Defendant was placed between the open doors of the Tahoe, and also between the body of the Tahoe and Detective Curl. Detective Curl testified she placed Defendant in this location for the search

> [b]ecause I—you don't want to be intrusive. I didn't want to show the public what we were doing, for one thing. And it—I mean, a

> privacy issue. I mean, you are going to search a lady and you're going to try to be as less intrusive as you can. You don't want to show everything.

Detective Curl instructed Defendant to pull the bottom of her bra away from her body and shake the bra. Defendant was not required to remove her shirt or lift it up to do this. Twice Detective Curl testified that nothing fell from Defendant's bra area: "Q. [Y]ou checked and there was nothing in the bra, right? A. Right." Defendant testified that a package of rolling papers fell out from her bra at this time. Detective Curl then conducted a pat-down search of Defendant, and placed her hands inside Defendant's pockets. Detective Curl felt nothing that suggested Defendant was carrying a weapon or contraband pursuant to this search. Detective Curl then testified that

> I went down to start checking her pants. And as I reached down to the front of her pants, [Defendant] reached [as if Defendant was attempting to reach inside her pants]. [Defendant] reached down to her pants. I said, no, stop. And I told her . . . let me do this. And again, I reached, trying to—she had—the pants she had on, they had a zipper on them and I reached to grab again, she reached down again. I told her for a second time, no, let me do this. I said, . . . Detective Dickerson, step back here, because he had the Taser in his hand. . . . He stepped back to where we—where I was searching her. He put his back against mine, facing the opposite direction of [Defendant].

Detective Curl testified that she asked Detective Dickerson to stand nearby with the Taser in case Defendant "reached again and we had to struggle[.]" Detective Dickerson testified that he readied his Taser "[n]ot knowing if [Defendant] was going to actively resist and if she had a weapon or anything of that nature on her person. At this time we didn't know that she had any drugs on her or not. It could have been a weapon." Detective Curl testified that she

> reached the third time. I pulled her pants open in front. They were unzipped. I pulled them open. Pulled her underwear back and between her skin and the underwear was a five dollar bill and a crack pipe. I reached in and retrieved it. I opened the five dollar bill up. There was a plastic baggie with tan powder inside. I placed her under arrest for possession of heroin.

Detective Curl testified that Defendant's pants were unzipped and open, but not pulled down, and that she pulled Defendant's under-

wear out away from Defendant's body from the front and from behind in order to see inside, but that Defendant's underwear was never "dropped." Detective Curl "could see the top of [Defendant's]—just—her hairline [pubic hair,]" and also Defendant's buttocks. Detective Curl testified that in her experience drugs are often hidden in a suspect's underwear, and that "guys would give [drugs] to the girls because ninety-five percent of the time a female officer is not there and the ladies are not going to get searched."

The search was conducted between 5:00 and 5:45 p.m., and it was daylight. At no time did either detective notice anything in the vehicle or on the occupants that resembled a weapon, nor were any drugs found prior to the heroin retrieved from Defendant's underwear. Defendant, Murfree and Evans were compliant and non-threatening throughout the entire stop and arrests, other than when Defendant reached towards her pants as Detective Curl was attempting to search inside Defendant's underwear. Additional facts will be discussed in the body of the opinion.

I.

Defendant makes two arguments on appeal under the umbrella heading that the trial court erred by dismissing her motion to suppress. Defendant contends that her rights pursuant to the Constitution of the United States and the Constitution of the State of North Carolina were violated by what amounted to a strip search of Defendant conducted by Detective Curl in public. We address these two arguments separately below.

> The scope of appellate review of a ruling upon a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence. . . . "Where there is no material conflict in the evidence, findings and conclusions are not necessary even though the better practice is to find facts."

State v. Johnston, 115 N.C. App. 711, 713-14, 446 S.E.2d 135, 137 (1994) (internal citations omitted). "[T]he trial court's conclusions of

law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997). " '[P]er se rules are inappropriate in the Fourth Amendment context,' as 'the proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter." ') (quoting *Florida v. Bostick*, 501 U.S. 429, 115 L. Ed. 2d 389, 402 (1991))" *State v. Stone*, 362 N.C. 50, 56-57, 653 S.E.2d 414, 419 (2007). The State has the burden of proving that all evidence was lawfully obtained. *State v. Gibson*, 32 N.C. App. 584, 586, 233 S.E.2d 84, 86 (1977). "[A]lthough the standard is the same, more evidence may be required when the officer is acting without a warrant." *State v. Nixon*, 160 N.C. App. 31, 34, 584 S.E.2d 820, 823 (2003); *see also State v. Harvey*, 281 N.C. 1, 7, 187 S.E.2d 706, 710 (1972).

We first note that neither the United States Supreme Court nor the appellate courts of this State have clearly defined the term "strip search." However, the United States Supreme Court has stated:

> The exact label for this final step in the intrusion is not important, *though strip search is a fair way to speak of it*. [Two female school officials] directed [the female student] to remove her clothes down to her underwear, and then "pull out" her bra and the elastic band on her underpants. Although [the two female school officials] stated that they did not see anything when [the female student] followed their instructions, we would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen. The very fact of [the female student's] pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

Safford Unified Sch. Dist. #1 v. Redding, —— U.S. ——, ——, 174 L. Ed. 2d 354, 364 (2009) (internal citations omitted) (emphasis added). We further note that the attorneys for both the State and Defendant referred to the search of Defendant as a "strip search" at the suppression hearing, and we will refer to the contested search as a "strip search."

II.

[1] In Defendant's first argument, she contends that "even if the informant's tip provided reasonable suspicion for the stop of the car . . . [Detective Curl] lacked probable cause to conduct what amounted to a strip search of [Defendant.]"

However, Defendant's first argument rests entirely upon the assumption that any search of Defendant was permissible solely upon the basis of reasonable suspicion, as defined and limited by *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), and United States Supreme Court and North Carolina appellate court opinions following *Terry*. Defendant argues that the search of Defendant went beyond the scope allowed pursuant to a *Terry* stop. Defendant's first assignment of error states in relevant part that the trial court erred "when it denied . . . [D]efendant's motion to suppress evidence on the grounds that law enforcement did not have probable cause to conduct a 'strip search' of . . . [D]efendant in a public place."

First, Defendant's argument does not conform to the relevant assignment of error, which states that Defendant's motion to suppress was based upon a lack of probable cause, not upon a search that exceeded the scope permitted based upon a reasonable suspicion. Second, the trial court's order dismissing Defendant's motion to suppress was based on the trial court's conclusion that probable cause existed for the search of Defendant, and does not mention the presence or absence of any reasonable suspicion. Third, Defendant makes no argument in this part of her brief that probable cause was lacking for the search of Defendant, only that the search was outside the scope permitted pursuant to *Terry* and its progeny. As Defendant makes no such argument, Defendant also cites no authority in support of a contention that probable cause was lacking in this case. Defendant's argument violates multiple rules of appellate procedure, and is subject to dismissal. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008); *Viar v. N.C. DOT*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005). Fourth, assuming *arguendo* the search of Defendant did fall outside the scope of what is permitted during a *Terry* stop—an issue not properly before this Court on this appeal—that fact would not serve as a basis upon which to find error with the trial court's order, as the trial court bases its order on its determination that probable cause existed on the facts before it. *Johnston*, 115 N.C. App. at 713-14, 446 S.E.2d at 137. This argument is without merit.

III.

[2] In Defendant's second argument, she contends that the contested search violated her Fourth Amendment rights because it "constituted an unnecessary intrusion into [Defendant's] privacy and was unreasonable under the totality of the circumstances." We agree.

> The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable. Thus, we have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so.

Florida v. Jimeno, 500 U.S. 248, 250-51, 114 L. Ed. 2d 297, 302 (1991). The scope of a search is generally defined by its expressed object. *Id.* at 251, 114 L. Ed. 2d 297, 303.

> What is reasonable, of course, "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619, 103 L. Ed. 2d 639, 661 (1989) (internal citations omitted).

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 559, 60 L. Ed. 2d 447, 481 (1979).

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Schmerber v. Cal., 384 U.S. 757, 769-70, 16 L. Ed. 2d 908, 919 (1966).

A. *Scope of the Particular Intrusion*

Our Supreme Court stated in *Stone* that " 'deeply imbedded in our culture . . . is the belief that people have a reasonable expectation not to be unclothed involuntarily, to be observed unclothed or to have their "private" parts observed or touched by others.' " *Stone*, 362 N.C. at 55, 653 S.E.2d at 418 (quoting *Justice v. City of Peachtree*, 961 F.2d 188, 191 (11th Cir. 1992)).

> The United States Supreme Court has said that the "constant element in assessing Fourth Amendment reasonableness in consent cases is the great significance given to widely shared social expectations." *Georgia v. Randolph*, 547 U.S. 103, 111, 164 L. Ed. 2d 208, 220 (2006). The search of . . . intimate areas would surely violate our widely shared social expectation; these areas are referred to as "private parts" for obvious reasons.

Id. In *Starks v. City of Minneapolis*, 6 F.Supp.2d 1084 (D.Minn., 1998), the United States District Court of Minnesota commented on the rarity of this kind of invasive roadside search.

> As one might expect, there is very little case law considering the use of on-street strip searches. The Court considers the paucity of case law as reflective of the natural assumption that these things simply do not occur. By way of example, the United States Supreme Court, when considering the governmental interest underlying a stationhouse search of an arrestee, stated in *Illinois v. Lafayette*, 462 U.S. 640, 645, 103 S.Ct. 2605, 2609, 77 L.Ed.2d 65 (1983) that, "the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street." Other courts have explicitly recognized that a strip search on a public street is not justified. "Probable cause that an arrestee is hiding something on his body does not justify conducting on a public street a strip search or some search akin to one." *United States v. Bazy*, Nos. 94-40018-01-SAC, 94-40018-02-SAC, 1994 WL 539300, at 8 (D.Kan. Aug.29, 1994).
>
> Similarly, the Fourth Circuit upheld a strip search which occurred in a police van, finding it was not unconstitutional because "the search did not occur on the street subject to public viewing." *United States v. Dorlouis*, 107 F.3d 248, 256 (4th Cir.1997). Under very unusual circumstances, the D.C. Circuit upheld a strip search on a public street when officers had deduced that the defendant was trying to push drugs into his buttocks. But

> even under such circumstances, that circuit stated, "We wish to make it clear, however, that such public intrusions should not be the norm. Ordinarily, when police wish to search the private areas of an arrestee's person incident to arrest, they should first remove the arrestee to a private location—i.e., a private room in the stationhouse." *United States v. Murray*, 22 F.3d 1185 (D.C. Cir.1994).

Starks, 6 F.Supp.2d at 1088.

> "A strip search is an invasion of personal rights of the first magnitude." *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir. 1993). The Seventh Circuit described strip searches as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G. v. City of Chicago*, 723 F.2d at 1272; *see also Chapman*, 989 F.2d at 396. No matter how professional or courteous the manner used in conducting a strip search, it remains an embarrassing and humiliating experience. *Boren v. Deland*, 958 F.2d 987, 988 n. 1 (10th Cir. 1992). Strip searches, thus, are not a matter of course for searches incident either to arrest or detention.

United States v. Bazy, 1994 U.S. Dist. LEXIS 14165, 13-14 (D. Kan. Aug. 29, 1994), *aff'd*, 82 F.3d 427, (10th Cir., 1996); *see also Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991) ("[T]he 'full search [incident to arrest]' authorized by [the United States Supreme Court decision in] *Robinson* was limited to a pat-down and an examination of the arrestee's pockets, and did not extend to 'a strip search or bodily intrusion.' ").

In the present case, the trial court made the following relevant findings of fact:

> 21. Detective Curl . . . unbuttoned [D]efendant's pants . . ., unzipped the zipper and lowered the pants . . . so that the top of the pants rested on the lower part of [D]efendant's hip. Detective Curl pulled the elastic waistband in the front of [D]efendant's underpants and observed a crumpled five dollar bill and a metal crack pipe. These items were inside [D]efendant's underpants at approximately the level of [D]efendant's pubic hairline.
>
> 22. Detective Curl reached into [D]efendant's underpants and removed these items. . . .

> 23. Detective Curl also pulled the rear elastic band of . . . [D]efendant's underpants and visually examined [D]efendant's buttocks area[.]
>
> . . . .
>
> 25. All of this activity took place during daylight hours.

We hold these findings demonstrate that the scope of the intrusion relative to Defendant's person was great, as any reasonable person would have found it to be a humiliating experience far beyond that incident to an arrest and search of Defendant's outer garments alone. *Redding*, ––– U.S. at –––, 174 L. Ed. 2d at 364 ("The very fact of [the female student's] pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.").

Whether anyone other than Detective Curl actually saw Defendant's private parts during the search is irrelevant to the Fourth Amendment analysis in this regard.

> Although [the two female school officials] stated that they did not see anything when [the female student] followed their instructions [by pulling the top of her underwear away from her body], we would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen.

Id.

B. *The Manner in Which the Search was Conducted*

In its findings of fact, the trial court stated the following relevant facts in addition to those stated above:

> 15. Detective Curl, who is female, then escorted [D]efendant to the passenger side of the police vehicle. The police vehicle was a Chevy Tahoe sports utility vehicle with darkly tinted windows. Detective Curl had [D]efendant stand between the open passenger side front and rear doors, and Detective Curl positioned herself so that [D]efendant was between the detective and the vehicle.
>
> . . . .

24. At no time did Detective Curl lower [D]efendant's underpants.

25. . . . Slightly to the front of the vehicle was a nursing home. Across the street on the driver's side of the police vehicle were several homes with occupants on the porch. During the course of the activity described herein five or six other vehicles passed on the road. There is no evidence that any person, other than Detective Curl, viewed the search or would have been able to view the search of [D]efendant because of the way the police vehicle was positioned with the doors open on either side and with Detective Curl's body shielding any possible view from the fourth side.

We further find that there was uncontested evidence that we factor into our analysis. *See Johnston*, 115 N.C. App. at 713-14, 446 S.E.2d at 137. Detective Curl was not wearing gloves at the time of the search, and Detective Curl reached into Defendant's underpants with her bare hand. Two additional officers responded that day, and at least one of these, a male, was at the scene at the time of the search. Further, Detective Dickerson stood in close proximity to Defendant during the search with a Taser at the ready.

We find that the trial court's statement that there was "no evidence that any person viewed the search or would have been able to view the search" is not supported by the record evidence. Defendant testified at the hearing, and her testimony was that pedestrians and passing cars could see her while the search was being conducted. Because it is the province of the trial court to judge the credibility of the witnesses and the testimony, we will assume the trial court's finding to mean that it determined, from the evidence presented, that Detective Curl conducted the search in a manner which shielded Defendant's mid-section from public view. We find that Detective Curl made honest attempts to protect Defendant's privacy during the search. However, we again reiterate that whether or not others were actually able to view Defendant's private parts does not automatically render a roadside strip search reasonable under the Fourth Amendment. *Redding*, —— U.S. at ——, 174 L. Ed. 2d at 364.

C. *The Justification for Initiating the Search*

Defendant has not preserved on appeal her argument that there was no probable cause to arrest her. Therefore, for the purposes of this appeal, we must assume that Detective Curl was justified in conducting a search of Defendant incident to arrest. A valid search inci-

dent to arrest, however, will not normally permit a law enforcement officer to conduct a roadside strip search. *See Mary Beth G. v. Chicago*, 723 F.2d 1263, 1270-71 (7th Cir. 1983) ("[C]ustodial searches incident to arrest still must be reasonable ones: 'Holding the Warrant Clause inapplicable in the circumstances present here does not leave law enforcement officials subject to no restraints. This type of police conduct "must [still] be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." ' 415 U.S. at 808 n.9 (quoting *Terry v. Ohio*, 392 U.S. at 20)"); *Bazy*, 1994 WL 539300 at 26 ("Probable cause that an arrestee is hiding something on his body does not justify conducting on a public street a strip search or some search akin to one. There must be other circumstances present which prevent an officer from waiting until the arrestee can be moved to a private location, like the station house."). In order for a roadside strip search to pass constitutional muster, there must be both probable cause and exigent circumstances that show some significant government or public interest would be endangered were the police to wait until they could conduct the search in a more discreet location—usually at a private location within a police facility. " 'The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,' and . . . the belief of guilt must be particularized *with respect to the person to be searched* or seized[.]" *Maryland v. Pringle*, 540 U.S. 366, 371, 157 L. Ed. 2d 769, 775 (2003) (citations omitted) (emphasis added).

> [T]he factors justifying a search of the person and personal effects of an arrestee upon reaching a police station but prior to being placed in confinement are somewhat different from the factors justifying an immediate search at the time and place of arrest.
>
> The governmental interests underlying a station-house search of the arrestee's person and possessions may in some circumstances be even greater than those supporting a search immediately following arrest. Consequently, the scope of a station-house search will often vary from that made at the time of arrest. Police conduct that would be impractical or unreasonable—or embarrassingly intrusive—on the street can more readily—and privately—be performed at the station. For example, the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street, but the practical necessities of routine jail administration may even justify taking a prisoner's clothes before confining him, although that step would be rare.

Illinois v. Lafayette, 462 U.S. 640, 645, 77 L. Ed. 2d 65, 70-71 (1983); *see also Welsh v. Wis.*, 466 U.S. 740, 751, 80 L. Ed. 2d 732, 744 (1984) (" 'When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.' ") (citation omitted); *Id.* at 752, 80 L. Ed. 2d at 745 (" 'The [exigent-circumstances] exception is narrowly drawn to cover cases of real and not contrived emergencies.' ") (citation omitted).

In addition to the findings of fact cited above, the trial court made these additional relevant findings:

> 1. On August 31, 2007, [the detectives] received a telephone call from a confidential informant advising Detective Dickerson that later that afternoon three individuals identified as Glenn Murfree, Antonio Evans, and [Defendant] would be going to Durham to make a purchase of one to one point five ounces of cocaine and returning to Oxford via Interstate I-85. The confidential informant told Detective Dickerson that these three individuals would be driving a green Oldsmobile belonging to Mr. Murfree's father and that they would be exiting I-85 at the Linden Road ramp.

The trial court also found the following: The detectives were experienced officers with special drug training, and that Detective Dickerson was familiar with the confidential informant, who had provided reliable information on numerous occasions in the past that had led to at least thirty arrests. The detectives stationed themselves in a position to observe the relevant exit ramp from I-85 onto Linden Road, and observed a green Oldsmobile proceed down that ramp and pull into a nearby gas station and convenience store. The Oldsmobile was occupied by Murfree, Evans and Defendant. After the Oldsmobile left the gas station parking lot, the detectives followed it and eventually activated their blue lights and stopped the vehicle. The detectives approached the Oldsmobile and requested Murfree's driver's license and registration, which Murfree provided. Detective Curl asked Murfree to exit the Oldsmobile, and when Murfree complied, Detective Curl noticed "at least fifty small plastic baggies in the driver door storage compartment." Detective Curl "recognized the plastic baggies as those used by drug dealers for packaging heroin or crack cocaine for individual sale." Detective Dickerson searched Murfree, but found no weapons or other contraband. Upon asking Defendant to pull out her bra and shake it, a package of cigarette

rolling papers fell to the ground from inside Defendant's shirt.[2] Detective Curl then searched Defendant. When Detective Curl "reached to unbutton [D]efendant's pants . . . [D]efendant also reached down towards her pants. After informing [D]efendant to stop reaching, [D]efendant attempted twice more to reach towards her pants." Detective Curl "perceived the repeated attempts by [D]efendant to reach into her pants to be an indication that contraband was likely secreted inside her pants." Detective Curl believed from her training and experience that people hiding drugs often hid them in "their pants or crotch area and that males involved in drug crimes often have female accomplices carry [the drugs] in their crotch area based on the belief that should apprehension occur, it is generally less likely that female officers would be available to search female suspects."

The trial court relied upon the information provided by the confidential informant, which was for the most part corroborated by the subsequent actions of Murfree, Evans and Defendant, as part of the basis for its conclusion that the search of Defendant was reasonable under the circumstances. The trial court also relied upon the following conclusion:

> In this instance the detectives had a reasonable basis for believing that contraband was hidden in [D]efendant's crotch area. This belief was founded upon the training and experience of the officers. The fact that rolling papers had been secreted in [D]efendant's bra and fell out when shaken and that [D]efendant had made several attempts to reach into her pants immediately prior to being search[ed].

We do not find the trial court's conclusion on this issue to be fully supported by its findings of fact. First, though there was evidence to support the trial court's finding of fact that rolling papers fell from Defendant's shirt when she was shaking her bra, this evidence came from the testimony of Defendant herself. Detective Curl testified that nothing fell from Defendant's shirt when Defendant shook her bra, and neither Detective Curl's nor Detective Dickerson's testimony included mention of any rolling papers. Therefore, there was no testimony from either detective supporting the trial court's conclusion that the rolling papers served as a basis for "believing that contraband was hidden in . . . [D]efendant's crotch area." Further, there was noth-

2. The trial court referred to these as "rolling papers used to roll marijuana cigarettes[.]"

ing that occurred at the scene of the search to indicate that these papers were for the purpose of smoking marijuana. No marijuana was found on Defendant, in the Oldsmobile, or anywhere at the scene. There was no testimony that any officer smelled the odor of marijuana. Nor was there any evidence that suggested that anyone had used marijuana prior to the search. Rolling papers alone do not constitute contraband, as they are legal to purchase, legal to carry, and legal to use for tobacco smoking. Second, the trial court found as fact that Defendant on three occasions "reached down towards her pants." The trial court did not find as fact that Defendant "made several attempts to reach into her pants." The uncontroverted testimony of Detective Curl was that when Detective Curl first attempted to unzip Defendant's pants, Defendant "reached down to her pants . . . like she was gon' go inside the top of her pants." Detective Curl then said to Defendant "let me do this. And again . . . I reached to grab again, she reached down again. I told her a second time, no, let me do this." Then Detective Curl called Detective Dickerson over with the Taser, and on her third attempt, Detective Curl was able to unzip Defendant's pants and conduct the search without interference from Defendant. The evidence supports that Defendant twice reached towards the top of her pants as Detective Curl was attempting to unzip Defendant's pants, and that, according to Detective Curl, Defendant's actions were "like" Defendant was "going to go inside the top of her pants." We take judicial notice of the fact that Defendant's action—reaching towards the top front of her pants—was also consistent with a person who is about to have her pants unzipped by a stranger. *State v. Stone*, 362 N.C. 50, 55, 653 S.E.2d 414, 418 (2007).

We hold that the trial court's findings of fact do not support its conclusion of law that Defendant "made several attempts to reach into her pants[,]" as this conclusion calls for speculation on Defendant's intent that cannot be determined from the record evidence. *See State v. Coley*, 193 N.C. App. 458, 483, 668 S.E.2d 46, 62 (2008); *see also Fuller*, 950 F.2d at 1446 ("The fundamental question under the fourth amendment is whether 'the grounds for a search . . . satisfy *objective* standards' of reasonableness. *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 471, 61 L. Ed. 2d 1[, 8], 99 S. Ct. 2425[, 2429] (1979) (emphasis added)."). The fact that contraband was in fact found in Defendant's underwear did nothing to support Detective Curl's strip search of Defendant. Prior to completing the strip search, Detective Curl could only speculate as to the motive for Defendant's reaction to the attempt to unzip her pants pursuant to the strip search. *Coley*, 193 N.C. App. at 483, 668 S.E.2d at 62.

More relevant to our analysis, Defendant's reaction to Detective Curl's attempts to unzip her pants was not, as the trial court stated, "immediately prior to [Defendant's] being search[ed]." At the time Defendant reached towards the top of her pants, Detective Curl had already initiated the strip search, as she was in the process of attempting to unzip Defendant's pants. Defendant's actions during the strip search cannot retroactively serve as a basis for justifying that strip search. For a search to comply with the requirements of Fourth Amendment jurisprudence, there must be sufficient supporting facts and exigent circumstances *prior* to initiating a strip search to justify this heightened intrusion into a suspect's right to privacy. The trial court's findings of fact contain nothing that suggests Defendant was acting suspiciously before the strip search. The testimony of the detectives at the hearing was that Defendant was quiet and completely cooperative until Detective Curl began the strip search.

The trial court made no findings of fact or conclusions of law regarding any exigent circumstances that existed warranting the roadside strip search of Defendant. When asked why he stood next to Defendant holding a Taser during the strip search, Detective Dickerson replied: "Not knowing if [Defendant] was going to actively resist and if she had a weapon or anything of that nature on her person. At this time we didn't know that she had any drugs on her or not. It could have been a weapon." Detective Curl had already conducted the normal search incident to arrest, manual inspection over the top of Defendant's clothing, as well as reaching inside Defendant's pockets, without discovering anything suspicious. At the time Detective Curl initiated the strip search, there were no reasonable grounds to believe Defendant was concealing any weapon. There was no testimony indicating a belief that if Defendant was actually concealing drugs, that she was in a position to destroy or further hide that evidence. The record shows that the strip search was conducted on the mere *possibility* that drugs would be found on Defendant's person, based upon the confidential informant's tip. This fails to meet constitutional muster. *Schmerber*, 384 U.S. at 769-70, 16 L. Ed. 2d at 919. Murfree, and possibly Evans, had already been searched and no contraband had been recovered. The Oldsmobile had been searched, and other than the suspicious plastic bags, nothing had been recovered. Murfree's father was allowed to retrieve the Oldsmobile from the site of the stop that same afternoon.

D. *The Place in which the Strip Search was Conducted*

"The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Lafayette*, 462 U.S. at 647, 77 L. Ed. 2d at 72 (holding that police practice of searching all containers carried by an arrestee upon entering a police station is not a violation of the Fourth Amendment even if less intrusive means were available). This does not mean, however, that the availability of less intrusive means play no role in the determination of the constitutionality of the scope of a search. The *Lafayette* Court illustrated this point in a way relevant to this case as already quoted above: "the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street." *Id.* at 645, 77 L. Ed. 2d at 71.

Defendant was strip searched on the side of a street in broad daylight. There were vehicles driving by, people on their front porches, and a nursing home "slightly to the front of the vehicle[.]" Two male officers were present as the strip search was conducted by Detective Curl. "[W]e would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen." *Redding*, —— U.S. at ——, 174 L. Ed. 2d at 364. Though the trial court failed to include any findings of fact concerning the availability of less intrusive options for conducting the strip search, the record evidence is uncontroverted that the strip search was conducted right next to a large sports utility vehicle with "darkly tinted windows." *See United States v. Dorlouis*, 107 F.3d 248, 256 (4th Cir. 1997) ("The officers knew that Moore had earlier that evening given $1,600 in marked money to [the defendants]. When all four of the [defendants] were searched and the money was not found, the decision was made to search the clothing of each of the [defendants]. [Defendant] Jacques Paul was placed in the jump seat of a police van, his trousers were pulled down and the $1,600 in marked money fell out. His boxer shorts were not removed. Under these circumstances, we conclude that the search in question was not an unconstitutional strip search. The search did not occur on the street subject to public viewing but took place in the privacy of the police van."). The State presented no evidence that an immediate roadside strip search of Defendant was necessary, nor that there were no more suitable locations nearby. *See State v. Darden*, 1999 Ohio App. LEXIS 5548, 16 (Ohio Ct. App., Montgomery County Nov. 24, 1999) (unpublished opinion) ("[T]he search had taken place in a men's restroom, where only the officers and sergeant involved in the

traffic stop had been present. Further, Officer Bergman testified that during the strip search, he had secured the door to assure that no one could have walked in while the search was in progress."); *see also United States v. Williams*, 477 F.3d 974, 977 (8th Cir. 2007). Detective Dickerson testified that the police station was at most a five minute drive away. *See Bazy*, 1994 U.S. Dist. LEXIS 14165 at 26 ("Probable cause that an arrestee is hiding something on his body does not justify conducting on a public street a strip search or some search akin to one. There must be other circumstances present which prevent an officer from waiting until the arrestee can be moved to a private location, like the station house."); *see also United States v. Murray*, 22 F.3d 1185 (D.C. Cir.1994).

IV.

Having examined the trial court's findings of fact and the uncontested evidence from the suppression hearing in light of the standard set forth in *Wolfish*, 441 U.S. at 559, 60 L. Ed. 2d at 481, we must now determine if the particular facts of this case demonstrate that Detective Curl violated Defendant's Fourth Amendment rights by conducting the strip search in light of all the surrounding circumstances. *Skinner*, 489 U.S. at 619, 103 L. Ed. 2d at 661.

Our Supreme Court has upheld a roadside strip search based in large part upon the reasoning in *Bazy*. *State v. Smith*, 342 N.C. 407, 464 S.E.2d 45 (1995) *(Smith II)*, *adopting the dissent in State v. Smith*, 118 N.C. App. 106, 454 S.E.2d 680 (1995) (*Smith I*, and in conjunction with our Supreme Court's adoption of the dissent in *Smith I*, *Smith*). We therefore find it useful to compare the facts and circumstances of *Bazy* to those in this case. The court in *Bazy* went to great lengths to elucidate its understanding that a roadside strip search is justified only in the most unusual of circumstances. *Bazy*, 1994 U.S. Dist. LEXIS 14165 at 8-26 (*see*, e.g., "Because they are a serious intrusion into an individual's privacy, strip searches are justified in only certain circumstances and rarely, if ever, justified in public. Searches akin to strip searches can be justified in public places if limited in scope and required by unusual circumstances." *Id.* at 24.).

In *Bazy*, the United States District Court of Kansas found the following relevant facts: (1) The defendant was in lawful custody and probable cause existed for the defendant's arrest and a search incident to arrest. (2) Police canines trained in detecting controlled substances had indicated an interest in certain areas of the vehicle from which the defendant had been removed. (3) There had been sufficient

time before the defendant had been removed from the vehicle for him to hide on his person any contraband that might have been in the vehicle. (4) During a pat-down search, troopers had found a large "wad of small plastic bags." (5) "The troopers later found in the defendant Bazy's pants leg two blocks of a substance appearing to be crack cocaine." (6) "The troopers observed the defendant Bazy to continue squirming in apparent discomfort from sitting on something." *Id.* at 18-19. Based upon this evidence, the *Bazy* Court determined that probable cause existed for the troopers to believe that "Bazy was secreting drugs on his body[,]" and further determined that the "circumstances of this case plainly amount to a fair possibility that additional crack cocaine [other than that recovered from Bazy's pants leg] would be found on the defendant Bazy's body." *Id.*

The *Bazy* Court was particularly concerned with whether exigent circumstances warranted the search conducted. "The more difficult question is what exigent circumstance[s] justifie[d] conducting the search without a warrant. The court believes there are two circumstances coming together to constitute an emergency." *Id.* at 19. The *Bazy* Court first determined that the facts demonstrated a real possibility that the defendants had the intent and the potential to dispose of contraband.

> The first is the imminent destruction of evidence. Based upon the crack cocaine found in the defendant Bazy's pants leg, the troopers knew the drugs had been packaged in small amounts making them readily concealable and disposable. A trooper could have reasonably appreciated that the defendants, by concealing the drugs on their bodies, were able and awaiting the chance to dispose of it surreptiously. The reasonableness of this apprehension is proved first by the fact that the defendant Parker, while handcuffed, was able to remove one block from his body and to throw it under the patrol car. More proof is that the defendant Bazy had worked two of the blocks down his pants leg putting them in a position where he could shake and kick them away if the opportunity presented itself. There is also the likelihood that the defendants were squirming or moving in an effort to push the drugs deeper between the buttocks to avoid detection. The troopers appreciated these risks as shown in their warnings to the defendants to sit still.

Id. at 19-20. The second exigent circumstance found by the *Bazy* Court was the potential serious health risk to Bazy, specifically, the

risk that were Bazy to manage to push crack cocaine into his rectum, he would be at a high risk of an overdose.

> The other exigent circumstance is the health risk to the defendant. The troopers observed that Bazy appeared to be squirming in discomfort. The troopers suspected that the defendants may have hastily concealed the drugs on their bodies upon seeing the patrol car. A trooper could reasonably infer from this situation that the defendants did not anticipate carrying the drugs in their underwear or rectum and, thus, did not package the drugs so as to protect themselves. Based on these two circumstances together, the court believes an emergency existed which justified proceeding with the immediate roadside search without a warrant.

Id. at 20-21; *see also In re I.R.T.*, 184 N.C. App. 579, 587, 647 S.E.2d 129, 136 (2007) ("[E]xigent circumstances are also apparent in this case: Juvenile had drugs in his mouth and could have swallowed them, destroying the evidence or harming himself.").

The State presented *no* evidence of exigent circumstances in the case before us. One can speculate that Detective Curl was concerned that contraband might somehow be lost or destroyed absent the strip search, but this is always a potential issue when an arrest is made based upon suspected drug activity. Were we to hold that the facts and circumstances surrounding this case warrant a finding of exigent circumstances justifying a strip search, we would effectively be holding that exigent circumstances are established to justify roadside strip searches, *per se*, as long as police officers have probable cause to suspect drug activity. This was certainly not the holding in *Bazy*, and does not comport with established law that the State has the burden of proving a search did not violate a suspect's constitutional rights, *Gibson*, 32 N.C. App. at 586, 233 S.E.2d at 86, that *per se* rules are not appropriate when conducting Fourth Amendment analysis, *Stone*, 362 N.C. at 56-57, 653 S.E.2d at 419, and that the

> test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Wolfish, 441 U.S. at 559, 60 L. Ed. 2d at 481.

A very recent United States Supreme Court opinion, *Redding*, *supra*, is helpful in our analysis, particularly because it was filed after all the previous authority cited, and after the authority cited in the State's brief. *Redding* involved what the United States Supreme Court effectively termed a strip search of Savana, a thirteen-year-old student, by school officials. The *Redding* Court

> recognized that the school setting "requires some modification of the level of suspicion of illicit activity needed to justify a search," and held that for searches by school officials "a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause[.]" We have thus applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student, and have held that a school search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction[.]"

Redding, —— U.S. at ——, 174 L. Ed. 2d at 361 (*citations to New Jersey v. T. L. O.*, 469 U.S. 325, 83 L. Ed. 2d 720 (1985) omitted). Thus, in a school setting, reasonable suspicion, not probable cause, is the standard applied. In *Redding*, the assistant principal of the school, Kerry Wilson (Wilson), summoned Savana to his office where he presented Savana with a day planner containing "several knives, lighters, . . . and a cigarette." *Redding*, —— U.S. at ——, 174 L. Ed. 2d at 360. Savana stated the day planner was hers, but that she had lent it to her friend, Marissa Glines (Glines) a few days prior, and that none of the items were hers. *Id.* Wilson then produced four prescription strength ibuprofen pills and one over-the-counter pill intended for pain relief and inflamation. All of these pills were considered contraband on school property without advance permission. Upon questioning, Savana denied knowledge of the pills. *Id.*

> Wilson then told Savana that he had received a report that she was giving these pills to fellow students; Savana denied it and agreed to let Wilson search her belongings. Helen Romero, an administrative assistant, came into the office, and together with Wilson they searched Savana's backpack, finding nothing.
>
> At that point, Wilson instructed Romero to take Savana to the school nurse's office to search her clothes for pills. Romero and the nurse, Peggy Schwallier, asked Savana to remove her jacket,

> socks, and shoes, leaving her in stretch pants and a T-shirt (both without pockets), which she was then asked to remove. Finally, Savana was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found.

Id. Wilson had obtained plenary evidence from other students that supported a reasonable suspicion that Savana might be possessing or dealing in contraband. *Id.* at ––, 174 L. Ed. 2d at 362-63.

> This suspicion of Wilson's was enough to justify a search of Savana's backpack and outer clothing. If a student is reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person and in the carryall that has become an item of student uniform in most places today. If Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making. And the look into Savana's bag, in her presence and in the relative privacy of Wilson's office, was not excessively intrusive, any more than Romero's subsequent search of her outer clothing.

Id. at ––, 174 L. Ed. 2d at 363. However, the *Redding* Court determined: "Here, the content of the suspicion failed to match the degree of intrusion." *Id.* at ––, 174 L. Ed. 2d at 364. The *Redding* Court first noted that the contraband involved, while potentially dangerous, was not as dangerous as other drugs. *Id.* at ––, 174 L. Ed. 2d at 364-65.

> Nor could Wilson have suspected that Savana was hiding common painkillers in her underwear. Petitioners suggest, as a truth universally acknowledged, that "students . . . hid[e] contraband in or under their clothing," and cite a smattering of cases of students with contraband in their underwear[.] But when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off. But nondangerous school contraband does not raise the specter of stashes in intimate places, and there is no evidence in the record of any general practice among Safford Middle School students of hiding that sort of thing in underwear; neither [of the students who provided evidence against Savana] suggested to Wilson that Savana was doing that, and the preceding search of Marissa that Wilson

> ordered [a strip search identical to the one Savana was subjected to] yielded nothing.

Id. at ——, 174 L. Ed. 2d at 365. The *Redding* Court then emphasized:

> We . . . mean . . . to make it clear that the *T. L. O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.

Id.

We recognize that the case before us is lacking the element of the young age of the person searched that is part of the analysis in *Redding*. We also recognize that the suspected drug, cocaine, involved in the case before us is inherently more dangerous than the drugs involved in *Redding*. However, we take from *Redding* that there must be more than the mere possibility that a female suspect could be hiding contraband in her underwear, such as Detective Curl's testimony that drugs are often hidden there, in order to justify an intrusion of the magnitude of a strip search. In *Redding*, there was a lower standard involved—reasonable suspicion rather than probable cause—and the strip search of Savana, in which she pulled her bra away from her body and shook it, and pulled her underwear away from her body as well, was conducted by a female nurse and another female school official in a private room. In neither case was there any evidence prior to the strip search that the suspect was, in fact, hiding contraband in her underwear.

Our Supreme Court has held unconstitutional a strip search similar to the one conducted in this case based upon its finding that the search went beyond the scope of the consent the defendant had given the officers. *Stone*, 362 N.C. 50, 653 S.E.2d 414. Because the search in *Stone* was initiated pursuant to the defendant's consent, the holding in *Stone* does not control the outcome of this case. Some of the analysis in *Stone*, however, is applicable to the facts involved here. The *Stone* Court dismissed the argument put forth by the State, and the dissent from our Court, that because "in a search for drugs, a suspect could reasonably expect some search of his genital area, such as 'a continuous sweeping motion over [the suspect's] outer garments[,]' " *id.* at 55, 653 S.E.2d at 418 (citation omitted), "that such touching is

no less intrusive than the flashlight-illuminated visual search conducted [in *Stone*]." *Id.* Our Supreme Court held that the visual inspection of the defendant's genitals was more intrusive than a pat-down search over the genital region, stating: "Although these events occurred at 3:30 a.m., the search occurred in the parking lot of an apartment complex, as opposed to a secluded area or police station. Both Officers . . . were present during the search." *Id.* at 56, 653 S.E.2d at 419. The *Stone* Court differentiated the facts in its case from those in *Smith*, *supra*, "where the officers had specific information that cocaine was hidden in the defendant's crotch." *Stone*, 362 N.C. at 56, 653 S.E.2d at 419 (citations omitted).

Smith represents the only North Carolina opinion dealing with a probable cause roadside strip search. In overturning our Court's holding that the search in *Smith* violated the Fourth Amendment, our Supreme Court adopted the dissent in *Smith I* without further opinion. *Smith II*, 342 N.C. 407, 464 S.E.2d 45.

In *Stone*, our Supreme Court explained its holding in *Smith* in the following fashion:

> Although the defendant in *Smith* did not give consent, the officers *had probable cause and exigent circumstances*, *as well as a specific tip from an informant that defendant "would have the cocaine concealed in his crotch or under his crotch."* This Court reversed the Court of Appeals for the reasons stated in the dissenting opinion, holding that the scope of the search was not unreasonable.

Stone, 362 N.C. at 54, 653 S.E.2d at 417 (internal citations omitted) (emphasis added).

In *Smith*, evidence was presented at the suppression hearing that the arresting officer (Officer Cook) knew the defendant, and had worked in the relevant area of Fayetteville for several years and knew it to be an area with high drug activity. Officer Cook had been informed numerous times from different sources that the defendant was operating a drug house and selling drugs in that area. Confidential sources had informed Officer Cook that the defendant operated multiple drug houses, and gave Officer Cook a large quantity of information concerning the defendant's actions and methods of operation. Officer Cook received a call on 12 May 1992 at 12:15 a.m. from a confidential informant who had proved reliable in the past, and whose information had led to two arrests. The confidential

informant told Officer Cook that the defendant was carrying approximately $2,000.00, was driving a red Ford Escort with license plate EVN7322, and was *en route* to purchase cocaine. The confidential informant informed Officer Cook that upon returning from the purchase, the defendant would be going to Apartment 617-D Johnson Street, which the confidential informant described as the last apartment on the left. The confidential informant also told Officer Cook that the defendant would package the cocaine in aluminum foil while at the apartment, then go to a house on Buffalo Street off of Bragg Boulevard to deliver the cocaine for sale. The confidential informant stated when the defendant "departed [617-D] Johnson Street that he would have the cocaine concealed in his crotch, or under his crotch." *Smith I*, 118 N.C. App. at 107-08, 454 S.E.2d at 681-82.

Officer Cook picked up his partner and the confidential informant, and headed to Johnson Street. The confidential informant pointed out the apartment and the red Escort with license plate number EVN7322, and said that the defendant would be leaving the apartment soon. The officers, with the confidential informant, followed the red Escort for a distance, then activated their blue lights and stopped the defendant. The officers then conducted a search of the defendant, at approximately 1:30 a.m., which involved shining a flashlight on the defendant's private parts, and reaching underneath the defendant's scrotum to retrieve what was later confirmed to be cocaine. *Id.* at 108-09, 454 S.E.2d at 682. The trial court made findings of fact in support of this evidence. *Id.* at 110-11, 454 S.E.2d at 683.

The facts in the case before us are distinguishable from those in *Smith*. Perhaps most importantly, the reliable confidential informant in *Smith* not only provided very specific evidence concerning what the defendant's actions would be, most of which were verified by the officers before the defendant was stopped, the confidential informant specifically stated that *the defendant* would be hiding the cocaine *in the defendant's underpants*, and perhaps underneath the defendant's scrotum. Officer Cook had multiple sources indicating that the defendant was a serious drug dealer, and operated out of multiple locations. The search took place in the early morning hours, approximately 1:30 a.m., and nothing in *Smith* indicates that there were other people in the immediate vicinity other than the officers.

The search in the case before us was conducted in daylight, on a street with both pedestrians and vehicles in the immediate vicinity. No evidence was presented at the hearing, and thus no findings of fact were made, that the detectives had any evidence other than the

confidential informant's tip that Defendant had ever been involved in any drug activity whatsoever. There was no evidence presented that Detective Curl knew Defendant to have any prior history of purchasing drugs or drug use, much less drug sales. Detective Curl testified that there was not any specific information concerning who in the vehicle might have the drugs. Though the confidential informant's tip was confirmed in many aspects before the strip search, no drugs were found in the Oldsmobile or on Murfree, the main focus of the detectives. Most importantly, the confidential informant provided no information that Defendant would have drugs on her person, much less hidden in her underwear. *Stone*, 362 N.C. at 54, 653 S.E.2d at 417; *see also Murray*, 22 F.3d 1185; *Starks*, 6 F.Supp.2d 1084; *Bazy*, 1994 U.S. Dist. LEXIS 14165; *People v. Jones*, 3 Misc. 3d 481 (N.Y. Sup. Ct. 2004).

V.

We hold that the facts and circumstances in this case are distinguishable from those in *Smith*. Were we to uphold the strip search on the facts and circumstances of this case, we would be expanding the authority of the police to conduct roadside strip searches beyond what was allowed in *Smith*. In light of precedent set by the United States Supreme Court and our appellate courts, and our analysis of the opinions from other jurisdictions involving the Fourth Amendment rights implicated in this case, we believe Defendant's Fourth Amendment rights were violated by the strip search in this case. The scope of the intrusion was great, the manner in which it was conducted was inappropriate in light of the circumstances, the justification for initiating it was slight, and the place in which it was conducted was one likely to increase the humiliation suffered by Defendant as a result of the strip search.

The trial court made no findings of fact or conclusions of law concerning the necessity of conducting the strip search at that time and at that location. Phrased another way, there is nothing in the trial court's order stating that there were exigent circumstances justifying any search more intrusive than that allowed incident to any arrest. The lack of findings or conclusions on this matter alone require vacating the trial court's order. *See State v. Coplen*, 138 N.C. App. 48, 52-58, 530 S.E.2d 313, 317-20 (2000); *see also Paulino v. State*, 924 A.2d 308, 319 (Md. 2007); *State v. Walker*, 1998 Ohio App. LEXIS 3466, 23-24 (unpublished opinion). Upon reading the suppression hearing testimony, the lack of findings and conclusions on this matter are understandable. The State presented no evidence of exigent circumstances at the hearing.

> There was no testimony at the suppression hearing in the case *sub judice*, that [the defendant] was attempting to destroy evidence, nor that he possessed a weapon such that an exigency was created that would have required the police officers to search [the defendant] at that precise moment and under the circumstances[.]

Paulino, 924 A.2d at 319.

> Without the constitutional safeguards of exigent circumstances and reasonableness, every search incident could result in a strip search. As we have said, "[t]he meaning of exigent circumstances is that the police are confronted with an emergency— circumstances so imminent that they present an urgent and compelling need for police action."

Id. at 315 (citation omitted). The stop initiated upon the tip provided by the confidential informant in this case is about as run-of-the-mill as can be imagined. Were we to affirm the order of the trial court, we would in effect sanction a *per se* rule that roadside strip searches of suspects are allowed as long as a reliable informant has provided information sufficient to give rise to probable cause that a suspect is carrying contraband, so long as some measures are taken to shield the suspect's private parts from public view. "Strip searches . . . are not a matter of course for searches incident either to arrest or detention." *Bazy*, 1994 U.S. Dist. LEXIS 14165 at 14. "This court shares the same reluctance and concern expressed above by the circuit court [concerning] such searches. Public intrusive searches of the body should never be commonplace but reserved for only the most unusual cases." *Id.* at 25-26.

We find the great weight of authority supports our holding that the roadside strip search of Defendant in this case constituted a violation of Defendant's Fourth Amendment right against unreasonable searches and seizures. We therefore vacate the order of the trial court denying Defendant's motion to suppress, and remand to the trial court for entry of an order granting Defendant's motion to suppress, and hereby grant Defendant a new trial.

Vacated and remanded; new trial.

Judge JACKSON concurs in the result only.

Judge STEELMAN concurs with a separate opinion.

STEELMAN, Judge, concurring.

In the case of *State v. Stone*, 362 N.C. 50, 653 S.E.2d 414 (2007), our Supreme Court held that a less-intrusive search, conducted with at least questionable consent, was not permissible under the Fourth Amendment to the United States Constitution. Because the instant search was more intrusive than that in *Stone*, with no consent, it was not permissible under the Fourth Amendment.

MICHAEL C. MUNGER, BARBARA HOWE, AND MARK WHITELY CARES, PLAINTIFFS V. STATE OF NORTH CAROLINA; JAMES T. FAIN III, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF COMMERCE, IN HIS OFFICIAL CAPACITY; REGINALD HINTON, ACTING SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, IN HIS OFFICIAL CAPACITY; DAVID T. MCCOY, STATE BUDGET OFFICER FOR THE OFFICE OF STATE BUDGET AND MANAGEMENT, IN HIS OFFICIAL CAPACITY; MICHAEL F. EASLEY, GOVERNOR OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; GOOGLE INC.; AND MADRAS INTEGRATION, LLC, DEFENDANTS

No. COA09-375

(Filed 16 February 2010)

Taxation— business incentives—sales and use exemption—discrimination claim—standing

The trial court correctly concluded that plaintiffs lacked standing to assert discrimination-based challenges to economic incentive legislation exempting eligible internet data centers from sales and use taxation and correctly dismissed those claims pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1). A challenge involving an indistinguishable class (all sales and use taxpayers) was disposed of in *Blinson v. State*, 186 N.C. App. 328.

Appeal by plaintiffs from order entered 14 November 2008 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 26 October 2009.

North Carolina Institution for Constitutional Law, by Robert F. Orr and Jeanette K. Doran, for Plaintiffs.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., Pressly M. Millen, and Sean Andrussier, for Defendants Google, Inc., and Madras Integration, LLC.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell and Special Deputy Attorney General I. Faison Hicks, for Defendants State of North Carolina, James T. Fain, III, Reginald Hinton, David T. McCoy, and Governor Michael F. Easley.

ERVIN, Judge.

The present appeal stems from another in a series of challenges to economic incentive legislation enacted by the General Assembly as violative of various provisions of the North Carolina Constitution. After careful consideration of the record in light of the applicable law, we conclude that Plaintiffs lack standing to assert the only claims that have been brought forward for our consideration on appeal and that the trial court correctly dismissed those claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1).

I. Factual Background

A. Substantive Facts

According to the allegations of the amended complaint, a series of meetings involving, at different times, representatives of Google; representatives of Burke, Caldwell, and McDowell Counties; various State officials, including employees of the Department of Commerce and the Department of Revenue; representatives of the City of Lenoir; and representatives of Duke Energy Carolinas, were held relating to the proposed project beginning in December, 2005. On or about 8 February 2006, the Caldwell County Commission and the Lenoir City Council made "an enhanced grant proposal" to Google relating to the construction of a proposed data center.

On 24 May 2006, a bill was introduced in the North Carolina House of Representatives that would, if enacted, have exempted internet data centers from certain sales and use taxes. On 25 May 2006, a substantially similar bill was introduced in the North Carolina Senate. On 10 July 2006, the Governor signed into law 2006 N.C. Sess. L. c. 66, which was entitled An Act to Modify the Current Operations and Capital Appropriations Act of 2005 (2006 Current Operations Appropriations Act). Among the components of the 2006 Current Operations Appropriations Act were certain amendments to Chapter 105 of the General Statues, which had the effect of exempting entities defined as "eligible internet data centers" from certain sales and use taxes. The General Assembly defined an "eligible Internet data center" in that legislation as:

A facility that satisfies each of the following conditions:

a. The facility is used primarily or is to be used primarily by a business engaged in Internet service providers and Web search portals industry 51811, as defined by NAICS.

b. The facility is comprised of a structure or series of structures located or to be located on a single parcel of land or on contiguous parcels of land that are commonly owned or owned by affiliation with the operator of that facility.

c. The facility is located or to be located in a county that was designated, at the time of application for the written determination required under sub-subdivision d. of this subdivision, either an enterprise tier one, two, or three area or a development tier one or two area pursuant to [N. C. Gen. Stat. §] 105-129.3 or [N. C. Gen. Stat. §] 143B-437.08, regardless of any subsequent change in county enterprise or development tier status.

d. The Secretary of Commerce has made a written determination that at least two hundred fifty million dollars ($250,000,000) in private funds has been or will be invested in real property or eligible business property, or a combination of both, at the facility within five years after the commencement of construction of the facility.

N.C. Gen. Stat. § 105-164.3(8e). Furthermore, the 2006 Current Operations Appropriations Act amended N.C. Gen. Stat. § 105-164.13 by inserting new language providing that "[t]he sale at retail and the use, storage, or consumption in this State of the following tangible personal property and services are specifically exempted from the tax imposed by this Article: . . ."

(55) Sales of electricity for use at an eligible Internet data center and eligible business property to be located and used at an eligible Internet data center. As used in this subdivision, "eligible business property" is property that is capitalized for tax purposes under the Code and is used either:

a. For the provision of Internet service or Web search portal services as contemplated by [N.C. Gen. Stat. §] 105-164.3(8e)a., including equipment cooling systems for managing the performance of the property.

b. For the generation, transformation, transmission, distribution, or management of electricity, including exterior

substations and other business personal property used for these purposes.

c. To provide related computer engineering or computer science research.

N.C. Gen. Stat. § 105-164.13(55). The General Assembly attempted to ensure that the level of investment contemplated by N.C. Gen. Stat. § 105-164.3(8e)d was actually made at the required location by mandating, in certain circumstances that are not relevant to this case, the forfeiture of the exemption and the repayment of avoided taxes with interest. N.C. Gen. Stat. § 105-164.13(55). Although Plaintiffs have alleged that these sales and use tax exemptions for eligible internet data centers were enacted for the specific purpose of providing incentives to facilitate the construction and operation of an internet data center in Caldwell County by Google, Inc., none of the statutory language in question makes any reference to Google or any Google affiliate and the same tax treatment is available to any other entity that meets the criteria specified in N.C. Gen. Stat. § 105-164.3(8e).[1]

B. Procedural History

On 25 July 2007, Plaintiffs Michael Munger, Barbara Howe and Mark Whitley Cares, acting in their capacities as individuals who pay state income taxes and state sales and use taxes, filed a complaint against James T. Fain, III, in his official capacity as Secretary of the North Carolina Department of Commerce; Reginald Hinton, in his official capacity as Acting Secretary of the North Carolina Department of Revenue; David T. McCoy, in his official capacity as State Budget Officer; Michael F. Easley, in his official capacity as Governor of the State of North Carolina (the State Defendants; Google; and Madras Integration, LLC., which is a subsidiary of Google (the Google Defendants). In their complaint, Plaintiffs sought a declaration that the various incentives provided for eligible internet data centers violated the exclusive emoluments, public purpose, fair and equitable taxation, and uniformity of taxation provisions of the North Carolina Constitution, and requested that the State Defendants be enjoined from providing any incentives to the Google Defendants and recoup

1. The complaint also contains allegations relating to the constitutionality of assistance provided to Google from the Job Development Investment Grant Program. However, since Plaintiffs have not brought their challenge to any Job Development Investment Grant that may be made to Google or its affiliates forward on appeal and since the parties' briefs suggest that no such grant may have actually been made, we will not discuss the Job Development Investment Grant Program further in this opinion.

any incentive amounts that had already been provided to the Google Defendants. On 16 August 2007, Plaintiffs amended their complaint as a matter of right in order to add a claim that the incentives provided for eligible internet data centers violated the law of the land provision of the North Carolina Constitution.

On 16 October 2007, the Google Defendants filed a motion to dismiss Plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6), on the grounds that Plaintiffs lacked standing to advance any of the claims asserted in their amended complaint and that Plaintiffs had failed to state a claim for which relief could be granted. On 18 October 2007, the State Defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6), on the grounds that, even if the factual allegations of Plaintiffs' amended complaint were true, their claims would fail as a matter of law and that they had failed to allege sufficient facts to demonstrate that they had standing to bring the claims asserted in their amended complaint.

On 14 November 2008, the trial court entered an Order and Memorandum of Decision. The trial court dismissed Plaintiffs' Claims for Relief 4, 5, 6, 9 and 10, which alleged violations of the provisions of N.C. Const. art. V, §§ 2(1) and (7) requiring that the taxation and appropriation powers be exercised for "public purposes only," pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on the grounds that "the challenged governmental activity in this case" was for a public purpose and that "the incentives offered to Google and those similarly situated, as a matter of law, benefit the public generally." The trial court dismissed Plaintiffs' Claims for Relief 1, 2 and 3, which alleged violations of the exclusive emoluments clause contained in N.C. Const. art. I, § 32, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on the grounds that, since the incentives in question have "been determined to 'promote the public benefit' under the Public Purpose Clause, [they] necessarily [are] not an exclusive emolument." (emphasis in the original) (citing *Blinson v. State*, 186 N.C. App. 328, 342, 651 S.E.2d 268, 277-78 (2007), *appeal dismissed and disc. review denied*, 362 N.C. 355, 661 S.E.2d 241 (2008) (citing *Peacock v. Shinn*, 139 N.C. App. 487, 496, 533 S.E.2d 842, 848 (2000), *disc. review denied and app. dismissed*, 353 N.C. 267, 546 S.E.2d 110 (2000)). The trial court dismissed Claims for Relief 7, 8 and 11, which rest upon the "just and equitable" taxation provision of N.C. Const. art. V, § 2(1); the uniformity of taxation provision of N.C. Const. art. V, § 2(2); and the "law of the land" clause of N.C. Const. art. I, § 19,

for lack of standing pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1). As a result of the fact that the 12th and final claim for relief set out in Plaintiffs' amended complaint "merely seeks the remedy of a declaratory judgment" and "[b]ecause each of the bases for the judgment that Plaintiffs seek have been considered and dismissed above," the trial court also dismissed Claim for Relief 12, which was the only remaining claim asserted in the amended complaint. On 12 December 2008, Plaintiffs noted an appeal from the trial court's order to this Court.

II. Legal Analysis

On appeal, Plaintiffs contend that they have standing in their capacity as taxpayers to challenge the sales and use tax exemptions granted to "eligible internet data centers" in the 2006 Current Operations Appropriations Act as violative of the uniformity in taxation provisions of N.C. Const. art. V, §§ 2(1) and 2(2) and the "law of the land" clause of N.C. Const. art. I, § 19.[2] After careful consideration, we conclude that Plaintiffs lack standing to assert the claims that they have brought forward on appeal from the trial court's order.

A. Standard of Review

> The rationale of [the standing rule] is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. The 'gist of the question of standing' is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.

Mangum v. Raleigh Board of Adjustment, 362 N.C. 640, 642, 669 S.E.2d 279, 282 (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (internal quotations omitted). As the party attempting to invoke the jurisdiction of the General Court of Justice, Plaintiffs have the burden of establishing standing. *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005), *aff'd per curiam*, 360 N.C. 398, 627 S.E.2d 461 (2006). "If a *party* does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607

2. Plaintiffs do not challenge the trial court's decision to dismiss Claims for Relief 1, 2, 3, 4, 5, 6, 9, 10, and 12 as asserted in their amended complaint on appeal.

S.E.2d 14, 16, *disc. review denied*, 359 N.C. 633, 613 S.E.2d 688 (2005). For that reason, the absence of standing is appropriately addressed by a dismissal motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1). *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 93, 614 S.E.2d 351, 354, *appeal dismissed and disc. review denied*, 360 N.C. 177, 626 S.E.2d 648 (2005).

"When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), a trial court may consider and weigh matters outside the pleadings." *DOT v. Blue*, 147 N.C. App. 596, 603, 556 S.E.2d 609, 617 (2001), *disc. review denied and cert. denied*, 356 N.C. 434, 572 S.E.2d 428-29 (2002) (citing *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998)). "However, if the trial court confines its evaluation to the pleadings, the court must accept as true the plaintiff's allegations and construe them in the light most favorable to the plaintiff." *Blue*, 147 N.C. App. at 603, 556 S.E.2d at 617 (citing *Privette*, 128 N.C. App. at 493, 495 S.E.2d at 397). "We note that this Court's review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*, 'except to the extent the trial court resolves issues of fact and those findings are binding on the appellate court if supported by competent evidence in the record.' " *Id.* (citing *Privette*, 128 N.C. App. at 493, 495 S.E.2d at 397); *see also Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) (stating that a trial court's decision to dismiss a case pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) for lack of standing is reviewed on a *de novo* basis). Since the trial court did not resolve issues of fact in determining that the Plaintiffs lacked standing to assert Claims for Relief 7, 8, and 11 as alleged in the amended complaint, we review the trial court's decision to grant Defendant's motion to dismiss Plaintiffs' claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) using a *de novo* standard of review.

B. General Principles of Taxpayer Standing

The Supreme Court has stated that, "[a]lthough we caution[]" against the hindrance of the North Carolina government "by lawsuits from taxpayers who merely disagree with the policy decisions of government officials, we [have] concluded that 'the right of a citizen and taxpayer to maintain an action in the courts to restrain the unlawful use of public funds to his injury cannot be denied.' " *Goldston v. State*, 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006) (quoting *Teer v. Jordan*, 232 N.C. 48, 59 S.E.2d 359 (1950)). For that reason, "a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds." *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881. "A taxpayer injuriously

affected by a statute may generally attack its validity[;] [t]hus, he may attack a statute which . . . exempts persons or property from taxation, or imposes on him in its enforcement an additional financial burden, however slight." *In re Appeal of Barbour*, 112 N.C. App. 368, 373, 436 S.E.2d 169, 173 (1993) (quoting *Stanley v. Department of Conservation and Dev.*, 284 N.C. 15, 29, 199 S.E.2d 641, 651 (1973)). On the other hand, "[a] taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation." *Nicholson v. State Education Assistance Authority*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969) (citing *Wynn v. Trustees*, 255 N.C. 594, 122 S.E.2d 404 (1961); *Carringer v. Alverson*, 254 N.C. 204, 118 S.E.2d 408 (1961); *Fox v. Commissioners of Durham*, 244 N.C. 497, 94 S.E.2d 482 (1956); *Turner v. Reidsville*, 224 N.C. 42, 29 S.E.2d 211 (1944)). "If a person is attacking the statute on the basis that the statute is discriminatory, however, the person 'has no standing for that purpose unless he belongs to the class which is prejudiced by the statute.' " *Barbour*, 112 N.C. App. at 373, 436 S.E.2d at 173 (quoting *In re Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974) (citation omitted)) (citing *State v. Vehaun*, 34 N.C. App. 700, 703-04, 239 S.E.2d 705, 708 (1977), *cert. denied* 294 N.C. 445, 241 S.E.2d 846 (1978); *Roberts v. Durham County Hosp. Corp.*, 56 N.C. App. 533, 538-39, 289 S.E.2d 875, 878, *motion to dismiss denied*, *disc. review allowed*, 306 N.C. 387, 294 S.E.2d 205 (1982), *aff'd per curiam*, 307 N.C. 465, 298 S.E.2d 384 (1983)); *see also Nicholson*, 275 N.C. at 448, 168 S.E.2d at 407 (citations omitted) (stating that "[t]he constitutionality of a provision of a statute may not [be challenged in the absence of proof] that the carrying out of the provision he challenges will cause him to sustain, personally, a direct and irreparable injury, apart from his general interest as a citizen in good government in accordance with the provisions of the constitution"). Thus, the decisions of the Supreme Court and of this Court with respect to "taxpayer standing" differentiate between (1) actions challenging the constitutional validity of a statute on the grounds that it allows public funds to be dispersed for reasons other than a "public purpose," in which a taxpayer generally has standing, and (2) actions challenging the constitutional validity of a statute on the grounds that the statute discriminates among classes of persons, in which a taxpayer must show that he belongs to a class that receives prejudicial treatment.

C. Nature of Plaintiffs' Claims

The present appeal centers on whether Plaintiffs, in their capacity as individuals who pay North Carolina income and sales and use

taxes, have standing to challenge the sales and use tax exemptions for eligible internet data centers on the grounds that they (1) violate N.C. Const. art. V, § 2(1), which states that "[t]he power of taxation shall be exercised in a just and equitable manner"; (2) violate N.C. Const. art. V, § 2(2), the uniformity of taxation clause, which states that "[n]o class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government"; and (3) violate the "law of the land" clause of N.C. Const. art. I, § 19, which provides that "[n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land" or "denied the equal protection of the laws . . . ."

In their complaint, Plaintiffs attempted to establish their standing to assert Claims for Relief 7, 8 and 11 on the basis of the following allegations:

> 2. This action arises from legislation (the "Google legislation") adopted by the North Carolina General Assembly on July 6, 2006 providing tax benefits and exemptions from retail sales and use tax totaling approximately tens of millions of dollars to Google with respect to its building and operating an internet data center in North Carolina. N.C. Gen. Stat. § 105-164.3(8e), 164.13 (55). The Google legislation discriminates among taxpayers, creates a taxing scheme which is not uniform, which discriminates among taxpayers, which is not for a public purpose only, which establishes an exclusive emolument not in exchange for public service, is contrary to the Law of the Land, and constitutes an unjust and inequitable exercise of the power of taxation—thereby violating various provisions of the North Carolina Constitution. . . . .
>
> **PARTIES**
>
> **(Plaintiffs)**
>
> . . . .
>
> 4. Plaintiff Michael C. Munger is a citizen and resident of the State of North Carolina, and is a taxpayer to the government of the State of North Carolina. Plaintiff Munger pays various types of taxes to the government of the State of North Carolina, including state income taxes and state sales taxes on items purchased.

5. Plaintiff Barbara Howe is a citizen and resident of the State of North Carolina, and is a taxpayer to the government of the State of North Carolina. Plaintiff Howe pays various types of taxes to the government of the State of North Carolina, including state income taxes and state sales taxes on items purchased.

6. Plaintiff Mark Whiteley Cares is a citizen and resident of the State of North Carolina, and is a taxpayer to the government of the State of North Carolina. Plaintiff Howe[3] pays various types of taxes to the government of the State of North Carolina, including state income taxes and state sales taxes on items purchased.

. . . .

55. Google's operation of the facility in question in Lenoir, Caldwell County, North Carolina will be a business operation pursuant to Google's overwhelmingly predominant intention and objective of maximizing Google's profitability. Those profit-making intentions and objectives of Google are similar to the profit-making intentions and objectives of numerous other businesses in North Carolina. Google's operation of the facility in question in Lenoir, Caldwell County, North Carolina will not be for the provision of public social services or public infrastructure or public amenities. Rather, the Google facility in question is a facility to enable Google to satisfy customers of Google.

. . . .

57. Plaintiffs are not eligible for and have not received any tax forbearance or subsidies or grants similar to the tax benefits for Google.

58. Through the present time, defendant State does not plan to provide any person or entity, other than Google, tax exemptions, grants, and subsidies pursuant to the Google legislation.

59. Plaintiffs are, have been, and/or will be directly and/or sufficiently injured by the tax benefits for Google in that those benefits unlawfully deplete the funds of the State to which

3. Presumably, the reference to Plaintiff Howe is a typographical error and should be understood as a reference to Plaintiff Cares.

the Plaintiffs contribute through their tax payments, thereby diminishing the funds available for lawful purposes and imposing disproportionate, additional, and increased financial burdens on the Plaintiff taxpayers.

. . . .

Count 7—N.C. Constitution

(Violations of the "Taxation Must Be Fair and Equitable Clause")

. . . .

76. The tax benefits for Google, and the purported laws, as applied for Google and/or on their face, constitute an unfair, unjust, inequitable, arbitrary, and capricious exercise of the power of taxation, and accordingly violate Article V, Section 2(1) of the North Carolina Constitution, which states, "The power of taxation shall be exercised in a just and equitable manner. . . ."

Count 8—N.C. Constitution

(Google Legislation Violates the Uniformity of Taxation Clause)

. . . .

78. The Google legislation and the tax benefits for Google and the purported laws violate Article V, Section 2(2) of the North Carolina Constitution in that they violate the requirement of uniformity of taxation within classifications and were not enacted by general law nor are they uniformly applicable to all businesses in every county, city and town and other unit of local government, and in that the legislation, purported laws, and tax benefits were specifically enacted for the benefit of Google. The Google legislation and the tax benefits for Google and the purported laws also violate Article V, Section 2(2) of the North Carolina Constitution in that they treat Google in a massively preferential way relative to other similarly situated taxpayers, and do so without a rational basis[.]

. . . .

Count 11—N.C. Constitution

(Violations of the "Law of the Land" Clause)

. . . .

84. References herein to the "Eligible" refer to anyone eligible for the tax breaks and exemptions contemplated by the Google legislation.

85. Providing Google with the tax benefits for Google is state governmental favoritism for Google, relative to other persons and entities (including plaintiffs) who contribute mightily to the economic well-being of this State but who do not receive such benefits and do not qualify to be among the Eligible.

86. Providing any of the Eligible with the tax breaks and exemptions contemplated by the Google legislation is unearned and undeserved state governmental favoritism for Google, relative to other persons and entities (including plaintiffs) who contribute mightily to the economic well-being of this State but who do not receive such tax breaks and exemptions and do not qualify to be among the Eligible.

87. The favoritism referred to in the preceding two paragraphs accrues only to Google and to those who are the Eligible by meeting the arbitrary criteria of the Google legislation.

88. The favoritism referred to in the preceding three paragraphs does not promote, is not sufficiently causally related to promoting, and in fact detracts from this State's overall economic well-being, all the while directly promoting the well-being of Google.

89. The tax benefits for Google and the purported laws, as applied for Google and/or on their face, constitute unreasonable and arbitrary state action, and are state action not sufficiently related to the accomplishment of sufficiently compelling state objectives.

90. As applied for Google and/or on their face, the tax benefits for Google and the purported laws impose burdens and costs which significantly outweigh the public good likely to result from such tax benefits and purported laws.

91. Accordingly, the tax benefits for Google and the purported laws, as applied for Google and/or on their face, violate Article I, Section 19 of the North Carolina Constitution , i.e. violate the Law of the Land Clause.

. . . .

103. Plaintiffs have sufficient interest and stake in the subject matter of this action. An actual controversy, and adverseness of interest, exist between plaintiff[s] and defendants with respect to the subject matter of this action. The subject matter of this action does not present mere abstract questions, but presents a concrete and real conflict between adverse interests.

On appeal, Plaintiffs contend that they have standing sufficient to support maintenance of the present action for three reasons. First, they argue that Claims for Relief 7, 8 and 11 are not subject to the standing requirement applicable to discrimination-based challenges to taxation statutes. In essence, Plaintiffs argue that, "where a taxpayer is challenging a tax exemption, rather than a tax levy, he need not be among the class eligible for the specific tax exemption in question in order to challenge the constitutionality of the exemption." Secondly, Plaintiffs argue that, despite Defendants' contentions to the contrary, they have not "raise[]d a true discrimination claim" so that "the standing calculus for such claims is inapplicable." Finally, Plaintiffs argue that, even if the claims in question are discrimination-based and subject to heightened standing requirements, they satisfy the applicable standing requirement by virtue of their status as persons who pay the relevant taxes. After carefully reviewing the authorities upon which Plaintiffs rely, we do not find any of their arguments persuasive.

D. Plaintiff's Standing to Assert Constitutional Claims

1. Plaintiffs are not Eligible to Assert Traditional Taxpayer Standing

In arguing that traditional taxpayer standing rules apply to the claims that they have brought before us on appeal, Plaintiffs note the Supreme Court's statement in *Goldston* that "[o]ur cases demonstrate that a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds," *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881, and argue that, "[w]hile *Goldston* did not specifically articulate that taxpayer standing applies equally to the unconstitutional failure to collect revenue, the rationale of *Goldston* is just as compelling to the latter situation." In essence, Plaintiffs argue that, since "[t]he justification of *Goldston* was simply that the misuse or misappropriation of public money results in a loss of funds available for legitimate public purposes" and since "[t]he same result follows in the government's fail-

ure to levy and collect taxes," "both situations warrant taxpayer standing."[4]

The fundamental difficulty with this aspect of Plaintiffs' argument is that it treats *Goldston* as having worked a fundamental change in North Carolina standing jurisprudence. A careful reading of *Goldston* provides no indication that the Supreme Court intended such a result. On the contrary, by stating that "our cases demonstrate that a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds," *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881, the Supreme Court clearly indicated that it viewed its standing decision in that case as nothing more than a restatement of established law. However, established North Carolina law also requires that a person seeking to challenge "the validity of a discriminatory statute . . . belong[] to the class which is prejudiced by the statute." *Appeal of Martin*, 286 N.C. at 75, 209 S.E.2d at 773; *see also Nicholson*, 275 N.C. at 447, 168 S.E.2d at 407. Nothing in *Goldston* suggests that the Supreme Court had any intention of calling into question the decisions which require membership in the class adversely affected by an allegedly discriminatory tax statute as a precondition for mounting a challenge to its constitutionality. Perhaps for that reason, a prior panel of this Court, in a post-*Goldston* decision, did not treat *Goldston* as having altered the test to be applied in determining whether a taxpayer had standing to mount a discrimination-based challenge to a tax statute. *Blinson*, 186 N.C. App. at 333-35, 651 S.E.2d at 273-74. As a result, we conclude that the mere fact that Plaintiffs pay North Carolina income and sales and use taxes, without more, does not give them standing to challenge the sales and use tax exemption afforded to eligible internet data centers.

2. Plaintiffs' Claims Are Discrimination-Based

Next, Plaintiffs contend that the trial court erroneously "concluded that Plaintiffs lacked standing to pursue their fair tax claims

4. According to Plaintiffs, the decision in *Stanley*, 284 N.C. at 15, 199 S.E.2d at 641, is "eerily similar to the instant case." However, the issue addressed in *Stanley*, which involved whether "the creation of the Halifax, Northampton, and Jones County Authorities for the purpose of financing pollution abatement and control facilities or industrial facilities for private industry by the issuance of tax-exempt revenue bonds is . . . for a public purpose," *Stanley*, 284 N.C. at 41, 199 S.E.2d at 658, is very different than the issue Plaintiffs seek to raise in this case, which revolves around the extent to which the General Assembly acted unconstitutionally by exempting eligible internet data centers, but not other taxpayers, from certain sales and use taxes. For that reason, we cannot agree with Plaintiffs' contention that *Stanley* is "eerily similar" to the present case.

because they were not in the class of taxpayers discriminated against by" the sales and use tax exemptions for eligible internet data centers. In essence, Plaintiffs contend that the trial court reached the erroneous conclusion that their claims were discrimination-based because of a mistaken reading of this Court's decision in *Barbour*. According to Plaintiffs, we concluded in *Barbour* "that the plaintiff in that case had standing for uniformity claims which were challenges to the existence of a tax exemption rather than those claims which challenged the discriminatory features of the exemption." Instead of alleging "that the qualifying criteria operate in a discriminatory manner," Plaintiffs claim to "have alleged that the *creation* of a special tax exemption—without regard to the qualifying criteria—is unconstitutional" (emphasis in the original). Based upon that analysis, Plaintiffs contend that they have not asserted a discrimination-based claim.

The statute at issue in *Barbour* exempted from taxation "[r]eal and personal property owned by a home for the aged, sick, or infirm, that is exempt from tax under Article 4 of [Chapter 105], and is used in the operation of that home." N.C. Gen. Stat. § 105-275(32). According to N.C. Gen. Stat. § 105-275(32), the "home" had to be "owned, operated, and managed" by a religious body, a Masonic organization, or a non-profit corporation controlled by a board of directors, a majority of whom were selected by a religious body or Masonic organization. In discussing the standing issue in *Barbour*, we first noted the plaintiff's allegation "that N.C. [Gen. Stat.] § 105-275(32) discriminates against the class of individual residential property owners who own their own property for private personal residences and are not exempt under the statute from taxation." Since the plaintiff "is a member of this class, and the exemption of property under this statute affects him as a residential property owner subject to taxation," we found that the plaintiff had "standing to challenge the statute on this basis." *Barbour*, 112 N.C. App. at 373, 436 S.E.2d at 173. In addition, the plaintiff alleged "that N.C. [Gen. Stat.] § 105-275 (32) discriminates against the class of homes for the aged, sick, or infirm, which are non-religious and non-Masonic." *Id.* Since the plaintiff was "not a member of this classification" and since "taxpayers of this State who are members of this class are under no disability to challenge this statute as discriminating against them," we held that the plaintiff "lack[ed] standing to challenge the statute on the basis that it discriminates against non-religious, non-Masonic homes for the aged, sick, or infirm." *Barbour*, 112 N.C. App. at 373-74, 436 S.E.2d at 173-74.

After carefully studying the discussion of the standing issue in *Barbour*, we are unable to find any support for the distinction upon which Plaintiffs rely in this case. *Barbour* explicitly describes both of the theories upon which the plaintiff in that case claimed to have standing to challenge N.C. Gen. Stat. § 105-275(32) as resting upon assertions that classes of taxpayers were being discriminated against. In addition, both theories under which the plaintiff asserted the right to challenge the constitutionality of N.C. Gen. Stat. § 105-275(32) involved an argument that it was unconstitutional to exempt homes for the aged owned, operated, or managed by religious or Masonic bodies from taxation while denying the same exemption to private homeowners or homes for the aged that were owned, operated, or managed by non-religious or non-Masonic bodies. In fact, this Court has cited *Barbour* as authority for the traditional requirement that, "in order to establish standing to challenge a statute under the Uniformity of Taxation Clauses, plaintiffs must demonstrate that they 'belong[] to the class which is prejudiced by the statute.' " *Blinson*, 186 N.C. App. at 335, 651 S.E.2d at 274 (quoting *Barbour*, 112 N.C. App. at 373, 436 S.E.2d at 173, quoting *Appeal of Martin*, 286 N.C. App. at 75, 209 S.E.2d at 773)). As a result, we are unable to find any support for a distinction between challenges to the existence of an exemption and challenges to the "qualifying criteria" associated with an exemption in our *Barbour* opinion.

A careful reading of the three claims that Plaintiffs have brought forward on appeal indicates that each of them is, as the trial court concluded, discrimination-based. In their complaint, Plaintiffs allege that the relevant statutory provisions "discriminate[] among taxpayers [and] create[] a taxing scheme which is not uniform, which discriminates among taxpayers." In Claim for Relief 7, Plaintiffs allege that the sales and use tax exemption for eligible internet data centers is "inequitable" and "unfair." In Claim for Relief 8, Plaintiffs allege that the sales and use tax exemptions "violate the requirement of uniformity of taxation within classifications" "in that they treat Google in a massively preferential way relative to other similarly situated taxpayers, and do so without a rational basis[.]" Finally in Claim for Relief 11, Plaintiffs allege that Google has received "unearned and undeserved state government favoritism" in the form of "tax breaks and exemptions" while other equally-deserving persons, such as Plaintiffs, have not "receive[d] such tax breaks and exemptions."[5] At

5. The claim that the Plaintiffs asserted in their amended complaint in reliance upon N.C. Const. art. I, § 19, appears to rest on that portion of the relevant constitutional provision that prohibits denial of the "equal protection of the laws." However, in

bottom, the crux of each of Plaintiffs' claims is that eligible internet data centers have received more favorable tax treatment than Plaintiffs and other similarly-situated persons, which makes their claims quintessentially discrimination-based. As a result, we conclude that the trial court correctly concluded that Plaintiffs had to demonstrate that they " 'belong[ed] to the class which is prejudiced by the statute,' " *Barbour*, 112 N.C. App. at 373, 436 S.E.2d at 173, as a prerequisite for maintaining a constitutional challenge to the sales and use tax exemption for eligible internet data centers.

3. Plaintiffs do not Belong to the Class Prejudiced by the Challenged Statute

Finally, Plaintiffs contend that, even if they must demonstrate membership in the class harmed by the challenged statute as a precondition for launching a discrimination-based attack on its constitutionality, the trial court erred by "view[ing] the 'class' to which plaintiffs must belong as the class attempting to qualify for the exemption rather than the class subject to the tax itself." According to Plaintiffs, "a plaintiff must be in the class of taxpayers who pay the tax exempted by the challenged tax exemption" and "need not be discriminated against by the criteria for the exemption itself" in order to challenge an exemption from the sales and use tax. In reaching this conclusion, Plaintiffs rely on this Court's decision in *Barbour* to grant the plaintiff standing to challenge an exemption from county property taxes granted to homes for the aged owned, operated, or managed by religious or Masonic bodies based on his status "as a residential property owner subject to taxation." *Barbour*, 112 N.C. App. at 373, 436 S.E.2d at 173. According to Plaintiffs, they "do not seek to vindicate the rights of other companies which cannot qualify for the tax exemptions" and instead "seek to vindicate their own personal rights–the right to have taxes levied in a uniform manner and to have those tax[] revenues available to fund lawful government purposes."

As we have already noted, our opinion in *Barbour* does not make any explicit distinction between challenges to the existence of an exemption and challenges to the "qualifying criteria" associated with

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the portion of their brief addressing their substantive claims, Plaintiffs appear to rely on that portion of Article I, Section 19, that equates to "substantive due process." We do not, however, believe that the exact portion of Article I, Section 19, upon which Plaintiffs' claim relies makes any difference in our standing analysis, since it is clear from an analysis of the substantive argument advanced in Plaintiffs' brief that the crux of their position remains that "[t]here is no fundamental difference between Google and any other taxpayer and yet the Google legislation, by its effect, singles out Google for preferential tax treatment" and is "repugnant to the administration of justice."

an exemption. For that reason, we conclude that the fundamental premise upon which Plaintiffs' standing argument rests lacks support in the language of our *Barbour* opinion. Thus, we must determine whether Plaintiffs' status as individuals who pay North Carolina sales and use taxes makes them members of a " 'class which is prejudiced by the statute,' " *Barbour*, 112 N.C. App. at 373, 436 S.E.2d at 173, entitled to challenge the sales and use tax exemption granted to eligible internet data centers. In our opinion, that question has already been answered in the negative by our decision in *Blinson*.

In *Blinson*, plaintiffs contended that "their status as taxpayers, suffering an increased tax burden as a result of the Dell incentives, [was] sufficient to provide [them] with standing" to challenge certain tax incentives and tax credits made available to major computer manufacturing facilities. *Blinson*, 186 N.C. App. at 334, 651 S.E.2d at 273. In concluding that the *Blinson* plaintiffs lacked standing to assert discrimination-based claims under "the Uniformity of Taxation Clauses of the North Carolina Constitution and Dormant Commerce Clause of the United States Constitution," this Court explained that:

> Plaintiffs' claims that the Computer Legislation violates the Uniformity of Taxation Clauses and the Federal Dormant Commerce Clause do not relate to any injury plaintiffs themselves have sustained. Rather, plaintiffs' claims under these provisions pertain only to a theoretical injury that might be suffered by other businesses that may attempt to compete with Dell. In other words, plaintiffs lack any " 'personal stake in the outcome of the controversy' " with respect to their challenges under these provisions. [*Goldston*, 361 N.C. at 30, 637 S.E.2d at 879] (quoting *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650).
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> Plaintiffs have not demonstrated that they belong to a class that is prejudiced by the operation of the Computer Legislation. Accordingly, we hold the trial court properly concluded that plaintiffs lack standing to bring their claims under both the Uniformity of Taxation Clauses and the Dormant Commerce Clause.

Blinson, 186 N.C. App. at 334-35, 651 S.E.2d at 274. As a result, this Court held that the fact that individuals seeking to challenge tax incentives provided to major computer manufacturers paid the taxes from which those computer manufacturers were exempt, without more, did not suffice to give them standing to advance a discrimination-based challenge to the constitutionality of those tax incentives.

The argument upon which Plaintiffs predicate their claim to have standing in this case does not differ materially from the argument utilized by the *Blinson* plaintiffs, which, as we have already noted, hinged solely upon the fact that they paid the taxes from which the affected computer manufacturers were exempt.[6] *Blinson*, 186 N.C. App. at 334, 651 S.E.2d at 273. In this case, Plaintiffs have made essentially the same argument, which is that they pay sales and use tax, that the same sort of exemption available to eligible internet data centers is not available to them, and that the existence of the sales and use tax exemption for eligible internet data centers forces them to bear more of the burden of financing the activities of state government than would be the case in the absence of the exemption. The fact that the class at issue here (that of all sales and use taxpayers) is indistinguishable on any principled basis from the class at issue in *Blinson* (that of all persons paying the taxes from which the large computer manufacturers were exempt) necessitates a conclusion that the Plaintiffs lacked standing to assert the discrimination-based claims set out in Claims for Relief 7, 8 and 11. Thus, the trial court correctly dismissed the challenges to the exemptions from the sales and use tax available to eligible internet data centers enacted as part of the 2006 Current Operations Appropriations Act set out in Claims for Relief 7, 8 and 11 of the amended complaint for lack of standing.[7]

III. Conclusion

As a result, we hold that the trial court correctly concluded that Plaintiffs lacked standing to assert the discrimination-based Claims

6. Plaintiffs describe the decision in *Bickett v. State Tax Commission*, 177 N.C. 433, 99 S.E. 415 (1919), as a case in which third parties were "permitted to prosecute claims for enforcement of a tax statute." In *Bickett*, the Governor instituted a *mandamus* proceeding to compel the enforcement of tax legislation which the State Tax Commission deemed unconstitutional. The Farmers Union was allowed to intervene because it was "largely interested in the enactment and enforcement of the statute." *Id.*, 177 N.C. at 434, 99 S.E. at 416. *Bickett* does little to elucidate the present case, since the Farmers Union was defending, not challenging, the constitutionality of the relevant tax legislation.

7. The *Blinson* opinion does not discuss the facts of *Barbour* in any detail. However, the facts at issue in the two cases are clearly different. In *Barbour*, a residential property owner was allowed to challenge a tax exemption granted to the owner of another tract of property used for residential purposes. In *Blinson*, however, a group of individuals who paid property, income, and sales and use taxes were not allowed to challenge tax exemptions provided to large computer manufacturers. As a result, the taxpayer who brought suit in *Barbour* was attempting to challenge a tax exemption associated with the type of property that he did, in fact, own, while the same could not be said of the taxpayers who brought suit in *Blinson*.

for Relief 7, 8, and 11 asserted in their amended complaint. For that reason, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge JACKSON concur.

JAN BRITT LYNN, PLAINTIFF v. JAMES GREGORY LYNN AND THE ESTATE OF KENNETH LYNN AND JAMES LYNN & SONS, INC., DEFENDANTS, AND JAMES GREGORY LYNN, THIRD PARTY PLAINTIFF, v. PENNY W. LYNN AS THE ADMINISTRATRIX OF THE ESTATE OF GEORGE KENNETH LYNN, PENNY W. LYNN, INDIVIDUALLY AND AS THE GUARDIAN AD LITEM OF MIRANDA KELSEY LYNN, JENNIFER KAY LYNN BACHINGER, BRANDON KENNETH LYNN, HOLLY KERRY LYNN AND JAMES LYNN AND SONS, INC., THIRD PARTY DEFENDANTS

No. COA09-556

(Filed 16 February 2010)

1. Corporations— Shareholders' Agreement—extrinsic evidence

The admission of extrinsic evidence about a Shareholders' Agreement in an action involving the disputed transfer of shares in a closely held company was improper but immaterial. Taken as a whole, the intent of the Shareholders' Agreement was clear: the corporation was to remain closely held and shares were not to pass to outsiders. Issues surrounding the use of the term "restricted shares" were not determinative. Morever, assuming the extrinsic evidence was correctly admitted, that evidence clearly established that the parties intended for all of the shares to be restricted.

2. Corporations— insurance policies—compliance with Shareholders' Agreement

Evidence concerning insurance policies in an action to determine the transfer of shares in a closely held corporation was necessary to determine compliance with the Shareholders' Agreement, and was not presented as extrinsic evidence clarifying an ambiguity in the Agreement.

3. Corporations— Shareholders' Agreement—compliance—findings supported by evidence

The trial court's findings concerning compliance with a Shareholders' Agreement were supported by competent evidence.

4. Corporations— Shareholders' Agreement—buy-sell provision—compliance

The trial court did not err by concluding that a buy-sell provision in a Shareholders' Agreement was complied with even though the insurance policy used to fund the provision was owned by an individual rather than the corporation. The intent of the Agreement was observed by the parties through their actions and course of dealing.

Appeal by third-party defendants from judgment entered 28 August 2008 by Judge Napoleon B. Barefoot, Jr. in Columbus County District Court. Heard in the Court of Appeals 4 November 2009.

H. Griffith Garner and law student K. Scott Newton for plaintiff-appellee.

Don W. Viets, Jr. for third-party plaintiff-appellee.

Williamson, Walton & Scott, LLP, by Benton H. Walton, III and C. Martin Scott, II, The Odom Firm, PLLC, by Thomas L. Odom, Jr. and David W. Murray for third-party defendants-appellants.

HUNTER, Robert C., Judge.

This case arises out of a dispute over a 55% ownership interest in James Lynn & Sons, Inc. ("James Lynn & Sons"), a closely held corporation. In a declaratory judgment entered 28 August 2008, the trial court held that third-party plaintiff James Gregory Lynn ("Gregory Lynn") was the rightful owner of that interest, making him the sole owner of the corporation. Third-party defendants James Lynn & Sons and Penny W. Lynn, in her individual capacity and as (1) administratrix of the estate of George Kenneth Lynn ("Kenneth Lynn") and (2) guardian ad litem for her four children, appeal the trial court's declaratory judgment. After careful review, we affirm.[1]

Background

James Lynn & Sons was incorporated on 22 December 1988 by James Carl Lynn ("James Lynn") and his two sons, Gregory Lynn and Kenneth Lynn. On the day of incorporation James Lynn received 25.5 shares of stock and Kenneth and Gregory Lynn each received 12.25 shares of stock. Upon graduation from high school, Kenneth and Gregory Lynn were employed on a full-time basis with the corporation.

1. The third-party defendants, appellants in this action, are collectively referred to as "defendants."

On 23 December 1991 and 22 December 1993, additional shares of stock were issued to the three owners, the latter date being the last time that stock was ever issued for the corporation. As of 22 December 1993, James Lynn owned 51% of the issued stock and each son owned 24.5%. On 30 December 1993, the three corporate owners and their spouses entered into a Shareholders' Agreement,[2] which stated in pertinent part:

> WHEREAS, it is desired by each of the parties hereto that the business and affairs of the Corporation shall be conducted without interruption and shall not suffer from the delays and losses that frequently occur when it appears to [sic] shares in a closely held corporation may pass to outsiders[.]
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> 3. SHARE CERTIFICATES. Each certificate representing restricted shares of the Corporation shall bare [sic] the following legend prominently displayed: "The shares represented by this Certificate, and the transfer thereof, are subject to the provisions of that certain Shareholders' Agreement, dated December 30, 1993, a copy of which is on file in, and may be examined at, the principal office of the Corporation."
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> 4. PURCHASE UPON DEATH. *Upon the death of any Shareholder, his estate will sell, and the Corporation will purchase, at purchase value (as hereinafter defined), all of the restricted shares owned by the deceased Shareholder at the time of his death*; and all the parties hereto will take such action as may be required to effect such purchase, including without limitation any necessary recapitalization of the Corporation. The purchase price shall be paid immediately upon the receipt by the Corporation of the proceeds of any insurance on the life of the deceased Shareholder owned by the Corporation and payable to the Corporation or to the estate or heirs of the deceased Shareholder, to the extent of such proceeds.
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> 5. PURCHASE VALUE (AGREED PRICE). *"Purchase value" means that life insurance proceeds in an amount not less than Seventy-Five Thousand ($75,000.00) Dollars*, which will be deemed automatically adjusted equitably and proportionately to reflect any stock dividend, stock split, or similar recapitalization affecting the shares. The aforementioned purchase value has

2. At times, the Shareholders' Agreement will be referenced as "the Agreement."

> been reviewed by all of the Shareholders and undersigned parties to the Agreement. The purchase value set forth herein shall be reviewed annually by all of the surviving Shareholders and will either be confirmed or revised upon such review on the basis of the then existing business and financial condition and prospects of the Corporation. The good faith decision of a majority of such Shareholders upon each such review shall be conclusive; and each such decision shall be noted in the attached Appendix "A" and endorsed by each such Shareholder. *It is the intent of the Shareholders that the receipt of the aforementioned insurance proceeds by the estate, or surviving spouse, or heirs of the deceased Shareholder shall be full and final satisfaction of said deceased Shareholder's interest in the James Lynn & Sons, Inc. Corporation.*

(Emphasis added). On 8 March 1993, prior to the execution of the Shareholders' Agreement, Kenneth and Gregory Lynn each purchased a $75,000 life insurance policy. Each brother was the record owner and beneficiary of the other brother's policy.

James Lynn died in October 1997 and his estate was administered by his wife, Doris Lynn. The corporation did not own insurance on the life of James Lynn because it was too expensive. The 51% interest in the corporation owned by James Lynn at the time of his death passed to his wife intestate. In March 2001, Gregory and Kenneth Lynn entered into a negotiated settlement with their mother in order to purchase the shares. On 11 April 2001, the parties signed a "Stock Purchase and Release Agreement" (the "release agreement") in which Gregory and Kenneth Lynn paid Doris Lynn $100,000 for the shares and to resolve other disputes between the parties. The release agreement referenced the Shareholders' Agreement stating:

> WHEREAS, Corporation and its Shareholders executed a Shareholders' Agreement dated December 30, 1993, entered into by the Decedent, the Minority Shareholders, the Corporation, among others, . . . to sell and purchase, respectively, the Stock upon the death of the Decedent.

In May 2001, Kenneth and Gregory Lynn purchased additional life insurance on each other in the amount of $150,000. In October 2001, they increased the life insurance policy amount on each policy from $150,000 to $300,000 and also maintained the original $75,000 policies. In total, each brother had life insurance in the amount of $375,000. At some point in 2001, the brothers became owners of their

own life insurance policies. Subsequently, during 2005 and 2006, Kenneth Lynn named his wife as the beneficiary of his policy while Gregory Lynn named his children as beneficiaries of his policy. The evidence at the hearing revealed that at all times the corporation paid the premiums for every policy on the lives of Kenneth and Gregory Lynn. The brothers never reimbursed the corporation for those payments nor were the payments reported as individual income on the brothers' W-2 tax forms.

On 24 November 2003 Jan Lynn filed a complaint against her husband, Gregory Lynn, requesting, *inter alia*, divorce from bed and board and equitable distribution. On 8 July 2004, after disagreements arose between Kenneth and Gregory Lynn, the two negotiated a stock transfer by which Kenneth Lynn became the majority shareholder with a 55% ownership interest, and Gregory Lynn kept a 45% minority shareholder interest. No consideration was given to either party with regard to the stock transfer. Kenneth Lynn subsequently terminated Gregory Lynn's employment with the corporation, though he maintained his 45% ownership interest.

Gregory and Jan Lynn were divorced on 14 October 2005, but continued to engage in contentious litigation to resolve issues concerning equitable distribution. On 17 October 2006, Jan Lynn moved to join Kenneth Lynn as a party in the domestic dispute in order to establish that Kenneth Lynn was the majority shareholder in James Lynn & Sons, that Gregory Lynn was the minority shareholder, and that Gregory Lynn's shares were subject to equitable distribution.

On 17 October 2006, prior to a final equitable distribution order pertaining to the property of Jan Lynn and Gregory Lynn, Kenneth Lynn unexpectedly died intestate. Upon his death, his estate received the 55% ownership interest in James Lynn & Sons, and his widow, Penny Lynn, received the $375,000 life insurance proceeds. On 28 February 2007, Jan Lynn filed an emergency request to have a manager appointed for the corporation. On 17 September 2007 and 11 December 2007, over objections by the Estate of Kenneth Lynn and James Lynn & Sons, orders were entered joining the Estate of Kenneth Lynn and James Lynn & Sons and severing the equitable distribution claims from the other claims between Jan Lynn and Gregory Lynn. On 19 December 2007, Jan Lynn filed an amended complaint for equitable distribution, claiming that after Kenneth Lynn's death Gregory Lynn became the sole owner of James Lynn & Sons and that those shares previously owned by Kenneth Lynn were, therefore, at issue in the equitable distribution dispute. The

amended complaint included the estate of Kenneth Lynn and James Lynn & Sons as defendants.

On 25 January 2008, Gregory Lynn answered the amended complaint for equitable distribution and asserted a third-party complaint against the corporation and Penny Lynn in her individual capacity, as administratrix of the estate of Kenneth Lynn, and as guardian ad litem for her four children. Gregory Lynn claimed that pursuant to the Shareholders' Agreement, he became the sole owner of the corporation upon his brother's death and subsequent payment of life insurance proceeds to Penny Lynn.

On 26 February 2008, Jan Lynn filed a motion for declaratory judgment regarding the nature and extent of Gregory Lynn's ownership interest in the corporation. On 28 February 2008, Penny Lynn filed an answer to the amended complaint and filed a counterclaim requesting a declaratory judgment that would declare her the rightful owner of her deceased husband's 55% interest in James Lynn & Sons.[3]

On 16 July 2008, a hearing was conducted by Judge Napoleon B. Barefoot, Jr. in Columbus County District Court.[4] The parties stipulated into evidence the Shareholders' Agreement and copies of the parties' share certificates. Upon review of the Shareholders' Agreement and hearing arguments of counsel, the trial court determined that there were ambiguities in the Shareholders' Agreement and decided to hear further evidence. The principal ambiguity, according to the trial court, concerned the term "restricted shares," which was not defined in the Shareholders' Agreement. The meaning of this term was critical to the trial court's determination of ownership because the "Purchase Upon Death" clause of the Shareholders' Agreement specified that any life insurance proceeds paid upon the death of one of the shareholders would serve as complete payment to purchase "restricted shares" inherited by an heir of the deceased—in this case, Penny Lynn.

Plaintiffs contended that all stock distributed prior to the execution of the Shareholders' Agreement was in fact restricted because it could not be transferred to anyone outside of the family.[5] Further-

3. For ease of reference, plaintiff Jan Lynn and third-party plaintiff Gregory Lynn are at times referred to collectively as "plaintiffs" as their positions at the declaratory judgment hearing were identical.

4. James Lynn & Sons was not represented by counsel at the hearing.

5. No shares were distributed after the Shareholders' Agreement was signed.

more, the Shareholders' Agreement provided that upon the death of a shareholder, the life insurance paid (a minimum of $75,000) would serve to repurchase the shares inherited by the decedent's heirs. Therefore, according to plaintiffs, because Kenneth Lynn owned only restricted shares of stock, and upon his death Penny Lynn inherited that stock and received $375,000 in life insurance proceeds, the stock was effectively purchased from her by the corporation, making Gregory Lynn the sole shareholder. Defendants contended that the language of the Shareholders' Agreement was clear and that Kenneth Lynn's shares did not specify on the legend that they were restricted. Accordingly, the proceeds of the life insurance policy did not effectively purchase the shares and Penny Lynn was, therefore, the rightful owner of her late husband's 55% interest in the corporation.

At the hearing, over defendants' objections, Harold Pope, the attorney who drafted the Shareholders' Agreement, testified that all shares issued by the corporation were "restricted" and that the omission of the restricted notation on the shares was immaterial. Plaintiffs presented documentary evidence that the brothers had purchased life insurance totaling $375,000 for each brother. Internal documents from the life insurance company showed that the applications for insurance noted that the insurance was to fund a "Partnership Buy/Sell Agreement." The brothers' applications also referenced each other and stated that each policy should be "issue[d] in conjunction with [the other brother's policy] . . . as part of a privately owned Partnership Buy/Sell Agreement." Glenn Ray, the life insurance agent who sold Gregory and Kenneth Lynn the policies, also testified regarding the intent of the purchase stating that the policy was to fund a buy-sell agreement. Faye Simmons, the corporation's office secretary testified that the corporation paid all premiums for the life insurance policies. Alan Thompson, a CPA who performed corporate account services for the corporation, testified that he was aware of the Shareholders' Agreement and it was his understanding that the life insurance was meant to fund a buy-sell agreement. Plaintiffs also submitted the release agreement entered into by the brothers and their mother, which references the Shareholders' Agreement and its purpose—"to sell and purchase . . . the Stock upon the death of the Decedent."

On 28 August 2008, the trial court issued an order in which it made findings of fact and conclusions of law based on the documents and evidence presented at the hearing. The court ordered: (1) "[t]hat the Estate of George Kenneth Lynn, administered by Penny W. Lynn,

shall transfer the decedent's stock shares of James Lynn & Sons, Inc. to said corporation on or before the 15th day of September, 2008"; (2) "[t]hat the receipt of the full life insurance proceeds from the policies owned by George Kenneth Lynn hereby constitute full and final payment for the stock shares owned by the decedent George Kenneth Lynn, pursuant to the Shareholders' Agreement executed December 30, 1993"; (3) "[t]hat this transfer shall fully and finally resolve the issues of stock ownership in James Lynn & Sons, Inc."; and (4) "[t]hat James Gregory Lynn shall be the sole owner of all shares of stock and sole owner of James Lynn & Sons, Inc." The third-party defendants now appeal the trial court's declaratory judgment.[6]

Standard of Review

" 'The Declaratory Judgment Act, [N.C. Gen. Stat. §] 1-253 *et seq.*, affords an appropriate procedure for alleviating uncertainty in the interpretation of written instruments and for clarifying litigation.' " *Hejl v. Hood, Hargett & Associates, Inc.*, —— N.C. App. ——, ——, 674 S.E.2d 425, 427 (2009) (quoting *Bellefonte Underwriters Ins. Co. v. Alfa Aviation*, 61 N.C. App. 544, 547, 300 S.E.2d 877, 879 (1983)). " 'The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal.' " *Cross v. Capital Transaction Grp., Inc.*, 191 N.C. App. 115, 117, 661 S.E.2d 778, 780 (2008) (quoting *Lineberger v. N.C. Dep't of Corr.*, 189 N.C. App. 1, 7, 657 S.E.2d 673, 678, *aff'd per curiam in part and disc. review improvidently allowed in part*, 362 N.C. 675, 669 S.E.2d 320 (2008)). " 'However, the trial court's conclusions of law are reviewable *de novo*.' " *Id.* (quoting *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000)). Questions of contract interpretation are also reviewed *de novo*. *Hickory Orthopaedic Center, P.A. v. Nicks*, 179 N.C. App. 281, 291, 633 S.E.2d 831, 837 (2006).

Discussion

I. Admission of Extrinsic Evidence

[1] Defendants first contend that because the Shareholders' Agreement was plain and unambiguous on its face, the trial court

6. Although an equitable distribution order had not been entered at the time of this appeal, the declaratory judgment was a final judgment from the district court regarding ownership of the shares, and, therefore, this appeal is not interlocutory. N.C. Gen. Stat. § 7A-27(c) (2007).

was required to rule strictly upon review of the Agreement itself and no extrinsic evidence was admissible, including, *inter alia*, witness testimony and documentary evidence concerning the intent behind the Agreement. Specifically, defendants argue that the Shareholders' Agreement clearly states in the "Purchase Upon Death" clause that the deceased shareholder's estate would be required to sell all "restricted shares" back to the corporation and that the corporation would purchase those shares through "the proceeds of any insurance on the life of the deceased [s]hareholder owned by the [c]orporation and payable to the [c]orporation or the estate or heirs of the deceased [s]hareholder . . . ." Defendants claim that the share certificates did not indicate that the shares owned by Kenneth Lynn were restricted and that the corporation did not own any life insurance on the life of Kenneth Lynn. Accordingly, defendants assert that Penny Lynn was not required to transfer the 55% interest she inherited back to the corporation. Based on this logic, Penny Lynn would keep the life insurance proceeds in the amount of $375,000 as well as the shares she inherited. First, we must determine whether the Shareholders' Agreement is, in fact, ambiguous.

"Since consensual arrangements among shareholders are *agreements*—the products of negotiation—they should be construed and enforced like any other contract so as to give effect to the intent of the parties as expressed in their agreements . . . ." *Blount v. Taft*, 295 N.C. 472, 484, 246 S.E.2d 763, 771 (1978). "With all contracts, the goal of construction is to arrive at the intent of the parties when the contract was issued. The intent of the parties may be derived from the language in the contract." *Mayo v. North Carolina State University*, 168 N.C. App. 503, 508, 608 S.E.2d 116, 120 (2005) (internal citation omitted), *aff'd per curiam*, 360 N.C. 52, 619 S.E.2d 502 (2005).

"It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument." *Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 693-94, 51 S.E.2d 191, 199 (1949). "When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court . . . and the court cannot look beyond the terms of the contract to determine the intentions of the parties." *Piedmont Bank & Trust Co. v. Stevenson*, 79 N.C. App. 236, 240, 339 S.E.2d 49, 52, *aff'd per curiam*, 317 N.C. 330, 344 S.E.2d 788 (1986). However, "[e]xtrinsic evidence may be consulted when the plain language of the contract is ambiguous." *Brown v. Ginn*, 181 N.C. App. 563, 567,

640 S.E.2d 787, 790 (2007) (citations omitted). "Whether or not the language of a contract is ambiguous . . . is a question for the court to determine." *Piedmont Bank and Trust Co.*, 79 N.C. App. at 241, 339 S.E.2d at 52. In making this determination, "words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible . . . ." *Id.* "[W]here the language presents a question of doubtful meaning and the parties to a contract have, practically or otherwise, interpreted the contract, the courts will ordinarily adopt the construction the parties have given the contract *ante litem motam*." *Davison v. Duke University*, 282 N.C. 676, 713-14, 194 S.E.2d 761, 784 (1973). The court must not, however, "under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein." *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978).

A. Evidence Concerning the Term "Restricted Shares"

Here, the trial court found as fact:

> That the Shareholder's Agreement had some ambiguities in it as in some paragraphs it referred to "shares" and in other paragraphs it referred to "restricted shares." That the agreement further provides that restricted shares of stock would be issued and there would be a legend prominently displayed on the shares of stock indicating they were restricted and subject to the Shareholders' Agreement dated December 30, 1993. However, no restricted stock or any other stock of any kind was issued after the Shareholders' Agreement on December 30, 1993. . . . Also, the $75,000.00 life insurance policies [were] already in effect between the brothers when the Shareholders' Agreement was signed.

The Agreement did not specifically define the term "restricted shares." Due to the perceived ambiguity by the trial court, further evidence was heard.

Upon careful review of the Shareholders' Agreement, we agree with defendants that there is no ambiguity in the Agreement, and, more specifically, we find no ambiguity in the term "restricted shares." Accordingly, extrinsic evidence admitted solely for the purpose of defining "restricted shares" under the Shareholders' Agreement was improper. *See Piedmont Bank & Trust Co.*, 79 N.C. App. at 240, 339 S.E.2d at 52. Nevertheless, we find no error in the trial court's ultimate determination—that the shares owned by

Kenneth Lynn were restricted and that the life insurance proceeds were intended to purchase those shares from his estate. Because we reach the same conclusion as the trial court based strictly on a reading of the Shareholders' Agreement, we find the admission of extrinsic evidence to clarify the term "restricted shares" to be immaterial in this case. *See Starco, Inc. v. AMG Bonding & Ins. Serv., Inc.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996) ("[T]o obtain relief on appeal, an appellant must not only show error, . . . appellant must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action.").

Our holding that the Shareholders' Agreement is unambiguous is based, in part, on the clear intent stated in the Agreement. "While the intent of the parties is at the heart of a contract, intent is a question of law where the writing is free of any ambiguity which would require resort to extrinsic evidence or the consideration of disputed fact." *Martin v. Ray Lackey Enterprises*, 100 N.C. App. 349, 354, 396 S.E.2d 327, 330 (1990). The Agreement states:

> WHEREAS, all of the issued and outstanding shares of the Corporation are owned and held of record as follows:
>
> | SHAREHOLDER | NUMBER OF SHARES |
> |---|---|
> | James Carl Lynn[] | 51% |
> | George Kenneth Lynn | 24.5% |
> | James Gregory Lynn | 24.5% |
>
> WHEREAS, it is desired by each of the parties hereto that the business and affairs of the Corporation shall be conducted without interruption and shall not suffer from the delays and losses that frequently occur when it appears to [sic] shares in a closely held corporation may pass to outsiders[.]
>
> . . . .
>
> 1. TRANSFER TO RELATED PARTY. Each Shareholder shall be free to transfer, during his lifetime or by testamentary transfer, all or [part of his] shares to any party related by blood; but such transferee of those shares shall thereafter be bound by all of the provisions of this Agreement, and no further transfer of such shares shall be made by such transferee except back to the Shareholder who originally owned them, or to a related party of such transferee, or except in accordance with the provisions of Paragraph 2. hereinbelow.

The Agreement further states that prior to the transfer of any "restricted shares, except as permitted under Paragraph 1[,]" the shareholder seeking to transfer his or her shares is required to first submit to the corporation an "offer to sale" the shares. If the corporation rejects the offer, or if the offer lapses, then the other shareholders must also receive the opportunity to purchase the shares for the same price and under the same terms as the offer made to the corporation. The Agreement then provides for the purchase of "restricted shares" upon the death of a shareholder with the proceeds of life insurance owned by the corporation, and payable to the heirs of the decedent. Multiple provisions are, therefore, included in the Agreement to ensure that the corporation remain closely held and not pass to "outsiders."[7] Paragraph one uses the term "shares" and limits the transfer of shares to blood relatives only. Subsequently, the term "restricted shares" is used in other provisions regarding transfer of shares. Due to the extensive restrictions on alienation of shares, we find that all shares that had been issued prior to the execution of the Agreement were "restricted" and that the term "restricted shares" was not limited to those shares distributed prospectively as defendants claim. In fact, no shares were ever issued after the execution of the Agreement, and the Agreement lists the percentage interest owned by each shareholder at the time the Agreement was executed.

The type of restrictions found in the Shareholders' Agreement at issue in this case are common in closely held corporations.

> In family owned corporations, or other corporations in which all shares of stock are held by a relatively small number of shareholders, it is not unusual for all shareholders to agree that the corporation, or the other shareholders, will be given the first opportunity to purchase the shares of a terminated or retiring shareholder. . . . These *restrictions* allow shareholders to choose their business associates, *to restrict ownership to family members*, and to ensure congenial and knowledgeable associates.

Crowder Const. Co. v. Kiser, 134 N.C. App. 190, 196-97, 517 S.E.2d 178, 184 (emphasis added) (internal citation omitted), *disc. review denied*, 351 N.C. 101, 541 S.E.2d 142 (1999).

Also relevant to our determination that the Shareholders' Agreement is not ambiguous is the fact that the brothers specifically purchased $75,000 in life insurance prior to executing the Shareholders'

7. Jan Lynn, Penny Lynn, and Doris Lynn signed the Agreement although they were not shareholders at that time.

Agreement.[8] Clearly the policies in the amount of $75,000, the exact amount stated in the "Purchase Value" provision of the Agreement, was meant to purchase those shares already distributed in the event that one of the shareholders died. These shares are designated as "restricted" in the Agreement. The Agreement explicitly states that "*[i]t is the intent of the Shareholders* that the receipt of the aforementioned insurance proceeds *by the estate*, or surviving spouse, or heirs of the deceased Shareholder shall be *full and final satisfaction of said deceased Shareholder's interest* in the James Lynn & Sons, Inc. Corporation." (Emphasis added). The term "interest" is used here as opposed to "restricted shares," which evidences the intent that all shares owned by the decedent be covered.

We recognize, as did the trial court, that the Agreement alternates between use of the terms "shares" and "restricted shares"; however, we do not find that this creates an ambiguity in the Agreement where the intent of the parties is clear from the document as a whole. "Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole." *Jones v. Casstevens*, 222 N.C. 411, 413-14, 23 S.E.2d 303, 305 (1942) (quoting *Simmons v. Groom*, 167 N.C. 312, 316, 83 S.E. 471, 473 (1914)). Viewing the Agreement as a whole, we find the intent to be clear and unambiguous. Each share distributed was subject to specific transfer limitations and was, therefore, restricted. The parties intended these "restricted shares" to be governed by the "Purchase Upon Death" and "Purchase Value" provisions of the Agreement.

We also acknowledge that the Agreement mandates specific language on the legend of restricted shares that was not present on the shares distributed in this case, but we do not find that fact to be determinative. The failure to indicate on the legends that the shares were restricted would perhaps impact a transfer to a good faith purchaser who would not have notice that the shares were restricted. *See* U.C.C. § 8-204 (1994) ("A restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without knowledge of the restriction . . . ."). However, that is not the case here. Penny Lynn signed the Shareholders' Agreement and was, therefore, aware of the clear intent of the Agreement and the limita-

8. As discussed *infra*, evidence concerning the purchase of life insurance was not admitted to clarify an ambiguity; rather, the evidence was admitted to show compliance with the Agreement.

tions on transfer. *Mosely v. WAM, Inc.*, 167 N.C. App. 594, 599, 606 S.E.2d 140, 143 (2004) ("When a party affixes his signature to a contract, he is manifesting his assent to the contract.").

Assuming, *arguendo*, that we found the Agreement to be ambiguous, thus requiring extrinsic evidence to clarify the intent of the parties, the evidence presented at the hearing clearly establishes that the parties intended for all shares in existence to be "restricted" and that the parties intended to abide by the "Purchase Upon Death" provision. Harold Pope, the attorney who drafted the Shareholders' Agreement, testified that all shares issued by the corporation were "restricted" and that the omission of the restricted notation on the shares issued prior to the execution of the Agreement did not make those shares unrestricted. He also pointed to paragraph five of the Agreement, which states that the intent of the shareholders was for the insurance proceeds to purchase the decedent's interest in the corporation, which would include all shares, and claimed that he always includes "a sentence or two, or paragraph if necessary, to state the intent of the parties."

The most revealing piece of extrinsic evidence presented to the trial court was the release agreement signed by Kenneth Lynn, Gregory Lynn, and their mother, Doris Lynn, in which the Shareholders' Agreement was referenced as well as the intent of the Agreement—"to sell and purchase . . . the Stock upon the death of the Decedent." All three individuals who signed the release agreement also signed the Shareholders' Agreement. *See Nicks*, 179 N.C. App. at 290, 633 S.E.2d at 836 ("Prior course of conduct evidence is more compelling when the prior conduct involved the same parties in the same relation to each other."). Even though the corporation did not own life insurance on James Lynn, the parties still honored the intent of the Agreement. Doris Lynn accepted $100,000 as full and final satisfaction for her deceased husband's shares, and to settle other disputes between the parties.

In sum, we find that there was no ambiguity in the Shareholders' Agreement. All shares owned by James Lynn and his sons at the time the Agreement was executed were "restricted" and subject to the terms of the Shareholders' Agreement, including the "Purchase Upon Death" provision. Even if we found that the Agreement was ambiguous, as the trial court did, the extrinsic evidence presented at the hearing overwhelmingly supports our interpretation.

B. Evidence Concerning the Life Insurance Policies

[2] Defendants further dispute the admission of evidence concerning the purpose of the life insurance policies. Specifically, testimony and documents admitted tending to show that the life insurance was purchased to fund a "buy-sell agreement."

The trial court did not find that there was an ambiguity in the Shareholders' Agreement concerning the insurance provision. Practically speaking, once the trial court determined that the shares owned by Kenneth Lynn were restricted, evidence was required to show whether the parties had complied with the insurance provision of the Shareholders' Agreement, which specified that life insurance owned by the corporation on the life of the deceased shareholder would serve as full payment for shares inherited by an heir of the decedent.

We conclude that all evidence submitted concerning the insurance policies was necessary to the determination of the action and was not presented as extrinsic evidence to clarify an ambiguity. The trial court did not, therefore, err in reviewing this evidence.

II. Findings of Fact

[3] Defendants further assign error to most of the trial court's findings of fact and allege that they are either irrelevant or not based on competent evidence. Because we have determined that the terms of the Shareholders' Agreement are not ambiguous, and that Kenneth Lynn's shares were restricted pursuant to the express intent of the Agreement, we need not address defendants' arguments concerning findings that were based on extrinsic evidence or findings regarding the intent of the Agreement itself. We will, however, address assignments of error pertaining to compliance with the Agreement.

The trial court found as fact, based on the evidence presented, that while the brothers technically "owned" the multiple life insurance policies, the intent of the brothers in purchasing the policies was to fund the buy-sell agreement, as provided for in the "Purchase Upon Death" and "Purchase Value" provisions of the Shareholders' Agreement. The court further found that at all times the corporation paid the policy premiums and were not reimbursed by the brothers; the premium payments were not included as income on the brothers' W-2 tax forms; and that the documents pertaining to the policies were kept at the corporate office.

Testimony from multiple sources and documentary evidence supported the trial court's findings. Glenn Ray, an agent with Farm Bureau Life Insurance, testified that prior to executing the Shareholders' Agreement, the brothers each purchased $75,000 in life insurance. The forms indicated that the purpose of buying the insurance was to fund a buy-sell agreement. The brothers subsequently purchased additional insurance such that the life of each brother was insured for $375,000. Faye Simmons, who had served as the corporation's office secretary since 1994, testified that the corporation paid the premiums on the policies; that the brothers never reimbursed the corporation; and that the documents concerning the policies were kept in the corporate office. Alan Thompson, a CPA who assisted the corporation with its taxes, testified that he was aware that a buy-sell agreement was in effect and that it was funded by the brothers' life insurance policies. There was no contrary evidence presented. Accordingly, we hold that the trial court's findings were supported by competent evidence.

III. Conclusions of Law

[4] Defendants assign error to all of the trial court's conclusions of law pertaining to the interpretation of the Agreement, the intent of the Agreement, and compliance with the Agreement. The trial court concluded:

> 2. That the intent and purpose of the Shareholders' Agreement dated December 30, 1993 is clearly stated in the plain language of the Agreement as is found in Paragraphs 4 and 5 of said Agreement. That the Shareholders' Agreement dated December 30, 1993 was a valid Buy/Sell Agreement supported by consideration and is binding on the parties.
>
> 3. That the shareholders of James Lynn & Sons, Inc. complied with the provisions of the Shareholders Agreement upon the death of Mr. James C. Lynn, Sr. in 1997 and upon the death of George Kenneth Lynn in 2006.
>
> 4. That Penny Lynn received the proceeds from the Life Insurance required in the Shareholder's Agreement upon her husband Kenneth Lynn's death and [to] comply with said agreement she as Administrator of Kenneth's estate should be required to transfer Kenneth Lynn's shares of James Lynn & Sons, Inc. stock [sic] [in] said corporation to be disbursed to Gregory as required in the Agreement.

5. That pursuant to Rule 57 of the North Carolina Rules of Civil Procedure the court declares that all terms of the Shareholders' Agreement have been complied with and the agreement shall be enforced with ownership of the shares of James Lynn & Sons, Inc.[,] stock currently held by the Estate of George Kenneth Lynn or his widow Penny Lynn[,] to be transferred through [the] Corporation to James Gregory Lynn their rightful owner.

We find no error in the trial court's conclusions of law. Based on our holdings, *supra*, with regard to interpretation and intent of the Agreement, we need only specifically address the trial court's conclusion of law that "the shareholders of James Lynn & Sons, Inc. *complied* with the provisions of the Shareholders' Agreement . . . upon the death of Kenneth Lynn . . . ." (Emphasis added). The trial court's findings establish that the brothers "owned" the life insurance policies. The Agreement states that life insurance "owned by the Corporation and payable to the Corporation or to the estate or heirs of the deceased Shareholder, to the extent of such proceeds[]" would serve as full payment for stock inherited. It is undisputed that the insurance proceeds were paid to the estate of the deceased shareholder. Defendants argue that because the corporation did not technically "own" the policies, the Agreement was not complied with and Penny Lynn is entitled to the insurance proceeds and the shares she inherited.[9] We disagree.

Kenneth Lynn originally named his brother as owner of his life insurance policy in the amount of $75,000 and he made it clear in his application that the policy was being purchased to fund a buy-sell agreement. He further referenced his brother's application and noted that his policy should be "issue[d] in conjunction with [Gregory Lynn's policy] . . . as part of a privately owned Partnership Buy/Sell Agreement."[10] Kenneth Lynn also purchased an additional policy in the amount of $150,000 and then increased that policy to $300,000. Gregory Lynn was listed as the owner of these policies as well. On 2 August 2001, Kenneth Lynn requested that ownership of his policies be changed so that he would become the owner of the policies rather than his brother. Regardless of who was the record owner, all prem-

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9. Defendants cite no authority for their argument in violation of N.C. R. App. P. 28(b)(6).

10. Viewed in context, the partnership agreement referenced is, in fact, the Shareholders' Agreement at issue.

iums on Kenneth Lynn's various policies from 1993 until his death in 2006 were paid by the corporation.

As the trial court acknowledged, the policies were owned by Kenneth Lynn, not the corporation, at the time of his death; however, this does not defeat the clear intent of the Shareholders' Agreement, which was observed by the parties through their actions and course of dealing since its execution. The evidence shows that the brothers intended for the life insurance policies to fund a buy-sell agreement. The Shareholders' Agreement expressed the intent of the shareholders that the proceeds of the life insurance policies would serve as full payment for any interest, which would include all shares, in the corporation inherited by the estate of a deceased shareholder. We must honor the intent of the Agreement, viewed as a whole. *State v. Philip Morris USA Inc.*, —— N.C. App. ——, ——, 669 S.E.2d 753, 756 (2008) ("Intent is derived not from a particular contractual term but from the contract as a whole.") (citation and quotation marks omitted), *aff'd*, 363 N.C. 623, 685 S.E.2d 85 (2009). In so doing, we hold that the trial court did not err in concluding as a matter of law that "the shareholders of James Lynn & Sons, Inc. complied with the provisions of the Shareholders' Agreement . . . upon the death of Kenneth Lynn . . . ."

Conclusion

We hold that the Shareholders' Agreement is not ambiguous; the trial court improperly considered extrinsic evidence to interpret the contract; Kenneth Lynn's shares were "restricted" and subject to the "Purchase Upon Death" provision of the Agreement; the trial court's findings of fact regarding compliance with the Agreement were supported by competent evidence; and the trial court's conclusions of law are not erroneous in any respect. Accordingly, we affirm the declaratory judgment, which ordered the Estate of Kenneth Lynn, administered by Penny Lynn, to transfer the shares inherited intestate from Kenneth Lynn to James Lynn & Sons, Inc.

Affirmed.

Judges CALABRIA and GEER concur.

DAILY EXPRESS, INC., PETITIONER v. BRYAN E. BEATTY, SECRETARY OF CRIME CONTROL & PUBLIC SAFETY, RESPONDENT

No. COA08-1509

(Filed 16 February 2010)

1. Administrative Law— overweight vehicle—fine improperly assessed—summary judgment

For the reasons stated in *Daily Express, Inc. v. N.C. Dep't of Crime Control & Pub. Safety*, the court did not err by granting petitioner's motion for summary judgment and requiring respondent agency to repay a penalty it had imposed upon petitioner for operating an overweight vehicle, plus interest, pursuant to N.C.G.S. §§ 20-188(e) and 119(d).

2. Costs— attorney fees—improperly granted—substantial justification

The trial court erred by awarding attorney fees to petitioner pursuant to N.C.G.S. § 6-19.1. Although the trial court had jurisdiction to award petitioner attorney fees despite the lack of a "final disposition" or a formal petition for attorney fees because the superior court was reviewing the action of the administrative agency *de novo*, the agency did not act without substantial justification in pressing its claim against petitioner.

Appeal by respondent from judgment entered 13 August 2008 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 20 May 2009.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for Respondent-Appellant.

Nexsen Pruet, PLLC, by Daniel W. Koenig and James W. Bryan, for Petitioner-Appellee.

ERVIN, Judge.

Respondent Bryan E. Beatty, Secretary of Crime Control and Public Safety, on behalf of the North Carolina Department of Crime Control & Public Safety, Division of State Highway Patrol, appeals from a memorandum opinion and order entered 13 August 2008 granting a motion for summary judgment filed by Petitioner Daily Express, Inc.; denying Respondent's motion for summary judgment; ordering Respondent to "refund to Petitioner the full amount of the civil

penalty assessed . . . in the amount of $24,208.00 . . . plus interest[;]" and ordering Respondent to "pay . . . Petitioner its reasonable attorney's fees[.]" We affirm in part and vacate in part.

I. Factual Background

On 24 August 2007, the North Carolina Department of Transportation issued Single Trip Permit #708240W0062 to Petitioner. The permit, which was valid from 29 August 2007 to 7 September 2007, authorized Petitioner to transport a large crane from Wilmington to Tennessee. Although the tractor trailer to be used to transport the crane had a registered weight of 80,000 pounds, the permit allowed it to move a gross weight of 187,000 pounds. The permit also authorized travel from sunrise to sunset on Monday through Thursday, required a rear escort vehicle, and mandated the use of a second escort vehicle if the gross weight of the tractor trailer and its cargo exceeded 149,999 pounds.

On 30 August 2007, Petitioner's driver, Robert Louis Belanger (Belanger), accompanied by two escort vehicles in accordance with the permit, transported the crane. At approximately 6:15 p.m. on that date, Belanger experienced mechanical difficulties with the tractor trailer and pulled to the side of Interstate 40 for the purpose of repairing a broken airline. The required repairs took forty-five minutes to complete.

In view of the fact that Belanger did not believe it would be either wise or safe to leave his tractor trailer parked on the side of Interstate 40 overnight, he sent the pilot escort vehicle to find a safe location at which to spend the night. The driver of the escort vehicle decided that Belanger should drive the tractor trailer to the Hillsborough weigh station for that purpose. Belanger arrived at the weigh station at 8:05 p.m.

Upon arrival, one of Respondent's officers informed Belanger that his permit was "null and void" because Belanger was traveling after sunset in violation of the permit's time of travel restrictions. As a result, the officer issued an assessment in the amount of $250.00 for operating in violation of the permit's time of travel restrictions pursuant to N.C. Gen. Stat. § 20-119(d)(2). In addition, the officer issued an overweight citation and assessment pursuant to N.C. Gen. Stat. § 20-119(d) and N.C. Gen. Stat. § 20-118(e) in the amount of $24,208.00, with the amount of this overweight penalty based on the difference between the actual weight of the vehicle and its load,

which was 173,000 pounds, and the registered weight of the tractor trailer, which was 80,000 pounds, without considering that the permit allowed the transportation of a gross weight of 187,000 pounds.

Since Petitioner could not pay the assessment that evening, the tractor trailer was impounded. After Petitioner paid the assessment on the following morning, Respondent returned the permit to Belanger and allowed him to continue his trip.

On 7 September 2007, Petitioner filed a letter with Respondent protesting the overweight penalty. On 12 October 2007, Respondent informed Petitioner that an administrative review revealed that the officer followed state law and agency policy in issuing the citation and assessing the overweight penalty. On 26 December 2007, Petitioner filed a petition protesting the $24,208.00 overweight penalty pursuant to N.C. Gen. Stat. § 20-91.1,[1] and sought to recover the amount of the assessment plus attorneys fees. On 19 May 2008 and 13 June 2008, respectively, Petitioner and Respondent filed summary judgment motions. On 13 August 2008, the trial court entered a memorandum opinion and order granting Petitioner's motion for summary judgment; denying Respondent's motion for summary judgment; ordering Respondent to "refund to Petitioner the full amount of the civil penalty assessed . . . in the amount of $24,208.00 . . . plus interest[;]" and ordering Respondent to "pay to Petitioner its reasonable attorney's fees[.]" From this order, Respondent noted an appeal to this Court.

II. Legal Analysis

A. Claim for Refund of Overweight Penalty

[1] First, Respondent contends that the trial court erred by granting Petitioner's motion for summary judgment and requiring Respondent to repay the overweight penalty plus interest. We disagree.

This Court reviews orders granting summary judgment using a *de novo* standard of review. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). According to well-established North Carolina law, summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admis-

1. We note that N.C. Gen. Stat. § 20-91.1 was repealed by 2007 N.C. Sess. Laws ch. 491, sec. 2 effective 1 January 2008. Because Respondent does not argue that the repeal of N.C. Gen. Stat. § 20-91.1 affects the disposition of this case, we need not address the impact of the General Assembly's action on the rights and obligations of the parties before us. *See* N.C.R. App. P. 10(b)(1).

sions 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). Moreover, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quotation omitted). The trial court may not resolve issues of fact in deciding a motion for summary judgment and must deny the motion if there is a genuine issue as to any material fact. *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972).

As we understand the record, there are no genuine issues of material fact in dispute between the parties. In *Daily Express, Inc. v. N.C. Dep't of Crime Control & Pub. Safety*, —— N.C. App. ——, ——, 671 S.E.2d 587, 591-92 (2009), we examined the relevant statutory provisions in detail and concluded that Respondent lacked the statutory authority to impose an overweight penalty incurred under circumstances essentially identical to those at issue here and calculated in the manner utilized in this instance. As a result, for the reasons stated in *Daily Express*, we affirm the trial court's decision to grant summary judgment in favor of Petitioner on the issue of whether Petitioner is entitled to a refund of the overweight penalty assessed against it with interest.

B. Attorney's Fees

[2] Secondly, Respondent contends that the trial court erred by awarding attorney's fees to Petitioner pursuant to N.C. Gen. Stat. § 6-19.1. We agree.

N.C. Gen. Stat. § 6-19.1 provides, in pertinent part, that:

> In any civil action . . . brought by the State . . . unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees . . . to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. The party shall petition for the attorney's fees within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request.

N.C. Gen. Stat. § 6-19.1. In its decision awarding attorney's fees, the trial court stated that:

> The Court, in the exercise of its discretion, concludes that Petitioner, the prevailing party in this action, should recover its reasonable attorney's fees in this action. The Court retains jurisdiction of this matter for the entry of an award of attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1, subject to Petitioner's submission of a petition/affidavit setting forth Petitioner's reasonable attorney's fees. In this regard, Respondent acted without substantial justification in pressing its claim against Petitioner and refusing to withdraw Citation # 3118999-6 and refund the $24,208.00 payment to Petitioner, and there are no special circumstances that would make the award of attorney's fees unjust.
>
> Respondent shall pay to Petitioner its reasonable attorney's fees incurred in this action, subject to Petitioner's submission of a petition/affidavit setting forth Petitioner's reasonable attorney's fees which it seeks to recover in this action. The issue as to the amount of Petitioner's reasonable attorney's fees shall come on for hearing before the undersigned at a time to be arranged among counsel for the parties and the Trial Court Administrator, which hearing shall take place no earlier than five (5) days following the service of such petition/affidavit by Petitioner upon counsel for Respondent.

According to Respondent, the trial court erred in deciding to award attorney's fees to Petitioner because (1) the trial court lacked jurisdiction to enter the award due to Petitioner's failure to file the required Petition, and (2) Respondent was substantially justified in pressing its claim against Petitioner.

1. Jurisdiction

Respondent initially contends that the trial court lacked jurisdiction to award attorney's fees to Respondent, rendering the order awarding attorney's fees void. We disagree.

"The issue of jurisdiction over the subject matter of an action may be raised at any time during the proceedings, including on appeal." *McClure v. County of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007). "[A] judgment entered without jurisdiction is a void judgment without legal effect and may be treated as a nullity." *Letterlough v. Atkins*, 258 N.C. 166, 168, 128 S.E.2d 215, 217 (1962) (citing *Hart v. Motors*, 244 N.C. 84, 92 S.E.2d 673 (1956)).

As we have already noted, N.C. Gen. Stat. § 6-19.1(2) requires a party seeking an award of attorney's fees to "petition for the attorney's fees within 30 days following final disposition of the case. . . ." "[T]he 30-day filing period contained in [N.C. Gen. Stat. § 6-19.1] is a jurisdictional prerequisite to the award of attorney's fees[.]" *Whiteco Indus., Inc. v. Harrelson*, 111 N.C. App. 815, 818, 434 S.E.2d 229, 232 (1993), *disc. review denied, appeal dismissed*, 335 N.C. 566, 441 S.E.2d 135 (1994). A "final disposition" for purposes of N.C. Gen. Stat. § 6-19.1 is " 'such a conclusive determination of the subject-matter that after the award, judgment, or decision is made, nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon.' " *Whiteco*, 111 N.C. App. at 818, 434 S.E.2d at 232 (quoting *Black's Law Dictionary*, 630 (6th ed. 1990)). The filing period "begins to run after the decision has become final and it is too late to appeal." *Id.*, 111 N.C. App. at 818, 434 S.E.2d at 231; *see also Hodge v. N.C. Dept. of Transp.*, 161 N.C. App. 726, 729, 589 S.E.2d 737, 738 (2003), *cert. denied*, 358 N.C. 234, 595 S.E.2d 151 (2004) (holding that plaintiff's failure to petition for attorney's fees until "almost a year and a half after final disposition of his case" constituted a failure to satisfy the " 'jurisdictional prerequisite' . . . that he petition for attorney's fees within 30 days of his case's final disposition") (citing *Black's Law Dictionary*, 1145 (6th ed. 1990)). "[T]he 30-day period" does not, however, establish a "starting point as well as a deadline[.]" *Whiteco*, 111 N.C. App. at 818, 434 S.E.2d at 231 (holding that, because the petitioner's motion for attorney's fees was filed well before final judgment, it was timely, and the trial court had jurisdiction to hear the matter) (citing *McDonald v. Schweiker*, 726 F.2d 311 (7th Cir. 1983)).

In addition, the "plain language" of N.C. Gen. Stat. § 6-19.1 requires a "prevailing party seeking recovery of attorney's fees to 'petition' for them." *Hodge*, 161 N.C. App. at 729, 589 S.E.2d at 738. "[A] petition is '[a] formal written application to a court requesting judicial action on a certain matter.' " *Id.* This Court has held that a "request for attorney's fees contained within a complaint's prayer for relief does not constitute a 'petition' within the meaning of Section 6-19.1(2)." *Id.* In the administrative review context, however, the Supreme Court rejected a contention that the superior court lacked the authority to award attorney's fees during the course of an administrative review proceeding and stated that, when the petitioner "petitioned the superior court for review, this gave the superior court jurisdiction[;]" that the relevant substantive "statute provides for a *de novo* hearing;" that "this gave the court jurisdiction to determine the

whole case, including the taxing of costs;" that N.C. Gen. Stat. § 6-19.1 "provides for attorney's fees to be taxed as costs in some instances;" and that "[w]e do not believe that the General Assembly intended that N.C. [Gen. Stat.] § 6-19.1 would provide for a separate proceeding in which the court does not have jurisdiction until certain prerequisites are met." *Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 170, 459 S.E.2d 626, 628 (1995). This Court has construed *Able* to mean that "a superior court has jurisdiction to award attorney's fees before final disposition of the case when reviewing the agency action *de novo*[.]" *McIntyre v. Forsyth County Dep't of Soc. Servs.*, 162 N.C. App. 94, 98, 589 S.E.2d 745, 748, *disc. review denied*, 358 N.C. 377, 598 S.E.2d 136 (2004) (citing *Able*, 241 N.C. at 170, 459 S.E.2d at 628); *see also Early v. Durham County Dept. of Soc. Servs.*, —— N.C. App. ——, ——, 667 S.E.2d 512, 524 (2008), *disc. review denied*, —— N.C. ——, ——, S.E.2d (2009) (stating that "a superior court has jurisdiction to interpret N.C. [Gen. Stat.] § 6-19.1 and 'award attorneys fees before final disposition of the case when reviewing the agency *de novo*' ") (quoting *McIntyre*, 162 N.C. App. at 98, 589 S.E.2d at 748)); *but see Hodge*, 161 N.C. App. at 729, 589 S.E.2d at 739 (rejecting the plaintiff's contention that he satisfied the 30-day filing period contained in N.C. Gen. Stat. § 6-19.1(2) by requesting attorney's fees in his complaint in July 1998 and by filing a separate petition almost a year and a half after final disposition of his case). As a result, a superior court judge reviewing administrative action on a *de novo* basis is entitled to award attorney's fees during the judicial review process even though "final disposition" has not occurred.

In this case, Respondent challenges the trial court's jurisdiction to award attorney's fees to Petitioner because, "after granting summary judgment in favor of [Petitioner], the trial court indicated *sua sponte* that it would award attorney's fees[.]" Although the record clearly reflects that Petitioner requested that the trial court "award attorneys' fees as allowed by law" in both its complaint and in its motion for summary judgment, these filings do not constitute the type of formal "petition" envisioned by N.C. Gen. Stat. § 6-19.1. *See Hodge*, 161 N.C. App. at 729, 589 S.E.2d at 739 (stating that "a petition is '[a] formal written application to a court requesting judicial action on a certain matter' " and that a "request for attorney's fees contained within a complaint's prayer for relief does not constitute a 'petition' within the meaning of [N.C. Gen. Stat. §] 6-19.1(2)"). However, before summarily ruling that jurisdiction did not attach, we must determine: (1) whether a "final disposition" necessitating the filing of a petition has occurred, and (2) whether the principle enunciated in *Able* autho-

rized the trial court to award attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1 despite the absence of a formal petition. After carefully reviewing the record in light of the applicable law, we conclude that the trial court did not exceed its jurisdiction by addressing the attorney's fees issue in this case.

First, we examine whether the time within which Petitioner is entitled to request attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1 has expired. As we have already noted, a "final disposition" for purposes of N.C. Gen. Stat. § 6-19.1 is " 'such a conclusive determination of the subject-matter that after the award, judgment, or decision is made, nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon.' " *Whiteco*, 111 N.C. App. at 818, 434 S.E.2d at 232 (quoting Black's Law Dictionary 630 (6th ed. 1990)).[2] In this instance, there does not appear to have been "a conclusive determination" of Petitioner's rights given that this case has been presented to this Court for review and given that either party may seek further review by the Supreme Court. For that reason, we conclude that "final disposition" for purposes of N.C. Gen. Stat. § 6-19.1 has not yet occurred in this case and will not occur until the Supreme Court either declines to grant discretionary review of our decision or until any proceedings resulting from Supreme Court review of our order have concluded. As a result, since "final disposition" for purposes of N.C. Gen. Stat. § 6-19.1 has yet to occur for purposes of this litigation, the fact that Petitioner has not yet filed a formal petition of the type contemplated by N.C. Gen. Stat. § 6-19.1 stands as no obstacle to Petitioner's ability to seek attorney's fees from Respondent, particularly given the trial court's decision to require Petitioner to file such a petition after the conclusion of all appellate proceedings in this case. *See Early*, ––– N.C. App. –––, 667 S.E.2d 512, 517 (2008) (stating that the petitioner "filed a [timely] motion . . . seeking attorney fees" on 11 January 2007, since that filing was made less than one month after the Supreme Court determined that it had improvidently granted discretionary review); *McIntyre*, 162 N.C. App. 94, 99, 589 S.E.2d 745, 748 (2004) (holding that, since "final disposition" for purposes of N.C. Gen. Stat. § 6-19.1 occurred on 20 December 2000, when the Supreme Court denied petitioner's peti-

2. Petitioner notes that the trial court's order requires it to "petition . . . for a determination of *the amount of attorney's fees* to be awarded within thirty days after the conclusion of this appeal (or any subsequent appeal)." In Petitioner's view, "[n]o other petition was required before the trial court's award of attorney's fees, because" *Able* and its progeny gave the trial court "jurisdiction to determine the whole case on summary judgment, including awarding attorney's fees as costs."

tion for writ of certiorari, and since the petitioner did not file petition seeking attorney's fees until 18 March 2002, the trial court lacked jurisdiction to award the requested attorney's fees); *Hodge*, 161 N.C. App. 726, 729, 589 S.E.2d 737, 739 (2003) (holding that, because "final disposition" occurred when the Supreme Court issued its opinion on 6 October 2000, the trial court lacked jurisdiction to award attorney's fees on 15 October 2002 since the plaintiff did not petition for such an award until 15 March 2002); *Whiteco*, 111 N.C. App. 815, 818, 434 S.E.2d 229, 232 (1993) (holding that the petitioner's motion for attorney's fees, which was filed on 10 June 1991, sufficed to confer jurisdiction on the trial court despite the fact that "final disposition" did not occur until 21 January 1992).

Next, we examine whether the trial court's review of the State Highway Patrol's administrative determination amounted to *de novo* review, such that jurisdiction attached to award attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1 under *Able* and its progeny. We conclude that it did, so that the trial court had jurisdiction to consider the attorney's fees issue under that line of authority despite the lack of a "final disposition" or a formal petition.

Petitioner initiated this proceeding pursuant to former N.C. Gen. Stat. § 20-91.1 (2007), which provided that:

> Whenever a person shall have a valid defense to the enforcement of the collection of tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and notify such officer in writing that he pays the same under protest. Such payments shall be without prejudice to any defense or rights he may have in the premises, and he may, at any time within 30 days after such payment, demand the same in writing from the Secretary of Crime Control and Public Safety; and if the same shall not be refunded within 90 days thereafter, may sue such official in the courts of the State for the amount so demanded. Such suit must be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides.

N.C. Gen. Stat. § 20-91.1 (2007), *repealed by* 2007 N.C. Sess. Laws 491, effective 1 January 2008. Although N.C. Gen. Stat. § 20-91.1 does not explicitly provide for *de novo* review in the superior court, the literal language of that statutory provision authorizes an aggrieved person who believes that he or she has any defenses to an assessment made by the State Highway Patrol to "sue such official in the courts of the State for the amount so demanded" without providing any indication that the resulting litigation differs in any way from ordinary civil liti-

gation. Perhaps for that reason, proceedings brought before the superior court pursuant to N.C. Gen. Stat. § 20-91.1 have consistently been reviewed on a *de novo* basis without adverse comment from this Court. *See Daily Express*, —— N.C. App. ——, 671 S.E.2d 587, 591-92 (2009) (affirming the trial court's order reversing an administrative decision of the State Highway Patrol, in which the trial court made findings of fact); *see also C & H Transp. Co. v. N.C. Div. of Motor Vehicles*, 34 N.C. App. 616, 619, 239 S.E.2d 309, 311 (1977). Similarly, in this case, both parties filed motions for summary judgment before the trial court, implicitly recognizing that the trial court could potentially be required to resolve disputed factual issues in the event that any such issues actually existed. As a result, we conclude that actions brought pursuant to former N.C. Gen. Stat. § 20-91.1 were to be heard on a *de novo* basis, rendering the principles enunciated in *Able* applicable to this proceeding and authorizing the trial court to consider the issue of attorney's fees prior to the point at which "final disposition" had occurred.

Thus, given that there has not yet been a "final disposition" of this case, the thirty day period for filing a petition for attorney's fees specified in N.C. Gen. Stat. § 6-19.1 has not yet run, a fact which means that Petitioner remains free to file the required formal petition prior to an actual attorney's fee award. Furthermore, given that the assessment of an additional overweight penalty against Petitioner was subject to review on a *de novo* basis pursuant to former N.C. Gen. Stat. § 20-91.1, the trial court had jurisdiction under *Able* and its progeny to make a decision to award attorney's fees at the summary judgment stage of this administrative review proceeding despite the fact that Petitioner had not filed a formal "petition" seeking such relief, particularly since the amount of the award will be determined upon the "final disposition" of the case and since the trial court has ordered that a "petition" of the type specified in N.C. Gen. Stat. § 6-19.1 be filed prior to the entry of an actual attorney's fee award.[3] As a result, we reject Respondent's jurisdictional challenge to the trial court's decision to award attorney's fees to Petitioner pursuant to N.C. Gen. Stat. § 6-19.1.

2. Substantial Justification

Finally, Respondent contends that the trial court erred by awarding attorney's fees to Petitioner because Respondent was substan-

3. We would note, however, "that judicial economy favors the [determination of] attorney's fees only after the judgment has become final, thereby avoiding piecemeal litigation of the issue." *Whiteco*, 111 N.C. App. at 818, 434 S.E.2d at 232.

tially justified in assessing the challenged overweight penalty. After careful consideration of the applicable law as of the time that Respondent penalized Petitioner, we are constrained to agree.

As we have already noted, N.C. Gen. Stat. § 6-19.1 authorizes an award of attorney's fees against the State "in its discretion" in the event that "[t]he court finds that the agency acted without substantial justification in pressing its claim against the party." N.C. Gen. Stat. § 6-19.1. Generally speaking, decisions committed to the discretion of the trial judge will be reviewed on appeal only upon a showing that the trial judge abused his discretion. *Tay v. Flaherty*, 100 N.C. App. 51, 57, 394 S.E.2d 217, 220, *disc. rev. denied*, 327 N.C. 643, 399 S.E.2d 132 (1990). "An abuse of discretion occurs where the ruling of the trial court could not have been the result of a reasoned decision." *May v. City of Durham*, 136 N.C. App. 578, 582, 525 S.E.2d 223, 227 (2000). However, a trial court's determination that a state agency acted without "substantial justification" is a conclusion of law and is reviewable by this Court on appeal. *Table Rock Chapter of Trout Unlimited v. Envtl. Mgmt. Comm'n*, 191 N.C. App. 362, 364, 663 S.E.2d 333, 335 (2008) (quoting *Whiteco*, 111 N.C. App. at 819, 434 S.E.2d at 232-33).

In this case, Respondent contends that the trial court erred by concluding that Respondent lacked "substantial justification in pressing its claim." A claim has " 'substantial justification' " within the meaning of N.C. Gen. Stat. § 6-19.1 when it is " 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Crowell Constructors v. State ex rel. Cobey*, 342 N.C. 838, 844, 467 S.E.2d 675, 679 (1996) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565, 101 L. Ed. 2d 490, 504 (1988)). The General Assembly enacted N.C. Gen. Stat. § 6-19.1 in order "to curb unwarranted, ill-supported suits initiated by State agencies." *Crowell Constructors*, 342 N.C. at 844, 467 S.E.2d at 679. For that reason, the "substantial justification" standard "should not be so strictly interpreted as to require the agency to demonstrate the infallibility of each suit it initiates." *Id.* "Similarly, this standard should not be so loosely interpreted as to require the agency to demonstrate only that the suit is not frivolous, for 'that is assuredly not the standard for Government litigation of which a reasonable person would approve.' " *Id.* (quoting *Pierce*, 487 U.S. at 566, 101 L. Ed. 2d at 505). As a result, the Supreme Court has adopted "a middle-ground objective standard" under which "the agency [is required] to demonstrate that its position, at and from the time of its initial

action, was rational and legitimate to such degree that a reasonable person could find it satisfactory or justifiable in light of the circumstances then known to the agency." *Id.*; *see also Williams v. N.C. Dep't of Env't & Nat. Res.*, 166 N.C. App. 86, 91, 601 S.E.2d 231, 233 (2004), *disc. review denied*, 359 N.C. 643, 614 S.E.2d 925 (2005) (stating that "the burden is on the agency to 'demonstrate that its position, at and from the time of its initial action, was rational and legitimate to such [a] degree that a reasonable person could find it satisfactory or justifiable in light of the circumstances then known to the agency[,]' " such that "substantial justification" is shown); *S.E.T.A. UNC-CH v. Huffines*, 107 N.C. App. 440, 443-44, 420 S.E.2d 674, 676 (1992) (quoting *Tay*, 100 N.C. App. at 56, 394 S.E.2d at 219-20) (stating that the appropriate test for "substantial justification" under N.C. Gen. Stat. § 6-19.1 is whether the agency's action was " 'justified to a degree that could satisfy a reasonable person' under the existing law and facts known to, or reasonably believed by, respondent at the time respondent refused to make disclosure"). "[I]n deciding whether a State agency has pressed a claim against a party 'without substantial justification,' the law and facts known to, or reasonably believed by, the State agency at the time the claim is pressed must be evaluated." *Crowell Constructors*, 342 N.C. at 845, 467 S.E.2d at 680. In addition, we are required to consider the entire record in determining whether there was "substantial justification" for the agency's action. *Williams*, 166 N.C. App. at 89, 601 S.E.2d at 233.

A proper resolution of the present issue requires analysis of two statutory provisions. First, N.C. Gen. Stat. § 20-119(d) provides that:

> (d) For each violation of any of the terms or conditions of a special permit issued or where a permit is required but not obtained under this section the Department of Crime Control and Public Safety may assess a civil penalty for each violation against the registered owner of the vehicle as follows:
>
> (1) A fine of five hundred dollars ($500.00) for any of the following: operating without the issuance of a permit, moving a load off the route specified in the permit, falsifying information to obtain a permit, failing to comply with dimension restrictions of a permit, or failing to comply with the number of properly certified escort vehicles required.
>
> (2) A fine of two hundred fifty dollars ($250.00) for moving loads beyond the distance allowances of an annual per-

mit covering the movement of house trailers from the retailer's premises or for operating in violation of time of travel restrictions.

(3) A fine of one hundred dollars ($100.00) for any other violation of the permit conditions or requirements imposed by applicable regulations.

The Department of Transportation may refuse to issue additional permits or suspend existing permits if there are repeated violations of subdivision (1) or (2) of this subsection. In addition to the penalties provided by this subsection, a civil penalty in accordance with G.S. 20-118(e)(1) and (3) may be assessed if a vehicle is operating without the issuance of a required permit, operating off permitted route of travel, operating without the proper number of certified escorts as determined by the actual loaded weight of the vehicle combination, fails to comply with travel restrictions of the permit, or operating with improper license. Fees assessed for permit violations under this subsection shall not exceed a maximum of twenty-five thousand dollars ($25,000).

N.C. Gen. Stat. § 20-119(d). Second, N.C. Gen. Stat. §§ 20-118(e)(1) and (3) provide that:

(1) . . . [F]or each violation of the single-axle or tandem-axle weight limits set in subdivision (b)(1), (b)(2), or (b)(4) of this section or axle weights authorized by special permit according to G.S. 20-119(a), the Department of Crime Control and Public Safety shall assess a civil penalty against the owner or registrant of the vehicle in accordance with the following schedule: for the first 1,000 pounds or any part thereof, four cents (4 [cents]) per pound; for the next 1,000 pounds or any part thereof, six cents (6 [cents]) per pound; and for each additional pound, ten cents (10 [cents]) per pound. These penalties apply separately to each weight limit violated. In all cases of violation of the weight limitation, the penalty shall be computed and assessed on each pound of weight in excess of the maximum permitted. . . .

(3) If an axle-group weight of a vehicle exceeds the weight limit set in subdivision (b)(3) of this section plus any tolerance allowed in subsection (h) of this section or axle-group weights or gross weights authorized by special permit under G.S. 20-119(a), the Department of Crime Control and Public Safety shall assess a civil penalty against the owner or regis-

> trant of the motor vehicle. The penalty shall be assessed on the number of pounds by which the axle-group weight exceeds the limit set in subdivision (b)(3), as follows: for the first 2,000 pounds or any part thereof, two cents (2 [cents]) per pound; for the next 3,000 pounds or any part thereof, four cents (4 [cents]) per pound; for each pound in excess of 5,000 pounds, ten cents (10 [cents]) per pound. Tolerance pounds in excess of the limit set in subdivision (b)(3) are subject to the penalty if the vehicle exceeds the tolerance allowed in subsection (h) of this section. These penalties apply separately to each axle-group weight limit violated.

N.C. Gen. Stat. §§ 20-118(e)(1) and (3). Since there is no question but that Petitioner violated the time of travel restrictions set out in its permit, it was clearly subject to a $250.00 fine pursuant to N.C. Gen. Stat. § 20-119(d)(2). The genuinely-contested issue before the trial court was whether N.C. Gen. Stat. § 20-119(d) and N.C. Gen. Stat. § 20-118(e) authorized Respondent to issue an additional overweight penalty based on the difference between the actual weight of the truck, which was 173,000 pounds, and the statutory maximum specified in Section 20-118(b), which is 80,000 pounds, despite the fact that the actual weight of the truck did not violate the 187,000 pound weight limit specified in the special permit.

The Court's reasoning in *Daily Express* essentially resolves the question of whether the State Highway Patrol was "substantially justified" in assessing such an additional overweight penalty against Petitioner. In *Daily Express*, the Court stated that "[i]t is not clear from the statutes, read *in pari materia*, if an additional weight based penalty is to be calculated where the truck is in violation of a condition of its special permit, but not as to the weight authorized by said permit." *Daily Express*, —— N.C. App. at ——, 671 S.E.2d at 590. "The ambiguity arises with section 20-119(d) in that it is not clear what it means to issue an additional penalty in accord with sections 20-118(e)(1) and (3)." *Id.* As it has in this case, Respondent argued in *Daily Express* "that where a truck is not in compliance with one or more of the conditions mandated by the special permit, the weight limit authorized by the permit does not apply and the driver is penalized for weight as if he did not have a permit at all." *Id.* The ultimate question faced by the Court in *Daily Express* was whether this argument was correct; the ultimate question before us in this case is whether Respondent was "substantially justified" in acting on the basis of this argument prior to our decision in *Daily Express*.

In evaluating the parties' arguments in *Daily Express*, this Court conceded that "[t]here is little evidence of legislative intent in this case." *Id.*, ––– N.C. App. at –––, 671 S.E.2d at 591. Given that situation, the *Daily Express* Court reasoned that:

> Section 20-119(d) says that an additional penalty "may" be assessed for those operating without a special permit at all. There is ambiguity presented by the "may" and "shall" language. Under section 20-118, someone without a permit would certainly be fined based on the truck's weight that exceeds the statutory limit and unlike under section 20-119(d), the penalty imposed under sections 20-118(e)(1) and (e)(3) would not be subject to a $25,000.00 cap. Hence, if section 20-119 is supposed to be in accord with section 20-118, there seems to be no need for the cap contained in section 20-119 where the truck driver is operating without a special permit. Plaintiff does not address the effect of the cap. Defendant claims the cap supports its position in that the legislature realized a cap was needed because the additional civil penalty would be substantial where a truck is significantly overweight according to the statutory limit, but not overweight according to the special permit.
>
> Defendant asserts that since section 20-118 already mandates the assessment of a penalty when a truck is overweight, the legislature must have intended the additional civil penalty mentioned in section 20-119(d) to authorize the assessment of a different weight penalty when a truck is operating in violation of the specified restrictions listed in the special permit, but is not overweight according to the special permit. Otherwise, both sections would regulate the same issue, rendering section 20-119(d) redundant. This argument has merit, but it remains unclear whether the legislature intended to fine truck operators based on weight as if no special permit existed to carry that amount of weight.

Id. As a result, the quoted language from our opinion in *Daily Express* indicated that, even though we ultimately did not accept Respondent's construction of the applicable statutory provisions, we recognized that Respondent's construction of the relevant statutory language had some level of support in both logic and the language enacted by the General Assembly. Given that fact and the fact that Respondent acted against Petitioner prior to the issuance of our decision in *Daily Express*, *see S.E.T.A.*, 107 N.C. App. at 443-44, 420 S.E.2d at 676 (stating that "[t]he test for substantial justification is not

whether this court ultimately upheld respondent's [legal theory] as correct but, rather, whether respondent's [legal theory] was justified to a degree that could satisfy a reasonable person under the existing law and facts known to, or reasonably believed by, respondent at the time respondent [pressed its claim against the party]"), we conclude that Respondent's decision to proceed against Petitioner was "substantially justified" and that the trial court erred by reaching a contrary conclusion in awarding attorney's fees to Petitioner pursuant to N.C. Gen. Stat. § 6-19.1.

III. Conclusion

As a result, for the reasons stated above, we conclude that the trial court correctly concluded that Respondent erroneously assessed a separate overweight penalty against Petitioner and that Respondent should refund the amount of this overweight penalty, plus appropriate interest, to Petitioner. However, since Respondent has shown that its action in assessing such an additional overweight penalty against Petitioner was, at the time that action was taken, not without substantial justification, we conclude that Respondent is not liable to Petitioner for attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1. Thus, we affirm that portion of the trial court's order overturning Respondent's assessment of an additional overweight penalty against Petitioner and requiring that Respondent refund the amount of this overweight penalty with interest and vacate that portion of the trial court's order requiring Respondent to pay Petitioner's attorney's fees.

AFFIRMED in part, VACATED in part.

Judge McGEE concurs.

Judge JACKSON concurs in Sections I, II.A, and III and concurs in the result only in Section II.B of the opinion.

STATE OF NORTH CAROLINA v. CHARLES DANIEL FRALEY

No. COA09-785

(Filed 16 February 2010)

1. Sexual Offenses— solicitation of child by means of computer for purpose of committing unlawful sex act—motion to dismiss—sufficiency of evidence

A *de novo* review revealed the trial court did not err by denying defendant's motion to dismiss the charge of solicitation of a person believed to be a child by means of a computer for the purpose of committing an unlawful sex act under N.C.G.S. § 14-202.3(a) based on alleged insufficient evidence that defendant "enticed or advised" the undercover detective to meet with him. Defendant's words, including his entire online and telephone conversations, fell within these definitions and accurately described his course of conduct.

2. Evidence— cross-examination—opinion testimony—invited error

The trial court did not commit plain error in a case involving the solicitation of a person believed to be a child by means of a computer for the purpose of committing an unlawful sex act by allowing a detective to give opinion testimony that defendant was going to have sex with a fourteen-year-old. Even assuming the elicited statements were error, defendant cannot be prejudiced by them as a matter of law when he invited them during cross-examination.

3. Constitutional Law— effective assistance of counsel—failing to renew motion to dismiss—eliciting and failing to move to strike testimony

Defendant did not receive ineffective assistance of counsel based on his trial counsel's failing to renew his motion to dismiss at the close of all evidence and by eliciting and failing to move to strike a detective's lay opinion testimony. There was no reasonable probability that a different outcome would have resulted absent the alleged errors.

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

Assignments of error defendant failed to argue in his brief were deemed abandoned under N.C. R. App. P. 28(b)(6).

Appeal by defendant from judgment entered 17 February 2009 by Judge W. Osmond Smith in Wake County Superior Court. Heard in the Court of Appeals 8 December 2009.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

Mark Montgomery, for defendant-appellant.

CALABRIA, Judge.

Charles Daniel Fraley ("defendant") appeals a judgment entered upon a jury verdict finding him guilty of soliciting a person the defendant believed to be a child by means of a computer for the purpose of committing an unlawful sex act. We find no error.

I. BACKGROUND

On 7 December 2007, defendant, a married father of a nine-year-old daughter, logged on to the Yahoo Internet chat room titled NC Romance ("NC Romance").[1] Defendant did not log on using his real name, but instead used the pseudonym "moonraker1rain." Detective Kelly Marshburn ("Detective Marshburn"), a cyber crimes detective with the Raleigh Police Department ("RPD"), also logged on to NC Romance that day. As part of her duties with the RPD, Detective Marshburn signed on to NC Romance as "cassia dutra" ("Cassia"). Detective Marshburn adopted the persona of Cassia, a 14 year-old-girl who lived with her mother in Raleigh near Crabtree Valley Mall ("the mall"), in order to see if someone would solicit a child for sex using a computer.

At 2:50 p.m. on 7 December 2007, defendant made his initial contact with Cassia in the NC Romance chat room. By 3:00 p.m., defendant asked Cassia if she was "looking for a hook up." At 3:08 p.m., defendant asked Cassia if she would "like [to] meet and have good sex," and then asked Cassia to send him a picture of herself over the Internet. Cassia sent defendant three pictures. The pictures were actually photographs of a female coworker at the RPD taken when the coworker was 14 years old. The coworker had given Detective Marshburn permission to use the photos. When defendant received

1. "Chat rooms" and "instant messenger" are types of Internet services that allow users to engage in real time dialogue "by typing messages to one another that appear almost immediately on the others' computer screens." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 851-52, 117 S. Ct. 2329, 2335, 138 L. Ed. 2d 874, 885 (1997).

the pictures, he replied to Cassia, "you look pretty." Defendant then sent two pictures of himself to Cassia. In one photo, defendant was pictured wearing only a small bathing suit and sunglasses, and in the other, defendant was wearing military fatigues. Defendant then told Cassia, "you look hot to [sic] . . . do you want to get together?" When Cassia asked how old he was, he replied that he was 32 and asked how old Cassia was. When she answered that she was 14, defendant stated that he thought she was older. However, defendant continued to chat with Cassia online for nearly 30 minutes. During this time, defendant asked Cassia where she lived, joked that he could "hook up" with her and her mother, and suggested meeting Cassia in person so they could "go somewhere and park."

On 12 December 2007, defendant logged on to NC Romance under the pseudonym "dan claussen." Defendant chatted with Cassia for nearly 50 minutes. During the chat, Cassia again identified herself as being 14 years old. Defendant expressed interest in meeting Cassia and asked her, "what do you want to do when we meet?" When Cassia asked what defendant wanted to do, he answered, "that is up to you sweetie[.]" Defendant suggested that he and Cassia meet at 1:00 p.m. on 13 December, and Cassia agreed. He stated, "I get the feeling that you are wanting to talk about sex[.]" Cassia said "sure," and defendant then stated that sex was something he would talk about in person. Defendant then asked Cassia if she was a virgin and also asked for her telephone number. Cassia gave him a number that, unbeknownst to defendant, was a specific undercover number the RPD would use for Detective Marshburn's cases. Defendant said he would call Cassia later that evening, and he and Cassia also agreed to meet at the food court at the mall the next day. On 13 December 2007, defendant sent Cassia an offline instant message stating, "hey sweetie . . . sorry I didn't call, I will still be there at 1 today and I hope to see you there, bye for now sweetie." However, defendant and Cassia did not meet that day.

After the online chat of 12 December 2007, Detective Marshburn was able to identify the IP address of "moonraker1rain" and "dan claussen," and tracked it to a military base. Detective Marshburn then obtained a subpoena for the Internet carrier service, which identified defendant as the subscriber who had been chatting under those pseudonyms. On 16 December 2007, defendant sent three offline instant messages to Cassia. In one, he asked if they could meet the next night. Cassia did not respond and did not meet with defendant on 17 December. On 20 December 2007, defendant sent a chat message to

Cassia stating that he was going to be away for Christmas and would "catch back up" with Cassia after that. Cassia did not respond.

On 9 January 2008, defendant called Cassia on the telephone. During the course of the conversation, defendant told Cassia that she had a nice voice, and stated that he would come see her on Tuesday. He also stated that he could get in trouble for talking to Cassia because she was so young. When Cassia stated that she was nervous because she "never did this before," defendant replied that he had done so once, "but not with someone this young," adding that he and his previous paramour "just kissed." When Cassia asked if defendant liked younger girls, he replied in the affirmative because "[t]hey just look better, feel better." Defendant and Cassia agreed to meet in person at the food court at the mall, and agreed to chat more online so that Cassia could tell defendant "everything that [she] want[ed] to do."

Defendant and Cassia engaged in an online chat that day that lasted an hour. Defendant stated that he was still interested in meeting Cassia in person and asked again for her phone number, which she gave him. Defendant told Cassia that she "sound[ed] very sexy" and asked her "what all [she] want[ed] to get into" when he saw her. When Cassia asked if they were going to kiss, defendant replied, "if you want," and stated, "we can do more if you want." Defendant then asked if Cassia was "turned on," and told her, "I want you on top of me[.]" When Cassia asked, "like sex," defendant replied, "yeah." Defendant agreed to meet Cassia that afternoon. Cassia stated that she would be wearing her pink New York Yankees baseball cap. However, they did not meet. Defendant sent a chat message to Cassia stating that the reason he could not meet was because he locked his keys in his vehicle.

On 15 January 2008, defendant sent an offline instant message to Cassia stating that he would meet her at 9:30 that morning. Later that morning, defendant and Cassia agreed that they would meet at 11:30 a.m. at the food court at the mall. At 10:00 that morning, Detective Marshburn was sitting at a table in the food court of the mall. Detective Regina Corcoran ("Detective Corcoran") of the RPD portrayed Cassia. Detective Corcoran was sitting at another table in the food court approximately 25 feet from Detective Marshburn. Detective Corcoran was wearing jeans, a sweatshirt, and a pink New York Yankees baseball cap and was pretending to listen to an Ipod. As defendant entered the food court and sat down across from Detective Corcoran, Detective Marshburn and Sergeant Gary Hinnant

("Sergeant Hinnant") of the RPD approached defendant and asked to speak with him. At that point, defendant stated, "I knew it."

Defendant was arrested and indicted on a charge of solicitation of a child by computer to commit an unlawful sex act. The trial commenced on 17 February 2009. At the close of the State's evidence, defendant moved to dismiss the charge, and the trial court denied the motion. Defendant then presented evidence. There is nothing in the record or transcript showing defendant renewed his motion at the close of all the evidence. On 19 February 2009, the jury returned a verdict of guilty. The trial court then sentenced defendant to a minimum term of four months to a maximum term of five months in the custody of the North Carolina Department of Correction and ordered defendant to register as a sex offender upon his release. Defendant appeals.

II. MOTION TO DISMISS

[1] Defendant argues that the trial court erred in denying his motion to dismiss. We disagree.

As an initial matter, we note that defendant made a motion to dismiss at the conclusion of the State's case, but there is nothing in the record showing that he renewed his motion at the conclusion of all the evidence. N.C. R. App. P. 10(b)(3) (2009) states:

> A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

Generally, if a defendant failed to renew his motion to dismiss after he presented evidence, he is precluded from challenging the denial of his motion to dismiss on appeal. *State v. Brunson*, 187 N.C. App. 472, 476, 653 S.E.2d 552, 555 (2007). "However, pursuant to N.C. R. App. P. 2, we will hear the merits of defendant's claim despite the rule violation because defendant also argues ineffective assistance of counsel based on counsel's failure to make the proper motion to dismiss." *State v. Gayton-Barbosa*, —— N.C. App. ——, ——, 676 S.E.2d 586, 593 (2009).

We review a trial court's denial of a motion to dismiss criminal charges *de novo*, to determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is evidence that a reasonable mind might find adequate to support a conclusion." *State v. Hargrave*, ––– N.C. App. –––, –––, 680 S.E.2d 254, 261 (2009) (citation omitted). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. . . ." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. "[C]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve[.]" *State v. Prush*, 185 N.C. App. 472, 478, 648 S.E.2d 556, 560 (2007). " 'The test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both. All evidence actually admitted, both competent and incompetent, which is favorable to the State must be considered.' " *State v. Israel*, 353 N.C. 211, 216, 539 S.E.2d 633, 637 (2000) (quoting *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984)). "In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citation omitted).

The crime of solicitation of a child by computer to commit an unlawful sex act is defined as follows:

> A person is guilty of solicitation of a child by a computer if the person is 16 years of age or older and the person knowingly, with the intent to commit an unlawful sex act, entices, advises, coerces, orders, or commands, by means of a computer, a child who is less than 16 years of age and at least 3 years younger than the defendant, or a person the defendant believes to be a child who is less than 16 years of age and who the defendant believes to be at least 3 years younger than the defendant, to meet with the defendant or any other person for the purpose of committing an unlawful sex act. Consent is not a defense to a charge under this section.

N.C. Gen. Stat. § 14-202.3(a) (2007).[2]

2. After defendant's offense date, our General Assembly adopted a series of amendments to this statute, including, *inter alia*, enticing "by means of a computer or any other device capable of electronic data storage or transmission," and stating that the age difference between the defendant and the victim or perceived victim is to be five years. *See* N.C. Gen. Stat. § 14-202.3(a) (2009).

In the instant case, defendant was 32 years old and Cassia stated she was 14 years of age. On 7 December 2007, defendant and Cassia engaged in a chat on NC Romance. During the chat, defendant asked Cassia if she was "looking for a hook up." When Cassia responded that she liked to "hang out and have fun," defendant asked if she was into "anything sexual" and asked her if she wanted to "have good sex with [defendant]." Defendant and Cassia then exchanged photos and defendant asked Cassia her age. When Cassia replied that she was fourteen, defendant stated, "oh, i [sic] am sorry, I thought you were older," but later asked, "so, if we were to meet, how would we do it?" During the same chat, defendant subsequently asked Cassia if she wanted to "go somewhere and park" and "see how it goes."

On 12 December 2007, defendant, now using the pseudonym "dan claussen," and Cassia engaged in another chat on NC Romance. Defendant again asked Cassia her age. When Cassia responded that she was fourteen, defendant stated, "you are underage, and i [sic] am not . . . . I am apprehensive about meeting you in person . . . ." Defendant then stated that he and Cassia could meet in person "and see where it goes from there" and do things like "catch a movie at the mall, or just hang out, or find other things to get into." When Cassia asked what defendant meant by that statement, defendant responded, "I get the feeling that you are wanting to talk about sex . . .," and that "[t]hat is something we could talk about in person if you like." Defendant then agreed to meet Cassia the next day at the mall. Before signing off, defendant asked Cassia, "are you a virgin?" Defendant signed off by telling Cassia, "ok, bye sweetie."

On 9 January 2008, defendant spoke by telephone with Detective Marshburn. Defendant identified himself by his middle name, Dan, and Detective Marshburn identified herself as Cassia. During that conversation, defendant told Cassia she had a "nice voice." He then stated, "I can just get in trouble for talking to you . . . [c]ause [sic] you're young." When Cassia stated that she was nervous because she "never did this before," defendant said "[w]ell, I have once, but not with someone this young[.]" When Cassia asked defendant what he did on that prior occasion, defendant said, "we just kissed and stuff." Defendant asked Cassia if she liked "older guys." She replied in the affirmative, then asked defendant if he liked "younger girls." He replied, "[y]eah, I do . . . [because] [t]hey just look better, feel better . . . ." Defendant and Cassia engaged in another chat on NC Romance that day. Defendant told Cassia, "you sound very sexy" and stated he wanted "to do whatever you are curious about or

want to try." When Cassia asked defendant if they were going to kiss, defendant replied, "if you want . . . we can do more if you want[.]" Defendant then asked Cassia, "are you turned on at all right now?" Defendant stated that he was also turned on and told Cassia, "I want you on top of me . . . ." Cassia replied, "like sex," and defendant answered "yeah." On 15 January 2008, defendant and Detective Marshburn engaged in another chat on NC Romance. Defendant agreed to meet Cassia at the mall at 11:30 a.m. that day. Substantial evidence sustained the jury verdict of guilty of solicitation of a person the defendant believed to be a child, by means of a computer, for the purpose of committing an unlawful sex act.

Defendant argues that there was no evidence that he "enticed or advised" Detective Marshburn to meet with him within the meaning of N.C. Gen. Stat. § 14-202.3(a). We disagree.

Defendant does not suggest definitions for these words. They are not defined in N.C. Gen. Stat. § 14-202.3(a), nor can we find any case law in our state providing us with a definition. When a word used in a statute is not explicitly defined by that statute, the General Assembly is presumed to have used the word to convey its natural and ordinary meaning. *State v. Worley*, —— N.C. App. ——, ——, 679 S.E.2d 857, 861 (2009). " 'The best indicia of [the legislature's] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.' " *State v. Abshire*, 363 N.C. 322, 330, 677 S.E.2d 444, 450 (2009) (quoting *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980)). The purpose of statutes such as N.C. Gen. Stat. § 14-202.3 is to protect children against exploitation. *Outmezguine v. State*, 97 Md. App. 151, 166, 627 A.2d 541, 548 (1993); *Bone v. State*, 771 N.E.2d 710, 717 (Ind. App. 2002); *Ward v. State*, 994 So.2d 293, 300 (Ala. Crim. App. 2007); PROTECT Act, Pub. L. No. 108-21, § 1(a), 117 Stat. 650, 650 (2003).

"Webster's Ninth New Collegiate Dictionary . . . defines 'advise' as 'recommend[.]' " *People v. Hatcher*, 392 Ill. App. 3d 163, 167, 910 N.E.2d 757, 761 (2009) (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 59 (1988)).

> Entice has been defined as: "to lure; to lead on by exciting hope of reward or pleasure; to tempt," *Webster's New 20th Century Dictionary* (2d ed. 1960), and "[t]o wrongfully solicit, persuade, procure, allure, attract, draw by blandishment, coax or

> seduce. . . . To lure, induce, tempt, incite, or persuade a person to do a thing." *Black's Law Dictionary* 531 (6th ed. 1990).

State v. Scieszka, 897 P.2d 1224, 1226 (Utah Ct. App. 1995); *State v. Hansen*, 750 N.W.2d 111, 114 (Iowa 2008); *Government of Virgin Islands v. Berry*, 604 F.2d 221, 225 n. 6 (1979), *superseded on other grounds by statute*, 14 V.I.C. § 1052(b) (2009); *Bayouth v. State*, 294 P.2d 856, 863 (Okla. Crim. App. 1956). We believe that defendant's words to Cassia fall within these rather broad definitions, particularly when the entire online and telephone conversations are considered. *Hatcher*, 392 Ill. App. 3d at 167, 910 N.E.2d at 761. "We do not find [the above] definitions at all inconsistent with defendant's conduct. On the contrary, they accurately describe his course of conduct." *Scieszka*, 897 P.2d at 1226. Defendant's assignment of error is overruled.

III. PLAIN ERROR

[2] Defendant argues that the trial court committed plain error in allowing Detective Marshburn to give opinion testimony. We disagree.

Under the plain error standard of review, defendant has the burden of showing: " '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.' " *State v. McNeil*, 165 N.C. App. 777, 784, 600 S.E.2d 31, 36 (2004) (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)). "Indeed, even when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S. Ct. 1730, 1736, 52 L. Ed. 2d 203, 212 (1977)).

"Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) (citing *State v. Greene*, 324 N.C. 1, 11, 376 S.E.2d 430, 437 (1989), *vacated on other grounds*, 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990)); N.C. Gen. Stat. § 15A-1443(c) (2007) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."); *see also State v. Chatman*, 308 N.C. 169, 177, 301 S.E.2d 71, 76 (1983) (holding

that the defendant could not assign error to testimony elicited by his counsel during a cross-examination of the State's witness).

In the instant case, the following exchange occurred when defendant's counsel cross-examined Detective Marshburn:

> Q: And one last question. In your last chat [defendant] said he was coming to Raleigh, which is State's Exhibit Number 17.
>
> A: Um-hum.
>
> Q: Just to be sure, there is no specific references [sic] to any sex act; is that correct?
>
> A: That's correct.
>
> Q: So you don't know why he was coming to Raleigh on that day.
>
> A: It is my opinion he was coming to Raleigh to have sex with a 14 year old.
>
> Q: But you don't know that.
>
> A: That's my opinion.

Even assuming *arguendo* the elicited statements above are error, defendant cannot be prejudiced by them as a matter of law because he invited them. *Gobal*, 186 N.C. App. at 319, 651 S.E.2d at 287. Defendant's assignment of error is overruled.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL ("IAC")

[3] In the alternative, defendant urges this Court to hold that he was denied the effective assistance of counsel because his trial counsel: (1) failed to renew his motion to dismiss at the close of all the evidence, and (2) elicited and failed to move to strike Detective Marshburn's lay opinion testimony. We disagree.

"Claims of ineffective assistance of counsel are . . . most properly raised in a motion for appropriate relief." *State v. Jones*, 176 N.C. App. 678, 688, 627 S.E.2d 265, 271 (2006). "Our Supreme Court has held that an ineffective assistance claim brought on direct review will be decided on the merits only 'when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.' " *Id.* (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)).

"To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *Id.* (internal quotations and citations omitted). "Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (internal quotations and citations omitted).

As for defendant's first IAC argument, if the evidence is sufficient to support a conviction, the defendant is not prejudiced by his counsel's failure to make a motion to dismiss at the close of all the evidence. *Gayton-Barbosa*, —— N.C. App. at ——, 676 S.E.2d at 594. Since we have found that the evidence in the instant case was sufficient to support the jury's verdict, "defendant has not shown counsel's assistance to be constitutionally inadequate, [and thus his] assignment of error is without merit." *Id.* at ——, 676 S.E.2d at 594.

As for defendant's second IAC argument, "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) (citing *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068-69, 80 L. Ed. 2d at 698). The online chats and the telephone call between defendant and Detective Marshburn provide overwhelming evidence that defendant thought Detective Marshburn was a 14-year-old girl and that defendant was meeting her at the mall for a sexual encounter. Even if defendant's counsel had not elicited or had moved to strike Detective Marshburn's lay opinion testimony, there was no reasonable probability that a different outcome would have resulted.

V. CONCLUSION

[4] Defendant's remaining assignments of error not argued in his brief are abandoned. N.C. R. App. P. 28(b)(6) (2009). Defendant received a fair trial free from error.

No error.

Judges WYNN and BEASLEY concur.

IN THE MATTER OF S.T.P.

No. COA09-1281

(Filed 16 February 2010)

1. Child Abuse and Neglect— jurisdiction—case previously closed

The trial court did not terminate its jurisdiction over a neglected and dependent juvenile by stating in a dispositional order, "case closed." Closing a case is not synonymous with terminating jurisdiction.

2. Termination of Parental Rights— conclusions supported by findings—no abuse of discretion

The trial court's uncontested findings in a termination of parental rights case demonstrated that the district court properly considered the required statutory factors and did not abuse its discretion in terminating the mother's parental rights. Contrary to the mother's argument, termination furthers the adoption plan.

Appeal by respondents from order filed 22 July 2009 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 11 January 2010.

Kathleen Arundell Widelski, for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Pamela Newell Williams, for appellee Guardian Ad Litem. Leslie C. Rawls, for respondent-appellant mother.

Janet K. Ledbetter, for respondent-appellant father.

STEELMAN, Judge.

Closing a case file is not the equivalent of the trial court terminating its jurisdiction. The district court retained subject matter jurisdiction and could act upon the "Motion in the Cause to Reassume

Custody." The district court did not abuse its discretion in determining that termination of Mother's parental rights was in juvenile's best interest.

I. Factual and Procedural Background

S.T.P. was born cocaine positive. Mother has a lengthy history of drug abuse, and she tested positive for cocaine and marijuana at S.T.P.'s birth. The hospital recommended that Mother enter inpatient treatment, but she refused. Both Mother and Father have a criminal history. At the time of S.T.P.'s birth, Mother was homeless but planned to move into her parents' residence.

On 4 February 1999, Mecklenburg County Department of Social Services, Youth and Family Services (DSS) filed a Juvenile Petition alleging that S.T.P. was a neglected and dependent juvenile. On 9 February 1999, Father acknowledged paternity. On 15 March 1999, S.T.P. was adjudicated a neglected and dependent juvenile. On 20 May 1999, the district court entered a Dispositional Order in Mecklenburg County case 99 J 85, which placed S.T.P. in the custody of his maternal grandparents. Mother was incarcerated at that time. Father was ordered to stay away from the maternal grandparents' residence.

In 2004, S.T.P.'s maternal grandfather died from cancer. On 11 August 2006, DSS received a report that Mother was abusing both S.T.P. and the maternal grandmother, and that the maternal grandmother was unable to care for S.T.P. due to medical issues. In September 2006, a safety plan was put in place and signed by the maternal grandmother. On 10 January 2007, DSS received another report regarding the maternal grandmother's substance abuse problems. On 26 January 2007, a family meeting was held between the maternal grandmother and a social worker. Mother was invited but did not attend. The maternal grandmother admitted to using controlled substances and that Mother had moved in with her. She later tested positive for cocaine.

On 29 January 2007, DSS filed a document styled as "Motion In The Cause To Reassume Custody" under file number 99 J 85, seeking to obtain custody of S.T.P. That same day, the district court entered an "Order to Reassume Custody and Schedule Review Hearing," placing S.T.P. in the legal and physical custody of DSS. On 6 February 2007, an Initial (7-Day) Hearing was held pursuant to N.C. Gen. Stat. § 7B-506, at which Mother admitted she had not completed any substance abuse treatment in the past eight years.

On 19 February 2007, the district court entered an Order requiring S.T.P. to remain in DSS custody with the goal of reunification with the maternal grandmother. DSS was given discretion to place S.T.P. back with his maternal grandmother if she complied with her treatment. S.T.P. suffered from asthma, attention deficit hyperactivity disorder (ADHD), and oppositional defiant disorder (ODD). His behavior therapist recommended that he receive special treatment and attend family therapy.

On 9 April 2007, a case plan was put in place for the maternal grandmother requiring her to: (1) maintain suitable housing and provide sufficient income for herself and S.T.P.; (2) attend medical appointments and family therapy for S.T.P.; (3) attend a parenting skills assessment; (4) attend a FIRST assessment; (5) attend outpatient treatment for substance abuse; and (6) submit to random drug screens.

On 26 February 2007, the maternal grandmother began substance abuse treatment, but was discharged on 18 April 2007 due to repeated unexcused absences. On 1 May 2007, a Review Hearing was held, and the district court ordered S.T.P. to remain in DSS custody with a plan for reunification with the maternal grandmother. Mother and the maternal grandmother were allowed visitation and ordered to comply with a case plan. On 18 June 2007, the maternal grandmother tested positive for opiates, and re-entered substance abuse treatment.

On 3 October 2007, Mother tested positive for cocaine, and following a show cause order, enrolled in the FIRST Program on 17 October 2007. On 26 November 2007, Mother enrolled in intensive outpatient treatment but was released on 6 December 2007 following a positive drug test for methadone. She was referred to inpatient treatment but refused to attend.

On 26 January 2008, Mother was ordered to complete an inpatient treatment program while she was incarcerated. On 4 April 2008, Mother completed the inpatient treatment program. On 21 April 2008, Mother supplied a breath sample, which showed a blood-alcohol concentration of 0.028. The next day, she was referred to adult mental health services but did not attend any scheduled appointments.

On 26 May 2008, licensed psychologist, Richard E. Bridgette (Dr. Bridgette) completed a written report on his psychological evaluation of S.T.P. Dr. Bridgette opined that S.T.P. needed "a living environment that is stable, conflict-free, and consistent in rules, expectations, and consequences to help him learn to control his own behavior." Dr.

Bridgette recommended that S.T.P. remain out of the maternal grandmother's custody. Dr. Bridgette attempted to assess Mother's "psychological and cognitive functioning," but Mother failed to attend either of the two scheduled evaluation appointments.

On 27 May 2008, a Permanency Planning Hearing was held, and the permanent plan for S.T.P. was changed to adoption, with supervised visits between S.T.P., and Mother and the maternal grandmother. Father's whereabouts were unknown. On 28 July 2008, DSS filed a Petition to Terminate Parental Rights for both Mother and Father. On 22 July 2009, the district court entered an order terminating the parental rights of both Mother and Father.

Both Mother and Father appeal.

II. Subject Matter Jurisdiction

A. Standard of Review

"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). "Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal." *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007) (citing *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006)), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). "The determination of subject matter jurisdiction is a question of law and this Court has the power to inquire into, and determine, whether it has jurisdiction and to dismiss an action . . . when subject matter jurisdiction is lacking." *In re J.B.*, 164 N.C. App. 394, 398, 595 S.E.2d 794, 797 (2004) (citations and internal quotations omitted).

B. District Court's Termination of Jurisdiction

[1] In their first argument, both Mother and Father contend that the district court lacked subject matter jurisdiction to act upon the "Motion in the Cause to Reassume Custody" because the district court terminated its jurisdiction over the juvenile on 20 May 1999 when it ordered "Case closed." We disagree.

By statute the district courts of this state are conferred "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a) (2007). "When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court

or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." N.C. Gen. Stat. § 7B-201(a) (2007).

The 20 May 1999 Dispositional Order stated, "Court adopts [DSS] recommendations. Custody vested [with maternal] grandparents [DSS] divested. Support may be sought by grandparents through c/s enforcement—[DSS] to provide c/s/e info. Case closed." Both parents argue that the "Case closed" language demonstrates the district court's intent to terminate its jurisdiction.

When a district court terminates its jurisdiction over a juvenile case, there "is no affirmative obligation on the juvenile court to remain involved in the life of [the] juvenile for a longer duration." *In re A.P.*, 179 N.C. App. 425, 429, 634 S.E.2d 561, 563 (2006) (Levinson J., dissenting), *rev'd per curiam for reasons stated in dissent*, 361 N.C. 344, 643 S.E.2d 588 (2007).

> Indeed, where the juvenile court has terminated its jurisdiction, . . . the juvenile court will no longer be holding subsequent hearings and Social Services will no longer have a court-ordered obligation to remain involved with the child or the parents. The parents have now been returned to their pre-petition legal status.

Id. at 429, 634 S.E.2d 564. In the instant case, after the district court's May 1999 order, neither Mother nor Father were returned to their pre-petition legal status. The maternal grandmother continued to be the legal guardian for S.T.P. for over six years. The plain language of N.C. Gen. Stat. § 7B-201(b) states that when the district court's jurisdiction terminates, the "legal status of the juvenile and the custodial rights of the parties shall revert to the status they were before the juvenile petition was filed, unless applicable law or a valid court order in another civil action provides otherwise." N.C. Gen. Stat. § 7B-201(b) (2007).

"Closing" a case does not mean the same thing as "terminating jurisdiction." Each is a separate action with distinct consequences. "Once jurisdiction of the court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined." *In re Baby Boy Scearce*, 81 N.C. App. 531, 538-39, 345 S.E.2d 404, 409 (citations omitted), *disc. review denied*, 318 N.C. 415, 349 S.E.2d 589 (1986); *see also In re H.L.A.D.*, 184 N.C. App. 381, 646 S.E.2d 425 (2007). In the instant case, the district court found in its 1999 order that the best interests of S.T.P. would be served by awarding legal custody to his maternal grandparents with limited visitation privileges to Mother. Father was ordered not to "go on or about the property of

the maternal grandparents—by court order." DSS was divested of its custody of S.T.P., but the district court did not terminate its jurisdiction over the child. "The participation of DSS . . . is not statutorily required or as a practical matter necessary." *In re Baby Boy Scearce*, 81 N.C. App. at 542, 345 S.E.2d at 411. We hold that the district court did not terminate its jurisdiction by its use of the words "Case closed." Thus, the district court's jurisdiction continued "until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." N.C. Gen. Stat. § 7B-201(a) (2007).

This argument is without merit.

Because we hold that the district court did not terminate its jurisdiction in its 20 May 1999 Dispositional Hearing Order, we decline to address respondents' remaining arguments based upon lack of subject matter jurisdiction.

III. Termination of Parental Rights

[2] In her second argument on appeal, Mother contends that the district court erred when it concluded that it was in the best interest of S.T.P. to terminate Mother's parental rights because the findings of fact do not support this conclusion as a matter of law. We disagree.

A. Standard of Review

The termination of parental rights is a two-step process. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 5 (citations omitted), *disc. review denied*, 358 N.C. 543, 599 S.E.2d 42 (2004). "During the initial adjudication phase of the trial, the petitioner seeking termination must show by clear, cogent, and convincing evidence that grounds exist to terminate parental rights." *Id.* (citations omitted). If the trial court determines that a ground for termination exists, the court moves to the disposition stage, where it must determine whether termination is in the best interest of the child. N.C. Gen. Stat. § 7B-1110(a) (2007). Upon review we consider, "based on the grounds found for termination, whether the trial court abused its discretion in finding termination to be in the best interest of the child." *Shepard*, 162 at 222, 591 S.E.2d at 6 (citing *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995)).

B. Analysis

In determining whether termination of parental rights is in the best interest of the juvenile, the district court is required to consider:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2007).

To support its determination that termination of Mother's parental rights was in the best interest of S.T.P., the district court made, in pertinent part, the following findings of fact:

19. That [S.T.P.] has continuously remained in the Petitioner's custody since January 26, 2007.

. . .

53. That [Mother] does not have the ability to meet her needs as well as [S.T.P.'s] needs. For that reason, the Court cannot find that [Mother] had the ability to contribute any monies to defray the cost of [S.T.P.'s] out of home placement.

54. That neither [Mother nor maternal grandmother] demonstrated an ability to obtain and/or maintain safe, stable, permanent, appropriate, and independent housing. The respondent mother frequently resided with the maternal grandmother. []

. . .

56. That Ms. Jackson began supervising the visits between [S.T.P., Mother and maternal grandmother] in July 2007. Ms. Jackson expressed concerns about how the respondent mother and maternal grandmother treated [S.T.P.]. They sometimes treated [S.T.P.] as if he were 3 or 4 years old instead of his actual age. The Petitioner also expressed concerns about the appropriateness of some of the gifts given to [S.T.P.].

57. That there is a clear bond between [S.T.P., Mother and maternal grandmother].

. . .

60. That the respondent father has a long history of involvement with the respondent mother and the maternal grandmother. [Mother and Father] have maintained an on again off again relationship for the past 16 years. There is cause for concern if he relied on the information provided by [Mother and/or maternal grandmother]. [Father] accepted, without question, the information provided by [Mother and maternal grandmother]. For example, they informed him that he could not participate in visits with [S.T.P.], he could not attend the court hearings regarding [S.T.P.], or that he no longer had any parents rights to [S.T.P.]. []

. . .

62. That [Father] allowed [Mother and maternal grandmother] to work towards reunification with [S.T.P.]. Although aware of [S.T.P.'s] out of home placement since January 2007, he took no affirmative action to become involved with [S.T.P.'s] case until August 2008 . . . .

. . .

71. That [Father] agreed to obtain/maintain safe, stable, appropriate, and permanent housing. While out of jail, [Father], with permission, resided with [S.T.P.'s] paternal grandmother. He has not accomplished this goal.

72. That [Father] maintained weekly contact with the Petitioner until the first week in December 2008. [Respondent father] has not maintained consistent contact with the Petitioner since December 2008.

. . .

79. That there is no credible evidence that either of the respondent parents or the maternal grandmother completed the recommended and/or any other substance abuse treatment program. Likewise, there is no verification that the respondent parents and the maternal grandmother have the ability to maintain sobriety on an on-going basis. In view of the fact that [Mother] and [maternal grandmother] failed to comply with the treatment team recommendations and the changed goal to adoption, they were discharged from the F.I.R.S.T. program. Neither graduated from the Family Drug Treatment Court Program. Furthermore, at the time of the termination hearing, neither [maternal grandmother] nor [Mother] was participating in NA/AA meetings.

. . .

81. That the respondent parents are not able, together or independently, to provide appropriate care for [S.T.P.].

82. That [Mother and Father] have always relied on [maternal grandmother] to meet [S.T.P.'s] needs and fill in the parenting gaps created by the respondent parents.

83. That [Mother, Father, and maternal grandmother] continue to struggle with their substance abuse problems.

84. That [Father and Mother] have not corrected the issues that led to the juvenile's out of home placement. They failed to demonstrate reasonable progress under the circumstances in correcting the conditions that led to the juvenile's out of home placement. Consequently, the respondent parents are not in a position now or the foreseeable future to appropriately care or provide a safe, stable, and permanent home for the juvenile. Given the respondent parents lack of progress regarding the mediated case plan and Out of Home Family Services Agreement, this situation is likely to continue indefinitely.

85. That Dr. Bridgette also assessed [S.T.P.'s] psychological, developmental, and safety needs. [S.T.P.] has unique needs.

86. That in January 2008, [S.T.P.] completed his 1st session with Dr. Bridgette. At the end of the session, Dr. Bridgette concluded that [S.T.P.] exhibited a severe learning disability and had a difficult time verbalizing his thoughts and answers. Therefore it is critical for [S.T.P.], in order to be successful and reach his full potential, needs a very stable home environment free from interpersonal conflict, consistent and calmly applied discipline methods, and calm environment. [S.T.P.] will need consistent support to improve his social skills. Additionally, [S.T.P.] needs a caretaker who actively participates in his treatment, actively works with the educational system to ensure [S.T.P.] continues with his IEP. The caretaker should also ensure that his other educational needs are addressed as well as consistently monitoring his medication regime. [S.T.P.] will continue to need individual therapy to address his emotions, behaviors, and social skills.

. . .

88. That Dr. Bridgette could not recommend physical custody of [S.T.P. to maternal grandmother]. Additionally, he recommended

no contact between [Mother and S.T.P.] until [Mother] overcomes her substance abuse problems and life style problems.

89. That [maternal grandmother] is unable to move beyond her parenting techniques which are not helpful but damaging to [S.T.P.]. The juvenile needs parenting techniques that are consistent and stable. Additionally, he needs a parent that exhibits effective communication skills and an understanding of the world. If these skills are not provided, then the result will be confusion to [S.T.P.].

90. That the maternal grandmother and the respondent mother unfortunately treated and continue to treat [S.T.P.] as much younger than his real age. [Maternal grandmother] sometimes treated [S.T.P.] as a 4 year old and then sometimes a 10 year old. [Mother and maternal grandmother] withheld information from [S.T.P.] which in the longer run will result in more damage and pain to [S.T.P.]. For example, they did not tell or address the issue that [S.T.P.'s] dog, Bruiser, was deceased. The motive for the maternal grandmother's behaviors and misapplied techniques/ parenting skills arose, according to the maternal grandmother's testimony, as a result of her love for [S.T.P.].

. . .

94. That on May 12, 2009, the Petitioner presented evidence that [S.T.P.] was in a potential adoptive placement. When the parties returned on May 26, 2009, [S.T.P.] had been moved from this placement. Ms. Weinstein testified that [S.T.P.'s] teacher and another foster parent expressed an interest in providing a permanent home for [S.T.P.]. It is troubling to the Court that within the last 2 weeks, the possible adoptive home was disrupted. [Mother] throughout the case raised concerns about [S.T.P.'s] care. [Mother and maternal grandmother] have tried to remain involved in [S.T.P.'s] life.

95. That Court finds, after balancing [S.T.P.'s bond with the Mother and maternal grandmother] and possibility of an adoptive placement that will be able to meet [S.T.P.'s] special needs, finds that termination [of] parental rights is in [S.T.P.'s] best interest.

96. That the evidence of the respondent parents' and [maternal grandmother's] consistent actions make it impossible for the Court to find that they will ever have the ability to meet [S.T.P.'s] needs. [S.T.P.] more than other juveniles, needs consistency. Life

> with the respondent's and [maternal grandmother] was chaotic and inconsistent. [Mother] due to her substance abuse and mental health issues is in and out of [S.T.P.'s] life.
>
> . . .
>
> 98. That the goal of the case is adoption. The juvenile needs a safe, stable, appropriate, and permanent environment. Finding a safe, stable, and permanent environment can only be accomplished through adoption. The only barrier to adoption is termination of parental rights. Termination of parental rights would assist in the adoption process.

On appeal, Mother has not challenged any of the above findings, and they are presumed to be correct and supported by competent evidence. *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982) (citations omitted), *appeal dismissed*, 459 U.S. 1139, 74 L. Ed. 2d 987 (1983). The district court's uncontested findings demonstrate that the district court properly considered the required factors listed in N.C. Gen. Stat. § 7B-1110(a). Contrary to Mother's argument, the termination of her parental rights does further the plan of adoption. The district court found that S.T.P. is in need of a stable and permanent environment. Terminating Mother's parental rights is a step toward giving S.T.P. a stable and permanent environment. Based upon these findings, the trial court did not abuse its discretion in terminating Mother's parental rights.

This argument is without merit.

We affirm the trial court's order terminating the parental rights of respondents.

The respondents have failed to argue their remaining assignments of error, and they are deemed waived pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure.

AFFIRMED.

Chief Judge MARTIN and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. DANIEL DAVID WEST, DEFENDANT

No. COA09-851

(Filed 16 February 2010)

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

Although defendant contends the trial court erred by admitting a witness's statement, this assignment of error was dismissed because defendant failed to object at trial and failed to argue plain error.

2. Evidence— testimony—subject of ongoing FBI investigation—waiver of objection

Although defendant contends the trial court erred by admitting a witness's statement that defendant was the subject of an on going FBI investigation, defendant elicited this same testimony on cross-examination and thus waived objection to the admission of the challenged testimony.

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

Although defendant contends the trial court erred in a prosecution for performing a notarial act without a commission by admitting a witness's statement about a cease and desist lawsuit, this assignment of error was deemed abandoned under N.C. R. App. P. 28(b)(6) based on defendant's failure to argue it in his brief.

4. Evidence— cross-examination—waiver of objection

The trial court did not commit plain error in a prosecution for performing a notarial act without a commission by admitting testimony from three witnesses that defendant's actions were not legal and that certain legal standards had not been met. Defense counsel elicited the same testimony on cross-examination, thus constituting waiver of defendant's challenge to its admission on direct examination.

5. Evidence— testimony—invalid notary seal—similar testimony already allowed

The trial court did not err or commit plain error in a prosecution for performing a notarial act without a commission by admitting a witness's testimony that he noticed the "county

notary" seal was not a valid seal. Another witness provided similar testimony.

6. Evidence— testimony—cease and desist lawsuit—no legal conclusions offered

The trial court did not commit plain error in a prosecution for performing a notarial act without a commission by admitting a witness's testimony that the cease and desist lawsuit was fraudulent and meant to impede or stop an investigation. Nowhere in the testimony does the witness offer any legal conclusion regarding the legal sufficiency of the pertinent acknowledgment.

7. Acknowledgments— performing notarial act without commission—motion to dismiss—sufficiency of evidence—single act

The trial court did not err by failing to dismiss the charge of performing a notarial act without a commission even though defendant contends a violation under N.C.G.S. § 10B-60(e) requires multiple unauthorized notarial acts. A violation of the statute requires only a single unauthorized notarial act.

8. Acknowledgments— performing notarial act without commission—instruction—single act

The trial court did not err in a prosecution for performing a notarial act without a commission by instructing the jury "in the singular" even though defendant contends a violation of N.C.G.S. § 10B-60(e) requires that a person commit at least two unauthorized notarial acts. The trial court's instruction correctly defined the law arising on the evidence.

Appeal by defendant from judgment entered 17 December 2008 by Judge Dennis J. Winner in Buncombe County Superior Court. Heard in the Court of Appeals 11 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General Richard H. Bradford, for the State.

David G. Belser for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Daniel David West appeals his conviction for performing a notarial act without a commission. Defendant primarily contends that a violation of the pertinent statute requires multiple unau-

thorized "notarial acts." Because the State's evidence tends to show only a single unauthorized notarial act, defendant claims that the trial court erred in failing to dismiss the charge. Guided by our rules of statutory interpretation, we conclude that a violation of the statute requires only a single unauthorized notarial act, and, therefore, the trial court properly submitted the charge to the jury. Accordingly, we find no error.

Facts

The State's evidence at trial tended to establish the following facts: On 4 April 2008, Andrew F. Romagnuolo, a special agent with the FBI, was at home with his family when his doorbell rang. Romagnuolo went to the door and saw John Leroy McKinley, an individual who was under investigation by Romagnuolo. Romagnuolo asked McKinley what he was doing at his home, and when McKinley did not respond, Romagnuolo asked McKinley to leave his property. Concerned by McKinley's presence at his home, he grabbed McKinley's arm and began to force him off the front porch of the house. At this point, McKinley dropped a package, which contained a lawsuit against Romagnuolo, said " '[y]ou are served,' " and began walking away. As McKinley was walking away, Romagnuolo picked up the package and threw it at him, hitting him in the back of the head.

McKinley went to the Buncombe County Sheriff's Department on 7 April 2008 and complained that he had been assaulted by Romagnuolo on 4 April 2008. McKinley provided the deputies with an affidavit that had been acknowledged by defendant ("McKinley affidavit"). The affidavit contained defendant's name, signature, and a seal indicating that defendant was a "county notary." McKinley was interviewed about his complaint and an incident report was prepared, but no charges were filed against Romagnuolo.

Cody Muse, a detective with the sheriff's department and Romagnuolo's partner on the North Carolina Joint Terrorism Task Force, investigated the incident involving Romagnuolo and McKinley. While reviewing the documentation relating to the incident, Muse became concerned that the McKinley affidavit was not notarized in accordance with North Carolina law. A search warrant for defendant's house was obtained and executed, during which Muse found a mechanical embossing seal matching the seal on the McKinley affidavit. Defendant was subsequently charged with performing notarial acts without being a commissioned notary.

In addition to other witnesses who testified at trial, Gayle Holder, the Director of the Certification and Filing Division of the Secretary of State's Office, testified that North Carolina law does not recognize the office of "county notary"—only the office of "notary public." She further stated that defendant had never been commissioned as a notary public in North Carolina and that the seal and language used in the acknowledgment of the McKinley affidavit did not comply with North Carolina law. The State also produced DMV records showing defendant's photograph and his signature, which matched the signature on the McKinley affidavit.

At the close of the State's evidence and after electing not to present any evidence in his defense, defendant moved to dismiss the charge for insufficient evidence. The trial court denied the motions and submitted the charge to the jury. The jury convicted defendant and the court sentenced defendant to four to five months imprisonment but suspended the sentence and imposed 36 months of supervised probation. Defendant timely appealed to this Court.

I

Defendant first assigns error to the trial court's admission of statements by Romagnuolo that (1) he was a member of the North Carolina Joint Terrorism Task Force; (2) defendant was a subject of an on-going FBI investigation; and (3) lawsuits involving cease and desist injunctions against law enforcement investigations are, based on his experience, "fraudulent and meant to impede or harass to stop an investigation." Defendant maintains that Romagnuolo's statements were irrelevant and prejudicial.

[1] As for Romagnuolo's first statement, that he was a member of the North Carolina Joint Terrorism Task Force, defendant argues that it is "obviously irrelevant to the prosecution of the defendant for the offense of performing notarial acts without being commissioned as a notary." Defendant, however, did not object to Romagnuolo's statement at trial on any basis, much less relevancy. Defendant, therefore, failed to preserve this specific contention for appellate review. 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, 364 (2008). Nor has defendant specifically argued that the trial court committed plain error. Accordingly, we decline to review defendant's argument. *See State v. Martin*, 191 N.C. App. 462, 471, 665 S.E.2d 471, 477 (2008) ("[D]efendant failed to object at trial and has not specifically argued that the trial court committed plain error. Under such circumstances,

this Court will not review whether the alleged error rises to the level of plain error."), *disc. review denied*, ––– N.C. ––––, 676 S.E.2d 49 (2009).

[2] Defendant did object at trial to Romagnuolo's statement during direct-examination that defendant was a subject of an on-going FBI investigation. On cross-examination, however, defense counsel elicited the same testimony from Romagnuolo:

> Q. And did you also say that Mr. West was the subject of an investigation that you are doing?
>
> A. That's correct.

"It is a well-settled rule that 'if a party objects to the admission of certain evidence and the same or like evidence is later admitted without objection, the party has waived the objection to the earlier evidence.' " *State v. Wingard*, 317 N.C. 590, 599, 346 S.E.2d 638, 644 (1986) (quoting 1 *Brandis on North Carolina Evidence* § 30 (1982)). Defendant, therefore, waived his objection to the admission of the challenged testimony. *See id.* (holding witness' testimony during cross-examination waived defendant's objection to same testimony on direct examination).

[3] As for defendant's assignment of error concerning Romagnuolo's statement about the cease-and-desist lawsuit, defendant makes absolutely no argument in his brief challenging the admissibility of this testimony. This assignment of error is thus deemed abandoned on appeal. N.C. R. App. P. 28(b)(6); *State v. Williams*, ––– N.C. ––––, ––––, 686 S.E.2d 493, 509 (2009). We have nonetheless reviewed the record on appeal and conclude that defendant's assignment of error is without merit.

II

[4] Defendant next contends that the trial court erred in admitting testimony by Holder, Muse, and Romagnuolo that "defendant's actions were not legal" and that "certain legal standards had [not] been met." Because defendant failed to object to the pertinent testimony at trial, his argument is subject to plain error review. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Plain error is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. 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).

Under the Rules of Evidence, a witness, whether an expert or lay witness, "may not testify that a particular legal conclusion or standard has or has not been met, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness." *State v. Ledford*, 315 N.C. 599, 617, 340 S.E.2d 309, 321 (1986); *accord Norris v. Zambito*, 135 N.C. App. 288, 292, 520 S.E.2d 113, 116 (1999) ("Opinion testimony may be received regarding the underlying factual premise, which the fact finder must consider in determining the legal conclusion to be drawn therefrom, but may not be offered as to whether the legal conclusion *should* be drawn.").

Holder testified on direct-examination that the signature on the McKinley affidavit's acknowledgment, the language in the acknowledgment, and the "county notary" seal affixed to the affidavit did not "meet the North Carolina requirements to be a legal notarial act." Although defendant contends that "Ms. Holder should not have been allowed to give her own opinion that the defendant's conduct amounted to a notarial act," defendant ignores the fact that on cross-examination, defense counsel questioned Holder extensively regarding the same "requirements to a valid notary or a valid notarial act[.]" In fact, defense counsel elicited testimony from Holder that the "county notary" seal appearing on the McKinley affidavit did not meet the requirements for a proper notarial act and that "the signature and the seal has no legal effect[.]" Defense counsel further inquired: "Now these words acknowledgement [sic], oath and affirmation and proof, these are all magic words in the law; aren't they?" In response, Holder explained the meaning of these "legal terms."

Defense counsel elicited on cross-examination the same testimony from Holder regarding the legal requirements necessary to constitute a valid notarial act that defendant claims was impermissible on direct-examination. Eliciting this testimony on cross-examination constituted waiver of defendant's challenge to its admission on direct-examination. *See Wingard*, 317 N.C. at 599, 346 S.E.2d at 644 (holding defendant waived objection to challenged testimony on direct-examination when "defense counsel, on cross-examination, elicited the same testimony to which no objection was made").

[5] Defendant also assigns plain error to the admission of Muse's testimony that he noticed the "county notary" seal when he reviewed the McKinley affidavit and that, based on his "review of the state statutes," he "knew" it was not a "valid seal[]." In light of Holder's similar testimony, the trial court did not err, much less commit plain error, in admitting Muse's testimony. *See State v. Reid*, 335 N.C.

647, 663, 440 S.E.2d 776, 785 (1994) (finding no error in admitting hearsay testimony of one witness when subsequent witness provided similar testimony).

[6] Defendant also argues that Romagnuolo should not have been allowed to testify that, based on his experience, "these types of submissions"—referring to the cease and desist lawsuit—"are fraudulent and meant to impede or harass to stop an investigation." Review of the transcript reveals that defendant's argument is simply a reprise of his contention regarding the relevancy of Romagnuolo's testimony. Nowhere in his testimony does Romagnuolo offer any legal conclusion regarding the legal sufficiency of the McKinley acknowledgment.

III

[7] Defendant next argues that the trial court erred in failing to dismiss for insufficient evidence the charge of performing notarial acts without a commission. On appeal, the trial court's denial of a motion to dismiss for insufficient evidence is reviewed de novo. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). A defendant's motion to dismiss should be denied if there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In ruling on a motion to dismiss, the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002). Contradictions and discrepancies do not warrant dismissal but are for the jury to resolve. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

N.C. Gen. Stat. § 10B-60(e) (2009) makes it unlawful "for any person to perform *notarial acts* in this State with the knowledge that the person is not commissioned under this Chapter." (Emphasis added.) N.C. Gen. Stat. § 10B-3(11) (2009) lists the "notarial acts" a notary public is "empowered to perform" under Chapter 10B of the General Statutes: (1) "taking an acknowledgment"; (2) "taking a verification or proof"; and (3) "administering an oath or affirmation[.]" *See also* N.C. Gen. Stat. § 10B-20(a) (2009) (providing that a notary may perform "[a]cknowledgments," "[o]aths and affirmations," and "[v]erifications or proofs"). Defendant argues that because § 10B-60(e) prohibits

"notarial acts" rather than a single notarial act, the State is required to "prove a defendant performed the functions of a notary on more than one occasion." Based on this reading of the statute, defendant maintains that, "taken in the light most favorable to the State, the evidence shows only a single notarial act, i.e., the acknowledgement [sic] by the defendant of a signature on the McKinley affidavit."

The State counters that defendant's "tortured" interpretation of § 10B-60(e) leads to the illogical conclusion that so long as a person commits only a *single* notarial act knowing that he or she is not a commissioned notary, that person has not violated § 10B-60(e). The State argues that the General Assembly could not have intended to allow "one 'free' offense" of § 10B-60(e).

Questions of statutory interpretation are questions of law, reviewed de novo on appeal. *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002). The primary goal of statutory interpretation is to ascertain and effectuate the intent of the legislature. *Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991). In determining legislative intent, "a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998). Where "the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give [the statute] its plain and definite meaning." *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988). Where, however, the statutory language is ambiguous, judicial construction is necessary to determine legislative intent. *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990).

The Legislature established rules for interpreting our statutes in N.C. Gen. Stat. § 12-3 (2009), which provides in pertinent part:

> In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute, that is to say:
>
> > (1) Singular and Plural Number, Masculine Gender, etc.—Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number

> only shall extend and be applied to one person or thing, as well as to several persons or things[.]

N.C. Gen. Stat. § 12-3(1). As mandated by § 12-3(1), we interpret § 10B-60(e) to mean that a person violates the statute if the person performs *one or more notarial acts* with the knowledge that he or she is not a commissioned notary. *See State v. Wilkerson*, 98 N.C. 696, 701, 3 S.E. 683, 686 (1887) (holding that statute referring to "person" included "persons").

Arguing that it would be "repugnant to the overall context of the statutory scheme regulating notaries public" to construe § 10B-60(e) as permitting only a single notarial act to constitute a violation, defendant points to N.C. Gen. Stat. § 10B-60(b), which provides in pertinent part:

> [A] person who commits any of the following acts is guilty of a Class 1 misdemeanor:
>
> . . . .
>
> (2) Performing a notarial act if the person's commission has expired or been suspended or restricted.
>
> (3) Performing a notarial act before the person had taken the oath of office.

N.C. Gen. Stat. § 10B-60(b)(2)-(3). Because § 10B-60(b)(2) and (3) refer to a "notarial *act*" rather than to "notarial *acts*," as used in § 10B-60(e), defendant asserts that the two terms cannot be read interchangeably.

Rather than supporting defendant's contention, § 10B-60(b)(2) and (3) undermine defendant's interpretation of § 10B-60(e). Both § 10B-60(b)(2) and (3) address situations where the person performing the notarial act has been or potentially will be commissioned as a notary public, but neither provides for the scenario where the person is not an appointee or has never been commissioned as a notary.[1] Thus, following defendant's argument to its logical conclusion, a person may perform a single notarial act without violating § 10B-60(b) or § 10B-60(e) so long as the person has never been a notary or an appointee. We do not believe that the General Assembly intended to create such a problematic gap in the statutory scheme governing notaries public.

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1. An "appointee" is a person who has been granted a notary public commission by the Secretary of State's Office but who has not taken the oath of office. N.C. Gen. Stat. § 10B-10 (2009).

Review of other provisions in Chapter 10B further illustrate the flaw in defendant's reasoning. N.C. Gen. Stat. § 10B-3(4), for example, defines the term "[c]ommission" as the "[t]he empowerment to perform notarial acts and the written evidence of authority to perform those acts." If, as defendant urges, the reference to "notarial acts" in § 10B-3(4) denotes only multiple acts, then a person may perform a notarial act without a commission so long as the person only performs one act.

Moreover, adopting defendant's interpretation leads to untoward consequences undermining the stated purposes of Chapter 10B. N.C. Gen. Stat. § 10B-2 (2009) provides that, among other things, the purposes of Chapter 10B are "[t]o promote, serve, and protect the public interests"; "[t]o simplify, clarify, and modernize the law governing notaries"; and "[t]o prevent fraud and forgery." In light of these purposes, it is unreasonable to read § 10B-60(e) as permitting non-commissioned members of the public to perform a notarial act so long as they do it only once. We, therefore, conclude that a person may be convicted of violating § 10B-60(e) if that person commits one or more notarial acts with the knowledge that he or she is not a commissioned notary.

Defendant nonetheless argues that pursuant to the "rule of leniency," § 10B-60(e) must be construed liberally in his favor. Defendant is correct that criminal statutes are to be strictly construed against the State. *State v. Hearst*, 356 N.C. 132, 136, 567 S.E.2d 124, 128 (2002). The "rule of leniency," however, only requires the court to "strictly construe *ambiguous* criminal statutes." *State v. Abshire*, 363 N.C. 322, 332, 677 S.E.2d 444, 451 (2009) (emphasis added). Defendant points to no ambiguity in § 10B-60(e); in fact, defendant's argument hinges upon a strictly literal interpretation of § 10B-60(e). Interpreting § 10B-60(e)'s reference to "notarial acts" in conjunction with § 12-3(1)'s directive that plural words are to be understood as encompassing both the plural and singular meaning of the word indicates that § 10B-60(e) is not ambiguous. Moreover, even assuming that § 10B-60(e) is ambiguous,

> " '[t]he canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.' "

State v. Raines, 319 N.C. 258, 263, 354 S.E.2d 486, 490 (1987) (quoting *United States v. Brown*, 333 U.S. 18, 25-26, 92 L. Ed. 442, 448 (1948)) (first alteration added). Interpreting § 10B-60(e) to require multiple notarial acts in order to constitute a violation would require ignoring the General Assembly's mandate in § 12-3(1) regarding the interpretation of this State's statutes and would require "overrid[ing] common sense and [the] evident statutory purpose[s]" of protecting the public, simplifying the law, and preventing fraud.

As for the sufficiency of the evidence in this case, defendant admits in his appellate brief that the evidence showed "a single notarial act, i.e., the acknowldgement [sic] by the defendant of a signature on the McKinley affidavit." The State's evidence tended to show that defendant was in possession of a "county notary" seal, that the county notary seal in defendant's possession matched the seal affixed to the McKinley affidavit, that the signature purportedly acknowledging the affidavit matched defendant's signature in DMV records, and that defendant is not commissioned as a notary by the Secretary of State's Office. From this evidence, the jury could reasonably conclude that defendant performed a notarial act knowing that he was not a commissioned notary in violation of § 10B-60(e). The trial court, therefore, properly denied defendant's motion to dismiss.

IV

[8] Based on his argument that in order to violate § 10B-60(e), a person must commit at least two unauthorized notarial acts, defendant contends that the trial court erroneously instructed the jury "in the singular": "[I]f the State has satisfied you beyond a reasonable doubt that on or about the alleged date the defendant performed *an act of a notary public* when he knew he did not have a notary public certificate from the State, and in fact he had no such certificate, it would be your duty to find the defendant guilty of this charge." (Emphasis added.)

"A trial judge is required by N.C.G.S. § 15A-1231 and N.C.G.S. § 15A-1232 to instruct the jury on the law arising on the evidence." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). When the trial court "undertakes to define the law," the court "must state it correctly." *State v. Earnhardt*, 307 N.C. 62, 70, 296 S.E.2d 649, 654 (1982). As we have already held that a single notarial act performed by a defendant with knowledge that he or she was not a commissioned notary is sufficient to constitute a violation of § 10B-60(e), the trial court's instructions correctly define the law arising on the evidence in this case. Finding no error, we uphold defendant's conviction.

No Error.

Chief Judge MARTIN and Judge ERVIN concur.

STATE OF NORTH CAROLINA v. KENNETH BERNARD DAVIS

No. COA09-278

(Filed 16 February 2010)

Evidence— testimony—nontestifying analyst's laboratory report—cocaine—harmless error

Even if a non-testifying lab analyst's laboratory report was erroneously admitted in a possession with intent to sell or deliver cocaine and sale of cocaine case, such error was harmless beyond a reasonable doubt in view of the overwhelming unchallenged evidence establishing that the substance at issue was crack cocaine.

Appeal by Defendant from judgment entered 20 October 2008 by Judge Clifton E. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 September 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

Bryan Gates for Defendant.

STEPHENS, Judge.

At issue in this case is whether the trial court violated Defendant's Sixth Amendment right of confrontation by allowing into evidence the testimony of a forensic analyst regarding the results of a forensic analysis performed by an analyst who did not testify at trial and the report of the non-testifying analyst. For the reasons which follow, we conclude that Defendant received a fair trial, free of error.

I. Procedural History

On 14 November 2007, Defendant was arrested and charged with possession with intent to sell or deliver cocaine and sale of cocaine. On 26 November 2007, Defendant was indicted for possession with intent to sell or deliver cocaine, sale of cocaine, and having obtained

habitual felon status. The case was tried during the 17 October 2008 Criminal Session of Mecklenburg County Superior Court. The jury returned guilty verdicts on all charges and the trial court sentenced Defendant to 168 to 211 months imprisonment. Defendant gave notice of appeal in open court on 20 October 2008.

II. Evidence

Detective D.L. Kellough of the Charlotte Police Department testified as follows: On 14 November 2007, Kellough was attempting to make undercover purchases of crack cocaine in the Reid Avenue area of Charlotte, N.C. Kellough and Officer Kimberly Blackwell, also of the Charlotte Police Department, drove into a convenience store parking lot where Defendant Kenneth Bernard Davis flagged them down. When Kellough stopped the vehicle, Defendant came up to the window and asked what they were looking for. Kellough replied that they wanted a couple of "dimes," meaning two ten-dollar rocks of crack cocaine. Defendant told them he could take them somewhere to get the crack.

Defendant got into the back of the officers' vehicle and directed them to the 2900 block of Reid Avenue. Kellough gave Defendant a marked twenty-dollar bill to purchase the crack, keeping Defendant's jacket so that Defendant would not run off with the money.

Defendant left the officers' view and then returned a short time later with an object. He gave the object to Blackwell and got into the back seat of the vehicle to be taken back to the store. Defendant asked Blackwell if she would break him off "a piece of that" for helping them out. Kellough testified that he knew Defendant was referring to "[t]he crack cocaine that he had just purchased for us."

On the way back to the store, Officer Ryan Buckler, also with the Charlotte Police Department, arrested Defendant. Kellough put the object received from Defendant into a manila envelope to give to Property Control. Kellough testified, over objection, "Based on my training and experience[,] my opinion of that substance [sic] appeared to be crack cocaine."

Blackwell testified that when Defendant got back into the officers' vehicle, Defendant "immediately handed me the crack rock. And then as soon as Kellough saw the crack rock[,] he relayed that we had a good case, the arrest team could come in." Blackwell also testified that Defendant asked if they would "pinch him off a piece for helping out[,]" meaning that "[h]e wanted a small piece off the crack rock that

he had handed us." Blackwell identified State's exhibit number three as "the envelope that the crack rock was put in that we purchased." She acknowledged that the crack rock was actually put into a two-inch-by-two-inch manila envelope, which was placed into the larger envelope. She further identified State's exhibit number four as the two-inch-by-two-inch manila envelope and testified, over objection, that the envelope "has a crack rock in it." Over objection, the manila envelope and its contents were admitted into evidence.

Blackwell also identified the property sheet "[f]or the crack rock that Detective Kellough and I purchased[,]" and testified that the item that was turned in with the property sheet was described on the sheet as a "crack cocaine rock" weighing 0.4 grams.

Buckler testified that he got into the backseat of the vehicle driven by Kellough and placed Defendant in handcuffs. Buckler then performed a search of Defendant and discovered a metal pipe with a metal Brillo pad and "what I believed to be an individual crack rock."

Kemika Daniels Alloway, a forensic chemist with the Charlotte Mecklenburg Police Department ("CMPD") Crime Laboratory, was tendered by the State as an expert witness in the field of forensic chemistry. Alloway testified that the substance sold by Defendant to Kellough and Blackwell was analyzed by Tony Aldridge, a chemist with the CMPD who had since retired. Alloway then testified that Deanne Johnson, another forensic analyst with the CMPD, reviewed Aldridge's work and determined that the substance was cocaine. Alloway also testified that, based on her experience and her review of Aldridge's work and test results, she concluded that the substance sold to Kellough and Blackwell was cocaine weighing 0.30 grams. Over objection, Aldridge's lab report stating that the substance at issue was cocaine was entered into evidence.

III. Discussion

Defendant first contends that the trial court erred in allowing Alloway to testify to the results of the chemical analysis performed by Aldridge, violating Defendant's Sixth Amendment right to confront and cross-examine the witnesses against him. Specifically, Defendant contends that "[u]sing a non-testing analyst to introduce a report on the chemical composition of a sample violates [Defendant's] right to confrontation[.]"

The Confrontation Clause of the Sixth Amendment bars the admission of testimonial statements unless the declarant is unavail-

able to testify and the accused has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 53-54, 158 L. Ed. 2d 177, 194 (2004); *State v. Lewis*, 361 N.C. 541, 545, 648 S.E.2d 824, 827 (2007). Recently, in *Melendez-Diaz v. Massachusetts*, —– U.S. —–, 174 L. Ed. 2d 314 (2009), the United States Supreme Court revisited the issue of what constitutes a "testimonial" statement subject to a defendant's Sixth Amendment right to confrontation. In *Melendez-Diaz*, defendant objected to the admission of three "certificates of analysis" which showed that seized substances contained cocaine. *Id.* at —–, 174 L. Ed. 2d at 320. In Massachusetts, state law required a forensic analyst, at the request of the police, to test seized evidence for the presence of illegal drugs, Mass. Gen. L. ch. 111, § 12, and required the analyst to provide the police with his or her findings on a "signed certificate, on oath." Mass. Gen. L. ch. 111, § 13. The certificate could then be admitted in court as "prima facie evidence of the composition, quality, and . . . net weight" of the substance at issue in the prosecution. Mass. Gen. L. ch. 22C, § 39. The Supreme Court held that these certificates, which it described as "quite plainly affidavits," were testimonial statements because they were made under oath and under circumstances which would lead an objective witness to believe that the statement would be used at a later trial; indeed, the Court noted that the sole purpose of the certificates was to provide prima facie evidence at trial. *Melendez-Diaz*, —– U.S. at —–, 174 L. Ed. 2d at 320. Thus, the Supreme Court held that the admission of the affidavits was error and reversed the judgment of the trial court. *Id.* at —–, 174 L. Ed. 2d at 332.

Following *Melendez-Diaz*, the North Carolina Supreme Court concluded in *State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (2009), that the trial court erred in admitting evidence of forensic analyses performed by a forensic pathologist and a forensic dentist who did not testify at trial. In *Locklear*, the State tendered John D. Butts, M.D., the Chief Medical Examiner for North Carolina, as an expert in the field of forensic pathology. Dr. Butts testified, over defense counsel's objection, to the results of the autopsy report of an alleged prior victim of the defendant. The autopsy report was prepared by Karen Chancellor, M.D., a forensic pathologist who performed the autopsy on the victim's body in 1997. Dr. Butts testified that, according to the autopsy report, the cause of the victim's death was blunt force injuries to the chest and head. Dr. Butts also testified to the results of a forensic dental analysis, which was included in the autopsy report, performed by Dr. Jeffrey Burkes, a consultant on the faculty of the

University of North Carolina School of Dentistry. Dr. Butts stated that, by comparing the victim's dental records to the skeletal remains, Dr. Burkes positively identified the body as that of the victim. The autopsy report was admitted into evidence over defense counsel's objection. Neither Dr. Chancellor nor Dr. Burkes testified.

In concluding that the trial court erred in overruling defendant's objections to the admission of this evidence, the Court held:

> Here, the State sought to introduce evidence of forensic analyses performed by a forensic pathologist and a forensic dentist who did not testify. The State failed to show that either witness was unavailable to testify or that defendant had been given a prior opportunity to cross-examine them. The admission of such evidence violated defendant's constitutional right to confront the witnesses against him . . . .

Id. at 452, 681 S.E.2d at 305. However, the Court concluded further that the admission of the evidence was harmless beyond a reasonable doubt as the evidence did not establish any fact critical to the State's case and the State offered "copious evidence" that defendant had killed the victim in the case pending before the court, including defendant's confessions to the crime. *Id.* at 453, 681 S.E.2d at 305.

This Court has applied the holdings in *Melendez-Diaz* and *Locklear* in two recent cases concerning the admission of evidence of forensic analyses where the experts who performed the analyses did not testify at trial. First, in *State v. Galindo*, —— N.C. App. ——, 683 S.E.2d 785 (2009), a chemical analyst who did not weigh the cocaine found at defendant's residence testified that the cocaine weighed approximately 1031.83 grams. This Court determined that the expert's testimony, which was based " 'solely' " on a laboratory report prepared by an analyst who had not been subpoenaed to testify, was "indistinguishable from the opinion testimony held to be unconstitutional in *Locklear*." *Id.* at ——, 683 S.E.2d at 788. Thus, this Court concluded that defendant's Sixth Amendment rights had been violated, although this Court also concluded that the error was harmless beyond a reasonable doubt. *Id.* at ——, 683 S.E.2d at 788-89.

Subsequently, in *State v. Mobley*, —— N.C. App. ——, 684 S.E.2d 508 (2009), *cert. denied*, —— N.C. ——, S.E.2d —— (2010), this Court distinguished the expert testimony at issue in *Locklear* and held that the testimony of a forensic analyst regarding DNA tests performed by other analysts did not violate the Confrontation Clause, and, thus,

was properly admitted into evidence, as the analyst "testified not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data." *Id.* at ——, 684 S.E.2d at 511.

In this case, *without objection*, Alloway was questioned by the State as follows:

> [State:] Do forensic chemists review each other's work?
>
> [Alloway:] Yes.
>
> [State:] How do they do that?
>
> [Alloway:] Once an item has been completed, the analysis is ready and the final report is ready, it's turned over to another forensic analyst to look at it and make sure that they would come to the same conclusions that the original analyst came to.
>
> [State:] Was that done in this case?
>
> [Alloway:] Yes.
>
> [State:] Who reviewed Mr. Aldridge's work?
>
> [Alloway:] Deanne Johnson.
>
> [State:] Did she come to a finding on—as to her review of his work?
>
> [Alloway:] Yes.
>
> [State:] What was her[] finding?
>
> [Alloway:] That it was cocaine.
>
> [State:] Did you review the work of Mr. Aldridge in this case?
>
> [Alloway:] Yes.
>
> [State:] And did you review his work on specifically control [n]umber 41999?
>
> [Alloway:] Yes.
>
> [State:] When did you do that?
>
> [Alloway:] Today.
>
> [State:] What tests were conducted by Mr. Aldridge when he examined the substance?

[Alloway:] Mr. Aldridge performed a color test, a melting point test, as well as a GC and a mass spec.

Furthermore, *without objection*, Alloway explained in detail how each of the four different tests was administered, what the results of each test were, and what the results of each test indicated, testifying that the results of each of the four tests indicated that the substance was cocaine. She further testified, *without objection*, to the procedures used to weigh a substance and that "[i]n this case the substance weighed 0.30 grams."

Alloway was then questioned further, *without objection*, by the State as follows:

[State:] . . . [A]re the tests that you've described for the jury in accordance with the lab's procedures?

[Alloway:] Yes.

[State:] Have you performed these same tests during your career to identify control[led] substances?

[Alloway:] Yes.

[State:] As a forensic chemist, are these the tests that you would personally rely upon in forming an opinion as to the identity and weight of a control[led] substance?

[Alloway:] Yes.

[State:] To your knowledge[,] are these tests the same tests that other experts in the field of forensic chemistry would rely upon in forming an opinion as to the identity and weight of a chemical substance?

[Alloway:] Yes.

. . . .

[State:] I'm now showing you what I have marked as State's Exhibit Number 14. Do you recognize State's Exhibit Number 14?

[Alloway:] Yes.

[State:] What do you recognize it to be? [Alloway:] It's a copy of our final report. [State:] Did you review that report as part of your review in this case?

[Alloway:] Yes.

. . . .

> [State:] Based upon your experience and your review of the work and test results of Tony Aldridge, did you form your own expert opinion with regard to the identity and weight of the substance [at issue in this case] . . . ?
>
> [Alloway:] Yes.
>
> [State:] What is that opinion?
>
> [Alloway:] Cocaine weighing 0.30 grams.

As Defendant failed to object at trial to any of the aforementioned testimony, Defendant failed to preserve for appeal the argument that the evidence was erroneously admitted. *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 . . . objection . . . stating the specific grounds for the ruling the party desired the court to make . . . ."). "Moreover, because [D]efendant did not 'specifically and distinctly' allege plain error as required by North Carolina Rule of Appellate Procedure 10(c)(4), [D]efendant is not entitled to plain error review of this issue." *State v. Dennison*, 359 N.C. 312, 312-13, 608 S.E.2d 756, 757 (2005) (citing N.C. R. App. P. 10(c)(4)).[1] Furthermore, "[a] constitutional issue not raised at trial will generally not be considered for the first time on appeal." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002). While this Court may pass upon constitutional questions not properly raised at the trial level in the exercise of its supervisory jurisdiction "[t]o prevent manifest injustice[,]" N.C. R. App. P. 2, because there was copious unchallenged evidence before the jury that the substance at issue was cocaine, including Alloway's unchallenged testimony, we decline to invoke Rule 2 in this case.

Moreover, without objection by Defendant, the following testimony was offered: Kellough testified that he heard Defendant ask Blackwell if she would break him off "a piece of that" for helping them out and that he knew Defendant was referring to "[t]he crack cocaine that he had just purchased for us." Blackwell testified that Defendant "immediately handed me the crack rock. And then as soon as Kellough saw the crack rock[,] he relayed that we had a good case, the arrest team could come in." Blackwell also testified that Defendant asked if they would "pinch him off a piece for helping

1. Aside from the bare mention of testimony in his assignment of error and argument heading, Defendant advances no argument on appeal regarding any alleged error in admitting this testimony. Defendant's argument instead focuses solely on the admission of the report.

out[,]" meaning that "[h]e wanted a small piece off the crack rock that he had handed us." Furthermore, Blackwell identified State's exhibit number three as "the envelope that the crack rock was put in that we purchased[.]" Buckler testified that when he searched Defendant incident to his arrest, Buckler discovered a metal pipe with a metal Brillo pad and "what I believed to be an individual crack rock."

By failing to object at trial to the aforementioned testimony, Defendant failed to preserve for appeal the argument that the evidence was erroneously admitted. *See* N.C. R. App. P. 10(b)(1). Moreover, Defendant did not allege plain error on appeal and, thus, is not entitled to plain error review of this issue. N.C. R. App. P. 10(c)(4)); *Dennison*, 359 N.C. at 312-13, 608 S.E.2d at 757.

Furthermore, Kellough testified, "Based on my training and experience[,] my opinion of that [sic] substance appeared to be crack cocaine." Additionally, Blackwell identified State's exhibit number four as the two-inch by two-inch manila envelope that "has a crack rock in it." Although Defendant objected to this testimony at trial, Defendant's objections were overruled and Defendant failed to assign as error and argue on appeal the trial court's rulings. Accordingly, this Court may not review the propriety of the rulings. *See* N.C. R. App. P. 10(a) ("[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ."); N.C. R. App. P. 28(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.").

We conclude that the aforementioned testimony of Kellough, Blackwell, Buckler, and Alloway is sufficient to show that the substance at issue was cocaine. *See State v. Freeman*, 185 N.C. App. 408, 414-15, 648 S.E.2d 876, 881-82 (2007) (no plain error where officer with "extensive training and experience" offered lay opinion that substance seized was crack cocaine).[2]

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2. In *State v. Ward*, —— N.C. App. ——, 681 S.E.2d 354, *disc. review allowed*, —— N.C. ——, 686 S.E.2d 153 (2009), this Court speculates that the holding in *Freeman* has either been impliedly overruled or significantly eroded by the North Carolina Supreme Court's decision in *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009), reversing this Court's decision, 189 N.C. App. 640, 649 S.E.2d 79 (2008), for the reasons stated in the dissenting opinion. *Ward*, —— N.C. App. at ——, 681 S.E.2d at 369-71. However, in *Llamas-Hernandez*, the dissent states, "Crack cocaine has a distinctive color, texture, and appearance. While it might be permissible, based upon these characteristics, for an officer to render a lay opinion as to crack cocaine, it cannot be permissible to render such an opinion as to a non-descript white powder [cocaine]." *Llamas-Hernandez*, 189 N.C. App. at 654, 649 S.E.2d at 87. Based on this statement, we believe that *Freeman* is still binding precedent as to an officer's lay opinion identifying

Defendant asserts, however, that his conviction should be reversed because "[d]rug testing reports are testimonial and forensic analyses are not admissible without the testing analyst's testimony." We need not address this argument because we conclude that, even if Aldridge's laboratory report was erroneously admitted, such error was harmless beyond a reasonable doubt in view of the copious—indeed, overwhelming—unchallenged evidence establishing that the substance at issue was crack cocaine.

NO ERROR.

Judges HUNTER, JR. and BEASLEY concur.

STATE OF NORTH CAROLINA v. DAVID JOHN BROWN

No. COA09-841

(Filed 16 February 2010)

Assault— deadly weapon—ethnic animosity—motion to dismiss—sufficiency of evidence—same race

The trial court did not err by failing to dismiss the charge of assault with a deadly weapon with ethnic animosity under N.C.G.S. § 14-3 even though defendant contends that both he and the victim are the same race. Defendant shot at the victim because he was a white man in a relationship with an African-American woman.

Appeal by Defendant from judgment entered 25 February 2009 by Judge L. Todd Burke in Superior Court, Guilford County. Heard in the Court of Appeals 9 December 2009.

Attorney General Roy Cooper, by Deputy Director Caroline Farmer, Victims and Citizens Services, for the State.

Mercedes O. Chut for Defendant-Appellant.

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crack cocaine. Moreover, in *Llamas-Hernandez*, the issue of the admissibility of a law enforcement officer's opinion on the identity of a non-descript white powder was properly for appellate review whereas, in this case, as previously stated, Defendant has not challenged or argued the admissibility of the officers' testimony identifying the substance Defendant sold them as crack cocaine. Consequently, *Llamas-Hernandez* does not control the outcome of this case.

McGEE, Judge.

David John Brown (Defendant) was indicted for assault with a deadly weapon with intent to kill and assault with a deadly weapon with ethnic animosity on 17 November 2008. According to the State's evidence at trial, Defendant twice fired his shotgun at Ray Peterson (Peterson) on 1 July 2008. Peterson was not hit by either shot. At the time of the shooting, Peterson was dating Katherine Richards (Richards), who was Defendant's next-door neighbor. Defendant and Peterson are both white and Richards is African-American.

The evidence for the State tends to show that Defendant and Richards had a history of heated disputes, often over issues such as Richards' dog, or Defendant's belief that Richards' fence encroached on Defendant's property. Richards testified that Defendant

> would throw things at my dog. He would hide behind the tree and hiss at me when I was feeding my dog. He would holler at me that I'd stolen his land and he was going to get me off of it; that I didn't know who his people were.

Defendant's arguments with Richards took on a racial tone that escalated in intensity as time passed. Richards testified that Defendant would call Richards' daughter "n——" as she would exit the school bus, and "say he was going to get her 'n—— gang a—' out of [Richards'] house and off of his land." This kind of conduct continued for at least a year prior to the incident leading to Defendant's arrest. About a week before the incident, Richards "ended up calling the police because [Richards' daughter] came in from hanging out with her friends . . . and [Defendant] did a heil Hitler sign, grabbing his crotch, called all of them n——s and a neighbor across the street heard it and I was just shaking." Richards testified that as she headed into her house, "[Defendant] looked at [Richards] and he said, 'n——, you're dead. You are a dead n——. N——, you're dead.' "

Peterson testified that Defendant

> was never respectful to [Richards]. He was, "Girl, let me tell you this. Girl, this damn dog. This isn't the way its going to work," like he is controlling her. Then he steps up to the black thing. Come on you all blacks. All you blacks are just alike. And then he goes up to the n—— thing.

Peterson testified that Defendant had threatened Richards' life and that: "The week previous [to the incident] [Defendant] told [Richards] she was dead[.]"

Richards testified that she had made prior calls to the police. Officer R.D. Goad of the Greensboro Police Department testified that he had responded to calls at Richards' address on multiple occasions and that Richards had "claimed that [Defendant] had shot at them." Presumably, "them" referred to Richards, Richards' daughter, and Peterson.

On 1 July 2008, Richards went into her yard to feed her dog before leaving to run an errand with her daughter. Defendant began harassing Richards, so she went back into her house and told Peterson, who was visiting at the time. Peterson told Richards and her daughter to go ahead and leave and he went outside to confront Defendant. Peterson walked down Richards' driveway. Peterson testified that Defendant began "spitting at [Peterson] off [Defendant's] back porch[.]" Peterson further testified that Defendant then said "[y]ou doing both them black b——s, ain't you, old man?" Defendant also called Peterson a "n—— lover." Peterson challenged Defendant to come off his porch so they could "settle this[.]" Peterson testified that in response to his challenge, Defendant said, "I got something for your a—[,]" and that Defendant then "went inside and he got that shotgun and he [came] out and he started shooting at me. He shot at me twice."

Peterson testified that he was a Vietnam War veteran, that one of Defendant's shots nearly hit him, and that he was convinced Defendant was trying to shoot him, not just scare him. Peterson went back inside Richards' house. Richards testified that she heard the shots as she was still on the street near her house at the time. Richards and her daughter returned to Richards' house and Richards called the police. Officer Goad responded.

Officer Goad testified that, after speaking with Richards and Peterson, he went to Defendant's house to speak with him. Defendant came to his front door, but he refused to allow Officer Goad into the house to check for weapons. Defendant used racial slurs as he talked about Richards and Peterson. Defendant went back into his house and Officer Goad returned to Richards' house to further question Richards. Officer Goad's assistant, Officer T.A. Boyer, recovered two shotgun shells and wadding from the discharged shells from Defendant's yard. Officer Goad went into Defendant's yard to look at the recovered shells and observed Defendant come out onto his back porch. Officer Goad noticed "a full bandolier of shotgun shells hanging on the back porch." Officer Goad described a bandolier as "kind

of like a *Rambo* thing. If you've seen *Rambo*, the movie, it goes across the front of your chest and you hold the shotgun shells in it."

Officer Goad again questioned Defendant. Defendant denied that he had shot any gun that day. When confronted with the shotgun shells, and an area of Defendant's yard that appeared to have been hit by a shotgun blast, Defendant stated he had been shooting squirrels in the backyard. Officer Goad testified that it violated a city ordinance to "shoot a firearm in the city limits period. And at that time I placed [Defendant] under arrest on my observations of the evidence[.]"

A search warrant was obtained to search Defendant's house, and a search was conducted that night. Officers located a shotgun behind one of Defendant's couches. Defendant testified at trial that he was "making a show of force as to just sitting on the back porch with my weapon." Defendant testified that Peterson "came to the back of the property. No other words were spoke . . . that evening, other than [Peterson asking] 'What are you going to do, shoot at me?' " Defendant testified that he "discharged a round up into the air," and that he then shot another round "into the ground," but not in Peterson's direction. Defendant accused the police of lying about statements he supposedly made that day, and also accused the police of planting inculpatory evidence at the scene.

The jury found Defendant not guilty of assault with a deadly weapon with intent to kill but guilty of assault with a deadly weapon with ethnic animosity. Defendant was sentenced to an active term of six to eight months, with credit given for time served. Defendant appeals.

In his sole argument on appeal, Defendant contends that the trial court erred in failing to dismiss the charge of assault with a deadly weapon with ethnic animosity because the evidence presented at trial was insufficient to support submitting that charge to the jury. We disagree.

" 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted).

> "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. 'Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.' If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then ' "it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty." ' "
>
> "Both competent and incompetent evidence must be considered." In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. The defendant's evidence that does not conflict "may be used to explain or clarify the evidence offered by the State." When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.

Id. at 596-97, 573 S.E.2d at 869 (internal citations omitted).

The crux of Defendant's argument is that the statute under which he was charged cannot apply to the facts presented at trial. Specifically, Defendant argues that because both he and Peterson are of the same race, N.C. Gen. Stat. § 14-3, the ethnic animosity statute, cannot apply. N.C. Gen. Stat. § 14-3 states in relevant part:

> If any Class A1 or Class 1 misdemeanor offense is committed because of the victim's race, color, religion, nationality, or country of origin, the offender shall be guilty of a Class H felony.

N.C. Gen. Stat. § 14-3(c) (2007). Assault with a deadly weapon is a Class A1 misdemeanor. N.C. Gen. Stat. § 14-33(c)(1) (2007).

Defendant argues that because both he and the victim, Peterson, were of the same race, the assault with a deadly weapon could not have been "committed because of the victim's race[.]" This is a ques-

tion of first impression in North Carolina, and our review of other jurisdictions does not reveal guidance directly on point. However, the issue of whether acts committed by one person against another person of the same race or color may be considered discriminatory and the result of racial or ethnic "animosity" has been considered by federal courts in Title VII cases. In *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. N.Y. 2008), the Second Circuit, after a lengthy analysis of relevant law, held that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race" even when the employer and employee are of the same race. *Id.* at 138. The *Holcomb* Court reasoned:

> One of the first cases to address the question, *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205, 208-09 (N.D. Ala. 1973), [decided the question in the negative]. There, a white employee claimed that he was discharged because of his association with black employees. The court decided the plaintiff's claim was not cognizable under the statute. It relied for this conclusion on the text of Title VII itself, which prohibits discriminatory action against an individual "because of *such individual's race*." 42 U.S.C. § 2000e-2(a) (emphasis added). On this view, Title VII does not help those who suffer adverse employment action as a result of association with persons of another race. *See also Adams v. Governor's Comm. on Postsecondary Educ.*, No. C80-624A, 1981 U.S. Dist. LEXIS 15346 at *8-9 (N.D. Ga. Sept. 3, 1981) (rejecting a claim by a white man married to a black woman, because "[n]either the language of the statute nor its legislative history supports a cause of action for discrimination against a person because of his relationship to persons of another race.").
>
> We reject this restrictive reading of Title VII. The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race. All the district judges in this circuit to consider the question, including the district court in this case, have reached that conclusion. *Holcomb*, 2006 U.S. Dist. LEXIS 50437, 2006 WL 1982764 at *9; *Rosenblatt v. Bivona & Cohen, P.C.*, 946 F. Supp. 298, 300 (S.D.N.Y. 1996) ("Plaintiff has alleged discrimination as a result of his marriage to a black woman. Had he been black, his marriage would not have been interracial. Therefore, inherent in his complaint is the assertion that he has suffered racial discrimination

based on his own race."); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975). The Fifth, Sixth, and Eleventh Circuits agree. *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), *vacated in part on other grounds by Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999) ("Title VII prohibits discrimination in employment premised on an interracial relationship."); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999) (holding Title VII applicable to allegation that employee suffered discrimination because he had a biracial daughter); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race.").

Holcomb, 521 F.3d at 139. The *Holcomb* Court stated:

> Holcomb [the plaintiff, who is white] alleges that he was discriminated against, not solely because of his own race, but as a result of his marriage to a black woman. This Court has never ruled on the question of whether Title VII applies in these circumstances. We resolve that question today, and hold that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race.

Id. at 138. Holcomb was an assistant men's basketball coach at Iona College. According to Holcomb's complaint, prior to his firing, two Iona administrators—the Athletics Director and a Vice-President—had made multiple offensive comments about Holcomb's wife, and they had taken actions that suggested racial bias. One particularly offensive comment attributed to one of the administrators was a statement directed at Holcomb before he married: " '[Y]ou're really going to marry that Aunt Jemima? You really are a [n——] lover.' " *Id.* at 134. It was the comments made, and actions taken, by the administrators upon which the Second Circuit based its determination that Holcomb had made out a *prima facie* case of employment discrimination based upon *his* race, even though he was of the same race as the two administrators. *Id.* at 140.

We note that in *Holcomb*, just as in the case before us, a defendant called the alleged victim a "n—— lover" before taking allegedly illegal race-based action. This is relevant because it is the alleged victim's race that is at issue. It is possible that no illegal race-

based action would have occurred in either case had the victims been African-American, instead of white, because then there would have been no interracial relationships.

The Second Circuit and other jurisdictions, cited in *Holcomb*, have determined that the possibility that a white defendant took action against another white person based upon that defendant's bias against interracial relationships can constitute discrimination based upon race, even though both the defendant and the victim are of the same race. "[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Holcomb*, 521 F.3d at 139.

> The Sixth Circuit explained why an associational discrimination claim is based on the plaintiff's race in *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988 (6th Cir. 1999). In *Tetro*, a white former employee brought a Title VII action alleging that his former employer discriminated against him because he had a bi-racial child. The circuit court explained:
>
> "If he had been African-American, presumably the dealership would not have discriminated because his daughter would also have been African-American. Or, if his daughter had been Caucasian, the dealership would not have discriminated because Tetro himself is Caucasian. So the essence of the alleged discrimination in the present case is the contrast in races between Tetro and his daughter. This means that the dealership has been charged with reacting adversely to Tetro because of Tetro's race in relation to the race of his daughter. The net effect is that the dealership has allegedly discriminated against Tetro because of his race." *Id.* at 994-95.

Floyd v. Amite County Sch. Dist., 581 F.3d 244, 250 (5th Cir. Miss. 2009). *Tetro* accordingly held that the discharge of the plaintiff-employee violated Title VII. *Tetro*, 173 F.3d at 995; *see also Ventimiglia v. Hustedt Chevrolet*, 2009 U.S. Dist. LEXIS 24834, 32-33 (E.D.N.Y. Mar. 25, 2009) ("[A] jury could conclude that [the plaintiff] was subject to a hostile work environment [from his male employer] because of his sex. In other words, but for his sex, male, his relationship with his co-worker, female, construing all facts most favorably to him as the non-movant, would not have been an issue.").

Similar discrimination claims have been recognized in a Section 1981, 42 U.S.C. § 1981(a)[1], context.

> It is well-settled that a claim of discrimination based on an interracial relationship or association is cognizable under Section 1981. *See*, e.g., *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 890 (11th Cir. 1986) (a claim of discrimination based upon an interracial marriage is cognizable under Section 1981); *Fiedler v. Marumsco School*, 631 F.2d 1144, 1150 (4th Cir. 1980) (a white student expelled from school for allegedly dating a black student had standing to sue under Section 1981); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312 (2d Cir. 1975) (a white man who was discriminated against because he sold his house to a black person has standing to sue under Section 1981); and *Faraca v. Clements*, 506 F.2d 956 (5th Cir.), *cert. denied*, 422 U.S. 1006, 45 L. Ed. 2d 669, 95 S. Ct. 2627 (1975) (Section 1981 proscribes discrimination based on an interracial marriage). Moreover, *Adams v. Governor's Comm. on Postsecondary Educ.*, 26 Fair Empl. Prac. Cas. (BNA) 1348, 1981 WL 27101 at *3 (N.D. Ga. Sept. 3, 1981), a case relied on by defendant in its Title VII argument, held that plaintiff also had standing to sue under Section 1981.

Rosenblatt v. Bivona & Cohen, P.C., 946 F. Supp. 298, 300 (S.D.N.Y. 1996).

In the case before us, the State argues on appeal that N.C. Gen. Stat. § 14-3(c) applies because not only Peterson, but also Richards, was a victim of Defendant's actions. According to the State's argument, Richards was a victim because Richards is African-American and Defendant had a history of racist behavior towards Richards; thus, Defendant's acts on 1 July 2008 are properly understood as having been committed because of the victim's race or color. We reject this argument. Richards was on the street near her house in her vehicle at the time of the shooting. Though Richards undoubtedly suffered emotional distress due to Defendant's actions, she was not the victim of any assault with a deadly weapon; however, Peterson was.

The trial court, in denying Defendant's motion to dismiss, stated:

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1. "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

> [Defendant's] [c]ounsel stated that the statute calls for the attack to be . . . motivated by race. In that sense the alleged victim is a white male and the defendant is a white male, that the statute did not apply. However, the facts bear out as alleged by the State that although there are two white males involved, the attack on the alleged victim was because of his relationship with a black female.

We agree with the trial court's analysis on the facts of this case. First, the bill enacted by the General Assembly amending N.C. Gen. Stat. § 14-3 to include the relevant provision was titled: "An Act to Provide Increased Sentences for Crimes Committed with Ethnic Animosity." There is nothing in either the language of N.C. Gen. Stat. § 14-3, or the title of the bill, to suggest the General Assembly intended a narrow construction of what constituted "ethnic animosity" or acts "committed because of the victim's race or color."

When viewed in the light most favorable to the State, Defendant shot at Peterson because Peterson was a white man in a relationship with an African-American woman. Had Peterson been an African-American, Defendant might not have shot at Peterson. Therefore, the jury could reasonably find that Defendant only shot at Peterson because Peterson was white, and Defendant was acting out his disgust with, or anger towards, Peterson because of Peterson's relationship with a woman of a different race or color. Guided by the intent of the General Assembly in enacting N.C. Gen. Stat. § 14-3, which we interpret as a general intent to provide for enhanced sentences for certain crimes committed based on "ethnic animosity," and further guided by the federal case law cited above, we hold that the trial court did not err in denying Defendant's motions to dismiss. This argument is without merit.

No error.

Judges STEELMAN and STEPHENS concur.

SARAH ISADORA McKOY, PLAINTIFF v. WILLIS EUGENE McKOY, DEFENDANT

No. COA09-447

(Filed 16 February 2010)

Guardian and Ward— jurisdiction—custody of incompetent adult

The trial court erred by denying plaintiff's motion to dismiss the parties' custody action, which was part of their larger divorce and equitable distribution action, for lack of jurisdiction under Chapter 50. After the clerk of superior court adjudicated the parties' adult child an incompetent adult under Chapter 35A, the clerk retained exclusive jurisdiction to resolve all disputes regarding guardianship. The district court obtains jurisdiction under N.C.G.S. § 50- 13.8 to determine custody only when the disabled adult child at issue has not been declared incompetent and had a guardian appointed. The parties should have filed a motion in the cause under N.C.G.S. § 35A-1207(a) with the clerk in order to resolve the dispute in accordance with N.C.G.S. § 35A-1203(c).

Appeal by plaintiff from orders entered 5 September 2006 and 19 March 2007 by Judge Chester C. Davis in Forsyth County District Court. Heard in the Court of Appeals 4 November 2009.

Robinson & Lawing, LLP, by Michelle D. Reingold, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

HUNTER, Robert C., Judge.

This appeal arises out of a custody dispute in district court between plaintiff Sarah Isadora McKoy and defendant Willis Eugene McKoy regarding their daughter T.M., who was previously adjudicated an incompetent adult by the clerk of superior court under Chapter 35A of the General Statutes. Plaintiff appeals from the trial court's orders (1) denying plaintiff's motion to dismiss for lack of subject-matter jurisdiction and (2) granting joint custody of T.M. to plaintiff and defendant. Plaintiff's sole contention on appeal is that the trial court should have dismissed the parties' custody action, which was part of their larger divorce and equitable distribution action, for lack of jurisdiction under Chapter 50 because, after the clerk of superior court adjudicated T.M. incompetent under Chapter 35A, the clerk retained exclusive jurisdiction to resolve all disputes regarding cus-

tody of T.M. We agree with plaintiff's contention, and, accordingly, reverse the trial court's order denying plaintiff's motion to dismiss and vacate the court's custody order.

Facts

Plaintiff and defendant were married on 29 March 1975. While married the McKoys had two children, M.M., born 1 July 1976, and T.M., born 4 March 1980. T.M. suffers from cerebral palsy, severe mental retardation, scoliosis, chronic kidney disease, high blood pressure, and vision problems. On 25 March 1998, after T.M.'s 18th birthday, the McKoys jointly petitioned the clerk of superior court to declare T.M. incompetent and to appoint both plaintiff and defendant as her guardians under Chapter 35A. On 9 April 1998, the clerk entered an order adjudicating T.M. as being an incompetent adult and finding that she should be appointed a guardian. In another order entered the same day, the clerk appointed both plaintiff and defendant as T.M.'s joint guardians.

Roughly six years later, on 20 February 2004, plaintiff and defendant separated. On 30 April 2004, plaintiff filed a complaint under Chapter 50 seeking equitable distribution, post-separation support and alimony, and joint legal custody and primary physical custody of T.M. (who was then 24). On 25 June 2004, defendant filed an answer and counterclaim, also seeking custody of T.M. Their divorce was finalized on 23 May 2005.

The trial court conducted a hearing on the issue of custody on 23-24 March 2006, which was continued until 20 April 2006. On 20 April 2006, prior to plaintiff finishing presenting her evidence in the custody hearing, plaintiff filed a motion to dismiss the Chapter 50 custody action, asserting that the clerk of superior court retained exclusive jurisdiction over T.M.'s guardianship under Chapter 35A and thus the trial court lacked jurisdiction to adjudicate the custody action. Plaintiff requested in the alternative that a guardian *ad litem* be appointed for T.M. pursuant to Rule 17(b) of the Rules of Civil Procedure.

In an order entered 5 September 2006, the trial court denied plaintiff's motion to dismiss but appointed T.M. a guardian *ad litem*. After concluding the custody hearing on 9 February 2007, the trial court entered an order on 19 March 2007, finding that it had subject-matter jurisdiction and awarding plaintiff and defendant joint legal custody of T.M., with plaintiff having custody 60% of the time and defendant

having custody 40% of the time. A final equitable distribution judgment was entered 2 September 2008. On 17 December 2008, plaintiff voluntarily dismissed her claim for post-separation support and alimony and appealed to this Court from the trial court's 5 September 2006 order denying her motion to dismiss and the court's 19 March 2007 custody order.

Discussion

Plaintiff's sole argument on appeal is that the trial court lacked subject-matter jurisdiction to determine custody of T.M. Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal. *Harper v. City of Asheville*, 160 N.C. App. 209, 213, 585 S.E.2d 240, 243 (2003). Subject-matter jurisdiction "involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130, *disc. review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law. *In re Peoples*, 296 N.C. 109, 144, 250 S.E.2d 890, 910 (1978), *cert. denied sub nom. Peoples v. Judicial Standards Comm'n of N.C.*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). "When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened." *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970). Thus the trial court's subject-matter jurisdiction may be challenged at any stage of the proceedings. *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006).

Here, the trial court determined that it had subject-matter jurisdiction under Chapter 50 to enter its custody order. Plaintiff contends, however, that once the clerk of superior court obtained jurisdiction to adjudicate T.M. as an incompetent adult and appointed plaintiff and defendant as her guardians under Chapter 35A, any modification of T.M.'s custody required filing a motion in the cause with the clerk under Chapter 35A rather than filing an action for custody in district court under Chapter 50. Issues of statutory construction are questions of law, reviewed de novo on appeal. *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 264, 664 S.E.2d 569, 575 (2008).

Chapter 35A "establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child." N.C. Gen. Stat. § 35A-1102 (2009). Pursuant to N.C. Gen. Stat.

§ 35A-1103(a) (2009), the clerk of superior court "ha[s] original jurisdiction over proceedings" determining competency. Here, as a result of a hearing conducted pursuant to N.C. Gen. Stat. § 35A-1112 (2009), T.M. was declared an "incompetent adult."[1]

After an adjudication of incompetence, N.C. Gen. Stat. § 35A-1203 (2009) provides the clerk with "original jurisdiction for the appointment of guardians of the person, guardians of the estate, or general guardians for incompetent persons and of related proceedings . . . ." In appointing a guardian, the clerk may conduct a hearing and receive evidence regarding, among other things, "[t]he nature and extent of the needed guardianship," N.C. Gen. Stat. § 35A-1212(a) (2009), and issue letters of appointment specifying the "powers and duties of the guardian or guardians," N.C. Gen. Stat. § 35A-1215(b) (2009). N.C. Gen. Stat. § 35A-1241 (2009) specifies the "powers and duties" of guardians of the person, including:

> (1) *The guardian of the person is entitled to custody of the person of the guardian's ward* and shall make provision for the ward's care, comfort, and maintenance, and shall, as appropriate to the ward's needs, arrange for the ward's training, education, employment, rehabilitation or habilitation. . . .
>
> (2) The guardian of the person may establish the ward's place of abode within or without this State. . . .

N.C. Gen. Stat. § 35A-1241(1)-(2) (emphasis added). Here, the clerk issued letters of appointment naming both plaintiff and defendant as T.M.'s "guardian[s] of the person" and authorizing them "to have . . . custody, care and control of [T.M.]"

With respect to authority over guardians of incompetent persons, N.C. Gen. Stat. § 35A-1203 provides:

> (b) The clerk shall retain jurisdiction following appointment of a guardian in order to assure compliance with the clerk's orders and those of the superior court. The clerk shall have authority to remove a guardian for cause and shall appoint a successor guardian . . . . after removal, death, or resignation of a guardian.

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1. Chapter 35A defines an "incompetent adult" as "an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C. Gen. Stat. § 35A-1101(7) (2009).

(c) *The clerk shall have authority to determine disputes between guardians* and to adjust the amount of the guardian's bond.

N.C. Gen. Stat. § 35A-1203(b)-(c) (emphasis added). Chapter 35A also allows "[a]ny interested person [to] file a motion in the cause with the *clerk* . . . to request modification of the order appointing a guardian or guardians or *consideration of any matter pertaining to the guardianship*." N.C. Gen. Stat. § 35A-1207(a) (2009) (emphasis added).

Reading Chapter 35A's provisions *in pari materia*, *see Redevelopment Commission v. Bank*, 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."), we conclude that the clerk of superior court is the proper forum for determining custody disputes regarding a person previously adjudicated an incompetent adult and who has been provided a guardian under Chapter 35A. The Chapter provides that the clerk has the authority to appoint guardians for incompetent persons, N.C. Gen. Stat. § 35A-1203, and to specify the guardians' powers and duties, including custody of the person declared incompetent, N.C. Gen. Stat. § 35A-1241. Chapter 35A further specifies that the clerk retains jurisdiction to ensure compliance with "the clerk's orders and those of the superior court" and to "determine disputes between guardians." N.C. Gen. Stat. § 35A-1203(b), (c). In addition, interested parties are directed to file a motion in the cause with the clerk for "consideration of any matter pertaining to the guardianship." N.C. Gen. Stat. § 35A-1207(a).

The custody dispute between plaintiff and defendant—T.M.'s guardians who have already been granted custody of T.M.—is a "matter pertaining to the guardianship." The parties, therefore, should have filed a motion in the cause under § 35A-1207(a) with the clerk in order to resolve the dispute in accordance with § 35A-1203(c).

Although the trial court acknowledged that the clerk had jurisdiction over "issues of guardianship" in this case and that the court did not "ha[ve] any jurisdictional authority to become mixed up in a guardianship quarrel," the court reasoned that Chapter 50 provided jurisdiction to enter a custody order in the parties' divorce proceedings:

In reading [N.C. Gen. Stat. § 50-13.5 (2009)] and [N.C. Gen. Stat. § 50-13.8 (2009),] it would appear that the legislature set into

> motion[] procedures for the court to hear a case identical to this and that this court would have exclusive jurisdiction to do so.

Thus the court concluded that the parties were permitted to "proceed[] in a custody matter in District Court to determine who would get custody and visitation of the minor child." The flaw in the trial court's reasoning is that the custody of a "minor child" is not at issue in this case: at the time she was adjudicated incompetent as well as at the time the trial court entered its custody order, T.M. was an adult.

Chapter 50 is titled "Divorce and Alimony." Within Chapter 50 is Article 1: "Divorce, Alimony, and Child Support, Generally." Article 1 includes N.C. Gen. Stat. §§ 50-13.1 through 50-13.12 (2009), provisions relating to child support and custody. N.C. Gen. Stat. § 50-13.1(a), the provision establishing a cause of action for child custody, provides in pertinent part: "Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a *minor child* may institute an action or proceeding for the custody of such child, as hereinafter provided. . . ." (Emphasis added.) This statute, by its plain terms, provides for an action for custody of a "minor child" only.

In its order denying plaintiff's motion to dismiss, the trial court relied on N.C. Gen. Stat. § 50-13.5, concluding that it provided the district court with jurisdiction over "*all* custody matters." (Emphasis added.) The plain language of the statute, however, does not support such an expansive interpretation. N.C. Gen. Stat. § 50-13.5 only provides for the "procedure in actions for custody and support of *minor children* . . . ." N.C. Gen. Stat. § 50-13.5(a). The statute also lists the "[t]ype[s]" of custody actions that may be maintained under N.C. Gen. Stat. § 50-13.5, none of which reference custody of an adult that has been adjudicated incompetent and provided a guardian under Chapter 35A. N.C. Gen. Stat. § 50-13.5(b).

The trial court also concluded that it had jurisdiction under N.C. Gen. Stat. § 50-13.8, which provides: "For the purposes of custody, the rights of a person who is mentally or physically incapable of self-support upon reaching his majority shall be the same as a minor child for so long as he remains mentally or physically incapable of self-support." The plain language of § 50-13.8 provides that the district court has jurisdiction to enter a custody order involving a disabled adult child. *See Speck v. Speck*, 5 N.C. App. 296, 303, 168 S.E.2d 672, 678 (1969) (holding under prior version of statute providing for support as well as custody that trial court had authority to enter custody and support order although disabled child had attained majority).

Thus the district court has concurrent jurisdiction with the clerk of superior court with respect to custody of disabled adult children. Here, for instance, plaintiff and defendant could have decided not to have T.M. declared an incompetent adult and the district court, in resolving the parties' other claims under Chapter 50, would have had jurisdiction under § 50-13.8 to determine custody of T.M. Chapter 35A, however, unequivocally provides that the clerk of superior court has exclusive jurisdiction over guardianship matters. Once the clerk of superior court exercised its jurisdiction under Chapter 35A, adjudicating T.M. an incompetent adult and providing a guardian, the clerk retained jurisdiction to resolve all matters pertaining to the guardianship. *See In re Greer*, 26 N.C. App. 106, 112, 215 S.E.2d 404, 408 (1975) ("It is the general rule that where there are courts of concurrent jurisdiction, the court which first acquires jurisdiction retains it."), *superseded on other grounds by statute as recognized in Taylor v. Robinson*, 131 N.C. App. 337, 508 S.E.2d 289 (1989); *In re James S.*, 86 N.C. App. 364, 365-66, 357 S.E.2d 430, 431-32 (1987) (holding that district court's jurisdiction over abuse, dependency, and neglect proceedings is in "abeyance" once adoption petition was filed in superior court, which had exclusive jurisdiction over adoption proceedings).

We conclude that the district court obtains jurisdiction under § 50-13.8 to determine custody only when the disabled adult child at issue has not been declared incompetent and had a guardian appointed. While the superior court clerk retains jurisdiction over all guardianship matters under Chapter 35A, obviously not all disabled adult children are declared incompetent and provided guardians. In those instances, § 50-13.8 fills the gap, authorizing the district court to determine custody. As the clerk in this case had exercised its jurisdiction under Chapter 35A—to the exclusion of the district court under N.C. Gen. Stat. § 50-13.8—it retained jurisdiction to resolve the parties' dispute regarding custody of T.M. Thus, the parties were required to file a motion in the cause with the clerk to resolve the dispute. As the trial court in this case lacked jurisdiction to determine custody of T.M., we reverse the court's order denying plaintiff's motion to dismiss and vacate its custody order.

Reversed in part and vacated in part.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA v. DWIGHT LAMAR PAIGE, DEFENDANT

No. COA09-563

(Filed 16 February 2010)

1. Evidence— motion to suppress—drugs—timeliness—notice

The Court of Appeals analyzed defendant's in-court objections as a motion to suppress in a drugs case and concluded that the trial court did not err by denying the motion on the grounds that it was not timely. The State provided defendant with sufficient notice, approximately seven weeks, which was more than the required 20 workings days under N.C.G.S. § 15A-975(b).

2. Constitutional Law— effective assistance of counsel—failure to file timely written motion to suppress

Defendant did not receive ineffective assistance of counsel in a drugs case based on his trial attorney's failure to file a timely written motion to suppress. It would have made no difference in the outcome of the case since the trial court resolved the factual and legal issue raised by defendant's objections.

On writ of certiorari to review judgment entered on or about 27 April 2007 by Judge Jack A. Thompson in Superior Court, Columbus County. Heard in the Court of Appeals 15 October 2009.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Lars F. Nance, for the State.

Duncan B. McCormick, for defendant-appellant.

STROUD, Judge.

Defendant was convicted by a jury of trafficking in cocaine by transportation, trafficking in cocaine by possession, possession with intent to sell and deliver more than 1 ½ oz of marijuana, and carrying a concealed handgun. Defendant filed a "Petition for Writ of Certiorari" as to his two trafficking charges; this Court allowed the petition. Defendant argues the trial court erred in denying his motion to suppress and thereby admitting "the evidence seized from his car" and "his pretrial statements." (Original in all caps.) Defendant also claims ineffective assistance of counsel as his trial attorney did not file a written motion to suppress. For the following reasons, we find no error.

I. Background

The State's evidence tended to show that on 15 March 2006, Ms. Bonnie Gore and her brother, defendant, needed to get his white Caprice aligned. Defendant came to Ms. Gore's house, and they switched cars. Ms. Gore drove defendant's white Caprice, and defendant drove a black car that was at Ms. Gore's house. Ms. Gore and defendant came upon a license check point, and defendant motioned for Ms. Gore to turn around because at the time she was 15 and did not have a license. Ms. Gore began to turn around in a yard when Detective William Little of the Columbus County Sheriff's Office pulled in behind her. Detective Little asked Ms. Gore if he could search the white Caprice she was driving. Ms. Gore testified that she told Detective Little to ask defendant as it was his car, but Detective Little testified Ms. Gore told him he could search the white Caprice.

Detective Little then searched the trunk and found "a large quantity of marijuana[.]" Detective Little also found "a set of digital scales, approximately ten more baggies of marijuana, and a large amount of powder cocaine, about two ounces of it." Detective Little had Deputy Brian Smith of the Columbus County Sheriff's Office detain defendant. Defendant repeatedly asked Deputy Smith if he could go to Ms. Gore. Deputy Smith asked if he could search the black car defendant was driving, and defendant consented and informed Deputy Smith there was a gun under the driver's seat. Deputy Smith found the gun. Meanwhile, after being read her Miranda rights, Ms. Gore wrote a statement which read, "My brother came to my home to get me so I could follow him to get one of his cars aligned up. And then that stuff in trunk, I didn't know nothing about it."

Deputy Smith took defendant to Detective Little. Defendant was read his Miranda rights, and he informed Detective Little that the items in the trunk were his and not Ms. Gore's items. Defendant further informed Detective Little of how he had purchased the drugs and apologized to Ms. Gore. Defendant was eventually taken to the Law Enforcement Center where he was read his Miranda rights again. Defendant also provided and signed the following statement:

> The following is a statement prepared by Detective William Heath Little of the Columbus County Sheriff's Office detailing an interview conducted with Dwight Lamar Paige at the Columbus County Law Enforcement Center. On Monday week I purchased one pound of marijuana and two ounces of cocaine from a friend of mine named Tyron (sic) from South Carolina and another male

> Tyron (sic) referred to as Black. I met the two individuals at the car wash in Tabor City. I gave Tyrone (sic) Thirty Five Hundred Dollars and he gave me the pound of marijuana and two ounces of cocaine. The deal took place in a blue Acura that the male called Black was driving. The narcotics have been inside my white Caprice from the purchase from these two individuals. One [sic] 3/15/06, I went to my mother's residence and asked my sister, Bonnie, if she would drive the Caprice to the shop to get it repaired. The black Cutlass I was driving today was already parked at my mom's house—my mother's house. We were traveling on Peacock Road when I saw the officers standing in the road and motioned for them—out the window for her to turn around. I then proceeded on to where the officers were standing. My sister, Bonnie, had no knowledge of what was inside the trunk. The marijuana and cocaine found in the trunk was mine. Dwight Paige, 3/15/06.

On or about 15 May 2006, defendant was indicted for trafficking in cocaine by transportation, trafficking in cocaine by manufacturing, trafficking in cocaine by possession, possession with intent to sell and deliver marijuana, and carrying a concealed gun. Defendant was convicted by a jury of trafficking in cocaine by transportation, trafficking in cocaine by possession, possession with intent to sell and deliver more than 1 ½ oz of marijuana, and carrying a concealed handgun. For the two trafficking in cocaine convictions, defendant was sentenced to 35 to 42 months imprisonment. For the possession of marijuana and carrying a concealed handgun convictions, defendant received a suspended sentence requiring 24 months of supervised probation. Defendant filed a "Petition for Writ of Certiorari" as to his two trafficking charges; this Court allowed the petition. Defendant argues the trial court erred in denying his motion to suppress and thereby admitting "the evidence seized from his car" and "his pretrial statements." (Original in all caps.) Defendant also claims ineffective assistance of counsel as his trial attorney did not file a written motion to suppress. For the following reasons, we find no error.

II. Defendant's Objections

[1] At trial, defendant's attorney objected to the admission of (1) the evidence found inside the trunk, including Ms. Gore's and Detective Little's testimony regarding that evidence, and (2) defendant's oral and written pre-trial statements, including Deputy Smith's and Detective Little's testimony regarding those statements. During Ms.

Gore's testimony, she was asked, "When [Detective Little] opened the trunk, did you see what was inside?" Bonnie responded, "No[,]" but was cut off from finishing her statement when defendant's attorney objected. The trial court had the jury leave the room and asked defendant's attorney his grounds for the objection. Mr. Dorman, defendant's attorney, responded,

> Judge, I have reason to—you've got to have permission or reason to do the search. She said he asked for permission and she said permission is not mine to give. And then asked her what she saw when he opened the trunk. Judge, they can't open the trunk unless he has permission or a warrant, it's unconstitutional[.]

Detective Little and Ms. Gore were then both extensively questioned on *voir dire*. The State's attorney, Ms. Freedman, then argued that defendant was improperly bringing a motion to suppress during the trial. Mr. Dorman then explained why he had not filed a motion to suppress prior to the trial:

> If I could see the court file. Judge, I just wanted to make sure—this case went through the case management system. In looking back through my notes the first time that I saw it was scheduled for trial was March 16th. Just wanted to see if there was a scheduling order for that, your Honor.
>
> Your Honor, this matter was scheduled for trial on January 16th. That day came and went. The defendant was here, ready for trial and then it went to February. That date came and went and we were ready for trial.
>
> Then eight days before the March trial date, the State serves me with notice and these statements. The first time I got them and it was on March 6th. The trial date in March was March 19th. North Carolina 15A-97-22, anyway concerning the statement says that if you are served less than 20 working days before trial, you do it at trial. Judge, I was served—assuming they're not going back to January, assuming that you—if you get served it is just going toward the next trial. I got served on March 6th, which was eight working days before and less than 20, so I'm at trial. Got served on March 6th, I'm at trial on March 19th. He was on the trial calendar, we were ready to go—
>
> COURT: But you're not at trial.
>
> MR. DORMAN: Sir?
>
> COURT: You were not at trial, it was not tried.

MR. DORMAN: It was not tried. So I've got ten days to file a motion and the ten days run out before the trial week is over. Again, if you want to say that when you get served it's talking about the next court date, Judge, I say it's talking about the original court date. And I was never served with any of this until two months after the first court date. I get served less than 20 days before trial, so I can make it at trial on March 19th if you say it starts running then but the ten days runs out during the middle of trial week. So, Judge, my main contention is that this is about original trial dates. Never got any information before the original trial date, never requested any information before the original trial date.

COURT: Is it not true that you have yet to file a motion to suppress?

MR. DORMAN: Yes, sir.

COURT: And you have known about this how long?

MR. DORMAN: Know about the case?

COURT: Known about the evidence.

MR. DORMAN: Well known about the evidence days after the start, your Honor, was served on March—was served almost a year later with the evidence.

The trial court then concluded,

I'm prepared to rule at this time. The Court finds that the defendant was properly noticed at least 20 working days before trial of the intention to use the evidence in question. That no motion to suppress was filed or has been filed—has yet to be filed. That the motion is—to suppress or the objection to the evidence is untimely.

In addition to that, the Court finds based upon the proffered evidence that there was consent to search in this case and I will enter proper findings of facts and conclusions of law when I have the opportunity to do so. Let's bring the jury back.

Thus, the trial court allowed Ms. Gore to testify as to what she saw in the trunk. Later, during Detective Little's testimony, defendant again repeatedly objected and was overruled regarding testimony and exhibits involving the evidence found in the car.

Defendant also objected to the admission of his pre-trial statements or testimony regarding his statements by Deputy Smith and Detective Little. During Detective Little's testimony, defendant expressed his objections outside of the presence of the jury. Defendant's attorney made essentially the same argument as he had made regarding the evidence found in the trunk, and the trial court concluded, "Let the record show that this trial was begun during the April 23, 2007 session of Superior Court for Columbus County. Jury selection began on the 25th of April, 2007. Today is the 26th day of April, 2007. There has yet to be any motion to suppress filed of record. Objection to the statement is overruled."

Thus, defendant's objections regarding the evidence found in the car and defendant's statements were overruled, presumably on the grounds that the trial court had already deemed the "motion to suppress" such evidence as untimely. Furthermore, both defendant and the State's briefs' arguments are based upon law regarding motions to suppress. Therefore, though no formal motion to suppress was filed nor during trial did defendant initially characterize his objections as a motion to suppress, we will analyze defendant's in-court objections as a motion to suppress.

III. Motion to Suppress

"It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. The trial court's conclusions of law, however, are fully reviewable." *State v. Green*, —— N.C. App. ——, ——, 670 S.E.2d 635, 637 (citation omitted), *affirmed per curiam*, 363 N.C. 620, 683 S.E.2d 208 (2009). N.C. Gen. Stat. § 15A-975 provides:

> (a) In superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c).
>
> (b) A motion to suppress may be made for the first time during trial when the State has failed to notify the defendant's counsel or, if he has none, the defendant, sooner than 20 working days before trial, of its intention to use the evidence, and the evidence is:

(1) Evidence of a statement made by a defendant;

(2) Evidence obtained by virtue of a search without a search warrant; or

(3) Evidence obtained as a result of search with a search warrant when the defendant was not present at the time of the execution of the search warrant.

(c) If, after a pretrial determination and denial of the motion, the judge is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, he may permit the defendant to renew the motion before the trial or, if not possible because of the time of discovery of alleged new facts, during trial.

When a misdemeanor is appealed by the defendant for trial de novo in superior court, the State need not give the notice required by this section.

N.C. Gen. Stat. § 15A-975 (2005). Thus,

> [a] defendant may move to suppress evidence once trial proceedings have commenced (1) if he did not have a reasonable opportunity to make the motion before trial, or (2) if the State has not given the defendant sufficient advance notice of its intention to use the evidence, or (3) when additional facts are discovered after a pre-trial motion has been denied that could not have been discovered with reasonable diligence before.

State v. Austin, 111 N.C. App. 590, 598, 432 S.E.2d 881, 886 (1993) (citation and quotation marks omitted).

Defendant's trial began on 25 April 2007. Defendant was notified of the State's intent to use the evidence on 6 March 2007. Thus, the State provided defendant with sufficient notice as defendant had approximately seven weeks of notice, certainly more than the required "20 working days[.]" *See* N.C. Gen. Stat. § 15A-975(b). Furthermore, defendant has not explained why he delayed in filing a motion to suppress or indicated that additional facts were discovered. Therefore, we conclude that the trial court did not err in denying defendant's motion to suppress on the grounds that it was not timely. *See State v. Jones*, 157 N.C. App. 110, 114, 577 S.E.2d 676, 679 (2003) ("[D]efendant's objection at trial to the admissibility of the evi-

dence is without merit because the objection, treated as a motion to suppress, was not timely made. We therefore overrule this assignment of error." (citation omitted)). This argument is overruled.

IV. Ineffective Assistance of Counsel

[2] Lastly, defendant contends that he received ineffective assistance of counsel due to his trial attorney's failure to file a timely written motion to suppress.

> To obtain relief for ineffective assistance of counsel, the defendant must demonstrate initially that his counsel's conduct fell below an objective standard of reasonableness. The defendant's burden of proof requires the following:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
> >
> > The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Quick, 152 N.C. App. 220, 222, 566 S.E.2d 735, 737, (citations and quotation marks omitted), *disc. review denied and appeal dismissed*, 356 N.C. 311, 570 S.E.2d 896 (2002).

Here, after determining that defendant's motion to suppress was untimely, the trial court also stated, "In addition to that, the Court finds based upon the proffered evidence that there was consent to search in this case and I will enter proper findings of facts and conclusions of law when I have the opportunity to do so. Let's bring the jury back." During sentencing, the trial court again noted that defendant's motion to suppress was untimely and stated "[t]hat in view of the foregoing the Court sees no necessity to enter a formal order concerning the brief voir dire relative to the search of the defendant's automobile nor the admission of the defendant's statements, both written and oral."

The State argued before the trial court and on appeal that defendant had no standing to contest Ms. Gore's consent to search the car; however, even if we assume *arguendo* that defendant did have standing to bring a motion to suppress Ms. Gore's consent, it is apparent that the trial court found Detective Little's testimony regarding consent to be more credible than that of Ms. Gore. In addition, despite defense counsel's failure to file a timely motion to suppress, the trial court considered defendant's objections and gave him a full opportunity to conduct *voir dire* and to make his arguments that evidence from the search should be suppressed. Although the trial court should have entered more findings of fact and conclusions of law, we are able to determine from the trial court's statement "that there was consent to search in this case" that the trial court resolved the factual and legal issue raised by defendant's objections. As the trial court found that there was consent for the search, a timely written motion to suppress would have made no difference in the outcome of the case. Accordingly, this argument is overruled.

V. Conclusion

For the foregoing reasons, we conclude that the trial court did not err in denying defendant's motion to suppress and defendant did not demonstrate a reasonable probability that the outcome of the case would have been different had a timely written motion to suppress been filed.

NO ERROR.

Judges STEPHENS and BEASLEY concur.

STATE OF NORTH CAROLINA v. HOBEY GLENN WHITE, DEFENDANT

No. COA09-119

(Filed 16 February 2010)

Indictment and Information— habitual impaired driving— amendment—look-back period—surplusage

The amendment of an habitual impaired driving indictment to change the "look-back" period from seven to ten years did not fundamentally change the nature of the charge against defendant. The original indictment alleged that defendant had three prior

convictions in seven years, although only one was actually within the seven year period. However, all three were within ten years, as required by the amended statute, and the look-back language in the indictment was surplusage.

Appeal by defendant from judgment entered 23 July 2008 by Judge Kenneth F. Crow in Craven County Superior Court. Heard in the Court of Appeals 19 August 2009.

Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

GEER, Judge.

Defendant Hobey Glenn White appeals his habitual impaired driving conviction, contending that the trial court erred in permitting the State to amend the indictment. The original indictment referred to defendant's having three prior driving while impaired ("DWI") convictions in seven years. Although seven years had previously been the "look-back" period set forth in the habitual impaired driving statute, the statute was amended prior to the date of defendant's offense to provide for a 10-year look-back period. We hold that because the original indictment at all times alleged the essential elements of habitual impaired driving under N.C. Gen. Stat. § 20-138.5 (2009)—three prior DWI convictions within 10 years of the charged offense—the language mistakenly referencing seven years was surplusage. Consequently, the amended indictment did not amount to a substantial alteration, and the trial court did not err in allowing the State to amend the indictment.

Facts

At trial, the State's evidence tended to show the following. On 2 September 2007, at around 10:00 a.m., Deputy H.R. Orr with the Craven County Sheriff's Office was patrolling when he saw a 1982 GMC pickup truck sitting idle behind a Food Lion grocery store. The deputy observed the car's driver and sole occupant—later identified as defendant—drinking out of a wine bottle. When defendant noticed the deputy, he put the bottle down and drove away. The deputy pulled defendant over and subsequently arrested him for DWI. A chemical breath analysis indicated that defendant had a blood alcohol content of .12.

Defendant was indicted for DWI, habitual impaired driving, and driving with a revoked license. At the close of the State's evidence, defendant moved to dismiss the charges against him. The trial court dismissed the charge of driving with a revoked license, but denied defendant's motion to dismiss the DWI charge. Defendant presented no evidence and again unsuccessfully moved to dismiss the DWI charge. Defendant then stipulated that he had three prior DWI convictions. The jury convicted defendant of misdemeanor DWI.

Following the jury's verdict, defendant moved to have the trial court dismiss or arrest judgment on the charge of habitual impaired driving and enter judgment on misdemeanor DWI. Defendant pointed out that while the indictment recited a look-back period of seven years, the list of convictions in the indictment only included two convictions that fell within that seven-year period. The third conviction alleged in the indictment was more than seven years, but less than 10 years, prior to the charged offense. In response, the State moved to amend the indictment.

The trial court, after noting that only one of the convictions listed in the indictment was actually within the seven-year look-back period, allowed the State to amend the indictment to reference a 10-year look-back period that encompassed all three prior convictions. The court then entered judgment for habitual impaired driving and sentenced defendant to a mitigated-range term of 13 to 16 months imprisonment. Defendant gave notice of appeal in open court.

Discussion

Defendant was charged with a violation of N.C. Gen. Stat. § 20-138.5(a), which provides that "[a] person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within 10 years of the date of this offense." The previous version of this statute provided that in order to convict someone of habitual impaired driving, the State had to show three or more impaired driving convictions within only *seven* years of the date of the current offense. *See* Motor Vehicle Driver Protection Act of 2006, 2006 N.C. Sess. Laws ch. 253 § 12.

In this case, the indictment listed the offense date as 2 September 2007, bringing the offense within the amended version of N.C. Gen. Stat. § 20-138.5 that provides for a 10-year look-back period. The indictment, however, alleged that defendant "within seven (7) years

of the date of this offense, has been convicted of three (3) or more offenses involving impaired driving." The indictment then alleged that defendant had three prior convictions: (1) a DWI conviction on 3 October 1997 in Pamlico County; (2) a DWI conviction on 30 May 2000 in Craven County; and (3) a DWI conviction on 24 May 2001 in Craven County.

Thus, the indictment referenced a seven-year look-back period even though the law had been amended to provide for a 10-year look-back period. And, as the trial court pointed out, only one of the alleged convictions fell within that seven-year span. Defendant's sole contention on appeal is that the trial court impermissibly allowed the State to amend the indictment to reflect the correct look-back period. This issue presents a question of law that we review de novo. *See*, *e.g.*, *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994) (reviewing de novo trial court's decision to allow State to amend indictment).

Although N.C. Gen. Stat. § 15A-923(e) (2009) provides broadly that "[a] bill of indictment may not be amended[,]" our appellate courts have interpreted this provision "to mean that 'a bill of indictment may not be amended in a manner that substantially alters the charged offense.' " *State v. Stephens*, 188 N.C. App. 286, 288, 655 S.E.2d 435, 437 (quoting *State v. Silas*, 360 N.C. 377, 380, 627 S.E.2d 604, 606 (2006)), *disc. review denied*, 362 N.C. 370, 662 S.E.2d 389 (2008). Defendant argues that because the indictment alleged a seven-year look-back period and only one of the alleged convictions fell within that period, the indictment alleged only the charge of misdemeanor DWI and not habitual impaired driving. Defendant then urges that allowing the State's amendment to the indictment to change the look-back period from seven to 10 years effectively elevated the misdemeanor DWI charge to a felony habitual impaired driving charge. This Court has held that an amendment " 'which result[s] in a misdemeanor charge being elevated to a felony[] substantially alter[s] the charge in the original indictment.' " *Id.* at 289, 655 S.E.2d at 437 (quoting *State v. Moses*, 154 N.C. App. 332, 338, 572 S.E.2d 223, 228 (2002)).

Defendant contends that *State v. Winslow*, 169 N.C. App. 137, 609 S.E.2d 463 (Hunter, J., dissenting), *adopted per curiam*, 360 N.C. 161, 623 S.E.2d 11 (2005), is controlling. In *Winslow*, 169 N.C. App. at 138, 609 S.E.2d at 464, the defendant was charged with DWI and habitual impaired driving on 9 April 2000. The indictment alleged three prior convictions: 1 April 1993, 22 November 1998, and 2 October 1999. *Id.* at 139, 609 S.E.2d at 464. The defendant moved to dismiss the indict-

ment on the grounds that the 1993 conviction identified in the indictment was not within the seven-year look-back period. *Id.* The State was permitted to amend the indictment to change the date of the challenged conviction to bring it within the look-back period. *Id.*, 609 S.E.2d at 464-65.

This Court held that "[t]he amendment to the indictment did not substantially alter the charge set forth in the indictment" and was therefore permissible. *Id.* at 142, 609 S.E.2d at 466. The dissenting opinion, however, which was adopted by the Supreme Court, concluded that "the trial court erroneously allowed an amendment to the habitual impaired driving indictment." *Id.*, 609 S.E.2d at 467. The dissent explained that "[t]he conviction of three or more offenses involving impaired driving within seven years of the present offense are necessary elements for the charge of habitual impaired driving." *Id.* at 143, 609 S.E.2d at 467. Therefore, "the date of the conviction [was] necessary to charge the offense and not mere surplusage." *Id.*

The dissent then applied this reasoning to the indictment at issue:

> By including the offense date in the indictment, which was eight days outside of the seven year time period for habitual impaired driving, the State did not properly indict defendant for habitual impaired driving. Accordingly, the indictment amendment allowed at trial was a substantial alteration of the charge and was not allowed under N.C. Gen. Stat. § 15A-923(e).

Id. Without an amendment of the indictment to show three prior impaired driving convictions within the look-back period, the defendant "could not be convicted of habitual impaired driving and would only be sentenced for the misdemeanor impaired driving charge." *Id.* at 144, 609 S.E.2d at 467. Accordingly, the dissent concluded, "the indictment amendment was a substantial alteration of the charge because it elevated defendant's offense to a felony from a misdemeanor." *Id.* at 143, 609 S.E.2d at 467.

Defendant contends that under *Winslow*, this Court must vacate judgment on the habitual impaired driving conviction and remand for resentencing on the misdemeanor DWI charge. Defendant has, however, overlooked a significant distinction between this case and *Winslow*. In *Winslow*, the charged offense occurred on 9 April 2000. For one of the prior convictions, the indictment incorrectly listed the offense date of 1 April 1993, rather than the actual conviction date of 11 August 1993. As the date listed in the indictment was eight days

outside of the seven-year look-back period, the indictment on its face failed to allege all the elements of habitual impaired driving set forth in the controlling version of N.C. Gen. Stat. § 20-138.5(a): three prior impaired driving convictions within seven years of the date of the current offense. 169 N.C. App. at 143, 609 S.E.2d at 467.

Here, by contrast, the indictment at all times alleged the essential elements of the crime set out in N.C. Gen. Stat. § 20-138.5(a). The indictment alleged that the defendant drove while impaired and had three prior DWI convictions within 10 years of the date of the offense. Even though the indictment mistakenly identified the relevant look-back time frame as seven years, the convictions were actually within 10 years, so the essential elements of N.C. Gen. Stat. § 20-138.5(a) were alleged. Unlike *Winslow*, the State's mistake in this case did not involve an essential element of the crime, such as the date of a prior conviction.

" 'Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.' " *State v. Bollinger*, 192 N.C. App. 241, 246, 665 S.E.2d 136, 139 (2008) (quoting *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996)), *aff'd per curiam*, 363 N.C. 251, 675 S.E.2d 333 (2009). Thus, in *State v. Freeman*, 314 N.C. 432, 434, 333 S.E.2d 743, 745 (1985), although the indictment alleged that the defendant had kidnapped the victim " 'for the purpose of committing a felony: Rape or Robbery' "—an improper allegation in the alternative—the Supreme Court held that the indictment was not defective because the kidnapping statute required only an allegation that the kidnapping was done for the purpose of committing a felony. The Court concluded that "[t]he additional 'Rape or Robbery' language in the indictment [was] mere harmless surplusage and [could] properly be disregarded in passing upon [the indictment's] validity." *Id.* at 436, 333 S.E.2d at 745-46.

Similarly, in this case, the incorrect recitation in the indictment of a seven-year look-back period was not essential to the indictment. Despite this mistake, the indictment still alleged the essential elements of the crime as set forth in the statute. The language regarding the look-back period was mere surplusage that could be amended. *See also State v. Hicks*, 125 N.C. App. 158, 160, 479 S.E.2d 250, 251 (1997) (holding trial court did not err in allowing State to amend habitual felon indictment to allege that one of specified felonies was committed prior to defendant's 18th birthday and explaining: "[T]he amendment to the indictment against defendant did not

substantially alter the charge of habitual felon. The three underlying felonies required to constitute the offense of habitual felon remained the same.").

Defendant argues that, nonetheless, when the State chose to allege a seven-year look-back period, it was bound by that choice under *State v. Keys*, 87 N.C. App. 349, 358, 361 S.E.2d 286, 291 (1987). In *Keys*, the defendant was charged with possession of " '*more than four* but less than fourteen grams of heroin.' " *Id.* The applicable statute, however, made it a Class F felony to possess " '*four grams or more*, but less than 14 grams' of heroin." *Id.* Thus, the indictment charged the defendant with possession of more than four grams, when under the statute she could be convicted for possessing exactly four grams. *Id.* This Court rejected defendant's argument that this variance from the statute rendered the indictment defective, pointing out that the indictment in fact alleged the essential elements of trafficking in heroin. *Id.* at 359, 361 S.E.2d at 291. In reaching this conclusion, however, the Court also held that the indictment "exclude[d] from criminal prosecution the possession of exactly four grams" and "limit[ed] the scope of defendant's liability . . . ." *Id.* at 358-59, 361 S.E.2d at 291.

Defendant argues that since the Court in *Keys* indicated that the State had limited itself to its allegation in the indictment that the defendant possessed more than four grams, the State, in this case, should be limited to the seven-year look-back period it alleged in the indictment. We note, however, that the language in *Keys* relied upon by defendant was dicta. Moreover, *Keys* does not consider the precise issue here: whether the indictment could be amended to correspond to the statute. Nothing in *Keys* suggests that the State would have been barred from amending the indictment to conform to the more expansive scope of the statute. Instead, *Keys* addresses what happens when there has been no amendment to the indictment. Finally, *Keys* involved a question of fact: the amount of heroin defendant possessed. Here, in contrast, the mistake was in the indictment's recitation of the applicable law. The State incorrectly described the look-back period as seven years rather than 10 years.

We find *State v. Hill*, 185 N.C. App. 216, 647 S.E.2d 475 (2007) (Tyson, J., dissenting), *adopted per curiam*, 362 N.C. 169, 655 S.E.2d 831 (2008), more analogous than *Keys*. In *Hill*, the indictment's caption identified the pertinent statute as N.C. Gen. Stat. § 14-27.7A (2005), but the text of the indictment set forth facts amounting to a violation of N.C. Gen. Stat. § 14-27.4 (2005). 185 N.C. App. at 219-20,

647 S.E.2d at 477. The trial court allowed the State, at the close of the evidence, to amend the indictment to reflect the proper statute, N.C. Gen. Stat. § 14-27.4. 185 N.C. App. at 220, 647 S.E.2d at 478. The majority for this Court vacated the judgment against the defendant on the ground that the State's amendment "fundamentally changed the nature of the charge against defendant" and was, therefore, "a substantial alteration of the original charge." *Id.* at 221, 647 S.E.2d at 478.

The dissent, which was subsequently adopted by the Supreme Court, concluded that there was "no prejudicial error in the trial court's discretionary decision to allow the State's motion to correct the indictments." *Id.* at 223, 647 S.E.2d at 479. The dissent concluded that the indictments were sufficient because they "alleged that the victim was under the age of thirteen, named the victim, and averred that defendant 'unlawfully, willfully and feloniously did engage in a sex offense . . . .' " *Id.* at 225, 647 S.E.2d at 480. The dissent explained that "[t]he corrections [to the indictment] allowed by the trial court did not 'substantially alter' the nature of the charges against defendant." *Id.* at 226, 647 S.E.2d at 481. Rather, "[t]he trial court's decision to allow the State to correct the indictments cured a mere clerical defect and the correction did not fundamentally change the nature of the charges against defendant." *Id.*

We hold, as in *Hill*, that the amendment of the indictment did not fundamentally change the nature of the charge asserted against defendant. The indictment at all times alleged, as required by N.C. Gen. Stat. § 20-138.5(a), three prior convictions within 10 years of the current offense. The language regarding the look-back period was surplusage, and the amendment simply corrected an error comparable to the one in *Hill*. There was no substantial alteration. We, therefore, find no error.

No error.

Judges ROBERT C. HUNTER and STEELMAN concur.

MONA J. LACARRUBBA, PLAINTIFF v. MICHAEL LACARRUBBA, DEFENDANT

No. COA09-612

(Filed 16 February 2010)

Child Support, Custody, and Visitation— jurisdiction—foreign order—modification

The trial court lacked jurisdiction to modify a foreign child support order issued in New York and later registered in Florida. Defendant father cited no authority for his contention that the court's jurisdiction over the uncontested registration of a child support order that was registered for enforcement only gave it jurisdiction to modify the order.

Appeal by Plaintiff from order entered 13 November 2008 by Judge Paul M. Quinn in Carteret County District Court. Heard in the Court of Appeals 17 November 2009.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Bradley Dawson, for the State.

Michael Lincoln, P.A., for Defendant-Appellee.

BEASLEY, Judge.

Plaintiff (State of North Carolina, on behalf of Mona Lacarrubba) appeals from orders holding that the trial court had jurisdiction to modify a foreign child support order, and modifying Defendant's (Michael Lacarrubba) child support obligations under the order. We reverse.

The parties were married in 1984 and divorced in 1995. Two children were born of the marriage: Nicole, born 31 May 1985; and Marissa, born 17 March 1990. On 21 April 1995 a divorce decree was entered in Suffolk County, New York, obligating Defendant to pay $1040 per month in child support. At the time the divorce decree was entered, the parties lived in New York. In 1999 Plaintiff moved to Florida with both children, and registered the support judgment in Lee County, Florida. In 2001, the parties' older child, Nicole, moved from Florida to New York and began living with Defendant. Thereafter, Defendant unilaterally reduced his child support payments by half, paying only $520 a month.

In 2006 Defendant and Nicole moved to North Carolina. On 26 September 2007 Plaintiff filed a Notice of Registration of Foreign

Support Order, specifically registering the order "for enforcement only," and seeking more than $30,000 in past due child support payments. The order was registered in Carteret County North Carolina on 26 September 2007. On 26 October 2007 Defendant filed a request for a hearing to contest the validity and enforcement of the order. However, on 6 March 2008 Defendant consented to entry of an order confirming registration of the child support order. The order stated that the "issue of the arrears owed under the terms of the child support order is held open and is to be addressed at a later time."

On 24 April 2008 Defendant filed a Motion to Contest and Reduce Arrearages. Defendant's motion conceded that the order was registered in Lee County, Florida, but asserted that North Carolina and Florida had "concurrent jurisdiction" to modify the amount of arrearages. Following a hearing conducted on 15 May 2008 Judge Paul M. Quinn entered an order on 13 November 2008, modifying Defendant's child support obligation and reducing the amount of arrearages he owed. Also on 13 November 2008, Judge Peter Mack entered an order requiring Defendant to pay specified monthly amounts in child support and arrearages, and finding that the trial court had jurisdiction to modify the child support order. From these orders, Plaintiff appeals.

Plaintiff argues that the trial court lacked authority to modify the foreign order for child support. We agree, and find this dispositive of Plaintiff's appeal.

"Because of the complexity and multiplicity of pertinent state and federal child support legislation, a summary of the law regarding review of multi-state child support orders is critical in order to define the proper analytical framework for cases such as this one." *New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 241, 578 S.E.2d 610, 612 (2003). *Kilbourne* noted that:

> [f]rom 1951 until 1996, URESA provided the procedural mechanism in North Carolina for establishing, modifying, and enforcing child support across state lines. Under URESA, a state was not bound to adopt a child support order entered in another state. Instead, "a state had jurisdiction to establish, vacate, or modify an obligor's support obligation even when that obligation had been created in another jurisdiction." . . . In 1986, in an effort to improve the collection of child support, Congress amended Title IV-D of the Social Security Act ("the Bradley amendment").

(quoting *Welsher v. Rager*, 127 N.C. App. 521, 524, 491 S.E.2d 661, 663 (1997)).

As a general rule, the Uniform Interstate Family Support Act (UIFSA) "requires that a support order be interpreted according to the law of the state in which it is issued." *Welsher*, 127 N.C. App. at 524, 491 S.E.2d at 663.

Together, UIFSA and the Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. § 1738B (2007), have severely limited the circumstances under which a state may modify a child support order issued by another state. FFCCSOA provides in pertinent part that:

> (a) The appropriate authorities of each State—
>
> (1) shall enforce according to its terms a child support order made consistently with this section by a court of another State; and
>
> (2) shall not seek or make a modification of such an order except in accordance with subsections (e), (f), and (I).
>
> . . . .
>
> (e) A court of a State may modify a child support order issued by a court of another State if
>
> (1) the court has jurisdiction to make such a child support order pursuant to subsection (i); and
>
> (2)(A) the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant; or (B) each individual contestant has filed written consent with the State of continuing, exclusive jurisdiction for a court of another State to modify the order and assume continuing, exclusive jurisdiction over the order.
>
> . . . .
>
> (i) If there is no individual contestant or child residing in the issuing State, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another State shall register that order in a State with jurisdiction over the nonmovant for the purpose of modification.

28 U.S.C. § 1738B9(a), (e), and (i) (emphasis added).

Further:

> "Under the supremacy clause of the United States Constitution, the provisions of FFCCSOA are binding on all states and supersede any inconsistent provisions of state law, including any inconsistent provisions of uniform state laws[.] . . . Modification of a valid order is permitted only when: (1) all parties have consented to the jurisdiction of the forum state to modify the order; or (2) neither the child nor any of the parties remains in the issuing state and the forum state has personal jurisdiction over the parties.

State ex rel. Harnes v. Lawrence, 140 N.C. App. 707, 710, 538 S.E.2d 223, 226 (2000) (quoting *Kelly v. Otte*, 123 N.C. App. 585, 589, 474 S.E.2d 131, 134 (1996); and citing *Welsher*, 127 N.C. App. at 528, 491 S.E.2d at 665) (emphasis added). The relevant provisions of N.C. Gen. Stat. § Chapter 52C echo the limitations expressed in FFCCSOA. The official comment to these statutes further articulates the legislature's intent to restrict the authority of a state court to modify either ongoing child support payments or arrearages due under a foreign child support order. In *Tepper v. Hoch*, 140 N.C. App. 354, 359, n.1, 536 S.E.2d 654, 658, n.1 (2000), this Court noted that:

> The official comment to [§ 52C-6-608] provides the confirmation "validates both the terms of the order and the asserted arrearages." . . . This comment correctly reflects the intent of the legislature[.] . . . 1. Although the commentary is not binding authority, it must be given "substantial weight" in this Court's "efforts to comprehend legislative intent."

(quoting *State v. Hosey*, 318 N.C. 330, 337-38, n.2, 348 S.E.2d 805, 810, n.2 (1986). In this regard, we note that the the Official Comment to N.C. Gen. Stat. § 52C-2-205 (2009) states that

> the issuing tribunal retains continuing, exclusive jurisdiction over a child support order, . . . [a]s long as one of the individual parties or the child continues to reside in the issuing State[,] . . . which in practical terms means that it may modify its order. . . . [I]f all the relevant persons . . . have permanently left the issuing State, the issuing State no longer has . . . jurisdiction to modify. . . . [but] the original order of the issuing tribunal remains valid and enforceable. . . . The original order remains in effect until it is properly modified in accordance with the narrow terms of [N.C. Gen. Stat. § 52C-6-] 609-612[.]

N.C. Gen. Stat. § 52C-6-603(c) (2009), expressly states:

> (c) Except as otherwise provided in this Article, a tribunal of this State shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction.

The Official Comment to § 52C-6-603 notes that:

> . . . An interstate support order is to be enforced . . . as if it had been issued by a tribunal of the registering State, although it remains an order of the issuing State. Conceptually, the responding State is enforcing the order of another State, not its own order.
>
> Subsection (c) mandates enforcement of the registered order. . . . This is at sharp variance with the common interpretation of [former] RURESA § 40, which . . . was generally construed as converting the foreign order into an order of the registering State. Once the registering court concluded that it was enforcing its own order, the next logical step was to modify the order as the court deemed appropriate. . . . UIFSA mandates an end to this process, except as modification is authorized in this article.

N.C. Gen. Stat. § 52C-6-611 (2009) provides in relevant part that:

> (a) After a child support order issued in another state has been registered in this State, . . . this State may modify that order only if G.S. 52C-6-613 does not apply and after notice and hearing it finds that: (1) The following requirements are met:
>
> a. The child, the individual obligee, and the obligor do not reside in the issuing state;
>
> b. A petitioner who is a nonresident of this State seeks modification; and
>
> c. The respondent is subject to the personal jurisdiction of the tribunal of this State[.]

The Official Comment to § 52C-6-611 makes it clear that this statute bars North Carolina from modifying the order in the present case:

> Under UIFSA, registration is subdivided into . . . registration for enforcement, for modification, or both. UIFSA is based on recognizing the truism that when a foreign support order is registered for enforcement, the rights of the parties affected have been previously litigated. . . . Under UIFSA a tribunal may modify an exist-

> ing child support order of another State only if certain quite limited conditions are met. . . . [O]ne of the restricted fact situations described in subsection (a) must be present. . . . UIFSA establishes a set of "bright line" rules which must be met before a tribunal may modify an existing child support order. . . .
>
> In the overwhelming majority of cases, the party seeking modification must seek that relief in a new forum, almost invariably the State of residence of the other party. This rule applies to either obligor or obligee, depending on which of those parties seeks to modify. . . . original issuing State for a document to confirm the fact that none of the relevant persons still lives there. . . . [T]he obligee may seek modification in the obligor's State of residence, or . . . the obligor may seek a modification in the obligee's State of residence. This restriction attempts to . . . prevent[] a litigant from choosing to seek modification in a local tribunal to the marked disadvantage of the other party.

"G.S. [§] 52C-6-607(a)(5) allows defendant to assert defenses under North Carolina law to the enforcement procedures sought but does not allow defendant to assert equitable defenses under North Carolina law to the amount of arrears." *State ex rel. George v. Bray*, 130 N.C. App. 552, 558, 503 S.E.2d 686, 691 (1998). Thus, "[i]f [D]efendant wishes to pursue his equitable defenses he must do so in [Florida]." *Id.* at 559, 503 S.E.2d at 691.

"In addition, under the FFCCSOA, the trial court did not have the authority to modify the Florida child support order by permitting registration of a portion of the order, the ongoing monthly child support, and denying registration of the arrears." *State ex rel. Lively v. Berry*, 187 N.C. App. 459, 464, 653 S.E.2d 192, 195 (2007).

In the instant case, it is undisputed that: (1) the child support order was issued in New York, and later registered in Florida; (2) Plaintiff registered the child support order in North Carolina for enforcement only; (3) North Carolina did not have personal jurisdiction over Plaintiff, who lived in Florida; and (4) the parties did not consent to North Carolina's jurisdiction to modify the child support order. We conclude that the trial court lacked authority to modify the order or reduce arrearages. We reject Defendant's arguments to the contrary.

Defendant argues that the trial court had the jurisdiction to modify the child support order because he "timely filed his objection to

registration" of the order, in a motion that asserted reasons "suggest[ing] that the Defendant was entitled to a credit for a portion or all of the child support arrearage." Defendant cites no authority for the proposition that his filing of a request to challenge registration and enforcement of the order automatically confers subject matter jurisdiction upon the trial court to modify the order. In addition, although Defendant filed this motion, he admits that when the case was heard he consented to registration of the order.

The order confirming registration of the child support order states that the order had been registered with the Carteret County Clerk of Superior Court on 26 September 2007, and that the registration "is hereby confirmed in the State of North Carolina." The registration thus confirmed specifically limits its scope to "enforcement only." Defendant fails to articulate any theory upon which this registration was transformed into registration for the purpose of enforcement and modification. Defendant asserts that Plaintiff "misconstrues the language" of the order, but fails to identify which part of the order has been "misconstrued." Defendant also asserts that, because the order recites that the trial court "has personal and subject matter jurisdiction over the parties," the order confirming registration of the child support order "thereby g[ave] North Carolina full and unfettered jurisdiction." There is no dispute that the trial court had jurisdiction over the matter before it, which was confirmation of the registration of a foreign support order. However, Defendant cites no authority for his contention that the court's jurisdiction over the uncontested registration of a child support order that was registered for enforcement only gave it jurisdiction to modify the order.

Defendant cites *Kelly v. Otte*, 123 N.C. App. 585, 590, 474 S.E.2d 131, 134, for his contention that "[o]nce the New York Order was registered in North Carolina pursuant to the 6 March 2008 Order, it essentially became the same as any other child support order issued by a Court of this State." However, *Kelly* was decided under former "Chapter 52A of the North Carolina General Statutes, North Carolina's version of URESA, [which] was repealed by Session Laws 1995, effective 1 January 1996." Accordingly, *Kelly* does not govern the instant case. Indeed, in *Welsher*, 127 N.C. App. at 524, 491 S.E.2d at 663, this Court explained:

> [t[he Uniform Reciprocal Enforcement of Support Act (URESA) was repealed by the North Carolina General Assembly effective 1 January 1996. In its place, the legislature adopted UIFSA in

> Chapter 52C of our General Statutes. Both URESA and UIFSA were promulgated and intended to be used as procedural mechanisms for the establishment, modification, and enforcement of child and spousal support obligations. . . . Under URESA, a state had jurisdiction to establish, vacate, or modify an obligor's support obligation even when that obligation had been created in another jurisdiction. . . . UIFSA was designed to correct this problem.

Defendant also contends that "the State has previously taken the position that no party should be required to pay child support twice simply because no motion to modify was timely filed, citing *Transylvania County DSS v. Connolly*, 115 N.C. App. 34, 443 S.E.2d 892 (1994). However, as with *Kelly*, Defendant cites a case decided under statutes long since repealed.

Defendant correctly notes that New York "lost modification jurisdiction" when neither the parties nor the children remained in New York. However, Defendant fails to cite any authority supporting his contention that registration of a child support order that Plaintiff had registered in Florida gave North Carolina jurisdiction to modify the order.

For the reasons discussed above, we conclude that the trial court lacked jurisdiction to modify the child support order, and that its order must be

Reversed.

Judges WYNN and CALABRIA concur.

DARRYL WRIGHT, PLAINTIFF v. TOWN OF ZEBULON, TOWN OF ZEBULON POLICE DEPARTMENT, ROBERT MATHENY, TOWN MAYOR, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS TOWN MAYOR, RICK HARDIN, TOWN MANAGER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS TOWN MANAGER, CHIEF TIM HAYWORTH, CHIEF OF POLICE FOR THE TOWN OF ZEBULON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE FOR THE TOWN OF ZEBULON, LIEUTENANT MICHAEL MCGLOTHLIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER FOR THE TOWN OF ZEBULON, SCOTT FINCH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER FOR THE TOWN OF ZEBULON, ROBERT GROSSMAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER FOR THE TOWN OF ZEBULON, DEFENDANTS

No. COA09-960

(Filed 16 February 2010)

1. Governmental Immunity— municipal police department— capacity to be sued

The trial court properly dismissed claims brought by plaintiff, a former police officer with the Town of Zebulon Police Department, against the Town of Zebulon Police Department, because a municipal police department lacks the capacity to be sued. The trial court also properly dismissed official capacity claims asserted against the individual defendants because the claims were duplicative of the claim against the Town of Zebulon, their employer.

2. Police Officers— North Carolina Electronic Surveillance Act—willful behavior—public safety

The trial court did not err in granting defendants' motion for summary judgment on plaintiff's claim that defendants violated the North Carolina Electronic Surveillance Act by monitoring plaintiff's conversations in his patrol car. Because the purpose of the monitoring was to ensure public safety, defendants did not act with a bad purpose or without a justifiable excuse. Thus, there was no genuine issue of material fact as to whether defendants acted willfully.

Appeal by plaintiff from order entered 23 March 2009 by Judge Shannon R. Joseph in Wake County Superior Court. Heard in the Court of Appeals 2 December 2009.

Gray Newell, LLP, by Angela Newell Gray, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Victoria S. Tolbert, for defendants-appellees.

HUNTER, Robert C., Judge.

Plaintiff Darryl Wright, a former police officer with the Town of Zebulon Police Department, appeals from the trial court's entry of summary judgment in favor of defendants—the Town of Zebulon, Zebulon Mayor Robert Matheny, Zebulon Town Manager Rick Hardin, the Zebulon Police Department, Zebulon Chief of Police Tim Hayworth, and Zebulon Police Officers Michael McGlothlin, Scott Finch, and Robert Grossman. Plaintiff's principal argument on appeal is that the trial court erred in granting summary judgment because triable issues of fact exist regarding plaintiff's claim that defendants violated the North Carolina Electronic Surveillance Act, N.C. Gen. Stat. §§ 15A-286 to -298 (2009) ("NCESA"), by willfully intercepting oral communications made by plaintiff in his patrol car during an integrity check conducted by the police department to determine whether plaintiff was "tipping off" drug dealers about confidential police information. We conclude that summary judgment was proper in this case as the forecast of evidence produced establishes that defendants did not act "willfully" in intercepting plaintiff's oral communications and that plaintiff, under the facts of this case, did not have a reasonable expectation of privacy as to his oral communications made in his patrol car. Accordingly, we affirm.

Facts

Plaintiff began working as a police officer for the Zebulon Police Department in June 1993 and was promoted to Sergeant in February 2001. Sometime in 2002, Zebulon Police Chief Timothy Hayworth received information from an informant that plaintiff was " 'tipping-off' drug dealers about confidential police department information" and "socializ[ing] with drug dealers." Unsure whether the informant was credible, Chief Hayworth decided not to take any action in 2002. In the late spring or summer of 2005, however, Chief Hayworth received allegations that plaintiff's personal vehicle was seen at a local residence known for drug activity and that plaintiff was seen at a party where illegal drugs were being used. Concerned about the three complaints in three years, Chief Hayworth decided to conduct an investigation into the allegations. Chief Hayworth feared that if plaintiff were, in fact, tipping-off drug dealers about police department information, it might endanger the lives of police officers, informants, and the public.

After discussing the matter with Detective Finch, who was in charge of the department's Investigations Division, Chief Hayworth

decided to conduct an "integrity check." The integrity check involved monitoring plaintiff's conversations in his patrol car while the department was staging the execution of a search warrant. Chief Hayworth also consulted with John Maxfield, legal counsel for the Wake County Sheriff's Office, who gave his opinion that the integrity check, as described by Chief Hayworth, did not appear to violate state or federal law.

On the day of the integrity check, plaintiff and other police officers were told that a search warrant had been issued to search the residence where plaintiff had previously been seen socializing with drug dealers. Only Chief Hayworth, his command staff, and Detective Finch knew that the search warrant was part of the integrity check. Chief Hayworth believed that if plaintiff were involved with local drug dealers, he would "leak" the information that the police planned to execute the search warrant by rolling down his window and telling someone about the search warrant.

To determine whether plaintiff would tip-off drug dealers at the residence, Chief Hayworth had officers from the Investigations Division placed a pager under the front seat of plaintiff's patrol car, which could pick up plaintiff's conversation in the vehicle. The pager would then transmit the conversation back to a repeater box located in the trunk of the car, which, in turn, would transmit to a receiver located in another patrol car where other officers were listening.

After the integrity check was initiated, Detective Finch listened to the transmissions from plaintiff's patrol car for approximately 10 to 15 minutes, but only heard him order lunch. After Detective Finch notified Chief Hayworth that plaintiff had not tipped-off anyone regarding the execution of the search warrant, Chief Hayworth terminated the integrity check, called off the execution of the fake search warrant, and ordered the officers, including plaintiff, to return to the police station. When plaintiff returned, the pager and repeater box were removed from his patrol car. No further action was taken by Chief Hayworth regarding the allegations against plaintiff.

Plaintiff was separated from the Zebulon Police Depart in July 2005 for reasons unrelated to the integrity check. On 22 October 2007, plaintiff filed a complaint against defendants, alleging that the integrity check violated North Carolina's wiretapping law and claiming defendants were liable for actual damages, punitive damages, attorney's fees, and litigation costs. Defendants filed an answer generally denying plaintiff's claim and moving to dismiss the complaint.

On 13 February 2009 defendants moved for summary judgment and on 23 March 2009 the trial court entered an order granting defendants' motion. Plaintiff timely appealed to this Court.

I

[1] Before reaching the merits of plaintiff's claim, we address defendants' argument that summary judgment was proper with respect to certain defendants as they are entitled to dismissal as a matter of law. Defendants first contend that the Zebulon Police Department should be dismissed as a defendant because it is not a "public entity . . . that can sue or be sued." Under North Carolina law, unless a statute provides to the contrary, only persons in being may be sued. *McPherson v. First & Citizens Nat. Bank of Elizabeth City*, 240 N.C. 1, 18, 81 S.E.2d 386, 397 (1954). "In North Carolina there is no statute authorizing suit against a police department." *Coleman v. Cooper*, 89 N.C. App. 188, 192, 366 S.E.2d 2, 5, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988), *overruled in part on other grounds by Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997). A municipal police department is a component of the municipality, and, therefore, lacks the capacity to be sued. *Id.*; *see also Ostwalt v. Charlotte-Mecklenburg Bd. of Educ.*, 614 F. Supp. 2d 603, 607 (W.D.N.C. 2008) (holding, per *Coleman*, that city police department was "entitled to dismissal as a matter of law" from negligence action). The trial court, therefore, properly granted summary judgment in favor of defendants with respect to the Zebulon Police Department.

Defendants next argue that the official capacity claims asserted against the individual defendants should be dismissed as being duplicative of the claim against the Town of Zebulon, their employer. Plaintiff sued Mayor Matheny, Town Manager Hardin, Police Chief Hayworth, and Officers McGlothlin, Finch, and Grossman in both their official and individual capacities. "[O]fficial-capacity suits 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' " *Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 121 (1985)). Thus, "in a suit where the plaintiff asserts a claim against a government entity, [also naming] those individuals working in their official capacity for th[e] government entity is redundant." *May v. City of Durham*, 136 N.C. App. 578, 584, 525 S.E.2d 223, 229 (2000); *accord Oakwood Acceptance Corp. v. Massengill*, 162 N.C. App. 199, 211-12, 590 S.E.2d 412, 422 (2004) (holding that claims against county tax collector were "identical" to clams asserted against county and thus trial court prop-

erly dismissed claims against tax collector on summary judgment). The official-capacity claims were properly dismissed in this case.

II

[2] Turning to plaintiff's contentions, he argues that the trial court erred in granting defendants' motion for summary judgment. On appeal, an order granting summary judgment is reviewed de novo. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006). "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.' " *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (quoting N.C. R. Civ. P. 56(c)).

Plaintiff contends that summary judgment was improper because triable issues of fact exist regarding whether defendants violated the NCESA, which provides in pertinent part that a person violates the Act if, "without the consent of at least one party to the communication," the person "[w]illfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." N.C. Gen. Stat. § 15A-287(a)(1) (2009). The NCESA establishes a civil cause of action for persons whose communications are intercepted, disclosed or used in violation of the NCESA against the person or persons violating the Act, and provides for the recovery of damages, attorney's fees, and associated litigation costs. N.C. Gen. Stat. § 15A-296(a) (2009); *Kroh v. Kroh*, 152 N.C. App. 347, 351, 567 S.E.2d 760, 763 (2002), *disc. review denied*, 356 N.C. 673, 577 S.E.2d 120 (2003). Plaintiff argues that his evidence establishes a *prima facie* case that defendants willfully intercepted plaintiff's oral communications in his patrol car in violation of N.C. Gen. Stat. § 15A-287(a)(1).

The NCESA defines the term "intercept" to mean "the aural or other acquisition of the contents of any wire, oral, or electronic communication through the use of any electronic, mechanical, or other device." N.C. Gen. Stat. § 15A-286(13) (2009). An "oral communication" denotes "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . . ." N.C. Gen. Stat. § 15A-286(17).

Defendants argue that the motivation behind the integrity check was public safety and thus their "conduct in this case was not 'will-

ful,' as that word has been interpreted under North Carolina law." As the NCESA does not define the term "willful," this Court has looked to federal courts' construction of the Federal Wiretapping Act, 18 U.S.C. §§ 2510 to 2522, which the NCESA is "modeled after . . . ." *State v. McGriff*, 151 N.C. App. 631, 638, 566 S.E.2d 776, 781 (2002); *see also State v. Price*, 170 N.C. App. 57, 65, 611 S.E.2d 891, 897 (2005) (noting that "[t]he North Carolina and federal wiretapping laws . . . are substantially similar"). Although the Federal Wiretapping Act also does not define the term, federal courts have construed " 'willfully' to mean *more than* intentional[,]" *United States v. Ross*, 713 F.2d 389, 391 (8th Cir. 1983), requiring that the challenged conduct be " 'done with a bad purpose,' 'without justifiable excuse,' or 'stub bornly, obstinately, or perversely.' " *McGriff*, 151 N.C. App. at 639, 566 S.E.2d at 781 (quoting *Adams v. Sumner*, 39 F.3d 933, 936 (9th Cir. 1994)).[1]

In his affidavit submitted in support of defendants' motion for summary judgment, Chief Hayworth stated that between 2002 and 2005, he received three complaints that plaintiff was "tipping-off" illegal drug dealers about confidential police information and socializing with drug dealers. Chief Hayworth decided to conduct an integrity check in order to "attempt to ascertain whether [plaintiff] was a 'dirty' cop,' or if he was otherwise engaging in activity that was putting the citizens of Zebulon, as well as its police officers and informants, in danger o[f] harm." Sergeant Finch, one of the officers who placed the surveillance device in plaintiff's patrol car, reiterated in his affidavit that the integrity check was designed to "protect the public."

In response to defendants' motion for summary judgment, plaintiff submitted the deposition of Chief Hayworth. His deposition, however, corroborates his statements in his affidavit with respect to whether the integrity check was conducted "willfully." Chief Hayworth states that he authorized the integrity check on plaintiff because of his concern about the complaints that plaintiff was tip-

1. We note that plaintiff lumps all the remaining defendants together, simply asserting that they collectively violated N.C. Gen. Stat. § 15A-287(a)(1). On appeal, plaintiff fails to point to anything in his forecast of evidence indicating that Matheny, Zebulon's mayor, or Hardin, the town's manager, knew or should have known, condoned, or participated in the integrity check. In fact, the only reference to Matheny and Hardin in plaintiff's brief is his acknowledgment that they were the mayor and town manager, respectively, "[a]t all times pertinent to this action . . . ." Thus, having failed to forecast any evidence tending to establish that Matheny or Hardin were involved in any way in the integrity check, plaintiff cannot establish that Matheny and Hardin "willfully" violated N.C. Gen. Stat. § 15A-287(a)(1). Summary judgment was, therefore, proper with respect to Matheny and Hardin in their individual capacities.

ping-off possible drug dealers and was worried that such disclosures would endanger police officers, informants, and the public.

Based on Chief Hayworth's statements that the purpose of the integrity check was to ensure public safety, defendants did not act with a bad purpose or without justifiable excuse. *See id.* at 638-40, 566 S.E.2d at 780 (holding that neighbor had not "willfully" intercepted telephone conversation where neighbor's cordless telephone picked up defendant's incriminating phone call and neighbor continued to listen to identify speaker because call was " 'so disturbing and so ugly,' it caused her alarm" and was "done out of concern for the welfare of a minor"); *see also Adams*, 39 F.3d at 936 ("The [hotel] clerk's continued eavesdropping was not done with a bad purpose or without a justifiable excuse. When he heard the callers mention a gun, he was alerted to the possibility of illegal activity occurring in the hotel and was justified in listening to the conversation to determine whether his concern was merited."). Plaintiff points to nothing in his forecast of evidence that contradicts Chief Hayworth's statements that public safety was the impetus for the integrity check, thus creating a genuine issue of material fact regarding whether defendants "willfully" intercepted plaintiff's oral communication. The trial court, therefore, properly granted summary judgment in favor of defendants. Due to our disposition of this appeal, we need not address defendants' remaining arguments as to why summary judgment was proper.

Affirmed.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. BARBARA YVONNE MAUER, DEFENDANT

No. COA09-807

(Filed 16 February 2010)

1. Animals— cruelty to animals—insufficient of evidence—"tormented" animal

The trial court did not err in denying defendant's motion to dismiss the charge of cruelty to animals as the State presented substantial evidence that defendant "tormented" a cat, causing it unjustifiable pain or suffering, under N.C.G.S. § 14-360(c).

2. Damages and Remedies— restitution—insufficient evidence

In an animal cruelty prosecution, the trial court committed reversible error in ordering defendant to pay $259.25 in restitution as the restitution worksheet submitted to the trial court was insufficient to support the order. Defendant's failure to object to the trial court's entry of the award of restitution did not preclude appellate review of the issue and defendant's silence while the trial court orally entered judgment against her did not constitute a stipulation to amount of restitution.

Appeal by defendant from judgment entered 17 February 2009 by Judge James Gregory Bell in Cumberland County Superior Court. Heard in the Court of Appeals 2 December 2009.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Barbara Yvonne Mauer appeals her conviction of misdemeanor cruelty to animals, arguing primarily that the trial court erred in denying her motion to dismiss the charge for insufficient evidence. Contrary to defendant's contention, the State presented substantial evidence of the offense, and, therefore, the trial court properly denied defendant's motion. We conclude, however, that insufficient evidence was presented to support the trial court's restitution order. Consequently, we vacate that order and remand for rehearing.

Facts

The State's evidence tended to establish the following facts at trial: At roughly 11:00 a.m. on 6 September 2007, Officer Melissa Hooks with the Cumberland County Animal Control Department responded to a complaint about the conditions in a home on Sandstone Lane in Cumberland County, North Carolina. When no one answered the door, Hooks looked around the outside of the home, noticing a "moderate" smell of rotting garbage and the smell of urine and feces. Hooks saw food and water bowls on the front step with bugs in them. In the yard, Hooks saw multiple pans of cat litter and litter bags, animal traps, animal carriers, roof tiles, hay, and over-

flowing garbage cans. She tried to enter the backyard through a gate but was unable to do so because the gate was blocked on the other side with debris. Hooks took pictures of the house and reported her investigation to her supervisor.

Animal Control obtained an inspection warrant, and the next day, Hooks, along with other Animal Control officers and Cumberland County Sheriff's deputies, returned to the residence, which they had learned was owned by defendant. Getting out of their vehicles to execute the warrant, they noticed that the smell of feces and urine became stronger as they approached the residence. When no one answered the front door, the deputies pushed open the door, although it was difficult to do so because it was blocked by feces, trash, and clothes on the inside. As the officers tried to enter the house, the smell was "overpowering," making their eyes water. The officers were unable to go inside and had to call the fire department to come and use positive pressure fans to ventilate the house. The fire department also provided Hook and other officers with breathing apparatus so that they could inspect the inside of the house.

When the animal control officers finally went inside, they saw at least 15 to 20 cats running around. The floor was covered with feces and urine and the officers could not walk around inside without stepping in it. Some of the feces were fresh, but some of it was old, with mold on it. In the front room of the house, eight to 10 cats were running around several metal cages covered with feces and fur. In the kitchen, the stove, sinks, and counter tops were covered with feces and urine. The furniture had feces on it and "leftover" food. The cats also had feces on them, and around the windows and doors were "streaks" from where, according to the animal control officers, the cats had been jumping trying to get out of the house.

Inside the house were several bags of cat food, but none of them were open. There were also litter boxes inside, most of them having been turned over. There were piles of clothes and trash on the floor in the rooms and halls and they were covered in cat hair, feces, and urine. In a back room of the house there was a feeder with fresh cat food in it. All the windows and doors in the house were shut and locked, with no access for the cats to go outside.

The officers were able to catch three of the cats before they had to leave the premises due to the expiration of the inspection warrant. Three days later, on 10 September 2007, animal control officers returned to the residence to search for more cats. The inspectors from

the county health department were there and they had condemned the house. The animal control officers saw defendant walking in and out of the house, cleaning it out. They saw several feral cats running around outside the house, but when they went inside, they found no animals.

Around the same time as the investigation at Sandstone Lane, animal control was also called out to investigate a complaint about a dead animal on Elliot Farm Road in Cumberland County. Officers Jason Seifert and Alan Canady found a dead cat in an upstairs room of the house. Inside the house, Seifert and Canady found the floors covered in two-to-three inches of feces. There was one room, above the garage, with clean carpet and no cat feces in it. A bed was in the room, with covers messed up like someone had recently slept in it. In the front yard near the driveway, they found a piece of mail with defendant's name on it.

Defendant was charged with one count of cruelty to animals. Defendant was tried and convicted in district court and defendant appealed for a trial de novo in superior court. At the close of the State's evidence in superior court, and, after electing to not present any evidence in her defense, defendant moved to dismiss the charge for insufficient evidence. The trial court denied both motions. The jury found defendant guilty and the trial court ordered a 30 day suspended sentence and 12 months probation, with no animals on her property or in her possession during her probation period. The court further ordered defendant to undergo a mental health evaluation and to pay $259.25 in restitution to animal control. Defendant gave notice of appeal in open court.

I

[1] Defendant first argues on appeal that the trial court should have granted her motion to dismiss the charge of cruelty to animals for lack of sufficient evidence. On appeal, the trial court's denial of a motion to dismiss for insufficient evidence is reviewed de novo. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged and (2) defendant being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In ruling on a motion to dismiss, "the trial court is required to view the evidence in the light most favorable to the State,

making all reasonable inferences from the evidence in favor of the State." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002). Contradictions and discrepancies in the evidence do not warrant dismissal, but are for the jury to resolve. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

To prove misdemeanor cruelty to animals, the State must present evidence that the defendant did "intentionally overdrive, overload, wound, injure, torment, kill, or deprive of necessary sustenance, or cause or procure to be overdriven, overloaded, wounded, injured, tormented, killed, or deprived of necessary sustenance, any animal[.]" N.C. Gen. Stat. § 14-360(a) (2007); *State v. Coble*, 163 N.C. App. 335, 338, 593 S.E.2d 109, 111 (2004). Under the statute, the term "torment" denotes "any act, omission, or neglect causing or permitting unjustifiable pain, suffering, or death." N.C. Gen. Stat. § 14-360(c). The State's theory at trial was that defendant tormented cat C142 by confining and exposing the cat to unsanitary conditions inside defendant's house for a prolonged period. Defendant argues that the "evidence failed to establish that mere exposure to the living conditions constituted torment as defined by § 14-306(c)."

The evidence presented at trial, viewed in the light most favorable to the State, tends to establish that the odor of cat feces and ammonia emanating from defendant's house was strong enough that it could be smelled outside of the property. The smell was so "overwhelming" that the animal control officers were unable to enter the house without the fire department first ventilating the house and giving the officers the breathing apparatus used when going into burning buildings. While the fire department was ventilating defendant's house, neighborhood residents from two blocks away came outside to find out what the smell was.

When the officers were able to enter the residence, there was so much fecal matter and debris on the floor that the front door was difficult to open. The officers observed that all the doors and windows were closed and feces and urine covered "everything"—including all the floors, furniture, and counter tops. Some of the feces were fresh while some were old and had mold on them. The officers, as well as the cats, were unable to walk in the house without stepping in the feces and urine. The officers also observed that cats, covered in their own feces and urine, were leaving streak marks from jumping on the walls, windows, and doors trying to get out of the house. We conclude that this evidence is sufficient to support a conclusion by a reasonable jury that defendant "tormented" cat C142, causing it unjustifiable

pain or suffering, under N.C. Gen. Stat. § 14-360(c). *See People v. Reed*, 121 Cal. App.3d Supp. 26, 31, 176 Cal. Rptr. 98, 101 (Cal. App. Dep't Super. Ct. 1981) (finding sufficient evidence of failure to provide animals with proper care and attention where evidence indicated that when animal regulation officers executed a search warrant on defendant's property, 22 dogs had been found in the garage and almost every room of the house; that the doors and windows in the house were closed; that dog feces had nearly covered the floors; and the dogs had been without food or water). The trial court, therefore, did not err in submitting the cruelty to animals charge to the jury.

II

[2] Defendant's only other argument on appeal is that the trial court committed reversible error in ordering her to pay restitution without sufficient evidence to support the award. The amount of restitution ordered by the trial court must be supported by competent evidence presented at trial or sentencing. *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995). Here, during sentencing, the trial court ordered defendant to pay $259.25 in restitution to Cumberland County Animal Control as that "[wa]s the amount that appear[ed] in the Court file . . . ." Defendant maintains that "[b]ecause no evidence was presented at trial or sentencing regarding the cost or value of anything associated with animal control or otherwise related to the case, the restitution order was wholly unsupported."

The State contends, however, that defendant waived appellate review of this issue by failing to object to the order of restitution in the trial court. Contrary to the State's contention, this Court has consistently held that pursuant to N.C. Gen. Stat. § 15A-1446(d)(18) (2007) a defendant's failure to specifically object to the trial court's entry of an award of restitution does not preclude appellate review. *See State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) ("While defendant did not specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18)); *State v. Reynolds*, 161 N.C. App. 144, 149, 587 S.E.2d 456, 460 (2003) ("We review this assignment of error under N.C. Gen. Stat. § 15A1446(d)(18) which allows for review of sentencing errors where there was no objection at trial.").

The State further objects to review of the restitution award, arguing that defendant stipulated to the restitution award by remaining silent when the trial court explained to her that it was ordering her to

pay $259.25 in restitution. "While it is true that '[s]ilence, under some circumstances, may be deemed assent,' a stipulation's terms must nevertheless 'be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them." *State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007) (quoting *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005)). Under the facts of this case, defendant's silence while the trial court orally entered judgment against her does not constitute a stipulation to amount of restitution. *See id.* (rejecting State's argument that "defendant's silence at trial bars his appeal of the issue" of restitution).

The State argues alternatively that even if defendant's challenge to the restitution order is preserved and defendant did not stipulate to the award, there is nonetheless sufficient evidence in the record to support the trial court's order. The State points to the superior court's reviewing the restitution worksheet submitted to the district court and contained in the superior court's file, arguing that "[t]his was analogous to the State resubmitting the restitution worksheet to the trial court . . . ." This Court has held, however, that a restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution. *See State v. Swann*, —— N.C. App. ——, ——, 676 S.E.2d 654, 657-58 (2009) (vacating restitution award where "victim did not testify and [restitution] worksheet was not supported by any documentation"); *State v. Calvino*, 179 N.C. App. 219, 223, 632 S.E.2d 839, 843 (2006) ("Here, at the sentencing hearing, the prosecutor noted that the State had a 'restitution sheet' requesting reimbursement from defendant of $600 for SBI 'lab work,' and $100 to the 'Dare County Sheriff's Office Special Funds.' However, defendant did not stipulate to these amounts and no evidence was introduced at trial or at sentencing in support of the calculation of these amounts. We vacate the restitution order and remand for a hearing on the matter at resentencing."). As no evidence was presented at trial or sentencing supporting the restitution worksheet, the trial court erred in ordering defendant to pay $259.25 in restitution. We, therefore, vacate the trial court's restitution order and remand for rehearing on the issue.

No error in part; vacated and remanded in part.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. DONALD SULLIVAN, DEFENDANT

No. COA09-526

(Filed 16 February 2010)

1. Constitutional Law— North Carolina—right to bear arms—courthouse restriction

The right to bear arms in Article I, Section 30 of the North Carolina Constitution was not violated by the application of N.C.G.S. § 14-269.4, prohibiting deadly weapons in courthouses. Defendant argued for an unrestricted right to bear arms, did not acknowledge the long-standing rule that the right to bear arms in North Carolina is subject to regulation by the General Assembly pursuant to its police power, and did not meet his burden of establishing the unconstitutionality of the statute as applied to him.

2. Firearms and Other Weapons— handgun openly carried in courthouse—intent

The trial court did not err by refusing defendant's request to instruct the jury that it must consider whether defendant knowingly or willfully violated N.C.G.S. § 14-269.4, which prohibits deadly weapons in courthouses. Although defendant argued that he did not knowingly violate the statute because he thought it restricted only concealed weapons and he was carrying his weapon openly, the statute in fact prohibits both open and concealed weapons.

Appeal by defendant from judgment entered 19 November 2008 by Judge Jay D. Hockenbury in Pender County Superior Court. Heard in the Court of Appeals 30 November 2009.

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

Donald Sullivan, pro se, defendant-appellant.

MARTIN, Chief Judge.

Defendant Donald Sullivan appeals from a judgment entered upon his conviction by a jury of possessing a deadly weapon in a courthouse in violation of N.C.G.S. § 14-269.4. We find no error.

On 13 May 2008, Cathy Dixon, a deputy clerk in Pender County, was in her office on the first floor of the main courthouse building

when she saw defendant in the bookkeeping office across the hall and observed that he was wearing a gun. Ms. Dixon immediately contacted a bailiff to report her observations. Deputy Sheriff Hugh T. Frazier, who was on duty as a bailiff in Courtroom 2 in the main courthouse building, responded to the call. Since there were only two bailiffs on duty in the main courthouse, Deputy Sheriff Frazier notified his supervisor, Captain Kevin Kemp of the Pender County Sheriff's Office, that he needed to leave his post in the courtroom "to see what the situation was." When he arrived at the bookkeeping office, Deputy Sheriff Frazier found defendant in conversation with Rebecca Carroll, the Clerk of Pender County Superior Court, and Joy R. James, the bookkeeper for the Pender County Clerk of Court, and observed that defendant "had a semiautomatic on his hip." Deputy Sheriff Frazier approached defendant and advised him that it was against the law for defendant to be wearing a gun in the courthouse, and "asked him to please stand up and remove the gun from his holster." Defendant complied with the deputy sheriff's request. Defendant also "drop[ped] the clip" out of the weapon and removed a round from the chamber at the deputy sheriff's further direction. Deputy Sheriff Frazier then took control of the semiautomatic nine-millimeter Glock 26 and noted that the weapon did not have a manual safety. Shortly thereafter, Captain Kemp arrived at the courthouse and proceeded to the bookkeeping office, where he arrested defendant and seized the nine-millimeter Glock 26, the full magazine clip, and the single round that had been removed from the chamber of defendant's weapon.

On 13 May 2008, defendant was charged with possessing a deadly weapon in a courthouse in violation of N.C.G.S. § 14-269.4. After defendant was found guilty by the Pender County District Court on 13 August 2008, defendant gave notice of appeal to the superior court. Following a two-day trial beginning 18 November 2008, a jury found defendant guilty of violating N.C.G.S. § 14-269.4. The Pender County Superior Court entered a judgment imposing a suspended sentence of forty-five days imprisonment and twelve months of unsupervised probation, and ordered defendant to pay a $500 fine and court costs. As a condition of his probation, defendant was ordered to turn over his semiautomatic nine-millimeter Glock 26 to the sheriff's department "to either be destroyed or used for educational purposes in their discretion." Defendant gave oral notice of appeal.

The record on appeal contains seventeen assignments of error. Those assignments of error in support of which defendant failed to

present argument or cite relevant authority in his main brief are not discussed below and are deemed abandoned. *See* N.C.R. App. P. 28(b)(6) (amended Oct. 1, 2009) ("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."); *see also Hardin v. KCS Int'l, Inc.*, ––– N.C. App. –––, –––, 682 S.E.2d 726, 740 (2009) (concluding that an appellant who failed to present argument in support of an issue in his main brief and, instead, did so only in his reply brief, failed to properly present the issue for appellate review (citing *Oates v. N.C. Dep't of Corr.*, 114 N.C. App. 597, 600, 442 S.E.2d 542, 544 (1994); *Golden Rule Ins. Co. v. Long*, 113 N.C. App. 187, 199, 439 S.E.2d 599, 606, *appeal dismissed and disc. review denied*, 335 N.C. 555, 439 S.E.2d 145 (1993); *Animal Prot. Soc'y of Durham, Inc. v. North Carolina*, 95 N.C. App. 258, 269, 382 S.E.2d 801, 808 (1989))).

I.

[1] Defendant first asserts that N.C.G.S. § 14-269.4, as applied to him, is an unconstitutional violation of his right to bear arms under Article I, Section 30 of the North Carolina Constitution. For the reasons stated, we overrule this assignment of error.

"[T]he judicial duty of passing upon the constitutionality of an act of the General Assembly is one of great gravity and delicacy. This Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality." *Guilford Cty. Bd. of Educ. v. Guilford Cty. Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993) (citation omitted). "In challenging the constitutionality of a statute, *the burden of proof is on the challenger*, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *Id.* (emphasis added).

Article I, Section 30 of the North Carolina Constitution provides, in part: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed . . . ." N.C. Const. art. I, § 30. However, our Supreme Court has "consistently pointed out that the right of individuals to bear arms is not absolute, but is subject to regulation." *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 9 (1968). Thus, while the right to bear arms " 'is protected and safeguarded by the Federal and State constitutions,' " it is also " 'subject to the authority of the General Assembly, in the exercise of the police power, to regulate, but the regulation

must be reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.' " *Id.* at 547, 159 S.E.2d at 10 (quoting *State v. Kerner*, 181 N.C. 574, 579, 107 S.E. 222, 226 (1921) (Allen, J., concurring)).

N.C.G.S. § 14-269.4 provides, in pertinent part: "It shall be unlawful for any person to possess, or carry, whether openly or concealed, any deadly weapon . . . in any building housing any court of the General Court of Justice." N.C. Gen. Stat. § 14-269.4 (2009). In support of defendant's contention that this statute, as applied, is an unconstitutional violation of his right to bear arms, defendant argues that "no authority exists in the Constitution for the General Assembly to enact any legislation which would regulate or infringe on [his] right to peacefully and non-threateningly bear arms." In other words, in his argument to this Court, defendant does not acknowledge the prevailing rule long held by our Supreme Court that the right to bear arms, *while protected* by our Constitution, *is subject to regulation* by the General Assembly pursuant to its police power. *See Dawson*, 272 N.C. at 547, 159 S.E.2d at 10. Instead, in support of his contention that he has an "unrestricted" constitutional right to bear arms—which occupies the better part of his discussion with respect to this assignment of error—defendant suggests only that he has a right to protect himself from "a surprise attack," which could occur in a courthouse or on courthouse grounds where it is "know[n]" that people are "unarmed," because "sometimes a cell phone and an armed deputy are just not good enough." In light of defendant's apparent disregard of the long-recognized rule that *the General Assembly can regulate the right to bear arms* within proscribed limits, and because defendant's argument only seeks to persuade this Court that the General Assembly has "no authority" to "enact any legislation which would regulate or infringe on" his right to bear arms, we conclude that defendant has not met his burden of establishing the unconstitutionality of N.C.G.S. § 14-269.4 as it was applied to him. *See In re House of Raeford Farms, Inc. v. Brooks*, 63 N.C. App. 106, 109, 304 S.E.2d 619, 621 (1983) ("As the party challenging the constitutionality of the statute, [defendant] has the burden of establishing its unconstitutionality."), *appeal dismissed and disc. review denied*, 310 N.C. 153, 311 S.E.2d 291 (1984). Accordingly, we overrule this assignment of error.

II.

[2] Defendant next contends the trial court erred when it refused defendant's request to instruct the jury that it had to consider whether

defendant "knowingly" or "willfully" violated N.C.G.S. § 14-269.4. We disagree.

"It is within the power of the Legislature to declare an act criminal irrespective of the intent of the doer of the act." *State v. Hales*, 256 N.C. 27, 30, 122 S.E.2d 768, 771 (1961). "The doing of the act expressly inhibited by the statute constitutes the crime." *Id.*; *State v. McDonald*, 133 N.C. 680, 684, 45 S.E. 582, 583 (1903) ("[W]hen an act is forbidden by law to be done, the intent to do the act is the criminal intent and the law presumes the intent from the commission of the act."). "Whether a criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design." *Hales*, 256 N.C. at 30, 122 S.E.2d at 771.

N.C.G.S. § 14-269.4 was enacted for the purpose of "prohibit[ing] the possession, whether openly or concealed, of any weapon while on any state property." 1981 Sess. Laws 927, ch. 646, § 1. The statute provides exceptions for superior and district court judges, magistrates, detention officers, and other military and law enforcement officers who are in possession of such weapons in a courthouse building while acting in the discharge of their official duties and who comply with other enumerated conditions, and also excepts those who are "in possession of a weapon [in a building housing a court of the General Court of Justice] for evidentiary purposes, to deliver it to a law-enforcement agency, or for purposes of registration." *See* N.C. Gen. Stat. § 14-269.4. The portion of N.C.G.S. § 14-269.4 with which defendant was charged, however, provides: "It shall be unlawful for any person to possess, or carry, whether openly or concealed, any deadly weapon . . . in any building housing any court of the General Court of Justice." *Id.* Thus, the plain terms of the provision with which defendant was charged "do not include any reference to criminal intent or *mens rea*." *See State v. Haskins*, 160 N.C. App. 349, 352, 585 S.E.2d 766, 768, *appeal dismissed and disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003).

Defendant admits that, on 13 May 2008, he chose to enter the Pender County Courthouse while wearing his semiautomatic nine-millimeter Glock 26. Defendant does not assert that he met any of the enumerated exceptions of N.C.G.S. § 14-269.4, but argues that, because he *thought* the courthouse only restricted the carrying of *concealed* weapons, and because he did not conceal his semiautomatic nine-millimeter Glock 26, he did not "knowingly" or "willfully" violate N.C.G.S. § 14-269.4. However, since the purpose of N.C.G.S. § 14-269.4

is "to prohibit the possession, *whether openly or concealed*, of any weapon while on any state property," *see* 1981 Sess. Laws 927, ch. 646, § 1 (emphasis added), and because the plain language of the statute with which defendant was charged does not require a consideration of whether an offender committed the offense "knowingly" or "willfully," we conclude that an offender's intent is not an essential element of N.C.G.S. § 14-269.4. Accordingly, we hold the trial court did not err when it refused defendant's request to instruct the jury that it must consider whether defendant "knowingly" or "willfully" violated N.C.G.S. § 14-269.4.

Because the remaining assignments of error set out in defendant's brief require that this Court accept defendant's contention that an offender's intent is an essential element of N.C.G.S. § 14-269.4, our disposition on this issue as set forth above renders it unnecessary to address defendant's remaining arguments.

No error.

Judges ELMORE and GEER concur.

ALEXANDRA CURY, PLAINTIFF v. DAVID F. MITCHELL, DEFENDANT

No. COA09-238

(Filed 16 February 2010)

1. Trusts—constructive— statement of claim—sufficient

The trial court erred by granting defendant's motion to dismiss a claim of constructive trust for failure to state a claim where plaintiff alleged that a fiduciary relationship existed, that defendant breached the duty, and that defendant was unduly enriched.

2. Trusts— resulting—statement of claim—sufficient

Plaintiff alleged a proper claim for a resulting trust where plaintiff and defendant together paid for the land in question but only defendant took title.

3. Contracts— breach—statement of claim—not sufficient

Plaintiff did not sufficiently allege a breach of contract claim in her pleadings and her brief offered no legal authority to justify

or explain the shortcoming. The trial court's dismissal of the claim was affirmed.

Appeal by plaintiff from judgment entered 4 December 2008 by Judge Dennis J. Winner in Buncombe County Superior Court. Heard in the Court of Appeals 15 September 2009.

Lentz & Associates, by John M. Olesiuk, for plaintiff.

Roberts & Stevens, P.A., by Sarah Patterson Brison, for defendant.

ELMORE, Judge.

Alexandra Cury (plaintiff) appeals an order dismissing her complaint against David Mitchell (defendant). After careful review, we affirm in part and reverse in part.

Plaintiff alleged the following facts in her 28 August 2008 complaint: The parties were "long-time domestic companions and resided together as such," although they never married. They also had a child together, who was nine years old at the time the complaint was filed. "In September 1998 the parties contributed their resources for the purchase of a home [in Asheville]. Specifically, Plaintiff contributed $25,000 of her own monies towards the $142,000 purchase price of the property. Title of the home in question was placed solely in Defendant's name." At the time plaintiff contributed $25,000.00 towards the purchase of the house, plaintiff was pregnant with their child. She alleged that, as a result, they had a fiduciary and "trusting" relationship.

In 1998, plaintiff's contribution represented eighteen percent of the property's purchase price and defendant had made no significant improvements since its purchase. After the parties separated, plaintiff asked defendant to "reimburse her for her contributions to the property, particularly her financial contribution at the time of" its purchase. "Although Defendant has repeatedly informed Plaintiff, both verbally and in writing, that he would do so, as of the time of the institution of this action Defendant has made no efforts to compensate Plaintiff for her acknowledged contributions." The complaint alleged that defendant acknowledged his obligation in writing in November 2006 and November 2007. At the time the parties purchased the property, "it was never the intentions of the parties that Defendant would receive exclusive interest in the home without compensating Plaintiff for her contribution." Specifically, "there was no agreement of the

parties that Plaintiff would go uncompensated for her $25,000 contribution at the time of closing."

Defendant moved to dismiss the action for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of our Rules of Civil Procedure. Defendant also filed an answer to plaintiff's complaint, denying that he agreed to compensate plaintiff for her contribution to the house purchase and alleging several defenses. The trial court held a hearing on defendant's motion on 4 November 2008; however, the parties did not include a transcript of that hearing in the record on appeal. On 4 December 2008, the trial court granted defendant's motion to dismiss.

Because this appeal arises from defendant's motion to dismiss for failure to state a claim, "we treat plaintiff['s] factual allegations as true. The question then becomes whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Thompson v. Waters*, 351 N.C. 462, 462-63, 526 S.E.2d 650, 650 (2000) (citations omitted).

> Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wood v. Guilford Cty., 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

[1] Plaintiff first argues that she set forth an adequate claim for relief based on the theory of a constructive trust.

> A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust. . . . [A] constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing. It is an obligation or relationship imposed irrespective of the intent with which such party acquired the property, and in a well-nigh unlimited variety of situations. . . . [T]here is a common, indispensable element in the many types of situations out of which a construc-

> tive trust is deemed to arise. This common element is some fraud, breach of duty or other wrongdoing by the holder of the property, or by one under whom he claims . . . . This equitable device belies its name, for no ongoing trust relationship is created when a court imposes a constructive trust. [T]he constructive trust plaintiff wins an *in personam* order that requires the defendant to transfer specific property in some form to the plaintiff. When the court decides that the defendant is obliged to make restitution, it first declares him to be constructive trustee, and then orders him[,] as trustee, to make a transfer of the property to the beneficiary of the constructive trust, the plaintiff.

Roper v. Edwards, 323 N.C. 461, 464, 373 S.E.2d 423, 424-25 (1988) (quotations and citations omitted; alterations in original). Although most constructive trusts arise from fraud, our Supreme Court held in *Roper* that the absence of fraud alone is not necessarily fatal to a claim of constructive trust:

> Inequitable conduct short of actual fraud will give rise to a constructive trust where retention of the property by the holder of the legal title would result in his unjust enrichment. Fraud need not be shown if legal title has been obtained in violation of some duty owed to the one equitably entitled.

Id. at 465, 373 S.E.2d at 425 (quotations and citation omitted). In *Booher v. Frue*, this Court explained that the "plaintiffs, by alleging that a fiduciary relationship existed, that a fiduciary duty was breached, and that [the] defendants gained because of that breach . . . have made a claim for constructive trust." 86 N.C. App. 390, 395, 358 S.E.2d 127, 130 (1987), *aff'd per curiam by* 321 N.C. 590, 364 S.E.2d 141 (1988).

In this case, plaintiff alleged that defendant had a fiduciary relationship with her at the time he purchased the house because she was pregnant with his child and they were in a "trusting" relationship. Our Supreme Court has broadly defined a fiduciary relationship

> as one in which there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . ., [and] it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other*.

Dalton v. Camp, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001) (quotations and citations omitted; alterations in original). "[T]he existence of a fiduciary relationship is a question of fact[.]" *Patterson v. Strickland*, 133 N.C. App. 510, 517, 515 S.E.2d 915, 919 (1999) (citation omitted). However, we have already recognized that a fiduciary relationship may exist between unmarried roommates, *see id.* (affirming a jury's determination that the roommates had a fiduciary relationship), so it seems reasonable that a jury could find a fiduciary relationship between unmarried romantic partners who are expecting a child together.

In her complaint, plaintiff alleged that defendant breached the trust of their fiduciary relationship by refusing to reimburse her for her financial contributions to the property and that defendant was unjustly enriched as a result. In *Rhue v. Rhue*, the plaintiff and the defendant were married, then divorced, and then reconciled and lived together as an unmarried couple from 1978 until 2003. 189 N.C. App. 299, 300, 658 S.E.2d 52, 55 (2008). The defendant purchased two properties after his divorce but before his reconciliation, and the properties remained in his name only. *Id.* at 301, 658 S.E.2d at 55. After the couple ended their romantic relationship in 2003, the plaintiff sued the defendant, alleging that she had a constructive trust in the two properties because she had helped the defendant improve the properties and he had promised her that the properties would "be used for their retirement[.]" *Id.* at 305, 658 S.E.2d at 58. At trial, the jury found a constructive trust in favor of the plaintiff. *Id.* at 302, 658 S.E.2d at 56. The trial court denied the defendant's motion for judgment notwithstanding the verdict, and we affirmed. *Id.* at 303, 658 S.E.2d at 56.

Here, plaintiff alleged that a fiduciary relationship existed, that defendant breached a fiduciary duty, and that defendant was unjustly enriched because of that breach. *See Booher*, 86 N.C. App. at 395, 358 S.E.2d at 130. These allegations and the facts as presented in the complaint are sufficient to state a claim for constructive trust, and the trial court erred by granting defendant's motion to dismiss for failure to state a claim.

[2] Plaintiff next argues that her complaint alleged a proper claim for resulting trust. We agree.

> A resulting trust arises "when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for

> the benefit of another. . . . A trust of this sort does not arise from or depend on any agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance taken in the name of another."

Patterson, 133 N.C. App. at 519, 515 S.E.2d at 920 (quoting *Teachey v. Gurley*, 214 N.C. 288, 292, 199 S.E. 83, 86-87 (1938)).

> The classic example of a resulting trust is the purchase-money resulting trust. In such a situation, when one person furnishes the consideration to pay for land, title to which is taken in the name of another, a resulting trust commensurate with his interest arises in favor of the one furnishing the consideration. The general rule is that the trust is created, if at all, in the same transaction in which the legal title passes, and by virtue of the consideration advanced before or at the time the legal title passes.
>
> If A and C pay for a parcel of land, but only C takes title, the theory of the law is that at the time title passed A and C intended that both would have an interest in the land.

Cline v. Cline, 297 N.C. 336, 344-45, 255 S.E.2d 399, 404-05 (1979) (citations omitted). Here, A (plaintiff) and C (defendant) paid for a parcel of land, but only C (defendant) took title. Thus, plaintiff's factual allegations are sufficient to plead a resulting trust claim and the trial court improperly dismissed her claim. If a resulting trust is found to exist, its value may be a fraction of the property's total value. *See Patterson*, 133 N.C. App. at 520, 515 S.E.2d at 921 ("[A] finder of fact could reasonably determine that plaintiff and defendant had an agreement to purchase the property together and that plaintiff was entitled to *some share* of the property[.]") (emphasis added).

[3] Plaintiff's last claim for relief is for breach of contract. However, her complaint does not sufficiently allege the existence of a contract between the parties, and her brief offers no legal authority to justify or explain this shortcoming. Accordingly, we affirm the trial court's dismissal of plaintiff's third cause of action.

For the foregoing reasons, we reverse the trial court's judgment granting defendant's motion to dismiss and dismissing plaintiff's complaint as the judgment applies to plaintiff's first and second causes of action. We affirm the trial court's judgment as it applies to plaintiff's third cause of action. We remand for proceedings consistent with this opinion.

Affirmed in part, reversed in part.

Judges WYNN and CALABRIA concur.

STATE OF NORTH CAROLINA v. KEVIN LEWIS JACKSON

No. COA09-692

(Filed 16 February 2010)

1. Evidence— cross-examination—defense of involuntary intoxication—pre- and post-arrest silence

The trial court did not commit plain error in an indecent liberties and statutory rape case by allowing the prosecutor to cross-examine defendant about his pre- and post-arrest silence regarding his belief that he had been drugged because the record reflected substantial evidence of defendant's guilt including testimony from the victim, the results of the paternity testing, and defendant's own testimony that he did not deny being the father of the victim's child.

2. Constitutional Law— effective assistance of counsel—failure to object to cross-examination

Defendant did not receive ineffective assistance of counsel in an indecent liberties and statutory rape case based on his trial counsel's failure to object to the cross-examination of defendant about his pre- and post-arrest silence regarding his belief that he had been drugged. The State presented substantial evidence of defendant's guilt, and the only issue in contention was his defense of involuntary intoxication. Defendant cannot show that his counsel's failure to object to the pertinent portion of the cross-examination prejudiced him.

3. Criminal Law— referring to complainant as "victim"—failure to show prejudicial error

The trial court did not err or commit plain error in an indecent liberties and statutory rape case by allowing the prosecutor and State's witnesses to refer to the complainant as the "victim" because there was no prejudice in light of the substantial evidence. Further, the trial court's use of the word "victim" in the jury charge tracked the language of the pattern jury instruction.

4. Constitutional Law— effective assistance of counsel—failure to object to referring to complainant as "victim"

Defendant did not receive ineffective assistance of counsel in an indecent liberties and statutory rape case based on his trial counsel's failure to object to every reference to the prosecuting witness as the "victim" because there was substantial evidence of defendant's guilt, and defendant failed to show how he was prejudiced by these remarks.

Appeal by defendant from judgment entered 5 November 2008 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General W. Wallace Finlator, Jr., for the State.

Mark Montgomery for defendant-appellant.

BRYANT, Judge.

On 5 November 2008, a jury found defendant Kevin Lewis Jackson guilty on charges of taking indecent liberties with a child and statutory rape of a person fourteen years of age. The trial court consolidated the offenses and sentenced defendant to an active term of 335 to 411 months. Defendant appeals. We find no prejudicial error.

Facts

The evidence tended to show the following. T.C. is the seventeen-year-old niece of defendant; defendant is the biological brother of T.C.'s father. T.C. testified that when she was fourteen or fifteen years old, she often stayed with defendant and his family. When she was fourteen years old, T.C. became pregnant and then gave birth to a baby boy in July 2006; T.C. testified that defendant is the baby's father.

T.C. testified that defendant began touching her inappropriately when she was fourteen years old. She and defendant had sexual intercourse more than once, usually when the rest of the family was asleep or out of the house. Defendant never used a condom. When T.C. became pregnant, she refused to name defendant as the father, even though she had not had sex with anyone else. T.C. was afraid of defendant and thought he would hurt her if she told anyone. She knew that defendant owned a gun.

T.C.'s mother, T.W., testified that she found out defendant was the father when T.C. was about six months pregnant. T.W. found out defendant had given T.C. a cell phone, and when T.W. tried to take the phone away, T.C. fought with her. T.W. had police take T.C. to detention. T.W. suspected defendant was the father and asked for a DNA test through the court system, which established defendant's paternity with a probability of 99.99%.

Officer Shabeer Mohammad of the Charlotte-Mecklenburg Police Department testified that on 14 June 2006, he responded to a call from the residence of T.W. At the Gaston County Detention Center, he interviewed T.C., who initially told him that someone named John had gotten her pregnant. Officer Mohammad then asked about her relationship with defendant, and T.C. admitted she and defendant had sex. She told him that defendant was the person who had gotten her pregnant. In July 2006, defendant gave Detective Donald Simmons a statement in which he claimed that T.C. must have impregnated herself with a used condom from his bedroom after defendant had sex with his wife. He did not mention being drugged by T.C.

At the close of the State's evidence, defendant moved to dismiss all three charges; the motion was denied. Defendant testified in his defense. He stated that on one Saturday in December 2005, when his wife was out of the house, he consumed food and drink prepared by T.C. and then felt "woozy." He went into the bathroom, and when he came out, T.C. was in his bedroom. Defendant sat down on his bed, and "after that things went bad." He stated that "I really do not remember anything too much after that." The next day, he "felt like somebody hit me over the head with a two by four," and he felt nauseated. Defendant testified he was "shocked" by the result of the DNA test. He stated that, in July 2006, T.C. called him and told him that she had put an ecstasy pill in his drink on the night they had sex. He denied that he willingly or consciously had sex with T.C. and claimed "involuntary intoxication."

At the close of all the evidence, defendant renewed his motions to dismiss, which the court denied.

Defendant contends the trial court (I) committed plain error by allowing the prosecutor to improperly attack defendant's right to remain silent, and (II) erred in allowing the prosecutor and witnesses to refer to the complainant as the "victim" and by using the word "victim" several times in charging the jury. We find no prejudicial error.

I

[1] Defendant first contends the trial court committed plain error in allowing the prosecutor to cross-examine him about his pre- and post-arrest silence regarding his belief that he had been drugged. We disagree.

The following exchange occurred between defendant and the prosecutor on cross-examination:

> Q. You never told Detective Simmons anything about this Ecstasy drugging, did you?
>
> A. No; it wasn't relevant at the time because I didn't find out until July. Like I said I met with Detective Simmons the early part of July. I believe it was on the 3rd if I'm not mistaken.
>
> Q. But you didn't call him in the two years since this case has been pending, you didn't pick up the phone and call him and say I was drugged?
>
> A. At that point in time I was protecting my equal rights. Why would I need to contact Detective Simmons during that point. At that point I needed to seek legal counsel because it was a serious case.
>
> Q. You have never told anyone this very detailed story about being drugged until this very moment, isn't that right?
>
> A. No, ma'am; actually the first person I told was my previous counsel . . . .
>
> . . .
>
> Q. So you wanted to keep this Ecstasy defense a secret?

Defendant did not object but contends the trial court should have intervened *ex mero motu*. In the alternative, defendant argues his trial counsel provided ineffective assistance by failing to object to the cross-examination.

"Plain error" does not connote "simply obvious or apparent error." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Under this standard of review, the defendant must show: "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

"[T]he State may use the defendant's pre-arrest silence for impeachment purposes at trial." *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894, *appeal dismissed and disc. review denied*, 362 N.C. 683, 670 S.E.2d 566 (2008). Once the defendant has been arrested and advised of his *Miranda* rights, however, the State's use of his silence against him violates his constitutional right against self-incrimination. *Id.* Violations of a defendant's constitutional rights are prejudicial unless the error is harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2009).

Here, the challenged cross-examination could refer to either defendant's pre- or post-arrest silence or to both. Defendant was not arrested until September 2007. He testified that T.C. told him she drugged him sometime in July 2006, and it is unclear whether defendant knew of his alleged drugging at the time he was interviewed by police in early July 2006. Because we conclude that the jury would not have reached a different result but for the cross-examination, we need not resolve to which period of time the cross-examination was intended to refer. The record reflects substantial evidence of defendant's guilt, including: testimony from T.C., the results of paternity testing, and defendant's own testimony that he does not deny being the father of T.C.'s child. Since any error was not prejudicial, defendant has failed to show plain error. *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779.

[2] Defendant also asserts that his trial counsel provided ineffective assistance in failing to object to the cross-examination. To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was deficient and prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). Here, the State presented substantial evidence of defendant's guilt, and the only issue in contention was his defense of involuntary intoxication. Defendant cannot show his counsel's failure to object to the brief portion of his cross-examination quoted above prejudiced him. This assignment of error is overruled.

II

[3] Defendant next argues the trial court erred or committed plain error in allowing the prosecutor and State's witnesses to refer to the complainant as the "victim," thereby reinforcing the complainant's credibility at the expense of defendant. Defendant also contends that the trial judge's use of the word "victim" in the charge to the jury constituted an improper opinion on the guilt or innocence of defendant, requiring a new trial. We find no merit in this argument.

Defendant's only objection to the use of the word "victim" by the prosecutor was overruled by the trial court. Even if the trial court erred in overruling defendant's objection to the prosecutor's use of the term "victim," he must show prejudice to receive a new trial. *See* N.C.G.S. § 15A-1443(b). The remaining uses of the word by the prosecutor and the State's witness went unchallenged and must be reviewed for plain error. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Our Supreme Court has held that a trial court referring to the prosecuting witness as "the victim" does not constitute plain error. *State v. McCarroll*, 336 N.C. 559, 565-66, 445 S.E.2d 18, 22 (1994). In light of the substantial evidence presented, we see no prejudice. Accordingly, we conclude that the trial court did not err in overruling defendant's objection, nor did the trial court commit plain error by failing to intervene *ex mero motu* to prosecution references to T.C. as "the victim."

Similarly, defendant's argument that the trial court's use of the word "victim" in the jury charge constituted improper personal opinion has no merit. The trial court tracked the language of the pattern jury instruction for statutory rape nearly word-for-word, and the instruction uses the term "victim" ten times. *See* N.C.P.I.—Crim. 207.15.2. Moreover, the indictment uses the word "victim" two times. The trial court did not err, let alone commit plain error. *See State v. Martin*, 191 N.C. App. 462, 471, 665 S.E.2d 471, 476 (2008).

[4] Defendant argues in the alternative that he received ineffective assistance of counsel because his attorney failed to object to every reference to the prosecuting witness as the "victim." As discussed above, the State presented substantial evidence of defendant's guilt, and we conclude that defendant cannot show he was prejudiced by these remarks. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Defendant has failed to show ineffective assistance of counsel, and this assignment of error is overruled.

No prejudicial error.

Judges ELMORE and STROUD concur.

STATE OF NORTH CAROLINA v. McCOY ANTWAN RICHARDSON

No. COA09-621

(Filed 16 February 2010)

1. Drugs— crack cocaine—constructive possession—evidence not sufficient

The trial court erred by denying defendant's motion to dismiss the charge of possession with intent to distribute cocaine where a baggy of crack cocaine was found near defendant's feet when he was detained after running out the back door of a house which officers had approached to serve a search warrant. Defendant did not have physical possession of the crack cocaine and there was no indicia of defendant's control of the place where the contraband was found. Defendant's residence in the same neighborhood, previous visits to the same house, and his proximity to the drugs after being detained were not a sufficient basis for constructive possession.

2. Drugs— paraphernalia—constructive possession—evidence not sufficient

The trial court erred by denying defendant's motion to dismiss a charge of possession of drug paraphernalia under a theory of constructive possession where the paraphernalia was found in the kitchen of a house and defendant was found in the backyard. Although it could be inferred that defendant had run through the kitchen into the backyard, the connection was tenuous.

3. Arrest— resisting an officer—running from search

The trial court erred by denying defendant's motion to dismiss the charge of resisting an officer where defendant ran from the back of a house when an officer announced "police, search warrant" at the front door. There is no authority for the State's presumption that a person whose property is not the subject of a search warrant may not peacefully leave the premises after the police knock and announce if the police have not asked him to stay.

Appeal by defendant from judgments entered 17 October 2008 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 4 November 2009.

Attorney General Roy Cooper, by Associate Attorney General Eryn E. Linkous, for the State.

Greene & Wilson, P.A., by Thomas Reston Wilson, for defendant.

ELMORE, Judge.

On 17 January 2008, a jury found McCoy Antwan Richardson (defendant) guilty of possession with intent to distribute cocaine, resisting a public officer, and possession of drug paraphernalia. He received a sentence of nine to eleven months' imprisonment for possession with intent to distribute cocaine, sixty days' imprisonment for resisting a public officer, and 120 days' imprisonment for possession of drug paraphernalia. For the reasons set forth below, we vacate all three convictions.

Background

On 28 February 2008, at approximately 5:20 p.m., the Greenville Police Department executed a search warrant for 508-A Contentnea Street. Greenville Police Officer Dennis Grimsley approached the front of the residence and yelled, "police, search warrant." Some other officers went to the back of the residence to prevent people from leaving the house through the back door. Officer Grimsley then pushed the front door open and saw a man and woman in the front room. He also saw several men running out the back door. Officer Grimsley followed them out the back door and noticed four men on the ground, all of whom had been detained by officers. Defendant was one of those men and he had a sum of money in his hands. Officer Grimsley handcuffed defendant and put the cash in defendant's pocket. Officer Grimsley patted down defendant, but found no weapons or contraband; he did find additional cash in defendant's pocket. The cash from defendant's hand and pocket totaled $1,060.00. Officer Grimsley also found a plastic baggy containing a 9.4-gram crack rock on the ground near defendant. The baggy was located about two feet from defendant's feet. The other men who had been detained were the same distance from defendant.

Officer Grimsley continued his search inside the house and found a "set of black digital scales, a small amount of suspected marijuana," and "an open box of sandwich bags which were similar to" the bag containing the crack rock. These items were found in a side room in the house. Officer Grimsley also found a "glassine" pipe in the lower left cabinet of the kitchen.

Before executing the search warrant, police had observed defendant "in the area of 508-A Contentnea Street" at least five, but no more than ten times. Officer Grimsley had observed defendant "[g]oing in and out of the house, standing on the front porch, standing in the yard." However, the officers did not specify a particular time span during which they saw defendant at the house; the officers had patrolled that neighborhood for years.

The house was rented by Benny Bullock, Jr., and defendant lived at a different address in the same neighborhood. There was no evidence that defendant lived at the house on Contentnea street.

Arguments

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the charge of possession with intent to distribute cocaine. We agree. A motion to dismiss should be denied if there is substantial evidence "(1) of each essential element of the offense charged . . ., and (2) of defendant's being the perpetrator of such offense." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (quotations and citation omitted). When reviewing a motion to dismiss based on insufficiency of the evidence, we "view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Id.* (citations omitted).

Section 90-95 of our General Statutes provides, in relevant part, that it is "unlawful for any person . . . [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]" N.C. Gen. Stat. § 90-95(a)(1) (2009). "The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citations omitted). Here, the second element is not at issue: it is undisputed that the substance in the baggy was crack cocaine, a controlled substance. However, defendant argues that the State presented insufficient evidence of possession.

> In a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of *nonexclusive*, constructive possession is sufficient. Constructive possession exists when the defendant, while

> not having actual possession, . . . has the intent and capability to maintain control and dominion over the narcotics.
>
> * * *
>
> Where [contraband is] found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. However, unless the person has exclusive possession of the place where the narcotics are found, the State must show *other incriminating circumstances* before constructive possession may be inferred.

State v. McNeil, 359 N.C. 800, 809–10, 617 S.E.2d 271, 277 (2005) (quotations and citations omitted; alterations in original). Here, it is undisputed that defendant did not have actual physical possession of the crack, did not reside in any way at 508-A Contentnea Street, and did not have exclusive control of 508-A Contentnea Street when the police executed the search warrant. Therefore, we must determine whether the State showed "other incriminating circumstances."

The State put forth, as "other incriminating circumstances," defendant's proximity to the baggy of crack, his previous visits to the house, and defendant's own home in the same neighborhood. Our Supreme Court recently observed that "[o]ur cases addressing constructive possession have tended to turn on the specific facts presented." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 595 (2009) (citations omitted). In *Miller*, the Court reviewed a number of constructive possession cases and concluded that "two factors frequently considered are the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found." *Id.* at 100, 678 S.E.2d at 594. The Court found sufficient evidence of both where the defendant was found sitting on the same end of a bed from which cocaine was recovered, a bag containing the defendant's birth certificate and state-issued identification card were found in that bedroom, and the bedroom was in a home in which two of his children lived with their mother. *Id.*

Here, there was no indicia of defendant's control over the place where the contraband was found. He was not listed as a renter, none of the utilities were in his name, no documents with defendant's name on them were located there, none of defendant's family members lived there, and there was no evidence that he slept there or otherwise lived there. The State points to *State v. Baize* to support its con-

tention that defendant's residence in the same neighborhood and previous visits to 508-A Contentnea Street, along with his proximity to the drugs after being detained by the police in the backyard, are a sufficient basis for constructive possession. We cannot agree. In *Baize*, this Court held that the State had presented sufficient evidence of constructive possession when a witness personally observed the defendant produce a plastic bag of cocaine and then hand it to another person, from whom the plastic bag was eventually recovered. *State v. Baize*, 71 N.C. App. 521, 523, 531, 323 S.E.2d 36, 38, 42 (1984). The scenario in *Baize* is too dissimilar from the scenario at hand to be instructive. We cannot find any authority that would support a finding of constructive possession given the factual scenario before us. Accordingly, we hold that the trial court erred by denying defendant's motion to dismiss and we vacate that conviction.

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of possession of drug paraphernalia because the State presented insufficient evidence of possession. We agree.

> General statute section 90-113.22 provides, in relevant part:
>
> It is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, or conceal a controlled substance which it would be unlawful to possess, or to inject, ingest, inhale, or otherwise introduce into the body a controlled substance which it would be unlawful to possess.

N.C. Gen. Stat. § 90-113.22(a) (2009). The police recovered the following drug paraphernalia from the house: glassine pipe, digital scales, and plastic sandwich bags. Again, the State progressed under a theory of constructive possession and, again, we cannot find that there was sufficient evidence of defendant's possession of any of the drug paraphernalia. Defendant was first identified in the backyard, although it could be reasonably inferred that he ran out of the house into the backyard through the kitchen. However, the glassine pipe was found in a lower cabinet in the kitchen and no other evidence connected the pipe to defendant. In addition, no evidence connected defendant to the room in which the scales and plastic sandwich bags were found. The connection between defendant and these objects is even more tenuous than the connection between defendant and the

baggy of crack, which we found insufficient to withstand a motion to dismiss. Accordingly, we hold that the trial court erred by denying defendant's motion to dismiss the charge of possession of drug paraphernalia and we vacate that conviction.

[3] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of resisting an officer. We agree. General Statute section 14-223 provides, "If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2009). The State asserts that defendant's flight after Officer Grimsley announced, "police, search warrant," at the front door is sufficient evidence of resisting an officer. Every appellate opinion interpreting § 14-223 implicates only the constitutional prohibition of unreasonable seizures of the person, generally in the context of an arrest or investigatory stop. *See*, *e.g.*, *State v. Swift*, 105 N.C. App. 550, 555, 414 S.E.2d 65, 68 (1992) (holding that a defendant does not have the right to resist a legal investigatory stop and his "flight from a lawful investigatory stop contribute[s] to probable cause that [he] was in violation of . . . § 14-223") (citation omitted). Here, though, the police officers were at the house to execute a search warrant, not an arrest warrant, and Officer Grimsley was not making an investigatory stop when he announced "police, search warrant" at the front door. We find no authority for the State's presumption that a person whose property is not the subject of a search warrant may not peacefully leave the premises after the police knock and announce if the police have not asked him to stay. Defendant's flight rightly suggests that some criminal activity was afoot, but, as we observed in *Swift*, "the Biblical provision that '[t]he wicked flee when no man pursueth,' Proverbs 28:1, does not have the force of law. The innocent may flee if frightened enough." *Swift*, 105 N.C. App. at 554, 414 S.E.2d at 68. Accordingly, we hold that the trial court erred by denying defendant's motion to dismiss the charge of resisting an officer for insufficiency of the evidence and we vacate that conviction.

Having vacated all of defendant's convictions, it is unnecessary for us to address defendant's final argument.

Vacated.

Judges STEELMAN and HUNTER, JR., Robert N., concur.

IN THE MATTER OF: N.E.L., A MINOR CHILD

No. COA08-1573-2

(Filed 16 February 2010)

1. Jurisdiction— personal—termination of parental rights—improper service—answer and appearance

The trial court did not err by exercising jurisdiction over respondent in a termination of parental rights action where respondent clearly received improper service but filed an answer without objecting to jurisdiction, appeared at the hearing, presented evidence, and was represented by counsel.

2. Termination of Parental Rights— jurisdiction—no summons issued to child or guardian ad litem

The trial court had personal jurisdiction in a termination of parental rights case where neither the child nor his guardian *ad litem* (G.A.L.) was issued or received a summons. The purpose of the summons is to obtain jurisdiction over the parties rather than the subject matter and the G.A.L. fully participated in the hearing.

On remand to the Court of Appeals from an order of the Supreme Court of North Carolina remanding the decision in *In re N.E.L.*, 197 N.C. App. 395, 676 S.E.2d 907 (2009), for reconsideration in light of *In re K.J.L.*, 363 N.C. 343, 677 S.E.2d 835 (2009). Appeal by respondent from an order entered 30 October 2007 by Judge J. Stanley Carmical in Robeson County District Court. Originally heard in the Court of Appeals 5 May 2009.

No brief, for Robeson County Department of Social Services, petitioner-appellee.

North Carolina Administrative Office of the Courts, by Associate Legal Counsel Pamela Newell Williams, for Guardian ad Litem.

Robin E. Strickland, for respondent-appellant mother.

JACKSON, Judge.

This case is heard on remand from the Supreme Court. The original opinion addressed the appeal of respondent-mother ("respondent") from the 30 October 2007 order terminating her parental rights.

That opinion provides a complete and concise recitation of the pertinent facts:

> Robeson County DSS ("DSS") took custody of N.E.L. on 6 January 2005, when he was just three days old. His mother had had no prenatal care and had used drugs during her pregnancy. N.E.L. tested positive at birth for cocaine. On 10 May 2005, N.E.L. was adjudicated a neglected juvenile within the meaning of North Carolina General Statutes, section 7B-101(15).
>
> DSS filed a petition to terminate respondent's parental rights on 1 December 2006. A summons was issued to respondent, but it was returned unserved on 6 December 2006. That original summons has no endorsement. Neither a new summons nor an alias and pluries summons was issued. On 12 September 2007, respondent signed a document purporting to accept service of a summons and petition. No summons was issued to or served upon N.E.L., nor was any summons served upon a guardian *ad litem* on his behalf.
>
> On 24 October 2007, the trial court held a hearing on the termination of respondent's parental rights. In its order filed 30 October 2007, the trial court made findings of fact and concluded as a matter of law that grounds existed to terminate respondent's parental rights and that it was in N.E.L.'s best interests to do so. Therefore, the trial court terminated respondent's parental rights. Respondent appeals.

In re N.E.L., 197 N.C. App. 395, 395-96, 676 S.E.2d 907, 907-08 (2009).

[1] Respondent first contends that, because the summons she received was invalid, the trial court did not acquire subject matter jurisdiction in this case. We disagree.

According to our Rules of Civil Procedure, "Personal service . . . must be made within 60 days after the date of the issuance of summons." N.C. Gen. Stat. § 1A-1, Rule 4(c) (2007). "When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either [an endorsement or an alias and pluries summons]." N.C. Gen. Stat. § 1A-1, Rule 4(d) (2007). "When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the 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) (2007).

Our Supreme Court has addressed whether noncompliance with North Carolina General Statutes, section 1A-1, Rule 4 ("Rule 4") affects a court's subject matter jurisdiction or solely personal jurisdiction over a party. *See In re K.J.L.*, 363 N.C. 343, 677 S.E.2d 835 (2009). In neglect and dependency proceedings, a court's subject matter jurisdiction is conferred by statute. N.C. Gen. Stat. §§ 7B-200, -1101 (2007). "[A] court's lack of subject matter jurisdiction is not waivable and can be raised at any time." *In re K.J.L.*, 363 N.C. at 346, 677 S.E.2d at 837 (citing N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2007)).

"Conversely, a court's jurisdiction over a person is generally achieved through the issuance and service of a summons." *Id.* (citing *Peoples v. Norwood*, 94 N.C. 167, 172 (1886)). "Deficiencies regarding the manner in which a court obtains jurisdiction over a party, including those relating to a summons, are waivable and must be raised in a timely manner." *Id.* (citing N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (2007)). Our Supreme Court has emphasized that "[b]ecause the summons affects jurisdiction over the person rather than the subject matter, this Court has held that a general appearance by a civil defendant 'waive[s] any defect in *or nonexistence of* a summons.' " *Id.* at 347, 677 S.E.2d at 837 (quoting *Dellinger v. Bollinger*, 242 N.C. 696, 698, 89 S.E.2d 592, 593 (1955) (emphasis added)). Based upon the foregoing, our Supreme Court "appear[s] to have rejected the application of Rule 4(e) of the North Carolina Rules of Civil Procedure in all cases under the Juvenile Code." *In re J.D.L.*, —— N.C. App. ——, ——, 681 S.E.2d 485, 489 (2009).

Here, respondent clearly received improper service pursuant to Rule 4. A valid summons was issued on 1 December 2006, but respondent could not be located in order to be served. Nothing in the record shows the existence of any alias or pluries summons, endorsement, or other extension, nor does it show the existence of a new summons. Respondent finally purported to accept service of the original summons on 12 September 2007—285 days after the summons was issued. Notwithstanding this clear violation of Rule 4, respondent filed an answer to the petition to terminate her parental rights and failed to object to the court's jurisdiction over her, thereby waiving any challenge she may have had to personal jurisdiction. She also appeared, presented evidence, and was represented by counsel at the 24 October 2007 hearing. Based upon our Supreme Court precedent that "the summons affects jurisdiction over the person rather than the subject matter," *id.*, and respondent's participation in the case without raising the issue of personal jurisdiction, we hold that

the trial court did not err in exercising jurisdiction over respondent in this action.

[2] Respondent's second argument, which we did not address in the original opinion, is that the trial court lacked subject matter jurisdiction because neither N.E.L. nor his guardian *ad litem* ("GAL") was issued or received a summons. We disagree.

> North Carolina General Statutes, section 7B-1106(a) provides
>
> upon the filing of the petition, the court shall cause a summons to be issued. The summons shall be directed to . . . :
>
> . . . .
>
> (2) Any person who has been judicially appointed as guardian of the person of the juvenile.
>
> (3) The custodian of the juvenile appointed by a court of competent jurisdiction.

N.C. Gen. Stat. § 7B-1106(a) (2007). As noted, *supra*, our Supreme Court has held that "[b]ecause the purpose of the summons is to obtain jurisdiction over the parties to an action and not over the subject matter, summons-related defects implicate personal jurisdiction and not subject matter jurisdiction." *In re K.J.L.*, 363 N.C. at 348, 677 S.E.2d at 838. Furthermore, in a case similar to the case *sub judice*, the Supreme Court emphasized that

> [i]t 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.

In re J.T., 363 N.C. 1, 4, 672 S.E.2d 17, 19 (2009). "[A] general appearance by a civil defendant 'waive[s] any defect in *or nonexistence of* a summons.' " *In re K.J.L.*, 363 N.C. at 347, 677 S.E.2d at 837 (quoting *Dellinger v. Bollinger*, 242 N.C. 696, 698, 89 S.E.2d 592, 593 (1955) (emphasis added)).

In the instant case, neither N.E.L. nor his GAL was issued or received a summons. Nonetheless, the GAL fully participated in the termination of parental rights hearing by filing a report and by appearing, via counsel, at the 24 October 2007 hearing. Accordingly,

we hold that the GAL waived any objection she may have had to the trial court's exercise of personal jurisdiction over the juvenile.

We hold that both respondent and N.E.L., through his GAL, waived any challenge they may have had to the trial court's exercise of jurisdiction by appearing in person or by representative at the 24 October 2007 hearing.

Affirmed.

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

STATE OF NORTH CAROLINA, *EX REL.*, WILLIAM G. ROSS, JR., SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, PLAINTIFF-APPELLEE v. RONALD GOLD OVERCASH, DEFENDANT-APPELLANT

No. COA09-318

(Filed 16 February 2010)

Statutes of Limitation and Repose— collection of payment of civil penalty—three years—final agency decision

The trial court did not err in granting summary judgment in favor of plaintiff North Carolina Department of Environment and Natural Resources in an action to collect payment of a civil penalty assessed against defendant for his failure to apply for a 401 Water Quality Certification before making various alterations. The three-year statute of limitations period began to run 30 days after the agency sent defendant a letter outlining his three options for responding to the imposition of the penalty, and the action was filed within three years of that date.

Appeal by defendant from order entered 8 December 2008 by Judge Clarence E. Horton, Jr., in Cabarrus County Superior Court. Heard in the Court of Appeals 29 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Menard, for the State.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James R. DeMay, for defendant-appellant.

ELMORE, Judge.

On 14 August 2003, the Department of Environment and Natural Resources (DENR) assessed a civil penalty against Ronald Gold Overcash (defendant) totaling $9,519.84 due to his failure to apply for a 401 Water Quality Certification before making various alterations, such as piping and grading, to a stream on his land. On 15 August 2003, DENR sent defendant a letter via certified mail notifying him of the penalty and outlining his three options for response: (1) submit payment of the penalty; (2) submit a written request for remission of the penalty; or (3) file a petition for an administrative hearing with the Office of Administrative Hearings. That letter was received by defendant on 21 August 2003.

The parties disagree as to whether defendant wrote plaintiff to dispute the claim; regardless, plaintiff sent defendant another letter on 17 June 2004 demanding payment within ten days of receipt of the letter. Defendant discussed a payment plan with an employee of plaintiff; whether such a plan was agreed upon is also the subject of dispute. On 8 September 2006, plaintiff instigated this suit to enforce collection of the penalty. Plaintiff moved for summary judgment on 19 November 2008, and that motion was granted on 8 December 2008. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred in granting summary judgment because this action was initiated outside the three-year statute of limitations on such claims. We disagree.

The statute pursuant to which the suit was instigated is N.C. Gen. Stat. § 143-215.6A(g) (2007), which states:

> If any civil penalty has not been paid within 30 days after notice of assessment has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment, unless the violator contests the assessment as provided in subsection (d) of this section, or requests remission of the assessment in whole or in part as provided in subsection (f) of this section. If any civil penalty has not been paid within 30 days after the final agency decision or court order has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment.

> *Such civil actions must be filed within three years of the date the final agency decision or court order was served on the violator.*

(emphasis added). As stated above, this action was instigated on 8 September 2006. The dispute is when the three-year statute of limitations began to run: Defendant argues that it began on 21 August 2003, the date he received the letter from plaintiff outlining his three options for responding to the imposition of the penalty, because, he argues, that is the only date that could be considered "the date the final agency decision or court order was served on the violator" per the statute. Plaintiff argues that it did not begin until thirty days later, when defendant's options to challenge the imposition of the penalty ended. We agree with plaintiff and thus affirm the order of the trial court.

In interpreting a statute, this Court will first look to the plain language of the statute; if its meaning is clear from such a reading, we will look no further. *State v. Jackson*, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001) ("When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.") (quotations and citation omitted). The plain meaning of the phrase "the final agency decision" clearly signifies a decision of the agency that is no longer under review or able to be challenged. The letter sent to defendant notifying him of the penalty assessed against him does not qualify as such a decision. As stated above, it gives defendant three options in a numbered list and apparently presented as three equal choices: pay the penalty, submit a request for remission of the amount of the penalty, or file a petition for a hearing on the violation that resulted in the penalty. Given that a full two pages of the three-page letter are taken up by explanations of defendant's options other than complying, this Court is hard pressed to accept defendant's analogy of the letter to a trial court's final order or judgment. As is well illustrated in the Superior Court's order granting summary judgment in this case, final orders and judgments from our trial courts do not come with instructions on how to overcome, reverse, or circumvent them.

Defendant urges this Court to focus not on the "final" requirement of the statute but rather the date of service requirement—that is, to find that, regardless of whether the letter was a final decision, the key requirement is the date the letter was served. This we decline

to do. Defendant was served with a letter stating a penalty, outlining his options for appealing the penalty, and giving a clear date on which the penalty would no longer be appealable. That date constitutes the final decision of the agency, regardless of when the letter was delivered, and it is that date that initiated the running of the statute of limitations. As such, the State filed the instant suit within the required time frame, and thus the trial court did not err in granting the State's motion for summary judgment.

Affirmed.

Judges WYNN and CALABRIA concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 FEBRUARY 2010)

AL-NASRA v. CLEVELAND CNTY No. 09-675	Cleveland (07CVS2689)	Affirmed
AL-NASRA v. CLEVELAND CNTY No. 09-316	Cleveland (07CVS2689)	Affirmed
ALL CAROLINA CRANE v. DAN'S RELOCATORS No. 09-543	Brunswick (07CVS2041)	Reversed and Remanded
BLEVINS v. STEEL DYNAMICS, INC. No. 09-540	Franklin (08CVS191)	Vacated and remanded
BUMGARNER v. BURLINGTON INS. CO. No. 09-850	Swain (08CVS31)	Affirmed
CHANNEL GROUP, LLC v. COOPER No. 09-874	Randolph (08CVD3256)	Reversed
DEAL v. FRYE REG'L MED. CTR., INC. No. 09-873	Catawba (06CVS2683)	Affirmed
GRIFFITH v. N.C. DEP'T OF CORR. No. 09-945	Anson (09CVS263)	Dismissed
HARDIN v. LIBERTY COMMONS No. 09-570	Alamance (06CVS1999)	Vacated
HARGETT v. SCHULZ No. 09-291	Union (08CVD3533)	Reversed
HARRIS v. HARRIS No. 09-224	New Hanover (08CVD5151)	Reversed and Remanded
IN RE A.M. No. 09-1169	Chatham (07JT1)	Affirmed
JOHNSON v. BAXTER HEALTHCARE CORP. No. 09-579	Indus. Comm. (IC103564) (IC993995) (IC055024)	Affirmed
MARTIN v. MARTIN No. 09-328	Forsyth (06CVD3364)	Reversed and Remanded
MEYER v. GOV'T EMPS. INS. CO. No. 09-446	Mecklenburg (08CVS4026)	Affirmed

NIX v. SONY COMPUTER No. 09-819	Carteret (07CVS1050)	Affirmed
PUCKETT v. N.C. DEP'T OF CORR. No. 09-782	Wake (04CVS14711)	Reversed
STATE v. BAUTISTA No. 09-711	Catawba (07CRS53223)	Affirmed
STATE v. CECIL No. 09-724	Guilford (07CRS104762) (08CRS23189) (08CRS23034) (08CRS23190)	No Error
STATE v. DEBERRY No. 09-420	Richmond (08CRS50570) (08CRS50573)	No Error
STATE v. GADDY No. 09-1013	Columbus (08crs1472) (08crs50657)	No error at trial, judgment vacated, and remanded for resentencing
STATE v. GALINDO No. 08-1460	Wake (07CRS82278) (07CRS82279) (07CRS82277)	No Error
STATE v. GARCIA No. 09-684	Forsyth (07CRS52590)	Dismissed
STATE v. HAWKINS No. 09-821	Davidson (04CRS57565) (04CRS57566) (04CRS57564)	No error in part; Remanded in part
STATE v. ISENHOUR No. 09-721	Cabarrus (05CRS14169) (05CRS13772)	No Error
STATE v. JACKSON No. 09-584	Onslow (07CRS60104) (07CRS60105) (07CRS60103)	New trial
STATE v. KING No. 09-524	Camden (06CRS50376)	No prejudicial error
STATE v. LARSON No. 09-723	Davidson (08CRS720) (07CRS60067)	No Error
STATE v. LITTLE No. 09-761	Wayne (06CRS57684)	No Error

STATE v. MCNEIL No. 09-518	Brunswick (07CRS7928) (07CRS7925) (07CRS7927)	No Error
STATE v. SIMPSON No. 09-836	Anson (07CRS158) (06CRS51689)	No prejudicial error
STATE v. SMITH No. 09-267	Wake (08CRS686) (08CRS16982) (08CRS685)	No Error
STATE v. WEBER No. 09-698	Henderson (07CRS703887)	Affirmed
STATE v. WOODRUFF No. 09-512	Lincoln (07CRS53730)	No error, in part; reversed in part, and remanded
TABAKOVA v. TEODORESCU No. 09-424	Pitt (07CVD350)	Affirmed
TEASLEY v. TEASLEY No. 09-544	Durham (08CVS5010)	Reversed in part and remanded in part
WOODARD v. CLEVELAND CNTY No. 09-598	Cleveland (07CVS2688)	Affirmed
WOODARD v. CLEVELAND CNTY No. 09-317	Cleveland (07CVS2688)	Affirmed

LATTA v. RAINEY

[202 N.C. App. 587 (2010)]

BARBARA C. LATTA AND NORMA B. ELLIS, PLAINTIFFS V.
JAMES L. "RIP" RAINEY, JR., DEFENDANT

No. COA09-511

(Filed 2 March 2010)

1. Appeal and Error— preservation of issues—claim preclusion

Defendant did not preserve for appeal his argument that plaintiffs presented insufficient evidence that mobile billboard sales/lease-back investments sold by defendant were "securities" as defined by N.C.G.S. §§ 78A-1 to -66. Moreover, a federal district court's prior holding that the investments at issue were securities precluded defendant from relitigating the issue in the present case.

2. Securities— exempt from registration—offeror—number of investors

The trial court did not err in denying defendant's motions for summary judgment and JNOV and the issue of whether mobile billboard sales/lease-back investments sold by defendant were exempt from registration under N.C.G.S. § 78A-17(9) was properly submitted to the jury. Mobile Billboards of America, not defendant, was the "offeror" of the securities and there was a triable issue of fact concerning the number of individuals who had invested in the securities.

3. Statutes of Limitation and Repose— securities—claims not time-barred

The trial court did not err in denying defendant's motions for summary judgment and JNOV because even if the issue of whether defendant was liable for selling unregistered securities was barred by a two-year statute of limitations, the issues pertaining to plaintiffs' security claims under N.C.G.S. §§ 78A-8 and -56 were subject to a three-year statute of limitations, which had not expired before the complaint was filed.

4. Fraud— billboard sales and lease—sufficient evidence

The trial court did not err in denying defendant's motions for directed verdict and JNOV on plaintiffs' claims for actual fraud and securities fraud as there was sufficient evidence to support each element of both claims. Defendant abandoned his assignment of error challenging the jury's finding him liable for constructive fraud.

5. Evidence— relevance—exclusion proper or nonprejudicial

Defendant's argument that the trial court erred in excluding certain evidence was overruled. Some of the challenged evidence was either correctly excluded as irrelevant or, even if erroneously excluded, was nonprejudicial. Furthermore, defendant failed to make an offer of proof with respect to the remaining challenged evidence so the exclusion of this evidence was not reviewed on appeal.

Appeal by defendant from judgments entered 17 December 2008 by Judge William C. Griffin, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 4 November 2009.

Martin & Jones, PLLC, by Walter McBrayer Wood, for plaintiffs-appellees.

McDaniel & Anderson, L.L.P., by L. Bruce McDaniel, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant James L. "Rip" Rainey, Jr. appeals from judgments entered after the jury found him liable to plaintiffs Barbara C. Latta and Norma B. Ellis for compensatory and punitive damages resulting from his participation in a Ponzi scheme involving investments in mobile billboard advertising. In challenging the compensatory damage verdicts only, defendant argues that the trial court erred in denying his motions for a directed verdict and judgment notwithstanding the verdict ("JNOV"). As the evidence presented at trial tended to establish each element of plaintiffs' claims, the trial court properly denied the motions and submitted the claims to the jury. Accordingly, we find no error.

Facts

Beginning in the spring of 2001 and continuing into August 2004, Mobile Billboards of America, Inc. ("MBA") sold mobile billboard investments throughout the United States, including North Carolina. As part of the sales process, MBA's sales agents presented potential investors with an "offering circular," a disclosure document designed to comply with federal and state regulations regarding "business opportunities."

Under the investment scheme, investors would purchase a billboard "unit" for $20,000.00 and simultaneously lease the unit for a

seven year term to Outdoor Media Industries ("OMI"), a shell company affiliated with MBA and owned and operated by MBA's principals. Investors were told that OMI would arrange for placement of the billboards on trucks for display, obtain advertising for each billboard, and make monthly lease payments to investors. Investors were told that the lease payments would provide a return of roughly 13.49% per year. At the end of the seven year term, MBA would buy back the billboard units for the full purchase price.

In order to fund the repurchasing of the billboards, MBA told investors that it had established the Reserve Guaranty Trust ("RGT") to insure that funds would be available and that $5,000.00 of the initial purchase price would be deposited into the RGT to support the buy-back. The funds in the RGT were to be invested to generate profits to fund the buy-back. In return for the initial $5,000.00 payment into RGT, RGT issued investors a Trust Secured Certificate that entitled them to an undivided beneficial interest in RGT's assets with a liquidation amount of up to the full amount invested by each individual investor—*i.e.*, $20,000.00 times the number of billboard units purchased.

From May 2003 through April 2004, defendant, a Certified Senior Advisor, was a sales agent of MBA in North Carolina. Sometime in 2003, defendant began meeting with Mrs. Ellis, Mrs. Latta, and her husband Charles W. Latta to discuss investment opportunities. Mrs. Ellis and the Lattas explained to defendant that because they were retirees living on fixed incomes, their primary investment objective was the protection of principal, particularly for Mrs. Latta, whose husband was terminally ill. According to plaintiffs, defendant recommended investing in MBA billboards, stating, among other things, that MBA was a "well settled" and "safe company" and that he "saw no problems with them"; that plaintiffs "could not lose any of [their] principal"; that the investments were "good" and had "absolutely no risk"; that the risk in investing in MBA "is so minimal it is not even worth mentioning"; and that defendant's father had invested in MBA and was planning to invest more.

On 21 November 2003, Mrs. Ellis purchased two MBA units from defendant for a total investment of $40,000.00. The Lattas purchased two units on 4 February 2004, one unit on 7 April 2004, and two more units on 21 April 2004, for a total investment of $100,000.00. According to plaintiffs, they were never given any of the MBA investment documentation to read; defendant explained everything to

them, filled out their paperwork in his own handwriting, and told them what they were signing.

The amount of sales agent commissions was not provided in MBA's investment materials and it was defendant's policy not to disclose the amount of his commissions unless asked directly. Defendant did not tell plaintiffs that he was receiving a 16-20% commission on their investments.

Plaintiffs received payments from OMI for the first year of their investment and for some time afterward. The payments were labeled "lease payments" and were supposed to come from OMI's advertising revenue. In actuality, however, MBA transferred money invested by more recent investors to OMI to fund the "lease payments" to earlier investors. Although defendant was aware that MBA was "taking part of the client's own money and giving it back to them" in the form of purported "lease payments," defendant did not disclose this fact to any of his clients, including plaintiffs because, as MBA management explained to him, if investors knew that they were being paid with their own money, they "would not have invested in it . . . ."

In order to "present[]" the sales investments as "business opportunities" rather than "securities," MBA provided in a memo to its sales agents a list of "unacceptable terms" that should "never" be used in discussing the investment with a client: "investment," "investor," "invest," "guaranty," "guarantee," "guaranteed," "interest," "annuity," "securities," insurance," "insure," and "sales/leaseback program."

By 31 March 2004, defendant and his business partner Arthur J. Anderson, Jr. were aware that the Secretary of State's Office was investigating MBA, believing that the investments were securities subject to federal and state regulation rather than business opportunities. The Secretary of State issued a cease and desist order to MBA on 7 April 2004, and defendant was aware that MBA had been shut down in North Carolina when he received Mrs. Latta's final investment payment on 21 April 2004. Defendant did not tell Mrs. Latta that MBA had been shut down.

On 15 September 2004, the Secretary of State sent a temporary cease and desist order to MBA sales agents in North Carolina, including defendant and Mr. Anderson, barring them from soliciting, offering, or selling MBA contracts to purchase until the contracts were registered as a security with the State and they registered as securities dealers or salespersons. On 17 September 2004, defendant was served with process in an administrative action against MBA. Three

days later, defendant sent a letter to his clients, including plaintiffs, advising them that the State had issued a cease and desist order to MBA and had initiated an action against MBA. The letter did not disclose that defendant had also been issued a cease and desist order or that he was named as a defendant in the action. In his letter to his clients, defendant stated that he had retained legal counsel to protect their "best interests" and that he planned on filing a lawsuit against MBA. Defendant urged his clients to quickly join the potential lawsuit as their delay might result in not being able to participate.

On 1 November 2004, the attorneys retained by defendant filed a complaint against MBA's principals in United States District Court for the Middle District of North Carolina (the "*Allison* case"). Throughout the litigation, defendant told his clients, including plaintiffs, that he was trying to maximize the return on their investments; that hopefully any return from the litigation would be in addition to any award from MBA's receiver in the administrative action; that he would pay their legal fees associated with the litigation; that no fines had been levied against his office and that this should reinforce the investors trust in him; that it was his duty to "seek what was in [their] best interests"; and that his clients should get a substantial settlement as he "started early" and was "first in line."

The Secretary of State obtained an entry of default against defendant on 3 August 2005 and a final cease and desist order was issued to defendant on 19 August 2005. The *Allison* case was dismissed on 30 August 2005 for lack of personal jurisdiction over the defendants and the decision was not appealed.[1] After the *Allison* case was dismissed, plaintiffs filed suit against defendant, as well as his wife Elisabeth G. Rainey, Daniel S. Dark, Mr. Anderson, Gary P. Walker, and 50 "[John] Does." Plaintiffs asserted claims for (1) sale of unregistered securities; (2) sale of securities by unregistered salespeople or dealers; (3) securities fraud; (4) negligence *per se*; (5) negligence and gross negligence; (6) negligent misrepresentation; (7) breach of fiduciary duty; (8) common law fraud; (9) fraudulent concealment; (10) conversion; and (11) equitable estoppel in asserting a statute of limitations defense. Plaintiffs requested compensatory damages, punitive and treble damages, and attorney's fees. Defendants filed an answer generally denying plaintiffs' claims, moving to dismiss plaintiffs' claims, and asserting affirmative defenses, including estoppel, laches, and statute of limitations. Defendant filed for bankruptcy on 1 March 2007; in an order issued 31 May 2007, the

1. *See Allison v. Lomas*, 387 F. Supp. 2d 516 (M.D.N.C. 2005).

bankruptcy court allowed plaintiffs to proceed with their state law claims against defendant. Mr. Latta died on 11 October 2007.

Prior to trial, plaintiffs moved for partial summary judgment, asserting that defendants should be collaterally estopped from litigating the issue of whether the MBA investments were securities subject to federal and state regulation because the issue had already been litigated in a federal district court case involving defendants.[2] The trial court granted plaintiffs' motion on 1 December 2008. Plaintiffs subsequently took a voluntary dismissal of all their claims against all defendants except Mr. Rainey.

Trial began on 1 December 2008. Defendant moved for directed verdict at the close of plaintiffs' evidence and the trial court directed verdicts in favor of defendant on plaintiffs' claims for the sale of securities by an unregistered salesperson or dealer, breach of fiduciary duty, fraudulent concealment, conversion, and equitable estoppel. The trial court submitted the remaining claims to the jury, and, with respect to Mrs. Latta, the jury found defendant liable for selling unregistered securities, common law fraud, securities fraud, and punitive damages. Mrs. Latta was awarded $95,503.40 in compensatory damages, $750,000.00 in punitive damages, $87,500.00 in attorney's fees, and $10,866.60 in costs. As for Mrs. Ellis, the jury found defendant liable for selling unregistered securities, constructive fraud, and securities fraud, as well as punitive damages. The jury awarded Mrs. Ellis $35,953.06 in compensatory damages, $500,000.00 in punitive damages, $87,500.00 in attorney's fees, and $10,866.60 in costs. After trial, defendant moved for JNOV and for a new trial; the trial court denied both motions. In judgments entered on 17 December 2008, the trial court reduced Mrs. Latta's punitive damages to $286,510.20 and reduced Mrs. Ellis's punitive damages award to $107,859.18. Defendant timely appealed the judgments to this Court.[3]

Motions for Directed Verdict and JNOV

Defendant first contends that the trial court erred in denying his motions for directed verdict and JNOV. The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical. *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002). Both motions require the deter-

2. *See Hays v. Adams*, 512 F. Supp. 2d 1330 (N.D. Ga. 2007).

3. By order of this Court entered 13 October 2009, plaintiffs took leave to move the trial court to amend the judgment for Mrs. Ellis to correctly calculate the amount of punitive damages award in accordance with N.C. Gen. Stat. § 1D-25(b) (2009).

mination of "whether the evidence presented at trial is legally sufficient to take the case to the jury." *Taylor v. Walker*, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987). In ruling on either motion, the trial court must consider all the evidence presented at trial in the light most favorable to the non-moving party, with the non-moving party being given the benefit of every reasonable inference that legitimately may be drawn from the evidence and all conflicts in the evidence being resolved in the non-moving party's favor. *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986). "If, after undertaking such an analysis of the evidence, the trial [court] finds that there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for judgment notwithstanding the verdict should be denied." *Abels v. Renfro Corp.*, 335 N.C. 209, 215, 436 S.E.2d 822, 825 (1993). Thus, motions for a directed verdict or JNOV are properly granted only when "it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977).

I. Applicability of the North Carolina Securities Act

[1] Defendant first argues that plaintiffs failed to present any evidence at trial establishing that the MBA billboard sales/leaseback investments are "securities" as defined by the North Carolina Securities Act, N.C. Gen. Stat. §§ 78A-1 to -66 (2009) ("NCSA"). Thus, defendant contends, he cannot be held liable for securities fraud under N.C. Gen. Stat. § 78A-8(2) (2009) and N.C. Gen. Stat. § 78A-56(a)(2) (2009).

Prior to trial, plaintiffs moved for partial summary judgment, asserting that the federal district court's holding in *Hays*, 512 F. Supp. 2d at 1339, that the MBA investments are securities, precluded defendant from re-litigating the issue in this case. The trial court granted plaintiff's motion for summary judgment. Defendant failed to assign error to the court's entering summary judgment in favor of plaintiffs on this issue, and, therefore, has waived appellate review of his contention that the investments are not securities under the NCSA. N.C. R. App. P. 10(a).[4]

4. On 2 July 2009, the North Carolina Supreme Court adopted new rules of appellate procedure. The newly adopted Rule 10 replaces assignments of error with "[p]roposed issues on appeal." N.C. R. App. P. 10(b). The new rules govern those appeals filed on or after 1 October 2009. Because defendant noticed his appeal prior to the effective date of the new rules, they are inapplicable.

In any event, the doctrine of collateral estoppel or claim preclusion bars defendant from re-litigating whether the MBA investments are, in fact, securities. *See Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) ("[T]he determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding."). In *Hays*, 512 F. Supp. 2d at 1336-40, defendant—a named defendant in that action—made precisely the same argument he makes here. The district court explicitly held that the investments are, in fact, securities and noted that defendant's argument to the contrary was "disingenuous, at best." *Id.* at 1339-40. Defendant's contention is, therefore, overruled.

II. Exemption from Registration under the NCSA

[2] Defendant next argues that even if the investments are "securities" for purposes of the NCSA, the investments are exempt from registration requirements and "so there could be no violation for sale of an unregistered security that did not have to be registered in the first place." Specifically, defendant asserts that the MBA investments are exempt from registration under N.C. Gen. Stat. § 78A-17(9) (2009), which excludes "[a]ny transaction pursuant to an offer directed by the offeror to not more than 25 persons . . . in this State during any period of 12 consecutive months . . . ."[5] N.C. Gen. Stat. § 78A-18(b) (2009) establishes that "[i]n a civil or administrative proceeding brought under this Chapter, the burden of proving an exemption . . . is upon the person claiming it."

Defendant contends that the registration exemption in § 78A-17(9) applies to the MBA investments because *defendant* sold the MBA investments to only "11 or 12" people in North Carolina. Defendant's argument is predicated on the supposition that he is the "offeror" referenced in § 78A-17(9), not MBA. The NCSA does not define the term "offeror." Defendant fails to cite any authority—and we have found none—supporting his position.

As defendant's counsel acknowledged in oral arguments, defendant's interpretation of § 78A-17(9) would lead to the untoward result that an entity such as MBA could sell an unlimited number of securi-

5. Defendant also cites the exemption provided in N.C. Gen. Stat. § 78A-17(17), but makes no specific argument in his brief that the MBA investments fall within this exemption. This contention is thus deemed abandoned on appeal. N.C. R. App. P. 28(b)(6).

ties through its sales agents so long as it had enough agents that no agent made an offer of investment to more than 25 potential investors. *See Hobbs v. Moore County*, 267 N.C. 665, 671, 149 S.E.2d 1, 5 (1966) ("If possible, the language of a statute will be interpreted so as to avoid an absurd consequence."). This reading of § 78A-17(9) would undermine one of the primary purposes of securities regulations: "protect[ing] the investing public from inequities in trading . . . ." *Skinner v. E. F. Hutton & Co.*, 70 N.C. App. 517, 520, 320 S.E.2d 424, 427 (1984) (citing *S.E.C. v. Texas Gulf Sulfur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976, 22 L. Ed. 2d 756 (1969)), *aff'd in part and rev'd in part on other grounds*, 314 N.C. 267, 333 S.E.2d 236 (1985).[6] We conclude, therefore, that MBA, through its sales agents, like defendant, is the actual "offeror" of the securities at issue in this case.

Defendant testified that he "arranged" for the complaint to be filed in the *Allison* case. The *Allison* complaint was admitted into evidence at trial and indicates that defendant's clients—including Mrs. Latta and Mrs. Ellis—sued other entities involved in the MBA investment scheme, alleging that it was a Ponzi scheme in violation of federal securities law and Chapter 75 of the North Carolina General Statutes. The *Allison* complaint states that MBA had at least 200 clients in North Carolina. The complaint further alleges: "The Mobile Billboard investments that were sold to investors, including the Plaintiffs, are securities, but no registration statement has been filed in connection with any of these investments and *no exemption is available*." (Emphasis added.) Defendant testified at trial that he believed the allegations in the *Allison* complaint to be true.

Thus, defendant's testimony at trial raised a triable issue of fact concerning the number of investors in North Carolina. The trial court, therefore, properly submitted the issue to the jury to determine whether he met his burden of proof under N.C. Gen. Stat. § 78A-18(b).

III. Statute of Limitations

[3] Defendant next argues that the trial court should have granted his motions for directed verdict and JNOV because plaintiffs' NCSA claims are barred by the Act's statute of limitations. N.C. Gen. Stat. § 78A-56(f) provides that claims for selling unregistered securities in

6. Although not controlling our interpretation of the NCSA, this Court has found it "instructive" to consider cases construing federal securities statutes and regulations. *State v. Davidson*, 131 N.C. App. 276, 282, 506 S.E.2d 743, 748 (1998), *disc. review denied*, 350 N.C. 312, 535 S.E.2d 34 (1999).

violation of N.C. Gen. Stat. § 78A-24 (2009) or being an unregistered securities dealer in violation of N.C. Gen. Stat. § 78A-36 (2009) must be filed within "two years [from] the sale or contract of sale." For "any other violation" of the Act, the statute provides that a person must file within

> three years [from the date] the person discovers facts constituting the violation, but in any case no later than five years after the sale or contract of sale, except that if a person who may be liable under this section engages in any fraudulent or deceitful act that conceals the violation or induces the person to forgo or postpone commencing an action based upon the violation, the suit may be commenced not later than three years after the person discovers or should have discovered that the act was fraudulent or deceitful.

N.C. Gen. Stat. § 78A-56(f).

Mrs. Ellis purchased MBA billboard units on 21 November 2003. The Lattas made purchases on 4 February 2004, 7 April 2004, and again on 21 April 2004. Their complaint was filed on 22 February 2006—over two years from the first two purchases but within two years of the April purchases.

Defendant maintains that plaintiffs' claims are "merely for the sale of unregistered securities" in an attempt to squeeze their claims into the two-year limitations period established for violations of N.C. Gen. Stat. § 78A-24. Defendant's characterization of plaintiffs' claims ignores the fact that plaintiffs not only asserted claims under § 78A-24 and § 78A-36,[7] but also brought a claim for securities fraud under § 78A-8 and § 78A-56, which are subject to the three-year limitations period. N.C. Gen. Stat. § 78A-56(f).

The trial court submitted the following issues to the jury:

> 1. Did the defendant sell a security and in doing so make any untrue statement of a material fact?
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> . . . .
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> 2. Did the defendant sell a security and in doing so omit to state a material fact necessary in order to make the statements made,

7. At the close of plaintiffs' evidence, the trial court granted a directed verdict in favor of defendant on plaintiffs' claim that defendant was an unregistered securities dealer under N.C. Gen. Stat. § 78A-36.

in the light of the circumstances under which they were made, not misleading?

. . . .

3. Did the defendant sell a security and in doing so engage in any act, practice, or course of business which operated as a fraud or deceit upon a person?

. . . .

4. Did the defendant sell a security in North Carolina that had not been registered?

. . . .

The jury answered "[y]es" to all four questions.

The first three issues pertain to plaintiffs' securities fraud claims under § 78A-8 and § 78A-56. The fourth issue relates to selling unregistered securities in violation of § 78A-24. The verdict sheet indicates that all four issues were submitted in the alternative. Thus, even assuming, without deciding, that the trial court erred in submitting to the jury the issue of whether defendant is liable for selling unregistered securities on the ground that plaintiffs' claim is barred by the statute of limitations, the jury's finding that defendant violated § 78A-8 and § 78A-56, which are subject to the three year statute of limitations, support its verdict.

IV. Fraud Claims

[4] In his next argument, defendant contends that the trial court erred in denying his motions for directed verdict and JNOV on plaintiffs' fraud claims. The jury found defendant liable to Mrs. Latta for common law or actual fraud and securities fraud; it found defendant liable to Mrs. Ellis for constructive fraud and securities fraud.

Although defendant assigned error to the jury's finding him liable to Mrs. Ellis for constructive fraud, defendant fails to make any specific argument in his brief challenging that verdict. Defendant's assignment of error regarding Mrs. Ellis's constructive fraud claim is, therefore, "taken as abandoned." N.C. R. App. P. 28(b)(6). With respect to the actual fraud and securities fraud claims, defendant fails to differentiate between the two types of claims, lumping them together into one argument.

The essential elements of actual fraud are: "(1) False representation or concealment of a material fact, (2) reasonably calculated to

deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974).

> In contrast to the elements of actual fraud
>
> > N.C.G.S. § 78A-8(2) and N.C.G.S. § 78A-56(a)(2) . . . impose[] civil liability upon any person who: "Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known of the untruth or omission . . . ."

Bob Timberlake Collection, Inc. v. Edwards, 176 N.C. App. 33, 41, 626 S.E.2d 315, 322 (quoting N.C. Gen. Stat. § 78A-56 (a)(2)), *disc. review denied*, 360 N.C. 531, 633 S.E.2d 674 (2006); N.C. Gen. Stat. §§ 78A-8(2) and -56(a)(2). *See also Sullivan v. Mebane Packaging Grp., Inc.*, 158 N.C. App. 19, 34, 581 S.E.2d 452, 463 (setting out elements of securities fraud by purchaser), *disc. review denied*, 357 N.C. 511, 588 S.E.2d 473 (2003).

A. False Representation or Omission of Material Fact

Defendant claims that the only "arguable misrepresentation" is that he told plaintiffs that there was "very little risk" involved in the MBA investments and that the only "material omission" attributable to defendant is his failure to disclose to plaintiffs the amount of his sales commission. Defendant thus concedes that he made at least one false representation and omission.

In addition, however, plaintiffs point to the fact that defendant was aware that the "lease payments" OMI made to investors like plaintiffs was not revenue from selling advertising but were actually funds transferred from MBA from more recent investments. At trial, defendant explained that he did not tell his clients, including plaintiffs, about the source of the purported lease payments because, as he was advised by MBA management, if he had told his clients, "people would not have invested in it . . . ." From his testimony, the jury could reasonably conclude that defendant misrepresented or failed to disclose to plaintiffs the actual source of the purported lease payments.

Evidence at trial also indicated that defendant learned that the State was investigating MBA as early as 31 March 2004 and that he had received notice of the cease and desist order soon after it was issued on 7 April 2004. Mrs. Latta produced at trial a copy of a check to MBA dated 21 April 2004. She testified that she gave the check, totaling $40,000.00, to defendant on 21 April 2004 as her final purchase of MBA units. Mrs. Latta explained that defendant did not tell her that the Secretary of State was shutting down MBA in North Carolina when he received her payment on 21 April 2004. Defendant received his commission from Mrs. Latta's 21 April 2004 investment. From this evidence, the jury could reasonably infer that although defendant knew that MBA was under investigation he did not disclose this information to Mrs. Latta on 21 April 2004 when he accepted her final investment.

Defendant next argues that any misrepresentation or omission on his part was immaterial. A misrepresentation or omission is "material" if, had it been known to the party, it would have influenced the party's judgment or decision to act. *Godfrey v. Res-Care, Inc.*, 165 N.C. App. 68, 75-76, 598 S.E.2d 396, 402, *disc. review denied*, 359 N.C. 67, 604 S.E.2d 310 (2004). Materiality is generally a question of fact for the jury. *Tharrington v. Sturdivant Life Ins. Co.*, 115 N.C. App. 123, 127, 443 S.E.2d 797, 800 (1994).

As for his admitted misrepresentation regarding the "low risk" involved in the MBA investments, plaintiffs' testified that when they first met with defendant to discuss investment options, they told defendant that their primary objective, as retirees on fixed incomes, was the preservation of principal. From this evidence, the jury reasonably could have inferred that defendant's misrepresentations about the "low risk" involved in the MBA investments induced their investment and was thus material. *See Mach. Co. v. Bullock*, 161 N.C. 1, 6, 76 S.E. 634, 636 (1912) ("Fraud is material to a contract when the [contract] would not have been made if the fraud had not been committed." (citation and quotation marks omitted)).

Similarly, with respect to defendant's omission regarding the size of his commissions, plaintiffs testified that "it would have mattered a great deal" if they had known that defendant was receiving a 16-20% commission and that they would not have invested in MBA if that fact had been disclosed. As Mrs. Ellis explained on cross-examination, if she had known the size of defendant's commission, she would not have invested "[b]ecause if he was getting that much[,] naturally he was trying to sell it."

Defendant's own testimony from trial reveals the materiality of his omission regarding the "lease payments"—he believed people would not invest if they knew that they would be paid with money from subsequent investors. As Mrs. Latta testified at trial, if defendant had explained MBA's payment structure, it would have sounded "like a pyramid scheme." Similarly, Mrs. Latta testified that she would not have invested in MBA if she had known that the Secretary of State's Office was investigating the corporation. The jury could reasonably infer from this evidence that defendant's failure to disclose to plaintiffs the source of the purported lease payments and his failure to inform Mrs. Latta that the State was investigating MBA when he received her final investment were omissions of material fact. *See Shreve v. Combs*, 54 N.C. App. 18, 23, 282 S.E.2d 568, 572 (1981) (holding seller's failure to disclose to purchaser that land was "heavily encumbered" was "concealment of a material fact" where seller knew existence of encumbrances would affect purchaser's decision to buy).

B. Intent to Deceive

Defendant also argues that there is no evidence that he acted with any intent to deceive plaintiffs. In the context of actual fraud, the required scienter is not present without both knowledge and an intent to deceive, manipulate, or defraud. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988). Fraudulent intent "usually is not shown by direct evidence but generally is proven by circumstances[.] . . . Oftentimes the intent can be shown by presenting evidence of some motive on the part of the perpetrator." *McLamb v. McLamb*, 19 N.C. App. 605, 610, 199 S.E.2d 687, 690, *cert. denied*, 284 N.C. 424, 200 S.E.2d 660 (1973). Whether the defendant acts with the requisite scienter for fraud is generally a question of fact for the jury. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 468, 343 S.E.2d 174, 178-79 (1986).

With respect to defendant's misrepresentations concerning the level of risk involved in the MBA investments, the evidence presented at trial tends to establish that defendant was aware of the high level of risk in investing in MBA and that plaintiffs would not invest in MBA if they knew that it was contrary to their personal financial goals of preserving principal. This evidence is sufficient to permit a reasonable inference that defendant intended to deceive plaintiffs. Similarly, with respect to his commissions, the jury could reasonably conclude that defendant intended to deceive plaintiffs about his 16-20% commissions by not disclosing that information unless asked directly.

As for the purported lease payments, again, defendant's own testimony belies his argument. From defendant's testimony, the jury could reasonably infer that defendant misrepresented the nature of the "lease payments" to plaintiffs because he believed that if they knew the actual source of the payments, they would not invest in MBA. Likewise, the jury could infer that defendant intended to deceive Mrs. Latta about MBA's status in order to receive his commission when he failed to tell her that the State was investigating MBA prior to accepting her final investment on 21 April 2004. *See Shreve*, 54 N.C. App. at 23, 282 S.E.2d at 572 (finding sufficient evidence of intent to deceive where seller told purchaser that title to land was clear despite knowledge of encumbrances that would hinder building permit process and seller knew purchaser intended to build on land and probably not purchase land if purchaser could not build on it).

C. Reasonable Reliance

Defendant also claims that plaintiffs failed to establish the element of reasonable reliance. Defendant argues that plaintiffs should be estopped from bringing their fraud claims because plaintiffs admit that they received and reviewed the documentation disclosing the risk involved in the MBA investments.

This argument is premised on defendant's assertion that the only misrepresentation he made was the "low risk" assessment of the investment and that the only omission he made concerned the size of his commissions; it ignores the evidence that defendant was aware that OMI and MBA were paying earlier investors with investment funds from later investors. "Where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser, the vendor is bound to disclose such facts, and make them known to the purchaser." *Brooks v. Construction Co.*, 253 N.C. 214, 217, 116 S.E.2d 454, 457 (1960).

Nowhere in the extensive investment documentation presented at trial does it state that subsequent investors' money would be funding the purported lease payments to prior investors. As defendant testified at trial, he purposefully withheld information regarding the actual source of the "lease payments." We conclude that the jury could have reasonably found that plaintiffs reasonably relied upon defendant's omission regarding the source of the "lease payments."

D. In Pari Delicto

Defendant also argues that the doctrine of *in pari delicto* bars Mrs. Ellis from bringing her fraud claims against defendant because she received a "referral fee" for referring Mrs. Latta to defendant. By accepting the referral fee, defendant claims that Mrs. Ellis is "comparably at fault by virtue of [her] aiding and abetting" defendant in the MBA investment scheme.

The legal doctrine of *in pari delicto*—meaning "equally at fault"—"prevents the courts from redistributing losses among wrongdoers." *Whiteheart v. Waller*, —— N.C. App. ——, ——, 681 S.E.2d 419, 422 (2009). Thus, where parties to a transaction are equally at fault, neither can recover from the other. *Trust Co. v. Gill*, 293 N.C. 164, 191, 237 S.E.2d 21, 37 (1977); *accord Byers v. Byers*, 223 N.C. 85, 90, 25 S.E.2d 466, 469-70 (1943) ("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."). The defense, however, is "narrowly limited to situations in which the plaintiff was *equally* at fault with the defendant." *Skinner v. E. F. Hutton & Co.*, 314 N.C. 267, 272, 333 S.E.2d 236, 240 (1985).

Defendant testified at trial that Mrs. Ellis incurred a penalty for withdrawing from an investment unrelated to the MBA investments. Defendant agreed to repay the penalty but told Mrs. Ellis that "the only way [he] could . . . do[] it" was to "pay [her] a referral fee." From this testimony, the jury reasonably could have—and apparently did—reject defendant's *in pari delicto* defense, finding either that Mrs. Ellis did not engage in any culpable conduct with respect to a transaction involving defendant or that her culpability was not equal to that of defendant's.

In sum, plaintiffs evidence tended to establish a *prima facie* case for common law fraud and securities fraud. The trial court, therefore, properly submitted these claims to the jury. Defendant's arguments are overruled.

V. Exclusion of Defendant's Evidence

[5] In his final argument addressing his motions for directed verdict and JNOV, defendant contends that it was reversible error for the trial court to exclude (1) evidence of plaintiffs' respective net worths; (2) transcripts from a criminal trial involving MBA's principal; (3) evidence of defendant's financial condition; and (4) testimony from defendant's other clients. Defendant argues that this

evidence was relevant to material issues at trial and thus should have been admitted.

Rule 401 of the Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. R. Evid. 401. Although a trial court's rulings on relevancy technically are not discretionary, and, therefore, are not reviewed under the abuse of discretion standard, they are given great deference on appeal. *State v. Lawrence*, 191 N.C. App. 422, 427, 663 S.E.2d 898, 901 (2008), *aff'd per curiam*, 363 N.C. 118, 678 S.E.2d 658 (2009).

Defendant first contends that he should have been allowed to present evidence of plaintiffs' individual net worths. Defendant argues on appeal, as he did at trial, that plaintiffs' net worths are relevant to whether the MBA investments were suitable for them given their financial status and goals.

Here, even if the specific information regarding each plaintiff's net worth is relevant, and thus the trial court erred in excluding the evidence under Rule 401, the exclusion of the evidence is not prejudicial. "The exclusion of evidence constitutes reversible error only if the appellant shows that a different result would have likely ensued had the error not occurred." *Forsyth Co. v. Shelton*, 74 N.C. App. 674, 678, 329 S.E.2d 730, 734, *appeal dismissed and disc. review denied*, 314 N.C. 328, 333 S.E.2d 484 (1985). "The burden is on the appellant not only to show error, but to show *prejudicial* error . . . ." *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983).

Review of the transcript from trial shows that, although the trial court prevented defendant from presenting to the jury evidence of each plaintiff's net worth in specific monetary terms, defendant testified extensively that the MBA investments were suitable for plaintiffs *based on their net worths*. Given defendant's testimony that he took plaintiffs' net worths into consideration in determining whether to recommend investing in MBA, defendant fails to demonstrate any prejudice resulting from the exclusion of this evidence.

Defendant also argues that the trial court erred in excluding transcript excerpts from the criminal trial at which MBA's founder and principal, Michael Lomas, testified. Defendant contends that Lomas's testimony was relevant to plaintiffs' fraud claims because Lomas testified that its sales agents, such as defendant, who sold the MBA

investments to clients, were misled by MBA management. The record reveals, however, that defendant failed to make an offer of proof with respect to this evidence when the trial court sustained plaintiffs' objection to its admission. The exclusion of evidence will not be reviewed on appeal unless the record sufficiently shows what the evidence would have been. *State v. Golphin*, 352 N.C. 364, 462, 533 S.E.2d 168, 231 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). Because the record on appeal fails to establish the "essential content or substance" of Lomas's testimony, this Court is unable to "ascertain whether prejudicial error occurred." *Id.* Defendant has, therefore, failed to preserve for review the trial court's exclusion of this evidence.

Defendant also claims that he should have been allowed to testify about his financial condition, including his net worth and the fact that he was in bankruptcy. Again, the record indicates that defendant failed to make an offer of proof when the trial court sustained plaintiffs' objection to the admission of defendant's testimony. Without " '[a] showing of the essential content or substance of the witness's testimony,' " it is "impossible on appellate review to determine whether exclusion of this testimony was prejudicial error." *State v. Satterfield*, 300 N.C. 621, 628, 268 S.E.2d 510, 515-16 (1980) (quoting *Currence v. Hardin*, 296 N.C. 95, 100, 249 S.E.2d 387, 390 (1978)).

The last piece of challenged evidence is the proffered testimony of other clients of defendant. Defendant argues that they should have been permitted to testify because they would have stated that defendant was "fair and honest with them in connection with their MBA investments." When the trial court sustained plaintiffs' objection to the witnesses testifying, defense counsel made the following offer of proof: "They would testify that they bought the same stuff [plaintiffs] did and that they weren't deceived and they understood it and they haven't sued Mr. Rainey or anything."

As described by trial counsel, we fail to perceive the relevance of the proffered testimony. Defendant's "good acts" or innocuous conduct with respect to his other MBA clients does not tend to make the

fact that defendant defrauded plaintiffs more or less probable given that plaintiffs only alleged and attempted to prove that defendant defrauded them in connection with *their* MBA investments. *See United States v. Santos*, 201 F.3d 953, 962 (7th Cir. 2000) (observing that evidence of "good acts" of a defendant is generally not probative unless it is alleged that "*every* transaction by [defendant] . . . was corrupt" (emphasis added)). The trial court, therefore, properly excluded the witnesses' testimony. *See State v. Hart*, 105 N.C. App. 542, 548, 414 S.E.2d 364, 368 (holding that "[e]vidence having no tendency to prove a fact at issue in the case is not relevant and is properly excluded" under Rules 401 and 402), *appeal dismissed and disc. review denied*, 332 N.C. 348, 421 S.E.2d 157 (1992).

Motion for New Trial

Defendant also moved for a new trial under Rule 59 of the Rules of Civil Procedure. Defendant fails to make any specific argument regarding his motion for a new trial, simply combining it with his contentions concerning his motions for directed verdict and JNOV. Because defendant makes no separate and distinct argument regarding his motion for a new trial, we conclude that the trial court did not err in denying defendant's motion. *See Everhart v. O'Charley's, Inc.*, —— N.C. App. ——, ——, 683 S.E.2d 728, 742 (2009) ("O'Charley's' arguments [regarding its motions for a new trial] . . . repeat the contentions we found unpersuasive regarding its JNOV motion. As O'Charley's fails to make any separate and distinct arguments in support of its motion for a new trial, we hold that the trial court did not err in denying O'Charley's' motion for a new trial.").

Punitive Damages

Defendant failed to assign error to the punitive damages awards and makes absolutely no argument in his brief for their reversal. The punitive damages awards, therefore, are not before this Court for review. N.C. R. App. P. 10(a); N.C. R. App. P. 28(b)(6).

No Error.

Judges CALABRIA and GEER concur.

IN RE W.B.M.

[202 N.C. App. 606 (2010)]

IN THE MATTER OF: W.B.M.,[1] A MINOR CHILD, PETITIONER: KELLY HOLT

No. COA09-205

(Filed 2 March 2010)

1. Appeal and Error— preservation of issues—constitutional challenge

The allegations in petitioner father's motion were sufficient under N.C. R. App. P. 10(b)(1) to preserve his constitutional challenge to the procedure for placing names of individuals who have allegedly abused or neglected children on the Responsible Individual's List under N.C.G.S. § 7B-323.

2. Constitutional Law— North Carolina—due process—North Carolina Juvenile Code—procedure for placing name on Responsible Individual's List—abused or neglected children—preponderance of evidence

The challenged statutory procedures for placing an individual's name on the Responsible Individual's List (RIL) under Articles 3 and 3A of the North Carolina Juvenile Code for those who have allegedly abused or neglected children violated an individual's due process rights under Article I, Section 19 of the North Carolina Constitution. An individual has a right to notice and an opportunity to be heard before being placed on the RIL. At a predeprivation hearing, the DSS director shall have the burden of proving abuse or serious neglect and identifying the responsible individual by a preponderance of the evidence.

3. Child Abuse and Neglect— Responsible Individual's List—untimely order

While the Court of Appeals disapproved of the inordinate delay of more than ten months past the statutory time period set under N.C.G.S. § 7B-323(d) for entry of the written order, petitioner was not entitled to have his name removed from the Responsible Individual's List, consisting of names of those who have allegedly abused or neglected children, based on the untimeliness of the district court's order.

Appeal by Petitioner from orders entered 30 July and 17 October 2008 by Judge J.H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 3 September 2009.

1. The minor child's initials are used to protect the child's identity.

Miriam M. Thompson for Petitioner.

Dean W. Hollandsworth for Respondent New Hanover County Department of Social Services.

STEPHENS, Judge.

The pivotal issue raised by this appeal is whether the statutory procedures for placing an individual's name on the Responsible Individual's List under Articles 3 and 3A of the North Carolina Juvenile Code violate the individual's procedural due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. For the reasons stated below, we conclude that, at a minimum, the challenged statutory procedures violate an individual's due process rights under Article I, Section 19 of the North Carolina Constitution.

I. Statutory Scheme

Petitioner challenges the State's procedures for placing the names of individuals who have allegedly abused or neglected children on the Responsible Individuals List ("RIL"). As this is an issue of first impression before this Court, a full explanation of the statutory scheme governing the RIL is essential for an understanding of this case.

A. The Responsible Individuals List

Chapter 7B, Division 01, Article 3 of the North Carolina General Statutes governs the screening and assessment of abuse and neglect reports of children, and the process by which substantiated reports may be reviewed. N.C. Gen. Stat. §§ 7B-300 to -311 (2007). The Department of Health and Human Services ("DHHS") maintains "a list of responsible individuals identified by county directors of social services as the result of investigative assessment responses" to reports of child maltreatment. N.C. Gen. Stat. § 7B-311(b). Information from this list may be provided by DHHS to "child caring institutions, child placing agencies, group home facilities, and other providers of foster care, child care, or adoption services that need to determine the fitness of individuals to care for or adopt children." *Id.*

B. Reporting and Initial Placement on the RIL

The RIL procedures are triggered by reports of suspected child maltreatment made to the department of social services. N.C. Gen.

Stat. § 7B-301. State law places an affirmative duty on all individuals and institutions who have "cause to suspect that any juvenile is abused, neglected, or dependent . . . [to] report the case of that juvenile to the director of the department of social services in the county where the juvenile resides or is found." *Id.* Upon receipt of a report, "the director of the department of social services shall make a prompt and thorough assessment . . . in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile[.]" N.C. Gen. Stat. § 7B-302(a).

Within five working days of completing an investigative assessment response that results in a determination of abuse or serious neglect, the director must notify DHHS of the results of the assessment and must give personal written notice to the individual deemed responsible for the abuse or serious neglect. N.C. Gen. Stat. § 7B-320(a). The notice to the responsible individual must include the following:

> (1) A statement informing the individual of the nature of the investigative assessment response and whether the director determined abuse or serious neglect or both.
>
> (2) A statement summarizing the substantial evidence supporting the director's determination without identifying the reporter or collateral contacts.
>
> (3) A statement informing the individual that the individual's name has been placed on the responsible individuals list as provided in [N.C. Gen. Stat. §] 7B-311 . . . .
>
> (4) A clear description of the actions the individual must take to have his or her name removed from the responsible individuals list. . . .

N.C. Gen. Stat. § 7B-320(c).

C. Procedures for Removal from the RIL

1. Review by the Director

"An individual who has been identified as a responsible individual as the result of an investigative assessment response may, within 30 days after receipt of the notice under [N.C. Gen. Stat. §] 7B-320(c), request that the director who determined the abuse or serious neglect and identified the individual as a responsible individual expunge the individual's name from the responsible individuals list." N.C. Gen.

Stat. § 7B-321(a). Upon receipt of a timely request for expunction, "the director shall review all records, reports, and other information gathered during the investigative assessment response . . . to determine whether there is substantial evidence to support the determination and the placement of the individual's name on the responsible individuals list." N.C. Gen. Stat. § 7B-321(b). "If the director decides that there is not substantial evidence in the records, reports, and other information gathered during the investigative assessment response to support a determination of abuse or serious neglect and to support the identification of the individual as a responsible individual," the director must notify DHHS to expunge the individual's name from the RIL. N.C. Gen. Stat. § 7B-321(b)(1). "If the director decides that there is substantial evidence . . . to support a determination of abuse or serious neglect and to support the identification of the individual as a responsible individual, the director may . . . refuse the request for an expunction." N.C. Gen. Stat. § 7B-321(b)(2). "If the director does not provide a written response to a request for expunction within 15 working days after its receipt, the failure shall be considered a refusal to expunge the individual's name . . . ." N.C. Gen. Stat. § 7B-321(c). "An individual whose request for expunction has been refused by a director . . . may, within 30 days after receipt of the notice of refusal, request a review of the director's decision by the district attorney . . . or file a petition requesting expunction with the district court . . . ." N.C. Gen. Stat. § 7B-321(e).

2. Review by the District Attorney

Within 30 days of receiving a request to review, the district attorney shall review the director's decision to refuse to expunge the individual's name from the responsible individuals list and make a determination of agreement or disagreement with the director's decision. N.C. Gen. Stat. § 7B-322(b). For purposes of the review, the director shall provide the district attorney all the information the director used in making the determination. *Id.*

If the district attorney determines there is "not substantial evidence to support a determination of abuse or serious neglect and to support the identification of an individual as a responsible individual," the individual's name must be expunged from the RIL. N.C. Gen. Stat. § 7B-322(c). If the district attorney determines there is "substantial evidence to support a determination of abuse or serious neglect and to support the identification of an individual as a responsible individual," the individual's name must remain on the list. N.C. Gen. Stat. § 7B-322(d).

3. Review by the District Court

"Within 30 days of the receipt of notice of the director's decision under [N.C. Gen. Stat. §] 7B-321(b) or (c), or within 30 days from the date of a determination by the district attorney under [N.C. Gen. Stat. §] 7B-322, whichever is later, an individual may file a petition for expunction with the district court of the county in which the abuse or serious neglect report arose." N.C. Gen. Stat. § 7B-323(a). Upon receipt of a filed petition for expunction, the clerk of court "shall calendar the matter for hearing at a session of district court hearing juvenile matters and send notice of the hearing to the [individual] and the director." N.C. Gen. Stat. § 7B-323(b). "At the hearing, the director shall have the burden of proving by a preponderance of the evidence the correctness of the director's decision determining abuse or serious neglect and identifying the individual seeking expunction as a responsible individual." *Id.*

"Within 30 days after completion of the hearing, the court shall enter a signed, written order containing findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-323(d). "If the court concludes that the director has not established by a preponderance of the evidence the correctness of the determination of abuse or serious neglect or the identification of the responsible individual, the court shall reverse the director's decision[,]" and the individual's name must be expunged from the list. *Id.*

"Notwithstanding any time limitations contained in this section or the provisions of [N.C. Gen. Stat. §] 7B-324(a)(3) or (4), a district court may review a determination of abuse or serious neglect at any time if the review serves the interests of justice or for extraordinary circumstances." N.C. Gen. Stat. § 7B-323(e).

4. Review by the Appellate Court

Either party may appeal the district court's decision to the Court of Appeals. N.C. Gen. Stat. § 7B-323(f); N.C. Gen. Stat. § 7A-27(c) (2007).

D. Individuals Ineligible to Request Expunction

An individual whose name has been placed on the RIL may not challenge that placement if any of the following apply:

(1) The individual is criminally convicted as a result of the same incident. . . .

(2) The individual is a respondent in a juvenile court proceeding regarding abuse or neglect resulting from the same incident. . . .

(3) That individual fails to make a timely request for expunction with the director who made the determination . . . .

(4) That individual fails to file a petition for expunction with the district court in a timely manner.

(5) That individual fails to keep the county department of social services informed of the individual's current address during any request for expunction . . . .

N.C. Gen. Stat. § 7B-324(a).

The statutory scheme is silent as to how long an individual's name remains on the RIL if the individual does not request an expunction, is denied an expunction, or is ineligible to request an expunction.

II. Factual Background and Procedural History in the Present Case

Petitioner is the biological father of the minor child W.B.M. ("the child"). Petitioner is not married to the child's mother ("the mother") and has secondary custody of the child with visitation on Tuesdays, Thursdays, and every other weekend. Petitioner and the mother have a cordial relationship and by all accounts, visitation between Petitioner and his son has always gone well.

The mother testified that around June of 2006, the child started to exhibit troublesome behaviors. On at least two different occasions, the mother witnessed the child trying to insert his fingers into his rectum. When she asked him why he was doing that, he said because he " 'had to do this' " and that " 'this is what Kelly do to me[.]' " The mother spoke with the child's pediatric nurse who advised her to make a report with the department of social services. Also around that time, the child started not wanting to go with strangers, started displaying angry behavior, wouldn't go to the bathroom at daycare, and started masturbating.

The mother made a report to the New Hanover County Department of Social Services ("DSS"). Ruth Massey, an investigator with DSS, interviewed the mother. She then took the mother and the child to the Brunswick County Sheriff's Department to be interviewed. Detective Simpson of the Sheriff's Department conducted the inter-

view with the child, which was videotaped, and Ms. Massey observed the interview from another room. The child's statements during the interview "mirrored" his statements to his mother.

After the interview, Detective Simpson had the mother call Petitioner on the telephone "to try and get any information" from him about the child's behaviors and allegations. Detective Simpson advised the mother to tell Petitioner that there was an investigation and that the sheriff's department needed to speak with him. During that phone call, Petitioner denied any wrongdoing.

On 29 September 2006, the child was given a physical examination by Dr. Archer at the Children's Clinic. No physical signs of abuse were found. On 5 October 2006, the child was taken for a second physical examination at the Carousel Center. Beth Deaton, P.A., attempted to examine the child, who did not want to participate in the examination.

After the child had been interviewed and physically examined, Ms. Massey contacted Petitioner and asked him to come in for an interview. Ms. Massey interviewed Petitioner on 6 October 2006 for "approximately a half-hour, 45 minutes, roughly." Petitioner denied any wrongdoing and could not think of any reason the child would make such statements about him. He did voice his concern regarding the mother's boyfriend because the boyfriend had an extensive criminal history. Ms. Massey asked Petitioner to voluntarily suspend his visitation with the child during the investigation or she would get a court order suspending it. Petitioner agreed to voluntarily suspend visitation with his son.

Petitioner called Ms. Massey several times after the interview to inquire when Detective Simpson was going to contact him and interview him. Detective Simpson never interviewed him and there was no further investigation into the matter.

Ms. Massey's next face-to-face contact with Petitioner was on 12 January 2007, when she informed him that the allegations of sexual abuse had been substantiated, that he was being placed on the RIL, and that the case was being closed. DSS did not enter into a case plan with Petitioner as he lived in Brunswick County and did not enter into a case plan with the mother as she had moved to Bladen County.

DSS followed up with the mother and requested that she continue to provide protection for the child by not allowing Petitioner any con-

tact with the child. DSS also asked Petitioner to seek "sex offender-specific treatment counseling" and informed him that if a counselor made contact with DSS and informed them that there was no risk to the child, Petitioner would be allowed contact with his son at that time. DSS also sent a letter to Terry McCoy, a social worker with the Bladen County Department of Social Services, advising her that sexual abuse had been substantiated but that DSS had closed the case as the mother had moved, and further advising her that Petitioner was to have no contact with the child unless the above-stated conditions had been met.

Within 30 days of being notified of his placement on the RIL, Petitioner requested that the DSS Director review that decision. On 27 February 2007, the DSS Director notified Petitioner that he was upholding the decision to place Petitioner on the RIL.

Petitioner timely requested that the District Attorney's office review the decision of the DSS Director. On 24 May 2007, New Hanover County Assistant District Attorney Connie Jordan notified Petitioner that she was upholding the DSS Director's decision to keep Petitioner on the RIL.

On 21 June 2007, Petitioner filed a Petition for Expunction from the RIL in New Hanover County District Court. After a hearing on 23 August and 12 September 2007, Judge Corpening denied Petitioner's expunction request and ordered DSS attorney Dean Hollandsworth to prepare an order with detailed findings of fact.

Although N.C. Gen. Stat. § 7B-323(d) requires that a written order containing findings of fact and conclusions of law be entered within 30 days after conclusion of the expunction hearing, as of 7 July 2008, no order had been entered.

On 7 July 2008, Petitioner filed a Motion to Remove Kelly Holt's Name from the Responsible Individual's List, alleging, *inter alia*, that N.C. Gen. Stat. § 7B-323 is unconstitutional. On 30 July 2008, a written order denying Petitioner's Petition for Expunction was entered. Also on that date, a hearing on Petitioner's Motion to Remove was held, and the trial court orally denied the motion. On 17 October 2008, the trial court entered a written order denying Petitioner's Motion to Remove and "declin[ing] to find at this stage of the proceeding that [N.C. Gen. Stat. §] 7B-323 is unconstitutional." From the 30 July and 17 October 2008 orders, Petitioner appeals.

III. Discussion

A. Preservation of Constitutional Challenge

[1] We first address the State's argument that Petitioner failed to raise any constitutional challenge to the RIL procedures while he "exercised the process of expunction of his name from the RIL" and, thus, Petitioner is barred from now raising a constitutional challenge on appeal. We disagree.

In Petitioner's Motion to Remove Kelly Holt's Name from the Responsible Individual's List, filed 7 July 2008, Petitioner alleged as follows:

> 9. That North Carolina General Statute § 7B-323 is unconstitutional on its face because the listing of Petitioner's name on said list without a prior hearing constitutes a violation of the Petitioner's procedural due process rights under the 5th and 14th amendments to the United States Constitution and similar provisions of the North Carolina Constitution.
>
> 10. That North Carolina General Statute § 7B-323 is unconstitutional on its face because the burden of proof . . . fails to satisfy the minimum requirements of due process.

These allegations in Petitioner's motion are sufficient to preserve the issue for our review. N.C. R. App. P. 10(b)(1). The State's argument is overruled.

B. Due Process Challenge

[2] Petitioner argues that the statutory procedures for placing an individual on the RIL are unconstitutional on their face as they violate the individual's procedural due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the North Carolina Constitution.

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully . . . ." *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987). "The presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if such legislation can be upheld on any reasonable ground." *Ramsey v. N.C. Veterans Comm'n*, 261 N.C. 645, 647, 135 S.E.2d 659, 661 (1964). An individual challenging the facial constitutionality of a legislative act "must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745, 95 L. Ed. 2d at 707.

The Due Process Clause of the Fifth Amendment to the United States Constitution guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V. A similar protection, that no "State [shall] deprive any person of life, liberty, or property, without due process of law" is contained in the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. XIV, § 1. Article I, Section 19 of the North Carolina Constitution warrants that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. The expression "the law of the land" as used in Article I, Section 19 of the North Carolina Constitution, is synonymous with the expression "due process of law." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949).

Procedural due process protection ensures that government action depriving a person of life, liberty, or property is implemented in a fair manner. *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998). We examine procedural due process questions in two steps: first, we must determine whether there exists a liberty or property interest which has been interfered with by the State, *Bd. of Regents v. Roth*, 408 U.S. 564, 571, 33 L. Ed. 2d 548, 557 (1972); second, we must determine whether the procedures attendant upon that deprivation were constitutionally sufficient. *Hewitt v. Helms*, 459 U.S. 460, 472, 74 L. Ed. 2d 675, 688 (1983).

Under both our federal and state constitutions, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 32 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66 (1965)); *accord Thompson*, 349 N.C. at 498, 508 S.E.2d at 286. The United States Supreme Court has consistently held that some form of hearing is required before a final deprivation of a protected interest, although the exact nature and mechanism of the required procedure will vary based upon the unique circumstances surrounding the controversy. *See Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (citing *Mathews*, 424 U.S. at 333, 47 L. Ed. 2d at 32; *Wolff v. McDonnell*, 418 U.S. 539, 557-58, 41 L. Ed. 2d 935, 952 (1974)). Three factors must be considered by a court in determining what procedures are constitutionally sufficient:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 47 L. Ed. 2d at 33; *see also Soles v. City of Raleigh Civil Serv. Comm'n*, 345 N.C. 443, 448, 480 S.E.2d 685, 688, *reh'g denied*, 345 N.C. 761, 485 S.E.2d 299 (1997).

Applying these principles to the present case, this Court must first decide whether an individual has a protected liberty or property interest in not being listed on the RIL. If so, then this Court must determine whether the present statutory scheme provides individuals with sufficient notice and an opportunity to be heard at a meaningful time and in a meaningful manner. If the process is inadequate, this Court must determine what alternative or additional protections are necessary to satisfy due process.

1. Constitutionally Protected Interest

Article I, Section 1 of the North Carolina Constitution declares that "[w]e hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const. art. I, § 1. Article I, Section 19 of the North Carolina Constitution prescribes that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Our Supreme Court has explained that

> [t]hese fundamental guaranties are very broad in scope, and are intended to secure to each person subject to the jurisdiction of the State extensive individual rights, including that of personal liberty. The term "liberty," as used in these constitutional provisions . . . includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; [and] to pursue any livelihood or vocation . . . .

Ballance, 229 N.C. at 769, 51 S.E.2d at 734 (citations and quotation marks omitted).

N.C. Gen. Stat. § 7B-320(c)(3) allows DHHS to provide information from the RIL "to child caring institutions, child placing agencies, group home facilities, and other providers of foster care, child care, or adoption services that need to determine the fitness of individuals to care for or adopt children." N.C. Gen. Stat. § 7B-320(c)(3). "Information from this list shall be used exclusively for the purpose of determining current or prospective employability or fitness to care for or adopt children." 10A N.C. Admin. Code 70A.0102(c) (2007).

Thus, placement on the RIL carries consequences that are serious to the accused individual. Those consequences flow in part from the personal stigma undoubtably attached to the accused individual by persons acquiring the individual's name from the list, even if such acquisition is "exclusively" for a determination of the individual's "employability or fitness to care for or adopt children." *Id.* The consequences also flow from the actions of the designated agencies that may penalize the individual on the basis of his or her inclusion on the RIL. An individual who is branded as a "child abuser" as a result of his or her inclusion on the RIL is "maimed and crippled. The injury is real, immediate, and incalculable." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 175, 95 L. Ed. 817, 856 (1951) (Frankfurter, J., concurring) (discussing the serious consequences resulting to an organization that is branded a "Communist" organization by the Attorney General of the United States).

We conclude that inclusion on the RIL deprives an individual of the liberty interests guaranteed under our State Constitution by inhibiting the individual from using his faculties to adopt, foster, and care for children, earning his livelihood in the childcare field, or pursuing or securing employment in the childcare field.

2. Procedures Used

Because an individual's liberty interests are adversely affected by virtue of being listed on the RIL, this Court must balance the *Mathews* factors to determine whether the statutory procedures adequately protect the individual's interests. We first address the factors relating to the personal and government interests involved, and then analyze the risk of error created by the procedures established by the State.

a. Private Interest

As discussed above, the private interest affected by inclusion on the RIL is an individual's liberty: that is, the individual's liberty to be free to use his faculties to adopt, foster, and care for children, to earn

his livelihood in the childcare field, and to pursue a career in the childcare profession.

b. Countervailing State Interest

On the other hand, the State has an undeniably vital interest in protecting children from abuse and neglect. *See Santosky v. Kramer*, 455 U.S. 745, 766, 71 L. Ed. 2d 599, 615 (1982) (noting state's interest in protection of children). We agree with the State that there is a significant interest on the part of the State in maintaining the RIL "to prevent those who have harmed children from being employed in positions where they would have access to further victims by way of their employment."

c. Risk of Erroneous Deprivation

Petitioner argues that the statutory procedures are constitutionally infirm because they permit an individual's name to be listed on the RIL without first providing an adequate opportunity to be heard. He contends that an individual is entitled to a pre-deprivation hearing before being placed on the RIL.

It is a well-settled principle that if the State feasibly can provide a hearing before depriving an individual of a protected interest, it generally must do so in order to minimize "substantively unfair or mistaken deprivations[.]" *Fuentes v. Shevin*, 407 U.S. 67, 81, 32 L. Ed. 2d 556, 570, *reh'g denied*, 409 U.S. 902, 34 L. Ed. 2d 165 (1972). Indeed, "[i]f the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Id.* While an individual's possessions can be returned to him if it is determined at a later hearing that they were unfairly or mistakenly taken in the first place and damages may even be awarded to him for such a wrongful deprivation, "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Id.* at 81-82, 32 L. Ed. 2d at 570. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Stanley v. Illinois*, 405 U.S. 645, 647, 31 L. Ed. 2d 551, 556 (1972).

Here, the RIL procedures are triggered by a report of suspected child maltreatment made to the department of social services. N.C. Gen. Stat. § 7B-301. In response to the report, the department of social services director must make a "prompt and thorough assessment . . . to ascertain the facts of the case, the extent of the abuse

or neglect, and the risk of harm to the juvenile[.]" N.C. Gen. Stat. § 7B-302(a). If, at the conclusion of the assessment, the director determines that there is "substantial evidence" to support a determination that the accused individual abused or seriously neglected the child, the individual is notified of the nature of the investigative assessment and his or her name is placed on the RIL. N.C. Gen. Stat. § 7B-320(a).

Because there is no case law in North Carolina controlling our analysis of the issues raised by this appeal, we will look to other jurisdictions for guidance. While we are not bound by the decisions of courts in those jurisdictions, we find their reasoning to be instructive in this case and conclude that the DSS investigation alone is plainly insufficient to support the loss of liberty that accompanies listing on the RIL. *See Jamison v. Dep't of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 408 (Mo. 2007) ("The investigation alone, even after review by the local director, is plainly insufficient to support the loss of liberty that accompanies listing in the Central Registry."[2]). Although the accused individual may have the opportunity to respond to the investigator's inquiries,[3] this opportunity is not guaranteed and there is no requirement that, at the time of the interview, the individual be apprised of the allegations against him. Furthermore, "[an] investigation is exactly that—an investigation. No matter how elaborate, an investigation does not replace a hearing." *Winegar v. Des Moines Indep. Cmty. Sch. Dist.*, 20 F.3d 895, 901 (8th Cir.), *cert. denied*, 513 U.S. 964, 130 L. Ed. 2d 340 (1994). Consequently, the face-to-face interview cannot constitute an opportunity to be heard "at a meaningful time or in a 'meaningful manner.' " *Jamison*, 218 S.W.3d at 409 (citation omitted).

Furthermore, "[t]he length and consequent severity of a deprivation are considered in determining what procedural protections are constitutionally required." *Id.* (*quoting Belton v. Bd. of Police*

2. The Central Registry is a statewide registry maintained by the Family Support and Children's Division ("the division") of Missouri's Department of Social Services. Mo. Rev. Stat. § 210.109 (2007). Similar to the RIL, the registry is a list "of persons where the division has found probable cause to believe prior to August 28, 2004, or by a preponderance of the evidence after August 28, 2004, or a court has substantiated through court adjudication that the individual has committed child abuse or neglect[.]" Mo. Rev. Stat. § 210.110(3) (2007).

3. In an investigation into a report of abuse or neglect, the director of social services shall conduct "a face-to-face interview with the alleged perpetrator or perpetrators unless there is documentation [in the case record] to explain why such an interview was not conducted." 10A N.C. Admin. Code 70A.0106(f) (2007).

Comm'rs, 708 S.W.2d 131, 137 (Mo. 1986)). Here, an individual could spend more than 169 days on the RIL before the clerk of court calendars an expunction hearing. *See* N.C. Gen. Stat. §§ 7B-320, 321, 322, and 323. Additionally, the procedures set no time limit on how long the clerk of court can take to schedule a hearing. *See* N.C. Gen. Stat. § 7B-323(b) ("[U]pon receipt of a filed petition for expunction[,] [the clerk of court] shall calendar the matter for hearing at a session of district court hearing juvenile matters . . . .").[4] This extended delay before an individual receives an opportunity to be heard is a significant factor in determining whether a pre-deprivation hearing is needed. *See Mathews*, 424 U.S. at 341, 47 L. Ed. 2d at 37 (delay between the deprivation and final decision after a hearing "is an important factor in assessing the impact of official action on the private interests" (citation and quotation marks omitted)); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 270, 95 L. Ed. 2d 239, 255 (1987) (Brennan, J., concurring in part and dissenting in part) (the adequacy of and need for "pre[-]deprivation procedures is in significant part a function of the speed with which a post[-]deprivation or final determination is made").

The failure to provide a pre-deprivation hearing is acceptable only if (1) a pre-deprivation hearing would be "unduly burdensome in proportion to the liberty interest at stake," (2) the State is unable to anticipate the deprivation, or (3) an emergency requires immediate action. *Zinermon v. Burch*, 494 U.S. 113, 132, 108 L. Ed. 2d 100, 118 (1990). Neither the second nor the third situation is implicated in this instance. Furthermore, with regard to the first situation, holding a hearing to determine if there is sufficient evidence to place an individual on the RIL before placing the individual on the list is no more functionally or financially burdensome than holding a hearing after the individual has been placed on the list to determine if the individual should be removed from the list.

Nonetheless, the State argues that a post-deprivation hearing is sufficient to satisfy due process because

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4. Moreover, "[w]ithin 30 days after completion of the hearing, the court shall enter a signed, written order containing findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-323(d). Thus, an individual must wait as long as 30 days after completion of the hearing for the trial court to enter a written order. Notwithstanding this statutory time limit, however, in this case, the trial court failed to enter a written order after the completion of hearing on 12 September 2007 until 30 July 2008, approximately 322 days after the hearing, and only after Petitioner filed a motion on 7 July 2008 drawing the court's attention to this failure.

> the actionable private interest, if any exists in this case, is far outweighed by the [S]tate's interest in keeping pedophiles, violent abusive persons and other individuals capable of serious harm to children out of employment that would give them an avenue to perpetrate more harm on the [S]tate's most vulnerable population.

While it is uncontested that protecting children from abuse and neglect is a significant State interest, this goal "can be fulfilled by means other than depriving individuals of substantial liberty interests without a prior opportunity to be heard." *Jamison*, 218 S.W.3d at 410. The State has not shown that inclusion on the RIL is required for the department of social services or law enforcement to respond to emergencies by investigating reports of abuse or neglect, removing children from dangerous environments, or pursuing criminal charges against an alleged perpetrator. Rather, the RIL provides information to employers in the childcare industry as a complement to the additional and more immediate protective measures permitted by North Carolina law. However, "[t]he need for expediency cannot overshadow the fact that a critical decision [is] being made about [an individual.]" *New York v. David W.*, 733 N.E.2d 206, 212 (N.Y. 2000) (procedures used to determine sex offender registry requirements and dissemination guidelines helped notify vulnerable populations of a possible threat but were unconstitutional because they failed to provide probationers an opportunity to be heard before deprivation of a liberty interest).

After weighing the significant interests of an individual against those of the State, and examining the risk of erroneous deprivation inherent in the current statutory procedures, we hold that an individual has a right to notice and an opportunity to be heard before being placed on the RIL. As currently written, the RIL procedures are unconstitutional under Article I, Section 19 of the North Carolina Constitution because they violate an individual's due process rights by listing the individual on the RIL prior to a hearing.

3. Burden of Proof

The next question is what standard of proof the State must meet at a pre-deprivation hearing to satisfy the minimum requirements of due process.

We conclude that due process requires the State to substantiate a report of child abuse or neglect by a preponderance of the evidence before an individual's name can be included in and disseminated from

the RIL. *See Jamison*, 218 S.W.3d at 412 ("Due process requires a [Child Abuse and Neglect Review Board] to substantiate a report of child abuse or neglect by a preponderance of the evidence before an individual's name can be included in and disseminated from the Central Registry.").

Currently, at the district court hearing provided under N.C. Gen. Stat. § 7B-323, "the director shall have the burden of proving by a preponderance of the evidence *the correctness of the director's decision* determining abuse or serious neglect and identifying the individual seeking expunction as a responsible individual." N.C. Gen. Stat. § 7B-323(b) (emphasis added). In the district court hearing in the present case, the presiding judge described the "whole set of statutes" as "interesting . . . because we're not here trying the issue of sexual abuse. We're here on the review of the correctness of the Director's decision and whether the Director can establish by a preponderance of the evidence the correctness of his decision." The judge further explained that the correctness of the director's decision "is based on whether there is substantial evidence in the records, reports, and other information gathered during the investigation to support the decision."

While the statute correctly identifies the burden of proof required at the hearing as a preponderance of the evidence, the statute incorrectly identifies the fact that must be proven by a preponderance of the evidence as "the correctness of the director's decision[,]" *id.*, instead of whether the accused individual perpetrated abuse or serious neglect of a juvenile. Indeed, as argued by Petitioner, the statute only allows the judge to review the reports and records accumulated during the initial investigation to determine if the department of social services "came up with enough" to justify its decision. Such limited review violates an individual's right to be heard "in a meaningful manner[,]" *Mathews*, 424 U.S. at 333, 47 L. Ed. 2d at 32 (citation and quotation marks omitted), as it does not allow the fact finder to weigh the evidence, thus eviscerating the purpose of allowing the accused individual the opportunity to be heard and to present his or her case.

In order to satisfy due process, we hold that at the constitutionally necessary pre-deprivation hearing in the district court, the director shall have the burden of proving abuse or serious neglect and identifying the responsible individual by a preponderance of the evidence.

C. Untimely Order

[3] Finally, Petitioner argues that the trial court erred in failing to remove his name from the RIL because the written order from the hearing on Petitioner's petition for expunction was entered outside of the statutory 30-day time limit.

N.C. Gen. Stat. § 7B-323(d) requires a written order containing findings of fact and conclusions of law to be entered within 30 days after the conclusion of an expunction hearing in district court. N.C. Gen. Stat. § 7B-323(d). In this case, the district court held an expunction hearing on 23 August and 12 September 2007 and, on 12 September 2007, announced in open court that Petitioner's name should not be expunged from the RIL. However, an order was not reduced to writing, signed, and filed by the district court until 30 July 2008, more than 10 months past the statutory time period.

Petitioner argues in his brief that he was prejudiced by such delay and, thus, his name should be removed from the RIL. However, at oral argument, counsel for Petitioner conceded that this matter is controlled by our Supreme Court's ruling in *In re T.H.T.*, 362 N.C. 446, 665 S.E.2d 54 (2008), such that "[m]andamus is the proper remedy when the trial court fails to . . . enter an order as required by statute." *Id.* at 454, 665 S.E.2d at 59.

Accordingly, while we disapprove of the inordinate delay in entry of the written order, we conclude that Petitioner was not entitled to have his name removed from the RIL based on the untimeliness of the district court's order. Petitioner's argument is overruled.

III. Conclusion

It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 170, 95 L. Ed. at 853 (footnote omitted). "The validity and moral authority of a conclusion largely depend on the mode by which it was reached . . . [and n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Id.* at 171-72, 95 L. Ed. at 854. "Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances." *Id.* at 174, 95 L. Ed. at 855. Because the statutory procedures for placing an individual on the RIL deprive individuals of due

process, they are unconstitutional under the North Carolina Constitution. Accordingly, the orders of the trial court are reversed.

REVERSED.

Judges HUNTER, JR. and BEASLEY concur.

IN THE MATTER OF: D.W.

No. COA09-1349

(Filed 2 March 2010)

Termination of Parental Rights— adjudication hearing— motion to continue denied—abuse of discretion

The trial court abused its discretion by denying respondent mother's motion to continue a termination of parental rights adjudication hearing based on respondent's absence from the hearing and the extraordinary nature of the circumstances presented to the trial court. Respondent was prejudiced by her inability to testify on her own behalf or to participate in any way in the proceedings.

Judge HUNTER, JR. concurs with a separate opinion.

Appeal by respondent mother from order entered 30 July 2009 by Judge Beverly Scarlett in District Court, Orange County. Heard in the Court of Appeals 15 February 2010.

Northen Blue, L.L.P., by Carol J. Holcomb and Samantha H. Cabe, for petitioner-appellee Orange County Department of Social Services.

Pamela Newell Williams for guardian ad litem. Ryan McKaig for respondent-appellant mother.

WYNN, Judge.

When a trial court rules on a motion to continue, "[t]he chief consideration is whether granting or denying a continuance will further substantial justice."[1] In this appeal, Respondent mother argues

1. *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003) (quoting *Doby v. Lowder*, 72 N.C. App. 22, 24, 324 S.E.2d 26, 28 (1984)).

that the trial court abused its discretion by denying a motion to continue a hearing addressing the termination of parental rights on the grounds that the parent was not present.[2] Because the circumstances of this case indicate that justice was impaired by the denial of the continuance, we agree with Respondent and reverse the trial court's order.

On 9 March 2009, the Orange County Department of Social Services ("DSS") filed a motion to terminate Respondent mother's parental rights to D.W., Jr. ("the juvenile"). The case came on for a termination of parental rights hearing on 16 June 2009. Initially, however, the trial judge believed that there was "just information to be read into the record" and that she would not be kept long from presiding over matters in another courtroom. Respondent's attorney requested that the trial court continue the hearing because Respondent was not present. Counsel indicated that she could not communicate with her client outside of court other than by letter. Counsel told the trial court that Respondent had been informed of the date of the hearing in writing, but there was no evidence offered to prove Respondent's receipt of that correspondence. Counsel also noted that Respondent had been present at each of the earlier stages of the proceeding. Attorneys for both parents expressed concern that their clients thought the hearing was to be held at another location.

The trial judge reiterated her assumption that the matter would be resolved quickly, stating "I was told that it was just information to be read in the record, and so, that's what I came to do . . . and if we're talking about something longer than that, then I need to run . . . ." It was suggested that the hearing be suspended until 1 p.m. to allow time for Respondents to appear. In response, Petitioner's attorney indicated that such a delay was incompatible with the schedules of certain expert witnesses prepared, at the insistence of Respondent's counsel, to testify in the matter. After considering the arguments of counsel, the trial court decided to hold the hearing.

The termination hearing proceeded hastily, and the court consented to preside only on the understanding that there would be limited questions asked of the experts. The trial judge stated "[w]hen I hear limited questions, I'm thinking three or four, so that's what I have time to do, then, I have to go back downstairs." In fact, as

2. The trial court's order also terminated Respondent father's parental rights, but he is not a party to this appeal. Thus, we focus on the facts relevant to the issues raised by Respondent mother.

Respondent's counsel was questioning one of the experts, the trial court stated "[i]f you have one last important question, I'm going to ask you to go ahead and ask that because this has already gone beyond the scope of what I bargained for." Counsel again requested a continuance, but the trial court responded, "If I do that, [the expert is] not going to be here because that's the whole point, to try to get her down so we don't have to pay her for time sitting down . . . ." Respondent's counsel asked one final question but informed that court that she had "other questions" which remained unasked because of the court's time frame. Shortly thereafter, the proceedings were put on hold so the trial judge could hear matters in another courtroom.

The hearing resumed after the return of the trial judge and, in response to an objection raised by counsel for Respondent father, the trial court again expressed confusion as to the nature of the hearing, stating, "So, I don't know what stage we're at, what rules apply. I'm just trying to facilitate getting this done, so somebody needs to *help* me . . . ." Respondent father's attorney informed the trial court that the hearing was an adjudication hearing in a termination of parental rights case. Later, the trial judge stated that she did not realize that the subject of the hearing "would be anything as serious as this."

After a recess, Respondent renewed her motion to continue the matter, because the trial court did not initially realize it was conducting a termination hearing. In response to Respondent's request, the trial court stated:

> I want to move forward . . . . Uh, I know what I heard, and I *did* hear some really good things. It's just that I wasn't aware of the *context* in which they should have been heard and applied. That was a deficit that I had, so, I would like to go ahead and move forward and do as much as we can do today.

After hearing the evidence, the trial court found, as grounds for termination of parental rights, that the juvenile had been willfully left in foster care for more than twelve months without Respondent making reasonable progress toward correcting the conditions that led to the juvenile being removed from her care, and that the juvenile was a neglected and dependent juvenile. The trial court took additional evidence at the disposition phase of the hearing and concluded, both in court and in its written order, that it was "in the best interests of the juvenile" that Respondents' parental rights be terminated.

Respondent appeals from the trial court's order terminating her parental rights. Respondent contends that the trial court abused its discretion when it denied her motion to continue the termination hearing.

> A motion to continue is addressed to the court's sound discretion and will not be disturbed on appeal in the absence of abuse of discretion. Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice.

Humphrey, 156 N.C. App. at 538, 577 S.E.2d at 425 (quoting *Doby v. Lowder*, 72 N.C. App. 22, 24, 324 S.E.2d 26, 28 (1984)). Furthermore, "the denial of a motion to continue . . . is sufficient grounds for the granting of a new trial only when the defendant is able to show that the denial was erroneous and that he suffered prejudice as a result of the error." *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000).

The Juvenile Code directly addresses the continuation of hearings involving juvenile matters and states in pertinent part:

> The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-803 (2009).

Respondent argues that "[t]he trial court erred in denying the motion . . . to continue on the ground that the Respondent Mother had a right to be present for the hearing." While we decline to find that parental absence, without more, constitutes extraordinary circumstances necessitating a continuance, the facts of this case indicate that the trial court abused its discretion when denying the motion for a continuance.

We are aware that this Court has previously held that a parent's due process rights are not violated when parental rights are terminated at a hearing at which the parent is not present. *In re Murphy*,

105 N.C. App. 651, 658, 414 S.E.2d 396, 400, *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992) ("When . . . a parent is absent from a termination proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail upon appeal."). However, in *Murphy*, the Court was deciding whether an incarcerated respondent had such a fundamental right to be present that the State was required to provide transportation for respondent to secure his presence. The matter *sub judice* presents a different set of factual circumstances, and we believe, as did the Court in *Murphy*, that a case-by-case analysis is more appropriate than the application of rigid rules. *See id.* at 653, 414 S.E.2d at 398 ("However, 'fundamental fairness may be maintained in parental rights termination proceedings even when some procedures are mandated only on a case-by-case basis, rather than through rules of general application.' ") (quoting *Santosky v. Kramer*, 455 U.S. 745, 757, 71 L. Ed. 2d 599, 609 (1982)).

In this case, the record is replete with indicia of the extraordinary nature of the circumstances presented to the trial court. First, Respondent notes that it was unclear whether she received notice of the hearing. While trial counsel told the trial court that she had informed Respondent of the hearing date, there was no evidence offered to show that Respondent received this correspondence. Furthermore, the record indicates that the trial court was on notice that Respondent suffered from diminished capacity, possibly making her absence involuntary. Trial counsel argued that Respondent's attendance at each of the previous hearings indicated her willingness to participate in the proceedings. Also, it was apparent from the transcript that external time constraints negatively affected the nature of the proceeding in such a manner as might have been avoided through the issuance of a continuance. Lastly, we are troubled by the trial court's failure to ascertain the nature of the proceeding prior to issuing a ruling on a motion to continue, particularly because the nature of the proceeding informs what is necessary to ensure "the proper administration of justice." N.C. Gen. Stat. § 7B-803 (2009).

Respondent has indicated that she was materially prejudiced by denial of her motion because she was unable to testify in the matter. *But see In re D.Q.W.*, *T.A.W.*, *Q.K.T.*, *Q.M.T.*, *& J.K.M.T.*, 167 N.C. App. 38, 41-42, 604 S.E.2d 675, 677 (2004) (holding that the respondent was not prejudiced where the respondent did not explain why

his counsel had inadequate time to prepare for the hearing, what specifically his counsel hoped to accomplish during the continuance, or how preparation would have been more complete had the continuance motion been granted). In Respondent's brief she argues that "prejudice results from the mother being unable to testify on her own behalf, or participate in any way in the proceedings." Generally, we consider the testimony of a parent to be a vital source of information regarding the nature of the parent/child relationship and the necessity of terminating parental rights. Additionally, a parent's right to the companionship, care, custody, and control of his or her children is protected by the Constitution of the United States. *See Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 519, *reh'g denied*, 435 U.S. 918, 55 L. Ed. 2d 511 (1978). This important interest "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 558 (1972). Thus we find that the trial judge abused its discretion when denying a motion to continue a hearing to terminate the parental rights of a Respondent mother who was suffering from mental disability, to whom there is no evidence that notice was given, and from whom the trial court could hear testimony directly addressing the ultimate issue at trial.

Because our holding as to Respondent's first argument is dispositive, we need not address Respondent's argument that the trial court erred by failing to bifurcate the adjudication and disposition portions of the termination hearing.

Reversed.

Judge BEASLEY concurs.

Judge HUNTER, JR. concurs with a separate opinion.

HUNTER, JR., Robert N., Judge, concurring.

I read the record with regard to the continuance issue somewhat differently than my colleagues. It appears that after the pleadings were filed, DSS's motion to terminate Respondent mother's parental rights was scheduled to be heard on 4 June 2009. Respondent contacted her attorney to request a continuance from the 4 June 2009 calendar date after learning of the date by a letter sent from her attorney. Respondent's attorney knew that, due to the crowded court calendar, the court would not be able to reach DSS's motion on 4 June

2009. After the trial court ordered a continuance on 4 June 2009, Respondent's counsel mailed Respondent a letter informing her that the hearing would be held on 16 June 2009 in Hillsborough, thus verifying that Respondent was informed of the date, place, and time.

At the hearing scheduled for 16 June 2009, Respondent did not appear. Counsel made a motion to continue or delay the hearing for a period of time until Respondent could arrive. The transcript of the record is unclear what the quality of the communication was between counsel and Respondent, but Respondent's counsel knew of the hearing, and communicated the date, time, and place of the hearing to her client by U.S. mail, which was the ordinary method of communication between Respondent and counsel.

The presumption should be that the mail was delivered and received.[3] *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, 62 N.C. App. 419, 423, 303 S.E.2d 332, 335 (1983) ("Evidence that a letter has been mailed permits an inference that it was properly addressed and stamped and that it was received by the addressee."); *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 586, 281 S.E.2d 463, 465 (1981) (" 'There is a presumption that mail, with postage prepaid and correctly addressed, will be received.' ") (citation omitted). To rebut this presumption, Respondent must, at a minimum, allege that she did not receive the notice. *Atlantic and East Carolina Ry. Co. v. Southern Outdoor Adver.*, 129 N.C. App. 612, 616, 501 S.E.2d 87, 90 (1998) ("Since Atlantic could not say with certainty that it did not receive the renewal letter, it did not overcome the presumption[.]"). This contention is not made affirmatively. Instead, the contention on appeal is that there is no record that Respondent received the letter from her counsel. To reverse a trial court ruling for abuse of discretion for lack of notice on a continuance matter, this minimal contention should be made.

Furthermore, Respondent did not proffer some forecast of evidence which she desired to tender to the court, or, in the alternative, show some specific prejudice that infringed on her right to cross-examine witnesses whose testimony was taken at the hearing. Therefore, I would find that adequate notice was received by Re-

3. Respondent nakedly alleges in her brief that "it is unclear that the respondent mother received proper notice of the hearing." However, Respondent offers no evidence on appeal rebutting: (1) her own trial counsel's assertion that a letter was sent informing her of the 16 June 2009 hearing, and (2) Finding of Fact 8 in the trial court's order stating that Respondent's trial counsel "verified" that Respondent knew of the hearing.

spondent, and absent either some explanation for her failure to appear or an allegation of prejudice as to the evidence presented, I do not think the judge erred in denying the continuance requested.

I agree with my colleagues that the transcript of the hearing lacks the deliberative nature of a judicial hearing where parental rights are at stake. It does not appear that any of the court proceedings before 16 June 2009 dealt with testimony directly on the issue of terminating parental rights. Unless we grant relief and reverse, the parent's testimony rebutting or mitigating the evidence presented will not be considered by the court at this critical stage. Given that the reasons for termination were based on the court's conclusion that the minor had been left in foster case for more than twelve months without Respondent making reasonable progress toward correcting the conditions that led to the minor being removed from her care, her testimony is particularly significant on this issue. Delaying a decision until Respondent has been heard from, or until the next available court session, to allow her personal testimony to be considered on this issue seems, to me, a modest request which should have been granted to assure fundamental fairness. Therefore, I concur in the result, albeit for a somewhat different reason.

MORRIS COMMUNICATIONS CORPORATION D/B/A FAIRWAY OUTDOOR ADVERTISING, PETITIONER v. CITY OF BESSEMER CITY ZONING BOARD OF ADJUSTMENT, RESPONDENT

No. COA09-440

(Filed 2 March 2010)

1. Zoning— board of adjustment—de novo standard of review

The superior court did not err by finding that a city zoning board of adjustment's interpretation of a zoning ordinance was entitled to some deference under a *de novo* standard of review. It was consistent with the standard of review for interpretation of a local zoning ordinance.

2. Zoning— validity of building permit—billboard

A whole record test revealed that the superior court did not err by concluding that a billboard was in violation of a zoning ordinance amendment even though petitioner Fairway contended it possessed an unexpired and unrevoked building permit from Gaston County. There was no physical construction on

the site during the six months after issuance of the sign permit, and there was no work on the property until months after the sign permit expired.

3. Zoning— sign permit—building permit—vested rights

Petitioner Fairway cannot rely upon a mistakenly issued permit to establish vested rights in its nonconforming use of the property. Although the building permit was not revoked at the time of the ordinance amendment, the county building inspector who issued the renewed permit testified that because Fairway did not possess a valid sign permit, the renewed permit was issued by mistake and was thus invalid under N.C.G.S. § 160A-385(b)(i).

4. Zoning— removal of billboard—detrimental reliance—invalid renewed permit—equitable estoppel

The superior court did not err by concluding that the City and the board of adjustment were not equitably estopped from ordering the removal of a billboard even though petitioner Fairway detrimentally relied upon an invalid renewed permit. A municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance.

5. Zoning— ordinance amendment—billboard—nonconforming use

The superior court did not err by failing to conclude that the nonconforming provisions of an ordinance prohibited the relocation of a billboard. The pertinent billboard was a nonconforming sign after an ordinance amendment passed. Only the interchange of the actual changeable sign sections of a billboard are allowed in order to maintain an existing nonconforming use.

6. Zoning— board of adjustment decision—competent, material, and substantial evidence—whole record test

A whole record test revealed the superior court did not err by concluding that a board of adjustment's decision was supported by competent, material, and substantial evidence, and was otherwise not arbitrary or capricious.

Judge HUNTER, Robert C., dissenting.

Appeal by petitioner from order entered 31 October 2008 by Judge Thomas W. Seay, Jr. in Gaston County Superior Court. Heard in the Court of Appeals 14 October 2009.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus and Lindsay P. Thompson, for petitioner-appellant.

Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., by David W. Smith, III and Michael L. Carpenter, for respondent-appellee.

CALABRIA, Judge.

Morris Communications Company d/b/a Fairway Outdoor Advertising ("Fairway") appeals from an order affirming the decision of the City of Bessemer City Zoning Board of Adjustment's ("the BOA") decision requiring the removal of petitioner's billboard. We affirm.

I. Facts

Fairway leases a parcel of land ("the property") in Bessemer City, North Carolina ("the City"), for the purpose of using and maintaining a billboard ("the billboard"). Prior to July 2005, the billboard was lawfully erected on the property. In July 2005, the North Carolina Department of Transportation ("NCDOT") condemned a portion of the property for a road widening project ("the project"). As a result of the condemnation, Fairway was required to move the billboard to another part of the property.

In order to relocate the billboard, Fairway applied to the City for a sign permit ("the sign permit"). The sign permit was issued on 31 August 2005 and indicated an "Expire Date" of 27 February 2006. By the terms of § 155.207 of the City's Zoning Ordinance ("the Ordinance"),

> [i]f the work described in any compliance or sign permit has not begun within six months from the date of issuance thereof, the permit shall expire. Upon beginning a project, work must be diligently continued until completion with some progress being apparent every three months. If such continuance or work is not shown, the permit will expire.

On 21 November 2005, Fairway applied to Gaston County for a building permit ("the building permit"). The building permit was issued on 13 December 2005[1] and contained, *inter alia*, the following language: "This permit becomes null and void if work or construction

1. The 13 December 2005 building permit is not contained in the record on appeal. However, the record does contain a renewed building permit that indicates the original building permit was issued on 13 December 2005.

authorized is not commenced within 6 months, or if construction or work is suspended, or abandoned for a period of 1 year at any time after work is started." The building permit additionally informs the permit holder that "[g]ranting of a permit *does not presume to give authority to violate or cancel the provisions of any other state or local law regulating construction or the performance of construction.*" (Emphasis added).

On 8 June 2006, Gaston County renewed the building permit ("the renewed permit") until 8 December 2006. On 12 June 2006, the City passed an amendment to the Ordinance ("the amendment") that banned billboards in the City. With the adoption of the amendment, the billboard became a nonconforming sign.

On 13 June 2006, Fairway took down the billboard in anticipation of the project. After the project was completed, Fairway relocated the billboard in its new location on 6 December 2006. Except for the footings, the billboard was the same sign that had been previously taken down by Fairway before the project began.

On 16 January 2007, the City sent Fairway a Notice of Violation ("the NOV") regarding the billboard. According to the City, the relocation of the billboard violated the amendment. The NOV also stated that Fairway's sign permit had expired and that the renewed permit was void as a result. Fairway appealed the NOV to the BOA, which affirmed the NOV on 7 May 2007 and entered a written order requiring the billboard's removal.

On 10 August 2007, the superior court of Gaston County, by consent of the parties, issued a Writ of Certiorari in order to review the BOA's decision. On 31 October 2008, the superior court entered an order and judgment affirming the decision of the BOA. Fairway appeals.[2]

II. Standard of Review

Upon reviewing a decision by a board of adjustment, the superior court's scope of review includes: (1) Reviewing the record for

2. As an initial matter, we note that the facts of the instant case are similar to the facts in *Lamar OCI South Corp. v. Stanly Cty. Zoning Bd. of Adjust.*, 186 N.C. App. 44, 650 S.E.2d 37 (2007), *aff'd per curiam in part and disc. review improvidently allowed in part*, 362 N.C. 670, 669 S.E.2d 322 (2008). In *Lamar*, this Court held that the NCDOT's billboard regulations preempted any conflicting local zoning ordinances and allowed a nonconforming sign to be relocated under NCDOT regulations. *Id.* at 50-53, 650 S.E.2d at 41-43. However, the record in the instant case indicates that NCDOT regulations did not apply to the billboard at issue. Therefore, the analysis in *Lamar* is not applicable.

> errors in law, (2) Insuring that procedures specified by law in both statute and ordinance are followed, (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents, (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and (5) Insuring that decisions are not arbitrary and capricious. Depending upon the nature of the alleged error, the superior court must apply one of two standards of review in an administrative appeal of a decision by a board of adjustment. Where the petitioner asserts that the board's decision is based on an error of law, *de novo* review is proper. If the petitioner contends that the board's decision is arbitrary or capricious, or is unsupported by the evidence, the court applies the whole record test.

E. Outdoor, Inc. v. Bd. of Adjust. of Johnston Cty., 150 N.C. App. 516, 518, 564 S.E.2d 78, 79-80 (2002) (internal quotations and citations omitted). "When this Court reviews such appeals from the superior court, our review is limited to determining whether (1) the superior court determined the appropriate scope of review and (2) whether the superior court, after determining the proper scope of review, properly applied such a standard." *Id.* at 518, 564 S.E.2d at 80.

III. *De novo* Review

[1] Fairway argues that the superior court erred in finding that the BOA's interpretation of the Ordinance is entitled to some deference under a *de novo* standard of review. We disagree.

In its order, the superior court stated: "In interpreting the applicable ordinances, the [BOA]'s decision is entitled to some deference so long as [the BOA] did not act arbitrarily, oppressively, manifestly abuse its authority, or commit an error of law." Fairway contends that this deference is inconsistent with a *de novo* review.

> Where the petitioner alleges that a board decision is based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been determined. However, one of the functions of a Board of Adjustment is to interpret local zoning ordinances, and [the BOA]'s interpretation of its own ordinance is given deference. Therefore, our task on appeal is not to decide whether another interpretation of the ordinance might reasonably have been reached by the board, but to

> decide if the board acted arbitrarily, oppressively, manifestly abused its authority, or committed an error of law in interpreting the ordinance.

Whiteco Outdoor Adver. v. Johnston Cty. Bd. of Adjust., 132 N.C. App. 465, 470, 513 S.E.2d 70, 74 (1999) (internal quotations and citations omitted). The standard of review included in the superior court's order is clearly consistent with the standard of review for interpretation of a local zoning ordinance as established by this Court. This assignment of error is overruled.

IV. Validity of Building Permit

[2] Fairway argues that the superior court erred by concluding that the billboard was in violation of the amendment because Fairway possessed an unexpired and unrevoked building permit from Gaston County. We disagree.

After the amendment, the Ordinance § 155.163(A) stated, in relevant part:

> No sign shall hereafter be erected, attached to, suspended from, or supported on a building or structure; *nor shall any existing sign be enlarged, relocated, or otherwise altered; nor shall any building permit be issued for such purposes until a sign permit for same has been issued by the Zoning Administrator . . . .*

(Emphasis added). In the instant case, the parties agree a valid sign permit was issued to Fairway on 31 August 2005. The parties do not agree on whether that permit was still in effect when Fairway renewed its building permit in June 2006.

The validity of Fairway's sign permit at the time it obtained the renewed permit is a mixed question of law and fact. The BOA's statutory interpretation of "work" in the Ordinance is a question of law reviewed under the standard articulated in *Whiteco*. Whether Fairway's action constituted "work" as defined by the Ordinance is a question of fact that is reviewed using the whole record test.

A. Definition of work

Under § 155.207 of the Ordinance, "[i]f the work described in any compliance or sign permit has not begun within six months from the date of issuance thereof, the permit shall expire." The BOA concluded that Fairway did not commence any "work" on the billboard in the six

months after the sign permit was issued on 31 August 2005 and therefore the sign permit was expired at the time Fairway attempted to renew the building permit.

Kevin Krouse, the City Zoning Administrator ("Krouse"), testified that he saw no signs of work on the property until December 2006, long after the sign permit would have expired by its terms. Krouse defined "work" as "actually something moving on the ground . . . [c]onstruction." The BOA affirmed the opinion of Krouse and ordered the billboard removed.

Fairway argues that the BOA should not have relied upon the definition of "work" offered by Krouse. As previously noted, this Court gives the BOA's interpretation of its own ordinance deference. *CG&T Corp. v. Bd. of Adjust. of Wilmington*, 105 N.C. App. 32, 39, 411 S.E.2d 655, 659 (1992). We need not decide whether another interpretation of the ordinance might reasonably have been reached by the BOA. *Whiteco*, 132 N.C. App. at 470, 513 S.E.2d at 74.

"When statutory language is clear and unambiguous, [w]ords in a statute must be construed in accordance with their plain meaning unless the statute provides an alternative meaning." *Procter v. City of Raleigh Bd. of Adjust.*, 140 N.C. App. 784, 785-86, 538 S.E.2d 621, 622 (2000) (internal quotations and citation omitted). The Ordinance itself does not define "work." However, the Ordinance § 155.163 requires a sign permit to be issued any time a sign is "erected, attached to, suspended from, or supported on a building or structure" or when an existing sign is "enlarged, relocated, or otherwise altered." Since the purpose of a sign permit is to allow the construction or physical alteration of a sign, it does not appear that the BOA's definition of "work" for the purposes of maintaining a valid sign permit, "something moving on the ground . . . [c]onstruction," is an unreasonable interpretation or otherwise the result of an error of law.

B. Fairway's "work"

Using the BOA's definition of "work," we must now determine whether the BOA properly concluded that Fairway's actions did not constitute "work." This determination requires the use of the whole record test.

> 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].

Coucoulas/Knight Props., LLC v. Town of Hillsborough, ___ N.C. App. ___, ___, 683 S.E.2d 228, 230 (2009) (citation omitted).

In the instant case, there is sufficient evidence in the whole record to support the BOA's decision. Fairway does not dispute that there was no physical construction on the site during the six months after issuance of the sign permit. Fairway presented evidence that it conducted negotiations with NCDOT and the owner of the property regarding where it would move the billboard, but at the same time admitted that it did not inform the City of these ongoing negotiations. Krouse testified that he observed no work on the property until months after the sign permit expired. This is enough evidence "as a reasonable mind might accept as adequate to support a conclusion" and the decision of the BOA should therefore not be disturbed.

V. Vested Rights

[3] Because the sign permit had expired before Fairway renewed its building permit in June 2006, it could not validly renew its Gaston County building permit under the express terms of the Ordinance § 155.163. The BOA argues that the building permit was therefore void. Fairway argues that until the invalid permit was revoked pursuant to N.C. Gen. Stat. § 160A-422 (2007), it has established statutory vested rights under N.C. Gen. Stat. § 160A-385(b)(i) (2007).

N.C. Gen. Stat. § 160A-422 delineates the procedure for the revocation of permits.

> The appropriate inspector may revoke and require the return of any permit by notifying the permit holder in writing stating the reason for the revocation. Permits shall be revoked for any substantial departure from the approved application, plans, or specifications; for refusal or failure to comply with the requirements of any applicable State or local laws; or for false statements or misrepresentations made in securing the permit. *Any permit mistakenly issued in violation of an applicable State or local law may also be revoked.*

N.C. Gen. Stat. § 160A-422 (2007) (emphasis added). The BOA argues that revocation of the renewed permit was unnecessary because it was void *ab initio*. This interpretation would render the portion of N.C. Gen. Stat. § 160A-422 emphasized above superfluous. "Such statutory construction is not permitted, because a statute must be construed, if possible, to give meaning and effect to all of its provisions." *HCA Crossroads Residential Ctrs. v. North Carolina Dep't of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990). Therefore, the proper way to revoke a building permit, even a permit issued in violation of a state or local law, is by following the statutory revocation procedure of N.C. Gen. Stat. § 160A-422.

In the instant case, it is undisputed that Fairway's building permit was not revoked pursuant to N.C. Gen. Stat. § 160A-422 until after the amendment was passed. Fairway argues that because it possessed an unrevoked building permit at the time of the amendment, it is entitled to vested rights under N.C. Gen. Stat. § 160A-385(b), which states, in relevant part:

> Amendments in zoning ordinances shall not be applicable or enforceable without consent of the owner with regard to buildings and uses for which . . . (i) building permits have been issued pursuant to G.S. 160A-417 prior to the enactment of the ordinance making the change or changes *so long as the permits remain valid* and unexpired pursuant to G.S. 160A-418 and unrevoked pursuant to G.S. 160A-422 . . . .

N.C. Gen. Stat. § 160A-385(b) (2007) (emphasis added). Although the building permit was not revoked at the time of the amendment, the Gaston County building inspector who issued the renewed permit testified that because Fairway did not possess a valid sign permit, the renewed permit was issued by mistake, contrary to applicable law, and was therefore invalid. An invalid permit does not qualify for statutory rights according to the express language of N.C. Gen. Stat. § 160A-385(b)(i).

This result is also supported by previous holdings of this Court. "Permits unlawfully or mistakenly issued do not create a vested right." *Clark Stone Co. v. N.C. Dep't of Env't & Natural Res.*, 164 N.C. App. 24, 40, 594 S.E.2d 832, 842 (2004); *see also Raleigh v. Fisher*, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950). Thus, Fairway cannot rely upon a mistakenly issued permit to establish vested rights in its nonconforming use of the property. This assignment of error is overruled.

VI. Equitable Estoppel

[4] Fairway argues that the superior court erred in concluding that the City and the BOA were not equitably estopped from ordering the removal of the billboard. We disagree.

It has been established that the building permit renewal was issued by mistake, contrary to the express terms of the Ordinance. Fairway correctly argues that it relied upon this invalid renewed permit to its detriment. However, in such a situation, our Supreme Court has held, "a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past." *Fisher*, 232 N.C. at 635, 61 S.E.2d at 902 (citations omitted); *see also Helms v. Charlotte*, 255 N.C. 647, 652, 122 S.E.2d 817, 821 (1961). The *Fisher* Court, acknowledging the hardship that this rule can create, succinctly explained the reasoning behind it:

> Undoubtedly this conclusion entails much hardship to the defendants. Nevertheless, the law must be so written; for a contrary decision would require an acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it.

Fisher, 232 N.C. at 635, 61 S.E.2d at 902. This assignment of error is overruled.

VII. Nonconforming Provisions of the Ordinance

[5] Fairway argues that the superior court erred by failing to conclude that the nonconforming provisions of the Ordinance did not prohibit the relocation of the billboard. We disagree.

As previously noted, § 155.163(A) of the Ordinance provides that:

> No sign shall hereafter be erected, attached to, suspended from, or supported on a building or structure; nor shall any existing sign be enlarged, relocated, or otherwise altered; nor shall any building permit be issued for such purposes until a sign permit for same has been issued by the Zoning Administrator. . . .

The parties agree that the billboard was a nonconforming sign after the amendment was passed. By the terms of the Ordinance, structural changes, including relocations, are not permitted, even for conforming uses, without a valid sign permit and a valid building permit.

Fairway did not possess a valid version of either of these permits at the time it relocated its billboard.

Additionally, § 155.172 of the Ordinance, entitled "Nonconforming Signs," provides that:

> (A) *Existing nonconforming sign.* A non-conforming sign . . . shall not be replaced by another non-conforming sign except that the substitution or inter-change of poster panels, painted boards, or demount-able material on nonconforming signs shall be permitted. . . .

Therefore, only the interchange of the actual changeable sign sections of a billboard are allowed in order to maintain an existing nonconforming use. The relocation of the billboard by Fairway went well beyond the interchange of sign sections and Fairway could not maintain an existing nonconforming use on this basis. This assignment of error is overruled.

VIII. Whole Record

[6] Fairway finally argues that the superior court erred in concluding that the BOA's decision was supported by competent, material, and substantial evidence and was otherwise not arbitrary or capricious. We disagree.

Specifically, Fairway argues that the superior court erred by upholding the BOA's findings that Fairway had done no "work" to maintain its right to the sign permit and by upholding the BOA's finding that Fairway possessed no statutory vested rights. These contentions have been previously considered and found to be without merit. There is substantial evidence in the whole record to support the BOA's findings and its decision was the result of the application of correct legal principles. This assignment of error is overruled.

Affirmed.

Judge GEER concurs.

Judge HUNTER, Robert C. dissents by separate opinion.

HUNTER, Robert C., Judge, dissenting

After careful review, I dissent from the majority opinion because I disagree with the majority's position on the definition of "work."

While we give deference to the City Board of Adjustment's ("BOA") own interpretation of its ordinances, we are not required to accept that interpretation, under *de novo* review, if it is arbitrary or constitutes an error of law. Here, the BOA committed an error of law when it accepted Kevin Krouse's ("Krouse") claim that "work" means construction. Work should not be so narrowly defined and can include actions that do not result in construction on the site. Under these circumstances I would remand this case to the trial court with instructions to remand to the BOA to determine if petitioner had begun "work" under a broader definition. If petitioner had begun work within six months after the sign permit was originally issued, then the subsequently renewed building permit would have been valid at the time the sign was relocated.

Facts

On or about 11 July 2005, the North Carolina Department of Transportation ("DOT") filed a Notice of Taking and Complaint for a road widening project, which effectively condemned a portion of Gastonia Highway where Fairway's billboard was located. The roadway contract was expected to be awarded on 19 June 2006. Fairway was required by DOT to move the billboard to a new location by 15 March 2006.

On 26 August 2005, Fairway applied for a City of Bessemer City Zoning Permit (the "sign permit"), which was then issued on 31 August 2005. On 21 November 2005, Fairway applied for a Gaston County Building Permit (the "building permit"), which was then issued on 13 December 2005. Fairway contends that after the permits were issued, it continued negotiations with DOT regarding the exact location of the road widening project and where the billboard could be relocated. Fairway also claims that negotiations were taking place between Fairway and the land owner for a new lease agreement. Additionally, a "NAPA" building was also located on the proposed right of way and there was some uncertainty as to where that building would be relocated on the parcel.

On 2 March 2006, Fairway generated a Work Order to take down the existing billboard on 13 June 2006. On 9 March 2006 Fairway sent a letter to DOT stating that it "would like to schedule the removal of this sign for (No Later Than) Tuesday, June 13th 2006."[3] On 28 April 2006, Fairway entered into a new lease for the

3. DOT's response is not included in the record.

relocated billboard with the land owner on the same parcel of land along Gastonia Highway.

On 8 June 2006, Fairway received a renewal of its building permit. On 12 June 2006, the City of Bessemer (the "City") adopted a new ordinance banning billboards within the City's zoning jurisdiction. At that point, Fairway's existing billboard became a nonconforming sign. On 13 June 2006, Fairway removed the billboard from its original location and stored it. On 6 December 2006, Fairway completed relocation of the billboard. On 16 January 2007, Fairway received the first notice of violation from the City's attorney.

Discussion

Pursuant to Bessemer City Ordinance § 155.163(A), a building permit cannot be issued "until a sign permit for same has been issued . . . ." A valid sign permit was issued to Fairway on 31 August 2005. Ordinance § 155.207 states:

> If the work described in any compliance or sign permit has not begun within six months from the date of issuance thereof, the permit shall expire. Upon beginning a project, work must be diligently continued until completion with some progress being apparent every three months. If such continuation or work is not shown, the permit will expire.

The BOA held that the sign permit expired six months after it was issued because Fairway had not begun any work under Ordinance § 155.207, and, therefore, the building permit that was renewed in June 2006 was not valid. The majority holds that without a valid building permit, Fairway does not have a statutorily vested right pursuant to N.C. Gen. Stat. § 160A-385(b) (2007) to relocate the sign. It follows that if Fairway had begun work within six months of the issuance of the sign permit, the renewed building permit would be valid and Fairway would have a vested right to relocate the sign as mandated by DOT.

The term "work" is not defined in the City's ordinances. At the hearing before the BOA, Krouse, the City Zoning Administrator, testified that, pursuant to his interpretation of the ordinance, work meant "construction." Fairway admits that no construction occurred during the six months after the sign permit was issued because they did not have a new lease signed and final negotiations with DOT had not taken place; however, Fairway contends that "work" does not necessarily mean that a physical alteration must occur at the site. I agree.

"Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly their express terms." *Cumulus Broadcasting, LLC v. Hoke County Bd. of Comm'rs*, 180 N.C. App. 424, 427, 638 S.E.2d 12, 15 (2006) (quoting *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966)); *see also Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 354, 578 S.E.2d 688, 691 (2003) ("Zoning ordinances derogate common law property rights and must be strictly construed in favor of the free use of property.").

The majority aptly states that the interpretation of "work" is a question of law reviewed *de novo*, and whether Fairway's actions constituted "work" is a question of fact that is reviewed using the whole record test. The majority is also correct in its assertion that the BOA's interpretation of its own ordinance is entitled to some deference under a *de novo* standard of review. *See Whiteco Outdoor Adver. v. Johnson Cty. Bd. of Adjustment*, 132 N.C. App. 465, 470, 513 S.E.2d 70, 74 (1999). "Therefore, our task on appeal is not to decide whether another interpretation of the ordinance might reasonably have been reached by the board, but to decide if the board acted arbitrarily, oppressively, manifestly abused its authority, or committed an error of law in interpreting the ordinance." *Id.* (citation and quotation marks omitted). I find that the Board in this case committed an error of law in defining "work" to be synonymous with construction.

In *Town of Hillsborough v. Smith*, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969), our Supreme Court held that the visible commencement of construction was not the only means by which a permit holder could preserve his or her rights under a zoning permit. Entering into contractual obligations, the purchase of building materials, expenditures of money, or other activities could preserve the permit holder's rights even where there was no "visible change in the condition of the land." *Id.* The Court reasoned that

> [i]t is not the giving of notice to the town, through a change in the appearance of the land, which creates the vested property right in the holder of the permit. The basis of his right to build and use his land, in accordance with the permit issued to him, is his change of his own position in bona fide reliance upon the permit.

Id. Here, there was no visible change in the land before the billboard was physically moved; however, it is important to recognize that in this particular circumstance, aside from installing new "footings" and

re-erecting the billboard, there was no construction that could have been performed on the new site. The old billboard was simply relocated, not fully reconstructed anew. This situation is different from the building of an office or other commercial property where construction visibly begins and continues for some time. In that circumstance most of the "work" conducted would be visible construction. That is not the case here. It appears from the record in this case that after the footings were installed, the billboard was re-erected in one day. The "work" involved in conducting that move was, arguably, performed behind the scenes.

In *Flowerree v. City of Concord*, 93 N.C. App. 483, 485, 378 S.E.2d 188, 189 (1989), this Court considered a non-conforming duplex under the City of Concord's Zoning Ordinance, which stated that discontinuance of a non-conforming use for more than three months would result in loss of non-conforming rights. In that case, the tenants of the lawful nonconforming duplex had moved out and the utilities were turned off. *Id.* at 484, 378 S.E.2d at 189. This Court affirmed the trial court's decision to reverse the City of Concord's denial of plaintiffs' application for an occupancy permit and held, "[w]hile there was an interruption in occupancy, there was no 'cessation of use within' the meaning . . . of the . . . Zoning Ordinance" since the "non-occupancy resulted from factors beyond petitioners [sic] control" and petitioners continued to look for tenants and made some repairs to the property to make it more marketable. *Id.* at 486, 378 S.E.2d at 190. In *Flowerree*, "cessation of use" was not synonymous with "unoccupied" where efforts were being made behind the scenes to comply with the ordinance. Similarly in the present case, "work" is not synonymous with "construction" as a matter of law.

Furthermore, "[w]hen statutory language is clear and unambiguous, 'words in a statute must be construed in accordance with their plain meaning unless the statute provides an alternative meaning.' " *Procter v. City of Raleigh Bd. of Adjust.*, 140 N.C. App. 784, 785-86, 538 S.E.2d 621, 622 (2000) (quoting *Kirkpatrick v. Village Council*, 138 N.C. App. 79, 86, 530 S.E.2d 338, 343 (2000)). According to a common dictionary definition, "work" means "[p]hysical or mental effort or activity directed toward the production or accomplishment of something." *The American Heritage Dictionary* 1554 (3rd ed. 1997). "Construction" is defined as "[t]he act or process of constructing" or "[t]he way in which something is built or put together." *Id.* at 299. "Construction" is thus limited to physical acts of assembly while the plain meaning of "work" does not require a physical manifestation of

one's efforts. Contrary to the BOA's determination, the two terms are not synonymous.

Additionally, the building permit states that the permit would expire if "work *or* construction authorized [was] not commenced within 6 months . . ." (Emphasis added.) Clearly, a distinction was made between work and construction. Had the City wanted to require the sign permit holder to begin "construction" within six months, it should have used that term in the ordinance. In sum, I find that work is not synonymous with construction alone and may include other efforts or preparations that are not visible on the site.

Fairway claims that between August 2005 and February 2006 it was actively carrying out the steps necessary in order to begin the physical relocation of the Billboard. Fairway argues that the "work" performed included: (1) applying for a building permit and subsequent renewal thereof; (2) negotiating with DOT over the relocation and compensation for moving the billboard; and (3) re-negotiating its lease with the landowner. Fairway points out that it could not begin construction prior to renegotiating its lease and obtaining funding guarantees from DOT. Also, the NAPA building that was located on the same parcel had to be relocated as well, which further delayed Fairway's relocation.

At this juncture, I decline to determine whether Fairway's actions constituted work or whether it complied with Ordinance § 155.207; rather, I would remand this case to the trial court with instructions to remand it to the BOA so that it may re-examine the issue under a broader definition of work.

CREDIGY RECEIVABLES, INC. v. BLANCHE WHITTINGTON, DEFENDANT

No. COA09-465

(Filed 2 March 2010)

1. Attorney Fees— lack of standing—absence of justiciable issue—award proper

The trial court did not err in awarding defendant attorney fees under N.C.G.S. § 6-21.5 where plaintiff did not have the right to enforce its purchased judgment against defendant. Because plaintiff did not have standing to pursue enforcement of

the judgment against defendant, and because the pleadings and judgment failed to connect defendant to the underlying debt, there was a complete absence of justiciable issues raised by plaintiff in its pleading.

2. Attorney Fees— absence of justiciable issue—award proper

Plaintiff's assertion that it was a *bona fide* purchaser for value of a default judgment, without notice of any defects, was irrelevant to the determination that there was a complete absence of justiciable issues raised by plaintiff in its pleading and, thus, that an award of attorney fees to defendant under N.C.G.S. § 6-21.5 was proper. Plaintiff purchased a default judgment that was non-justiciable as to defendant as a matter of law.

Appeal by plaintiff from judgment entered 4 September 2008 by Judge Timothy I. Finan in Wayne County District Court. Heard in the Court of Appeals 14 October 2009.

Ellis & Winters, LLP, by Jeffrey M. Young, for plaintiff appellant.

John Robert Hooten; and White & Allen, P.A., by Matthew S. Sullivan, for defendant appellee.

HUNTER, JR., Robert N., Judge.

In 2008, Credigy Receivables, Inc. ("Credigy") purchased and became the assignee of a default judgment against "Blanche Whittington" of 107 Courtland Place, Goldsboro, Wayne County, North Carolina. The assignment granted Credigy the right to collect on the judgment, which concerned a delinquent credit card account opened in the name "Blanche Whittington." After the purchase, Credigy initiated proceedings to collect the debt against 82-year-old Ms. Blanche Whittington of 2114 Michelle Drive, Kinston, Lenoir County, North Carolina.

The real Ms. Whittington, residing in Kinston, did not incur the debt underlying the judgment, but instead was the victim of identity theft by a Ms. Mary E. Atkinson. Ms. Atkinson appropriated Ms. Whittington's social security number in perpetrating a number of similar frauds on other creditors during the time the credit card debt was incurred.

Upon receiving a notice to claim exemptions from Credigy, Ms. Whittington retained counsel, who immediately notified Credigy's counsel of the error. Subsequently, Ms. Whittington's counsel filed a Rule 60 motion, including a motion for attorneys' fees, to set aside the judgment. The matter proceeded to hearing, and the judgment was eventually set aside as to the true Ms. Whittington by consent of the parties.

Despite this agreement, the trial court awarded Ms. Whittington $26,101.75 in attorneys' fees accumulated while defending against Credigy's enforcement efforts under N.C. Gen. Stat. § 6-21.5 (2009). Credigy appeals the attorneys' fees award and argues: (1) that it pursued a justiciable claim against Ms. Whittington in the preliminary stages of enforcement of the judgment, and (2) that the attorneys' fees were not reasonably incurred, since its enforcement efforts were suspended during an investigation of whether Ms. Whittington was, in fact, the debtor. For reasons stated herein, we affirm the trial court's award.

I. BACKGROUND

At some point prior to 10 May 1999, Ms. Atkinson, posing as "Blanche Whittington," applied for a credit card account with Fleet Bank. On the application, Ms. Atkinson represented to Fleet Bank that: (1) her name was "Blanche Whittington"; (2) her social security number ended in 1234;[1] and (3) she lived at 107 Courtland Place, Goldsboro, Wayne County, North Carolina. The credit account became delinquent as of 10 May 1999, and Fleet Bank transferred the account to First Select Corporation ("First Select"). On 28 July 1999, First Select filed suit against Ms. Atkinson for nonpayment of the outstanding balance plus interest, $6,319.72. First Select used the name "Blanche Whittington" in the complaint heading.

On 21 August 2001, default judgment was entered in favor of First Select against a "Blanche Whittington" residing at "107 Courtland Place[,] Goldsboro, North Carolina," and the judgment was registered in Wayne County, North Carolina. The judgment award included the principal sum of $6,205.47 with 8% interest per annum, $947.96 in attorneys' fees, and the costs of the action. The Clerk of Superior Court of Wayne County entered default judgment in favor of First Select upon a showing by its attorney that service of the summons

1. These are fictitious numbers employed here to protect Ms. Whittington against further identity theft, but the numbers used were in fact the last four digits of Ms. Whittington's social security number.

and complaint was obtained by certified mail on 20 July 2001. The mail summons was delivered to the residence of 107 Courtland Place, and someone at the residence signed their name as "Blanche Whittington" to receive service. Prior to completing service by mail, First Select's counsel had six summons and complaints returned without service, because the Wayne County Sheriff's office could not locate any person by the name "Blanche Whittington" at 107 Courtland Place in Goldsboro.

In October 2001, First Select attempted to serve a Notice of Right to Have Exemptions Designated on "Blanche Whittington[,] 107 Courtland Place[,] Goldsboro, North Carolina." The deputy sheriff returned the notice unserved on 23 October 2001, and stated that the "Blanche Whittington" purportedly residing at 107 Courtland Place was not able to be located and that no forwarding address was available.

On 26 March 2003, First Select assigned the default judgment to Credigy for $10.00, and the assignment was registered in Wayne County. On 16 April 2003, Credigy's counsel mailed a notice of the assignment to "Blanche Whittington" at 107 Courtland Place in Goldsboro.

Credigy obtained a Notice of Right to Have Exemptions Designated for "Blanche Whittington[,] 107 Courtland Place[,] Goldsboro, North Carolina[,]" on 25 May 2007. The notice was returned by the Wayne County Sheriff's Office on 1 July 2007 with the notation: "Does not live at given address[.] Lives out of state[.]" Credigy's counsel thereafter conducted a "skip trace" search through Lexis using the social security number listed in the credit application. A "skip trace" search is a tool provided by several online search companies to help debt buyers locate missing debtors. By entering only Ms. Whittington's social security number into the appropriate Lexis search data field, Credigy's counsel acquired a new address for "Blanche Whittington": 2114 Michelle Drive, Kinston, North Carolina.

On 18 February 2008, counsel for Credigy sent a letter to Blanche Whittington of 2114 Michelle Drive, Kinston, North Carolina.[2] The letter offered Ms. Whittington the opportunity to settle the outstanding debt of $11,620.36 for a 20% discount.

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2. The record does not disclose whether the default judgment was ever transcribed from Wayne County to Lenoir County pursuant to N.C. Gen. Stat. § 1-234 (2009).

Ms. Whittington immediately informed her counsel, who sent a letter by first class mail on 22 February 2008 to notify Credigy's counsel that an identity theft had occurred, and that Ms. Whittington did not owe the debt underlying the default judgment. The letter was properly addressed and was not returned. In a sworn statement at trial, Credigy's counsel stated that neither Credigy nor its counsel had any record of receiving the 22 February 2008 letter.

On 1 April 2008, the Sheriff of Lenoir County, North Carolina, served a Notice of Right to Have Exemptions Designated on Ms. Whittington. Ms. Whittington again informed her counsel, who sent another letter by certified mail and facsimile on 3 April 2008, denying Ms. Whittington's liability on the judgment. On 16 April 2008, Ms. Whittington sought relief from Credigy's judgment by motion under Rules 6 and 60 of the North Carolina Rules of Civil Procedure. As grounds for relief from judgment, Ms. Whittington's counsel stated that Ms. Whittington had never resided at the 107 Courtland Place address, and that Ms. Whittington had never been served with process with respect to the default judgment. The motion was accompanied by an affidavit from Ms. Whittington, where Ms. Whittington provided: (1) she had never resided outside Lenoir County, and she had resided at her Michelle Drive address since 1964; and (2) Ms. Atkinson had stolen her identity several years prior, and Ms. Whittington had spent years dealing with Ms. Atkinson's creditors. In her motion, Ms. Whittington asked the trial court for attorneys' fees.

Shortly after receiving service of Ms. Whittington's motion on 16 April 2008, one of Credigy's counsel called counsel for Ms. Whittington, and left Ms. Whittington's counsel a voicemail stating that "a mistake had been made and that the mistake should be corrected." Later that afternoon, Ms. Whittington's counsel received a call from another attorney for Credigy. The second caller also indicated that a mistake had been made, and that the Rule 60 motion to set aside the judgment should be allowed. Ms. Whittington's counsel asked Credigy's counsel to discontinue Credigy's collection efforts. Though counsel for Credigy concurred that the Notice of Right to Have Exemptions Designated and all collection efforts should be stopped, he declined to make a binding agreement to do so unless Ms. Whittington withdrew her motion for attorneys' fees. The dispute continued.

On 21 April 2008, a preliminary hearing was held on Ms. Whittington's motion to set aside the judgment. At the hearing, counsel for Credigy said that all collection efforts would be suspended as

to Ms. Whittington; however, he did not withdraw the Notice of Right to Have Exemptions Designated. Instead, Credigy's counsel asked for an extension of time in order to give his client an opportunity to investigate the facts contained in Ms. Whittington's affidavit. Another hearing was scheduled for 30 June 2008.

On 16 June 2008, Ms. Whittington's counsel filed a motion for attorneys' fees under N.C.G.S. § 6-21.5. In the motion, Ms. Whittington claimed that Credigy had pursued a non-justiciable claim against Ms. Whittington, because Ms. Whittington had never been served with process with respect to the default judgment in issue. Ms. Whittington argued that the judgment was void and unenforceable against her. The motion was thereafter accompanied by two affidavits detailing the times and hours calculating the attorneys' fees sought. Ms. Whittington's initial counsel filed one affidavit, and the other was filed by an attorney associated with initial counsel. Up until the filing of the affidavits on 30 June 2008, the total hours accrued between both counsel was 89.4 hours.

On 30 June 2008, Credigy filed a motion in opposition to Ms. Whittington's motion for relief from judgment, where Credigy moved the trial court to deny Ms. Whittington's motion for attorneys' fees. In the brief, Credigy contended that attorneys' fees were not proper, because it had no notice of a potential identity theft until 3 April 2008, and Ms. Whittington had refused to fill out an industry standard Fraud/Identity Theft Affidavit. Credigy stated that, without the affidavit, it lacked "sufficient justification" to suspend post-judgment collection efforts, and that it lacked "sufficient documentation" of "an act of fraud or identity theft." Credigy also noted that it had purchased the judgment "without prior knowledge or notice of any disputes involving the subject account, and as such, is a bona fide purchaser for value."

On 30 June 2008, the trial court conducted a hearing on Ms. Whittington's motions. Credigy's counsel informed the trial court that Credigy had concluded, after "investigation," that Ms. Whittington did not commit the acts described in the default judgment. On 16 July 2008, Credigy filed a motion in opposition to Ms. Whittington's motion for attorneys' fees under N.C.G.S. § 6-21.5. In the motion, Credigy contended again that it did not have notice of any deficiency in the judgment until 3 April 2008, and that Ms. Whittington had refused to fill out a Fraud/Identity Theft Affidavit in accordance with industry standards. Credigy averred in particular that Ms. Whittington "knew or with the exercise of due care should have known through

the course of her efforts to correct her credit report of the existence of the judgment involving the subject account prior to her receipt of [Credigy's] [d]emand [l]etter dated February 18, 2008."

On 4 September 2008, the trial court filed an order granting Ms. Whittington's motions to set aside the judgment and to award attorneys' fees. From the 4 September 2008 order, Credigy appeals.

II. ANALYSIS

[1] On appeal, Credigy argues the imposition of attorneys' fees is unjustified because: (1) the pleadings and the default judgment were presumptively valid, and presented a justiciable issue as to Ms. Whittington's identity and indebtedness, and (2) Credigy suspended its enforcement efforts upon receiving competent evidence that Ms. Whittington was not liable on the judgment. We do not agree.

A. Standard of Review

When reviewing an award of attorneys' fees under section 6-21.5, this Court must review all relevant pleadings and documents of a case in order to determine if either: (1) the pleadings contain "a complete absence of a justiciable issue of either law or fact," N.C.G.S. § 6-21.5; or (2) "whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue." *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 258, 400 S.E.2d 435, 438 (1991). *See Lincoln v. Bueche*, 166 N.C. App. 150, 153-54, 601 S.E.2d 237, 241 (2004) (this Court must review "all relevant pleadings and documents" to determine if either of the above requirements are satisfied).

B. Assignment

It has long been the law in North Carolina that "the assignee stands absolutely in the place of his assignor, and it is . . . as if the contract had been originally made with the assignee, upon precisely the same terms as with the original parties." *Smith v. Brittain*, 38 N.C. 347, 354, 1844 N.C. LEXIS 157, at *13 (1844); *see Turner v. Beggarly*, 33 N.C. 331, 334-35, 1850 N.C. LEXIS 66, at *6-7 (1850) ("[A]n assignee is affected by the liabilities of his assignor, . . . [and] he shall be thus affected in respect of such liabilities, as existed at the time of the assignment and constituted a demand which was then available as a defense at law."). In the context of negotiable instruments, this concept is codified in N.C. Gen. Stat. § 25-3-203 (2009),

which grants the transferee of an instrument "any right of the transferor to enforce the instrument."

This State's Supreme Court addressed the doctrine of assignment with respect to purchased judgments in *Jones v. T. S. Franklin Estate*, 209 N.C. 585, 183 S.E. 732 (1935).[3] In that case, Jones, an attorney, purchased for value a judgment prosecuted by the North Carolina Corporation Commission (the "Commission") against T. S. Franklin Estate. *Franklin Estate*, 209 N.C. at 585, 183 S.E. at 732. The purchased judgment entitled the Commission to levy a stock assessment against T. S. Franklin Estate after the failure of the Central Bank and Trust Company of Asheville, North Carolina. *Id.* After levying on twenty shares of stock, judgment was entered in favor of the Commission for two thousand dollars. *Id.* Thereafter, Jones purchased the judgment, and the assignment was docketed in November 1931. *Id.*

Both during the initial prosecution and after the assignment to Jones, Julian Price was the executor of T. S. Franklin Estate. *Id.* About three and a half years after the assignment, Jones filed a motion in superior court in order to make Price a party "individually and as trustee" to the purchased cause of action. *Id.* at 586, 183 S.E. at 732. In the motion, Jones alleged that Price was the "actual owner" of the stock that was levied by the Commission, even though the stock at issue "stood on the books of the [failed] bank in the name of . . . T. S. Franklin Estate[.]" *Id.* The trial court denied Jones's motion, and Jones appealed to the North Carolina Supreme Court. *Id.*

In affirming the trial court's decision, the *Franklin Estate* Court concisely presented the relevant question:

> Does the simple assignment of a judgment on the judgment docket entitle the assignee in a subsequent proceeding to bring in others, who were not parties to the original action, and subject them to liability for the payment of the judgment which had been rendered against the original debtor only?

Id. The Court concluded that the doctrine of assignment does not allow such an action against third parties who are unnamed in the judgment, and further observed:

3. We apply the common law instead of the Uniform Commercial Code in this case, because the default judgment in issue concerned an unsecured credit account, and the judgment, by itself, did not serve as collateral. N.C. Gen. Stat. § 25-9-109 (2009). The judgment is also not a negotiable instrument. N.C. Gen. Stat. § 25-3-104 (2009) (negotiable instruments must contain either "an unconditional promise or order to pay" by the issuer).

> The mere assignment of a judgment transfers to the assignee all the rights and remedies of the assignor with respect to the judgment and carries with it the right to enforce the judgment by a resort to every legal or equitable remedy available to the assignor, but, unless expressly provided for, this does not confer upon the assignee the additional right thereafter to subject to liability on the judgment others who were not parties to the original action, though the assignor, the original plaintiff, might have had a cause of action against them but [forbore] to pursue it.

Id.

Here, when Credigy purchased the default judgment in issue, it acquired a right to collect on the underlying debt only to the extent of its predecessors in interest: First Select and Fleet Bank. *Id.*; *see Smith*, 38 N.C. at 354, 1844 N.C. LEXIS 157, at *13. Credigy has admitted that someone other than Ms. Whittington signed the contract with Fleet Bank that was later transferred to First Select. First Select, as transferee of Fleet Bank's interest, prosecuted its rights to the outstanding obligation under the contract, and obtained a valid judgment against the party incurring the debt under the credit card agreement, Ms. Atkinson. It was under these circumstances that Credigy obtained its rights as assignee of the default judgment, and accordingly, these facts outline the boundaries by which its collection efforts are subject. *See Turner*, 33 N.C. at 334-35, 1850 N.C. LEXIS 66, at *6-7.

Within these strictures, it is apparent that Credigy never had the right to enforce its purchased judgment against Ms. Whittington, because it stepped directly into the shoes of Fleet Bank, who never had a claim against Ms. Whittington for the underlying debt. Credigy has conceded that Ms. Whittington did not open the credit card account with Fleet Bank, and that she was never made a party to the judgment through service of process. Thus, Credigy, through operation of law, did not purchase the right to seek payment of the judgment from Ms. Whittington, and it had no right under the holding of *Franklin Estate* to make her part of any subsequent proceedings. *Franklin Estate*, 209 N.C. at 586, 183 S.E. at 732.

Credigy argued at the June hearing that the delinquent account had always been tracked by three things: (1) the name "Blanche Whittington," (2) the address at 107 Courtland Place, and (3) the social security number ending in 1234. This information, while helpful in potentially locating the real debtor, did not expand Credigy's rights as an assignee stepping into the shoes of its predecessors in

interest. Absent a right to involve Ms. Whittington in the enforcement of the judgment, we now turn to whether attorneys' fees were proper.

C. Justiciability and Attorneys' Fees

Under N.C.G.S. § 6-21.5, attorneys' fees may be awarded by the trial court in its discretion, where "upon motion of the prevailing party, . . . the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." N.C.G.S. § 6-21.5. In North Carolina, a justiciable issue is one that is " 'real and present as opposed to imagined or fanciful.' " *In re Williamson*, 91 N.C. App. 668, 682, 373 S.E.2d 317, 325 (1988) (quoting *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 326, 344 S.E.2d 555, 575 (1986)).

"In order to find complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss." *K & K Development Corp. v. Columbia Banking Fed. Savings & Loan*, 96 N.C. App. 474, 479, 386 S.E.2d 226, 229 (1989). Under this deferential review of the pleadings, a plaintiff must either: (1) "reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue"; or (2) be found to have "persisted in litigating the case after the point where [he] should reasonably have become aware that pleading [he] filed no longer contained a justiciable issue." *Brooks v. Giesey*, 334 N.C. 303, 309, 432 S.E.2d 339, 342 (1993) (quotation marks and citations omitted). Section 6-21.5 was enacted "to discourage frivolous legal action and that purpose may not be circumvented by limiting the statute's application to the initial pleadings. Frivolous action in a lawsuit can occur at any stage of the proceeding and whenever it occurs is subject to the legislative ban." *Short v. Bryant*, 97 N.C. App. 327, 329, 388 S.E.2d 205, 206 (1990).

Our conclusion that Credigy did not purchase the right to enforce its judgment against Ms. Whittington pursuant to *Franklin Estate*, goes to the heart of a justiciable, civil cause of action: standing.

"The gist of standing is whether there is a justiciable controversy being litigated among adverse parties with substantial interest affected so as to bring forth a clear articulation of the issues before the court." *Texfi Industries, Inc. v. City of Fayetteville*, 44 N.C. App. 268, 269-70, 261 S.E.2d 21, 23 (1979), *aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980). The burden is on the plaintiff to demonstrate that the require-

ment of standing is satisfied. *Am. Woodland Indus., Inc. v. Tolson*, 155 N.C. App. 624, 627, 574 S.E.2d 55, 57 (2002). In civil cases, standing requires a plaintiff to prove three elements:

> "(1) 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 364 (1992)).

By purchasing the default judgment from First Select, Credigy stepped not only into the shoes of First Select, but also those of the contracting party, Fleet Bank. *Smith*, 38 N.C. at 354, 1844 N.C. LEXIS 157, at *13; *Franklin Estate*, 209 N.C. at 586, 183 S.E. at 732. Credigy was therefore subject to "any setoff or other defense, existing at the time of, or before notice of, the assignment[.]" N.C. Gen. Stat. § 1-57 (2009); *see Trust Co. v. Williams*, 201 N.C. 464, 466, 160 S.E. 484, 485 (1931) (Assignments are "without prejudice to any setoff or other defense existing at the time of, or before notice of the assignment."). The defense relevant to the case *sub judice* is Credigy's lack of standing against Ms. Whittington.

Since Fleet Bank did not contract with Ms. Whittington, Credigy, as an assignee, cannot show that it suffered an "injury in fact" under the first element, because no legally protected contractual interest was purchased as to Ms. Whittington. *Beachcomber Properties, L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 824, 611 S.E.2d 191, 194 (2005) (plaintiff held to have no injury in fact, and consequently no standing, where it had no enforceable contract right against the defendant). Moreover, Credigy's injury is also not "fairly traceable" to Ms. Whittington under the second element, because Ms. Whittington did not default on the credit card account underlying the default judgment. The failure of these two elements is sufficient to show that Credigy did not have standing to enforce the judgment against Ms. Whittington, and any action that Credigy thought it had against Ms. Whittington was "imagined or fanciful" as a matter of law. *In re Williamson*, 91 N.C. App. at 682, 373 S.E.2d at 325; *see Short*, 97 N.C. App. at 329, 388 S.E.2d at 206 (non-justiciable claims can arise "at any stage of the proceeding").

As to the requirement under section 6-21.5 that Credigy must have been aware of its lack of standing, the law of assignment imputes Credigy with the knowledge that it lacked standing at the time it attempted to enforce the judgment. *Smith*, 38 N.C. at 354, 1844 N.C. LEXIS 157, at *13; *Turner*, 33 N.C. at 334-35, 1850 N.C. LEXIS 66, at *6-7; *Pickett v. Fulford*, 211 N.C. 160, 164, 189 S.E. 488, 490 (1937) (an assignee takes with an instrument "constructive notice of antecedent equities"); *cf.* 1 Samuel Williston, *A Treatise on the Law of Contracts* § 74:56, at 607 (Richard A. Lord ed., 4th ed. 1990) (When transacting under section 9-404 of the UCC, "the assignee steps into . . . the assignor's shoes absolutely, and, if the shoes are dirty, then that dirt sullies the assignee no less than it did the assignor."). Fleet Bank, as the creditor, should have been aware that it would have standing against no one other than the signing party in the case of a default on the credit account. Upon transferring its rights promptly to First Select at the first signs of collection trouble, this knowledge of standing was also transferred and was made part of the default judgment by operation of law, because it was First Select's burden to show standing at the time it filed the complaint. *Am. Woodland Indus., Inc.*, 155 N.C. App. at 627, 574 S.E.2d at 57. When Credigy purchased the judgment, it was "as if [Fleet Bank's] contract had been originally made with [Credigy], upon precisely the same terms[.]" *Smith*, 38 N.C. at 354, 1844 N.C. LEXIS 157, at *13. Accordingly, Credigy had constructive notice through the principles of assignment that the judgment did not present a justiciable issue as to Ms. Whittington.

However, Credigy's imputed knowledge aside, Credigy also should have recognized that the pleadings on their face, even under an "indulgent" review, fail to present a colorable claim that Ms. Whittington was the debtor.

On 28 July 1999, First Select filed a complaint seeking to enforce its rights as to Ms. Atkinson's delinquent credit card account. The complaint alleges in relevant part:

> 2. Upon information and belief, the defendant ["Blanche Whittington"] is a resident of Wayne County, North Carolina.
>
> 3. The attached account agreement is a true and accurate copy of the terms and conditions of the written account agreement between the parties.
>
> 4. The defendant is in default under the terms of that account agreement, in that said defendant has failed to make the payments due thereunder.

The complaint contains no social security number, and lists no address for the "Blanche Whittington" named as the defendant. The account agreement attached to the complaint, as shown in the record in this appeal, contains only the terms and conditions of the credit card account upon being transferred to First Select, and does not mention the identity of the debtor. The complaint makes no mention of a credit card application, nor does it state the contents of such application. The county of residence mentioned for the debtor, "Blanche Whittington," has never been the county of residence for Ms. Whittington. The only link to Ms. Whittington and the "Blanche Whittington" named in the complaint's heading is the bare mention of the same name.

First Select filed a motion for default judgment dated 20 August 2001 based on this complaint. The motion was accompanied by two affidavits: one from Credigy's counsel stating that service of process was obtained through certified mail under Rule 4(j)(1), and the other from First Select verifying the amount due under the credit card agreement. Neither affidavit contains an address, social security number, or any other information identifying the debtor except for using the name "Blanche Whittington" and listing the credit card account number.

On the default judgment itself, the address at 107 Courtland Place appears below the name "Blanche Whittington" in the judgment heading. No other indication of the debtor's identity is provided. Though Credigy argued at the June hearing that the same social security number was traced throughout the history of the account, nothing in the record shows that this piece of information was ever made part of the pleadings or judgment.

Prior to enforcing their judgment, it was Credigy's burden to establish standing against Ms. Whittington. *See Am. Woodland Indus., Inc.*, 155 N.C. App. at 627, 574 S.E.2d at 57. As assignee, Credigy purchased the inability of these pleadings and the judgment to implicate the real Ms. Whittington. *Franklin Estate*, 209 N.C. at 586, 183 S.E. at 732; *Smith*, 38 N.C. at 354, 1844 N.C. LEXIS 157, at *13; *Turner*, 33 N.C. at 334-35, 1850 N.C. LEXIS 66, at *6-7. Since Credigy did not have standing to pursue enforcement of the judgment against Ms. Whittington, and because the lack of allegations in the pleadings and judgment fail to connect the real Ms. Whittington to the underlying debt, Credigy should have been aware that no justiciable claim would lie against anyone other than the only person clearly identified on the judgment: "Blanche Whittington" residing at 107

Courtland Place in Wayne County. Thus, the award of attorneys' fees under section 6-21.5 was proper. These assignments of error are overruled.

D. Credigy's Remaining Arguments

[2] Credigy has maintained at trial and on appeal that it was a bona fide purchaser of the default judgment without notice of any defects, and it contends that once it received competent evidence of an identity theft, it ceased to pursue its claim in a timely fashion. However, it is through simple operation of law that Credigy purchased a default judgment that was non-justiciable as to Ms. Whittington. Therefore, whether Credigy is a purchaser for value is not relevant to our determination here. As to notice, Credigy assumed the notice that Fleet Bank and First Select possessed upon Credigy's purchase of the judgment, *see Pickett*, 211 N.C. at 164, 189 S.E. at 490, and Credigy should have known from an examination of the pleadings that the default judgment was not enforceable against Ms. Whittington. We stress again that Credigy must assume the posture of its predecessors in interest, and be subject to the same liability and defenses at law that existed at the time it became the assignee of the judgment. *Turner*, 33 N.C. at 334-35, 1850 N.C. LEXIS 66, at *6-7; *see also Overton v. Tarkington*, 249 N.C. 340, 106 S.E.2d 717 (1959) (debtor able to bring claim against assignee for usurious charges alleged to be part of the assigned contract). The circumstance that the judgment was fatally flawed by Ms. Atkinson's fraud does not make the judgment justiciable as to Ms. Whittington, and does not change the context in which Credigy and its predecessors in interest should have known that no cause of action has ever existed against Ms. Whittington.

Credigy also makes several arguments in its brief that the trial court's findings are not supported by competent evidence. However, because Credigy has admitted that Ms. Whittington was not the debtor, our analysis shows that the trial court properly concluded as a matter of law that no "justiciable issue of law or fact" has ever been raised against Ms. Whittington.

III. CONCLUSION

Credigy lacked standing to enforce the default judgment against Ms. Whittington, and the pleadings supporting Credigy's default judgment present no justiciable issue. Credigy reasonably should have been aware that it was pursuing a non-justiciable claim, and as such, attorneys' fees were properly granted under N.C.G.S. § 6-21.5. Accordingly, the order of the trial court is

Affirmed.

Judges ELMORE and STEELMAN concur.

PAMELA S. DAVIS, EMPLOYEE, PLAINTIFF v. HOSPICE & PALLIATIVE CARE OF WINSTON-SALEM, EMPLOYER, KEY RISK INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA09-306

(Filed 2 March 2010)

1. Workers' Compensation— motion to reinstate total disability compensation—unsuccessful trial return to work—automatic duty after notice

The Industrial Commission did not err in a workers' compensation case by denying defendants the ability to present evidence on plaintiff employee's motion to reinstate total disability compensation after her unsuccessful trial return to work. Defendants had an automatic duty under N.C.G.S. § 97-32.1 to reinstate total disability compensation to plaintiff following notice, and defendants were required to follow the procedures in Chapter 97 if they wanted to cease making the reinstated disability payments.

2. Workers' Compensation— disability—unsuccessful return to work—findings

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff showed substantial evidence that she was disabled following her unsuccessful return to work in 2006. No findings by the Commission supported defendants' claim that Dr. Rauck intended plaintiff's disability status to be temporary pending some future appointment.

3. Workers' Compensation— change of treating physician—appeal of summary denial not required

The Industrial Commission did not err in a workers' compensation case by designating Dr. Rauck as plaintiff's treating physician in the 9 January 2008 opinion and award. Plaintiff was not required to appeal the summary denial of her motion for a change of treating physician under I.C. Rule 703 within fifteen days following the order since this issue was again raised by plaintiff in the pretrial agreement on 12 September 2006.

Appeal by defendants from Opinion and Award filed 2 October 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 September 2009.

Charles Peed and Associates, P.A., by J. William Snyder, Jr., for plaintiff-appellee.

Prather Law Firm, by J.D. Prather, for defendant-appellants.

HUNTER, JR., Robert N., Judge.

On 2 October 2008, the Full Commission of the North Carolina Industrial Commission (the "Commission") found that Pamela S. Davis ("plaintiff") suffers from Complex Regional Pain Syndrome ("CRPS") secondary to the compensable back injury she sustained while working for Hospice & Palliative Care of Winston-Salem ("employer"). Employer and Key Risk Insurance Company (collectively "defendants") appeal the Commission's Opinion and Award arguing: (1) plaintiff's temporary total disability payments were improperly reinstated after an unsuccessful return to work, because the issue was not properly before the Deputy Commissioner for determination; (2) plaintiff did not prove that she remains disabled; and (3) the Commission erred in designating plaintiff's current physician, Dr. Richard Rauck, as an authorized treating physician given that plaintiff did not timely file an appeal from an order denying plaintiff's Motion for a Change of Treating Physician. We affirm.

Facts

Plaintiff began working for employer on 28 October 2002 as a staff nurse and case manager; her duties primarily included visiting patients in their homes to assist them with physical needs. On occasion, plaintiff had to lift patients in order to help them, which sometimes required her to lift in excess of 100 pounds.

On 18 November 2004, plaintiff lifted a home patient out of his chair in order to assess whether the patient had been injured in a recent fall. The patient initially used his own strength to aid plaintiff in the lift. Plaintiff customarily expected assistance from her patients during these maneuvers to the extent they were able. The patient suddenly stopped helping plaintiff midway through the lift. Unable to bear the entire weight of the patient, both plaintiff and patient fell back into the chair. During the accident, plaintiff suffered "pain in her arm and left shoulder that felt like an electrical shock that went down her left arm."

Plaintiff did not initially seek medical treatment for her injury, because she thought that treatment for work-related injuries needed to be approved in advance. She continued working for employer through early December 2004, though her pain continued to remain the same after her accident on 18 November 2004. On 7 December 2004, plaintiff again tried to assist a patient by moving him into a bed in his home. The morning after, the pain in "her neck and left upper extremity . . . was unbearable." Plaintiff then asked employer for authorization to see a physician, and she was referred by employer to PrimeCare of Highland Oaks ("PrimeCare") for medical treatment.

On 9 December 2004, plaintiff had her first appointment at PrimeCare, and she presented to Mr. Ken Bush, a physician's assistant being supervised by Dr. James T. Fink. Plaintiff told Mr. Bush that she had felt a pull on the left side of her neck radiating down her left arm on 18 November 2004, and that she had recently aggravated the injury. "She described the pain initially being sharp but that it later became a dull ache that radiated down into the fourth and fifth fingers of her left hand." During Mr. Bush's exam, he noted that plaintiff "exhibited positive tenderness to pressure applied to her left shoulder." Mr. Bush diagnosed plaintiff with a strain of her neck and left trapezius muscle, and prescribed medication and physical therapy. Mr. Bush also restricted plaintiff from doing work requiring either the use of her left arm or lifting overhead.

After learning of plaintiff's work restrictions, employer informed plaintiff that they did not have a job open within her restrictions. On 16, 18, and 23 December 2004, plaintiff met with Mr. Bush, and showed no improvement in the condition of her neck and left arm. While meeting with her physical therapist during this time, plaintiff said that she was experiencing swelling in her left hand and arm. At plaintiff's 23 December 2004 visit at PrimeCare, she reported that: (1) "she had been experiencing swelling in her left hand and particularly in her 4th and 5th fingers with decreased sensation[,]" (2) "she was not getting any relief with her oral pain medications[,]" and (3) "she was unable to sleep even with taking her prescribed Vicodin."

Sometime after the 23 December 2004 appointment with Mr. Bush, employer offered plaintiff a clerical, light-duty position. Plaintiff returned to work for two days, but was unable to complete the duties of the job because it required the use of her left hand.The trial return to work caused plaintiff's hand to swell, and she presented again to PrimeCare on 28 December 2004 for more treatment.

Plaintiff stated that the pain in her left arm had increased while trying to work, and that she could not take her pain medications during work hours. Mr. Bush noted during his exam "increased sensation over the last three fingers on [p]laintiff's left hand" and "tenderness to pressure along the left upper trapezius muscle." Mr. Bush then restricted plaintiff from working at all until her upcoming initial appointment on 4 January 2005 with her physiatrist,[1] Dr. John G. Bentley.

At her appointment with Dr. Bentley on 4 January 2005, plaintiff rated her pain a seven out of ten. "On physical examination, Dr. Bentley observed that [p]laintiff had hyperhidrosis, which is excessive sweating, of both palms, but she had no hyperemia[2] in her left hand." Dr. Bentley noted that plaintiff suffered from diminished sensation in her fifth finger on her left hand, and noticed that an MRI scan of plaintiff's cervical spine showed "disc bulges at several levels." These observations led Dr. Bentley to conclude that plaintiff was "suffering from left neck and upper extremity pain"; but because he could not locate the source of plaintiff's symptoms, he opined instead "that Reflex Sympathetic Dystrophy (RSD)[3] or Complex Regional Pain Syndrome (CRPS)[4] might be a differential diagnosis although he felt that the obvious characteristics of RSD or CRPS were not present at that time." Dr. Bentley continued to restrict plaintiff from work completely.

Following her appointment on 4 January 2005, plaintiff received an epidural steroid injection in an effort to relieve her pain and an EMG study to find out whether she was suffering from nerve irritation or damage. The injection provided plaintiff no significant relief, and the EMG study came back normal. Due to the results of the EMG, Dr. Bentley began to entertain "the idea that [plaintiff] might be suffering from [CRPS]."

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1. A physician specializing in physical medicine and rehabilitation. *The American Heritage Dictionary* 935 (2d ed. 1985).

2. "Hyperemia" refers to an "excess of blood in a part due to local or general relaxation of the arterioles." *Dorland's Illustrated Medical Dictionary* 630 (26 ed. 1985).

3. In his deposition, Dr. Bentley explained that this was an "outdated term" for CRPS.

4. Dr. Rauck explained in his deposition that CRPS is a "neuropathic pain disorder" which is found predominately in a person's extremities. Type I stems from minor traumas not involving major nerve injury, and Type II manifests through the subsequent existence of pain outside the distribution of a past nerve injury.

Plaintiff met with Dr. Bentley again on 9 February 2005, and plaintiff described pain that was "intermittent, sharp, aching and burning" in her left hand and shoulder in addition to swelling in her fingers. Dr. Bentley found hyperhidrosis on plaintiff's left palm, but did not observe any swelling in the fingers of her left hand. "Dr. Bentley remarked that while he was not completely convinced of the diagnosis of CRPS[,] . . . he believed that the best course of action was to treat her as if she suffered from that condition." He recommended that plaintiff receive a sympathetic nerve block, and extended her total disability status until the next appointment.

On 18 February 2005, plaintiff presented to Dr. Albert Bartko for a second opinion at the request of defendants. Dr. Bartko stated that plaintiff "was not having any symptoms of frank CRPS"; however, as with Dr. Bentley, he similarly "suspected that [plaintiff] might be suffering from CRPS but that she might also be suffering from myofascial pain.[5]" Dr. Bartko commented that Dr. Bentley's treatment approach was "entirely appropriate."

Plaintiff met with Dr. Bentley again on 8 March 2005, and "complained of new soft tissue swelling in the medial aspect of the left arm and in all five fingers of her left hand." Dr. Bentley noted swelling in plaintiff's left arm and fingers, however, he did not observe any hyperhidrosis. In order to better determine whether plaintiff was suffering from CRPS, he ordered a triple-phase bone scan.

The bone scan came back negative for CRPS. At an appointment on 5 April 2005, Dr. Bentley "noted that [p]laintiff exhibited hyperhidrosis of the left palm and some slight [swelling] of the distal digits compared to the right[,]" and reported that plaintiff demonstrated "significant improvement in grip and tip pinch strength with physical therapy." Though Dr. Bentley's "impression remained that [plaintiff] was suffering from non-dermatomal pain of the left upper extremity status post injury at work with an undetermined [source,]" he continued to prescribe "treatment for [plaintiff] as if she actually suffered from CRPS Type I." After the visit, plaintiff's total disability status remained unchanged.

Dr. Bentley continued to be undecided about a final CRPS diagnosis for plaintiff through 14 June 2005 when he referred plaintiff to

5. "Myofascial Pain Syndrome" is characterized as the "[i]rritation of the muscles and fasciae (membranes) of the back and neck causing chronic pain (without evidence of nerve or muscle disease)." *Attorney's Dictionary of Medicine Illustrated* M-338 (2008).

Dr. Robert B. Wilson, a pain management specialist in Salisbury. Dr. Wilson examined plaintiff on 7 July 2005, and while focusing on plaintiff's left upper extremity, noted

> that her skin was slightly mottled and that the palm of her left hand was redder than the palm of her right hand. He also observed that the left upper extremity was drier to the touch than the right upper extremity. He noted that [p]laintiff complained of pain to light touching of the dorsum of the left hand but that she did not complain of pain to light touching of the dorsum of her right hand. He remarked about how much she protected her left upper extremity and that she tended to withdraw it during his initial attempts to examine it.

Based on these observations, Dr. Wilson diagnosed plaintiff conclusively with CRPS in her left upper extremity. On 19 July 2005, Dr. Bentley met with plaintiff for the last time, and he continued her total disability status.

At defendants' request, plaintiff met with Dr. Jeffrey Siegel on 12 September 2005 for another independent medical evaluation. After examining plaintiff, Dr. Siegel reported that plaintiff "lacked the 'cardinal' signs of CRPS or any neurological disorders that might explain her subjective symptoms[.]" Dr. Siegel further "speculated that [plaintiff] might be suffering from a previously unidentified orthopedic disorder or that she might be suffering from a somatoform[6] or other psychiatric disorder."

On 6 December 2005, Special Deputy Commissioner Layla T. Santa Rosa ordered defendants to authorize payment to plaintiff for a one-time appointment with Dr. Rauck; plaintiff presented to Dr. Rauck for her first appointment on 7 December 2005. Plaintiff rated her pain a seven out of ten, and described the pain as "dull, aching, and constant with episodes of being sharp and shooting." Plaintiff also complained of sensitivity to temperature along her upper extremity. Dr. Rauck observed a minimal amount of swelling during the visit, and "noted mild-to-moderate allodynia[7] in the left upper extremity, primarily in the medial aspect of the forearm." Dr. Rauck

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6. "Somatoform Disorder" is "[a] condition marked by the presence of symptoms suggesting a physical disease but without physical changes or physiological mechanisms that might account for the symptoms." *Attorney's Dictionary of Medicine Illustrated* S-205 (2008).

7. "Allodynia" is "pain resulting from a non-noxious stimulus to normal skin." *Dorland's Illustrated Medical Dictionary* 49 (26 ed. 1985).

also noticed plaintiff's left hand did not have any redness. Based on these observations, "Dr. Rauck's impression was that [p]laintiff suffered from left upper extremity pain with qualities of CRPS," and recommended that plaintiff consider receiving spinal cord stimulation treatment to combat the CRPS.

Plaintiff met with psychologist Dr. Timothy Webster on 20 December 2005 in order to determine whether a spinal cord stimulator would be appropriate. In contrast to Dr. Siegel's findings, Dr. Webster "concluded that [plaintiff] did not suffer from any major psychopathology that would render spinal cord stimulation" inappropriate for her.

In January 2006, Dr. Rauck informed plaintiff that he would seek authorization from defendants to pay for a spinal cord stimulator. In a Form 61 dated 31 January 2006, defendants denied plaintiff's workers' compensation claim stating that plaintiff's symptoms were the result of a "cervical strain only." On 28 February 2006, Special Deputy Commissioner Santa Rosa entered an order denying a prior request by plaintiff to have Dr. Rauck designated one of her authorized treating physicians. Plaintiff requested a hearing to review the order via a Form 33 on 3 April 2006.

At an appointment with Dr. Rauck on 13 April 2006, plaintiff told Dr. Rauck that defendants had denied the claim for the spinal cord stimulator. During this examination plaintiff complained that she was suffering pain and discoloration in her face. Dr. Rauck prescribed plaintiff a Duragesic patch for the pain, and at an appointment on 10 May 2006, plaintiff stated that her pain had improved. Dr. Rauck continued to diagnose plaintiff with CRPS through 28 June 2006.

Defendants requested more independent evaluations of plaintiff in April and June 2006. Plaintiff met first with Dr. Hans Hansen on 23 April 2006; Dr. Hansen opined that plaintiff did not suffer from symptoms of CRPS. Plaintiff then had an appointment with Dr. Arne Newman on 13 June 2006. After examining plaintiff and observing her during a cigarette break,

> Dr. Newman opined that Plaintiff suffered from the Axis-I diagnoses of undifferentiated somatoform disorder, major depression, moderate and recurrent, and probable symptom exaggeration, and he also opined that [p]laintiff suffered from the Axis-II diagnosis of personality disorder with dependent and histrionic features. He opined that [p]laintiff's depression was the result of long-standing personality factors.

Both Dr. Newman and Dr. Hansen recommended against plaintiff receiving spinal cord stimulation treatment. The day after her appointment with Dr. Newman, defendants completed a Form 33 requesting a hearing which claimed that "[p]laintiff is no longer disabled and has failed to cooperate with medical treatment as provided by defendants."

On 12 September 2006, a hearing was held before Deputy Commissioner Chrystal Stanback, and the parties entered into a pretrial agreement for the competing Form 33 requests for hearings. After the hearing, the record was left open.

Several days prior to the hearing, on 6 September 2006, employer offered plaintiff a job as a Compliance Assistant at $18.00/hour, and demanded that she attend orientation for the position on 18 September 2006. Dr. Hansen reviewed the job description for this position as part of an examination of plaintiff in August 2006, and he believed that the job would be within her abilities given that he disagreed with the diagnosis of CRPS. Plaintiff deferred a decision on taking the job until she met with Dr. Rauck at a scheduled appointment on 15 September 2006. Though Dr. Rauck approved plaintiff for the Compliance Assistant job in a letter following the 15 September 2006 appointment conditioned on a list of restrictions regarding plaintiff's left hand, arm, and extremities, plaintiff did not attend the orientation on 18 September 2006. As a result, defendants filed a Form 24 dated 29 September 2006 to terminate or suspend plaintiff's compensation based on Dr. Hansen's opinion and plaintiff's failure to attend the orientation.

Plaintiff did eventually attempt a return to work with employer on a trial basis on 23 October 2006 at the Compliance Assistant position. At follow-up visits with Dr. Rauck on 7 and 30 November, plaintiff complained of lesions on her arms, severe pain, and new swelling in her neck and chest. Dr. Rauck placed plaintiff on total disability status again on 30 November 2006.

On 5 December 2006, plaintiff's counsel informed defendants' counsel by email of the unsuccessful trial return to work. On 21 December 2006, plaintiff's counsel served defendants with a Form 28U requesting that plaintiff's compensation be reinstated due to plaintiff's inability to return to work at the Compliance Assistant position. Defendant's counsel filed a response to plaintiff's motion to reinstate compensation by a letter dated 12 January 2007.

On 9 January 2008, Deputy Commissioner Stanback filed an Opinion and Award: (1) concluding that plaintiff was totally disabled due to her development of CRPS Type I subsequent to her injury on 18 November 2004; (2) authorizing Dr. Rauck to be plaintiff's treating physician; (3) reinstating plaintiff's total disability payments dating back to 30 November 2006; (4) awarding a 10% penalty on all payments overdue by 14 days since 30 November 2006; and (5) ordering defendants to pay all of plaintiff's past and continuing medical expenses, including payment for a spinal cord stimulator. The Commission affirmed the Deputy Commissioner's Opinion and Award with minor modifications on 2 October 2008. Defendants appeal.

Analysis

I.

[1] Defendants first argue they were improperly denied the ability to present evidence on plaintiff's motion to reinstate total disability compensation after her unsuccessful trial return to work. We disagree.

Total disability compensation must be reinstated under N.C. Gen. Stat. § 97-32.1 (2007) as soon as an employer has knowledge that an employee's return to work has been unsuccessful. *Burchette v. East Coast Millwork Distribs., Inc.*, 149 N.C. App. 802, 809, 562 S.E.2d 459, 463-64 (2002) (payments required to be reinstated at time employer acquired actual knowledge of unsuccessful return to work and employee did not file a Form 28U requesting reinstatement of compensation); *Roberts v. Dixie News, Inc.*, 189 N.C. App. 495, 500-01, 658 S.E.2d 684, 687 (2008) (after receiving a Form 28U, employer can only cease reinstated disability payments by following statutory procedures). If an employer wishes to contest the reinstatement of compensation after receiving a Form 28U from an employee, they may do so "only on the basis of N.C. Gen. Stat. § 97-18.1, N.C. Gen. Stat. §§ 97-83 and -84, or both." *Roberts*, 189 N.C. App. at 501, 658 S.E.2d at 687. Though an employee "should" give notice to an employer of an unsuccessful trial return to work via a Form 28U prior to total disability compensation resuming, a Form 28U is not required for reinstatement of compensation. I.C. Rule 404A(3) (2009); *Burchette*, 149 N.C. App. at 809, 562 S.E.2d at 463.

Here, defendants acquired actual knowledge of plaintiff's unsuccessful return to work on 5 December 2006 when plaintiff's counsel informed defendants by email. Defendants were informed again of plaintiff's unsuccessful return to work on 21 December 2006 when

plaintiff's counsel served defendants with a Form 28U requesting that plaintiff's disability compensation be reinstated. Thus, under our case law, defendants were under an automatic duty to reinstate total disability compensation to plaintiff on 5 December 2006, and if defendants wished to cease making the reinstated disability payments, they were required to follow the procedures under one of the listed sections in Chapter 97. Defendants never made a payment of total disability compensation upon receiving notice that plaintiff's attempted return to work was unsuccessful.

On 12 January 2007 and 17 September 2007, defendants wrote letters to Deputy Commissioner Stanback requesting that the issue of reinstatement not be ruled upon without defendants being given an opportunity to present evidence as to whether total disability should be reinstated. Defendants asked to depose Dr. Rauck in the letters, and did not receive a response from Deputy Commissioner Stanback. On appeal, defendants argue that these facts demonstrate that they were denied the opportunity to present evidence on the issue of whether total disability compensation should be reinstated.

Defendant's argument is misplaced. As explained, employers do not have the right to present evidence before reinstating disability compensation following notice of an unsuccessful return to work. When an employer receives notice, either through a Form 28U or other means of acquiring actual knowledge, then disability compensation should be reinstated automatically. Furthermore, the referenced letters defendants sent were written in January and September 2007. This was during the pendency of the action, when depositions were being taken. After defendants' first letter, the time for depositions was extended twice, which allowed defendants six additional months to depose Dr. Rauck. The sole reason defendants provided in their letter for wanting to depose Dr. Rauck was to oppose plaintiff's request for reinstatement of compensation. Defendants did not have this right, and nothing in the record shows that defendants were denied an opportunity to depose Dr. Rauck before the filing of the Opinion and Award.

Because G.S. § 97-32.1 mandates that defendants should have resumed plaintiff's compensation upon gaining knowledge of plaintiff's unsuccessful return to work, defendants were not denied any right to present evidence on whether disability compensation should have been reinstated. This assignment of error is overruled.

II.

[2] Defendants contend that plaintiff failed to show that she is disabled following her unsuccessful return to work in 2006. We disagree.

When reviewing the Commission's finding as to disability, we are required to "determine whether the record contains any [competent] evidence tending to support the finding." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). Even if other evidence in the record is contrary to a finding made by the Commission, "[t]he Commission's findings of fact [will] only be set aside in the complete absence of competent evidence to support them." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 42, 653 S.E.2d 400, 410 (2007); *see Jones v. Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965). Unchallenged findings of fact by the Commission are binding on appeal. *Clayton v. Mini Data Forms, Inc.*, —— N.C. App. ——, ——, 681 S.E.2d 544, 545-46 (2009).

"Disability" under the North Carolina Workers' Compensation Act means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2007). An employee may prove "disability" by:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted). In addition to medical testimony, an employee's "own testimony that he is in pain" may be evidence of disability. *Weatherford v. Am. Nat'l Can Co.*, 168 N.C. App. 377, 381, 607 S.E.2d 348, 351 (2005).

In their brief, defendants specifically challenge Finding of Fact 10 in the Commission's Opinion and Award by listing Assignment of Error 22 under the argument heading. However, the record shows

that defendants assigned error to many other findings made by the Commission concerning plaintiff's disability, but those assignments of error are not listed or quoted in their brief on appeal.

Defendants' failure to list the appropriate assignments of error in their appellate brief is a non-jurisdictional violation of the North Carolina Rules of Appellate Procedure under Rule 28(b)(6). Pursuant to *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008); however, this Court will address the merits of defendants' appeal, albeit within the narrow scope of the contentions presented by defendants in their brief. *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366 ("In such instances, the appellate court should simply perform its core function of reviewing the merits of the appeal *to the extent possible*.") (emphasis added). The specific arguments offered by defendant are: (1) plaintiff presented "no evidence" that she remains disabled following her unsuccessful return to work under any of the four methods of *Russell*, and (2) even if plaintiff did suffer a disability beginning 30 November 2006, such disability should have lasted only until plaintiff's next appointment with Dr. Rauck.

Contrary to defendants' argument, in its findings, the Commission discussed plaintiff's evidence at length. Given that defendant does not argue with any sort of particularity that these findings are unsupported by competent evidence as required by the standard of review in this case, the following findings regarding plaintiff's disability are binding on this Court. *Mini Data Forms, Inc.*, —— N.C. App. at ——, 681 S.E.2d at 545-46.

> 33. With regard to her ability to work, [p]laintiff testified that, in her opinion, she was not able to work. She explained that she would need a job in which she would not have to use her left hand. She clarified that she does want to return to work eventually but that she has not been able to work since December 2004. Plaintiff testified that she was in pain in her left shoulder that extended down into her left arm. She described the pain as a burning and stabbing pain. Plaintiff is rarely, if ever, completely pain free. She complained of suffering from hand tremors, and she also complained of difficulty sleeping due to pain until Dr. Rauck started her on the Duragesic patch.
>
> . . . .
>
> 37. Plaintiff commenced a trial return to work attempt in the position of Compliance Assistant on October 23, 2006. Plaintiff

returned to Dr. Rauck on November 7, 2006 for a follow-up visit. She reported no change in the baseline symptoms of her CRPS since her previous visit with Dr. Rauck, and she also reported having returned to work and that she was experiencing some neck pain secondary to having to bend her neck to perform her job duties. Dr. Rauck decided to continue her medication regimen since it was working well for her, but he recommended that she seek follow-up care if the lesions that he observed on her left arm did not heal within a reasonable time. Plaintiff returned to Dr. Rauck's office on November 30, 2006 complaining of severe pain for approximately one week after working two 8-hour shifts. Dr. Rauck noted that [p]laintiff was experiencing significantly worse pain on that date that she rated as being a "10" on a 10-point scale, which is the first time that he recalled her rating her pain level as being that high. On physical examination, [p]laintiff exhibited elevated swelling in the left arm. Dr. Rauck described it as the allodynia extended around into the chest area and into the axilla. At that time, he recommended that she remain out of work until her condition could be "straightened out," and [p]laintiff was placed on total disability status.

. . . .

39. At his deposition on December 19, 2006, Dr. Rauck testified that he hoped that [p]laintiff would not be out of work very long and that he was disappointed by the flare-up of [p]laintiff's pain. He opined that installation of a spinal cord stimulator would significantly increase the likelihood that [p]laintiff would be able to tolerate similar flare-ups in the future and also would enhance the likelihood that she would be able to return to work successfully. Dr. Rauck opined to a reasonable degree of medical probability that "her condition and symptoms and signs would be consistent with the type of injury" plaintiff sustained on November 18, 2004. Dr. Rauck further explained that, in his experience, lifting injuries by nurses tend to cause these types of injuries in the extremities, and he noted nothing in [p]laintiff's history of any pre-existing conditions that could be responsible for her symptoms.

40. The Full Commission finds as fact that as a direct and natural result of the [p]laintiff's compensable injury by accident to her left upper extremity that the [p]laintiff has contracted Complex Regional Pain Syndrome (CRPS) Type I of the

left upper extremity. The Full Commission assigns great weight to the opinion [of] Dr. Bentley, to whom the Plaintiff was referred at the request of the [d]efendant, Dr. Wilson, to whom the [p]laintiff was referred by Dr. Bentley and who was trained by Dr. Rauck and who has extensive experience diagnosing and treating CRPS, and the opinion of Dr. Rauck, who not only has extremely extensive experience in the diagnosis and treatment of CRPS but who also trained Dr. Wilson in the subspecialty of chronic pain management.

. . . .

42. The [p]laintiff commenced an unsuccessful trial return to work attempt on October 23, 2006, and has been totally disabled from any ability to work and earn wages since of [sic] November 30, 2006. The [d]efendants have failed to file any forms with the Commission indicating that they have reinstated payment of total disability compensation to the [p]laintiff as of November 30, 2006.

These findings show that (1) plaintiff offered a substantial amount of evidence demonstrating her disability after the unsuccessful return to work, and (2) no findings by the Commission support defendants' claim that Dr. Rauck intended plaintiff's disability status to be temporary pending some future appointment. These arguments and assignment of error are overruled.

III.

[3] Defendants lastly argue that Dr. Rauck was improperly designated as plaintiff's treating physician in the 9 January 2008 Opinion and Award by Deputy Commissioner Stanback. In particular, defendants contend that I.C. Rule 703 precluded a decision on plaintiff's Motion for a Change of Treating Physician in Deputy Commissioner Stanback's Opinion and Award, because plaintiff did not timely appeal the denial of her motion on 28 February 2006 until she completed a Form 33 on 3 April 2006. We disagree.

I.C. Rule 703(1) provides in relevant part:

Orders, Decisions, and Awards made in a summary manner, without detailed findings of fact, including . . . *applications for change in treatment or providers of medical compensation* . . . may be appealed by requesting a hearing within 15 days of receipt of the Decision or receipt of the ruling on a Motion

to Reconsider. *These issues may also be raised and determined at a subsequent hearing.*

I.C. Rule 703(1) (2009) (emphasis added).

Here, plaintiff could have appealed the summary denial of her Motion for a Change of Treating Physician under I.C. Rule 703 in the 15 days following Special Deputy Commissioner Rosa's order. However, plaintiff was not required to appeal the summary order, because this issue was again raised by plaintiff in the pretrial agreement on 12 September 2006. Therefore, under I.C. Rule 703, plaintiff's motion was properly presented to Deputy Commissioner Stanback for consideration. This assignment of error is overruled, and the Opinion and Award of the Commission is

Affirmed.

Judges STEPHENS and BEASLEY concur.

STATE OF NORTH CAROLINA v. KERRY McKINLEY HOUGH, DEFENDANT

No. COA09-790

(Filed 2 March 2010)

1. Constitutional Law— right to confront witnesses—expert witness—opinion based on another's testing

Defendant's Sixth Amendment right to confront the witnesses against him was not violated in a cocaine and marijuana prosecution where a forensic chemist's testimony identifying the substances was based on her own opinion, even though she did not conduct the original testing. Her testimony was based on her independent review and confirmation of test results, and the report was not offered for proof of the matter asserted or as *prima facie* evidence that the substances were marijuana and cocaine.

2. Evidence— hearsay—drug analysis—nontestifying chemist

Testimony by a forensic chemist that was based on an analysis by another chemist was not hearsay. Evidence offered as the basis of an expert's opinion is not offered for the truth of the matter asserted.

3. Drugs— constructive possession—non-exclusive control of premises

The trial court did not err by denying defendant's motion to dismiss charges of possession of cocaine and trafficking in marijuana where there was sufficient evidence of constructive possession, even though there was evidence that defendant did not exclusively control the premises.

Appeal by defendant from judgments entered 10 December 2008 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 2009.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Daniel D. Addison, for the State.

Robert W. Ewing for defendant-appellant.

HUNTER, Robert C., Judge.

Kerry McKinley Hough ("defendant") appeals from judgments entered 10 December 2008 after a jury found him guilty of: (1) possession of cocaine and (2) trafficking in marijuana by possessing more than 10 pounds but less than 50 pounds. After careful review, we find no error.

Background

On 24 March 2007, Officers James Stansberry ("Officer Stansberry") and John Reid ("Officer Reid") of the Mecklenburg County Police Department, responded to a call reporting domestic violence at 106 Winding Canyon Drive. Upon arriving at the front door of the house, the officers noticed drops of blood on the porch. The officers knocked on the door and did not get a response. Due to the blood and lack of response from the home's occupants, the officers called for a medic unit to come to the scene.

While waiting for the unit to arrive, the officers heard a slamming noise coming from the rear of the house. Upon investigation, the officers saw defendant rolling a city trash can behind the house. Defendant's face was bleeding. Officer Reid asked defendant if he lived at that residence and defendant responded affirmatively. The Officers testified at trial that defendant was behaving suspiciously in that he was attempting to keep the trash can between himself and the officers and did not seem concerned about the obvious injury to his face. Because of defendant's behavior, the officers believed that defendant was hiding something in the trash can that he did not want the offi-

cers to find. Officer Stansberry attempted to open the lid of the trash can twice, but each time defendant slammed the lid back down. Defendant stated that there was only " 'trash in the can' " and then he backed up with the trash can until he reached the right-rear corner of the residence.

Officer Stansberry then struggled with defendant and the trash can was knocked over. Defendant then ran from the scene with the officers in pursuit. Defendant evaded apprehension at that time. Upon returning to the back of the house, the officers saw that two packages had fallen out of the overturned trash can. The packages were the size and shape of telephone books and contained green leafy material. Based on the officers' training and experience, they believed the packaged substance to be marijuana. At that point, a "vice officer" was called to the scene to collect the evidence.

Because the officers had not encountered the female who was allegedly being assaulted at that residence, the officers entered the house to search for her. When Officer Stansberry entered the kitchen, he saw a trash can holding packaging similar to that containing the suspected marijuana outside. Upon searching the living room, the officers saw blood droplets on the floor and noticed that the room was in disarray as if a struggle had occurred there. The officers searched the entire residence and did not find anyone else inside.

After searching the residence, Officer Stansberry went out to the carport area where he discovered a white powder substance on top of a "video-type machine." The officers then called Detective Dan Kellough ("Detective Kellough") who obtained a warrant to search the house for drugs. During the search, Detective Kellough seized the two packages of marijuana that fell out of the trash can outside. He weighed the packages at the scene, and together they weighed 18.6 pounds.

The detective also found a digital scale in the trash can, $1,660.00 inside a "wash mit" in the living room, as well as packaging material and tape in the kitchen. Detective Kellough testified that he also found seven empty wrapper packages in the kitchen trash can, five of which were the same size as the two packages found outside. One of the empty packages had "22.5 lb." written on it in black magic marker and another package had "22.2 lb." written on it as well as the number 156 with a circle around it. Detective Kellough also found an envelope with names and numbers written on one side. On the other side was the name Camellia Garmon with the address 106 Winding Canyon Drive. Detective Kellough testified that he believed the envelope to be

a ledger used to record drug transactions. Mail was found throughout the residence with the names of defendant and Camellia Garmon listed as the recipients. A substance called Inositol was discovered, which Detective Kellough explained is typically added to cocaine to increase volume.

In the master bedroom, 12.3 grams of marijuana were seized. Men's and women's clothing were found in the bedroom, and underneath the bed, a piece of luggage was found with defendant's name on the identification tag. Also in the bedroom, officers found a cellular phone with defendant's name appearing on the screen saver as well as a picture of defendant. In the garage, Detective Kellough seized three bags of what he believed to be cocaine, which weighed 9.5 grams, 9.2 grams, and 9.4 grams, respectively. One of the vehicles in the driveway was registered to defendant and contained mail addressed to him and Camellia Garmon.

At trial, Kamika Daniels Alloway ("Alloway"), a forensic chemist with the Charlotte-Mecklenburg Police Department crime laboratory, testified that she reviewed the lab reports of retired forensic chemist Tony Aldridge ("Aldridge") and believed his analysis to be accurate. Alloway testified that the substance found in the trash can that defendant was rolling constituted 17.05 pounds of marijuana. The three bags recovered from the garage contained cocaine and weighed 7.93 grams, 7.72 grams, and 7.87 grams respectively. The weight of the cocaine and the marijuana varied from the weights recorded at the scene by Detective Kellough; however, Alloway testified that the weights in the lab report did not include the packaging. Alloway admitted on cross examination that she did not test any of the substances herself and was not present when Aldridge conducted the tests.

On 10 December 2008, the jury found defendant guilty of: (1) possession of cocaine and (2) trafficking in marijuana by possessing more than 10 pounds but less than 50 pounds. Defendant was sentenced to 25 to 30 months imprisonment and a second consecutive sentence of 6 to 8 months imprisonment, which was suspended on condition that defendant be placed on supervised probation.

Analysis

I. Alloway Testimony

Defendant makes two arguments pertaining to admission of Alloway's testimony concerning the controlled substances seized at his residence: (1) defendant's right to confrontation under the Sixth

Amendment of the United States Constitution was violated; and (2) the testimony amounted to impermissible hearsay.

At trial, defendant made only general objections during Alloway's testimony. Accordingly, defendant has not preserved these arguments for appellate review. N.C. R. App. P. 10(c)(1); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541, 174 L. Ed. 2d 314, 331 (2009) ("The defendant *always* has the burden of raising his Confrontation Clause objection[.]"); *State v. Muncy*, 79 N.C. App. 356, 364, 339 S.E.2d 466, 471 ("It is well established that appellate courts will not ordinarily pass on a constitutional question unless the question was raised in and passed upon by the trial court."), *disc. review denied*, 316 N.C. 736, 345 S.E.2d 396 (1986). "However, the North Carolina Rules of Appellate Procedure allow review for 'plain error' in criminal cases even where the error is not preserved 'where the judicial action questioned is specifically and distinctly contended to amount to plain error.' " *State v. Mobley*, —— N.C. App. ——, ——, 684 S.E.2d 508, 210 (quoting N.C. R. App. P. 10(c)(4) (amended Oct. 1, 2009)), *disc. review denied*, —— N.C. ——, —— S.E.2d —— (2010). Defendant has requested plain error review. "Thus, we review to determine whether the alleged error was such that it amounted to a fundamental miscarriage of justice or had a probable impact on the jury's verdict." *Id.* at ——, 684 S.E.2d at 510. When reviewing a constitutional issue under the plain error standard of review, the State is not required to prove that the error was harmless beyond a reasonable doubt. *Id.* at ——, 684 S.E.2d at 510.[1]

A. Confrontation Clause

[1] First, defendant argues that his constitutional right to confront the witnesses against him was violated when the trial court allowed an expert to testify to analysis that provided the composition and weight of the substances found in and around defendant's residence when the analysis was performed by someone other than the testifying expert.

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' " *Crawford v. Washington*, 124 S. Ct. 1354, 1359, 158 L. Ed. 2d 177, 187 (2004) (quot-

1. Defendant argues that *Melendez-Diaz* created a new rule of law and therefore his failure to object did not violate the Rules of Appellate Procedure. Defendant's argument is disingenuous at best. The proper objection was pursuant to the Confrontation Clause, hardly a new rule of law.

ing U.S. Const. amend. VI). *Crawford* held that a criminal defendant has the right to confront those who "bear testimony" against him. *Id.* at 1364, 158 L. Ed. 2d at 192. Such testimonial statements include "extrajudicial statements[,]" such as affidavits, or "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 1364, 158 L. Ed. 2d at 193 (citation and quotation marks omitted).

The Supreme Court recently revisited the holding of *Crawford* stating that "[a] witness's testimony against a defendant is . . . inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Melendez-Diaz*, 129 S. Ct. at 2531, 174 L. Ed. 2d at 320-21. In *Melendez-Diaz*, the State of Massachusetts presented at trial "certificates of analysis" that served as "prima facie evidence of the composition, quality, and the net weight of the narcotic" defendant was alleged to have possessed. *Id.* at 2531, 174 L. Ed. 2d at 320. There was no accompanying testimony of an expert witness at trial. *Id.* The Court held that because the certificates were testimonial in nature, and the expert who performed the analysis was never subject to cross examination, the admission of the certificates was in error. *Id.* at 2542, 174 L. Ed. 2d at 332.

In applying *Melendez-Diaz*, our State Supreme Court held that "when the State seeks to introduce forensic analyses, '[a]bsent a showing that the analysts [are] unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them' such evidence is inadmissible under *Crawford*." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 305 (2009) (quoting *Melendez-Diaz*, 129 S. Ct. at 2532, 174 L. Ed. 2d at 322). In *Locklear*, the State tendered the testimony of Dr. John Butts, the Chief Medical Examiner for North Carolina, who presented the results of an autopsy performed by Dr. Karen Chancellor and the forensic dental analysis performed by Dr. Jeffrey Burkes. *Id.* at 451, 681 S.E.2d at 304. Dr. Butts did not testify to his own expert opinion; rather, he *exclusively* relayed the findings of Drs. Chancellor and Burkes. *Id.* The Court held that because the State sought to introduce evidence of forensic analyses performed by non-testifying experts, and the State failed to establish that the experts were unavailable to testify or had been subject to cross examination, the defendant's right to confront the witnesses against him was violated. *Id.* at 452, 681 S.E.2d at 305. However, the Court held that the error was harmless beyond a reasonable doubt. *Id.*

Since our Supreme Court's holding in *Locklear*, two opinions from this Court have been issued that pertain to the admission of forensic analysis where the person performing the analysis did not testify at trial.[2] In *State v. Galindo*, —— N.C. App. ——, 683 S.E.2d 785, 787 (2009), Michael Aldridge, a chemist with the Charlotte-Mecklenburg police department, testified that evidence seized from the crime scene was, in fact, marijuana and cocaine. Aldridge explained to the jury the custody procedures at the lab and stated that the tests performed there were relied upon by experts in the field of forensic chemistry; however, his opinion regarding the substances seized was "based '*solely*' on the [absent analyst's] lab report." *Id.* at ——, 683 S.E.2d at 787 (emphasis added). This Court determined that the defendant's Sixth Amendment rights had been violated, but that the error was harmless beyond a reasonable doubt. *Id.* at ——, 683 S.E.2d at 788.

In the *Mobley* case, this Court distinguished *Locklear* and held that the defendant's right to confrontation was not violated where "the testifying expert . . . testified not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data." N.C. App. ——, 684 S.E.2d at 511. The Court further distinguished *Melendez-Diaz*, stating that in that case the analysis at issue was prima facie evidence that the substance was cocaine, while in the case at bar "the underlying report, which would be testimonial on its own, [was] used as a basis for the opinion of an expert who independently reviewed and confirmed the results, and [was] therefore not offered for the proof of the matter asserted under North Carolina case law." *Id.* at ——, 684 S.E.2d at 512. Accordingly, the Court found no error. *Id.* at ——, 684 S.E.2d at 513.

We find the case *sub judice* to be analogous to *Mobley* and find no error, much less plain error, in the admission of Alloway's testimony. Here, Alloway first testified to the laboratory's chain of custody procedures. She then explained in detail the process by which cocaine and marijuana are identified through various laboratory tests. Specifically, with regard to cocaine testing, she stated that "[t]he laboratory requires you to do a preliminary test which consists

2. A third case, *State v. Steele*, —— N.C. App. ——, —— S.E.2d —— (COA-09-498) (Jan. 5, 2010), has also been published; however, the facts of that case pertain to the defendant's failure to object to a lab report pursuant to the State's notice-and-demand statute and is not pertinent to our analysis in the case *sub judice*.

of a color test as well as two confirmatory tests which could either be GC mass spec, GCFID, or an FTIR." Alloway then explained how each of these tests are conducted. She further detailed the procedure for testing and identifying marijuana.

Most importantly, Alloway testified that on two occasions prior to trial she completed a "peer review" of Aldridge's analysis in connection with this case, and it was her opinion that the test results were correct. Alloway testified as follows:

Q. What does the peer review entail?

A. A peer review consists of looking for . . . mainly errors in your analysis meaning they wouldn't come to the same conclusion that I came to. So if there is a discrepancy . . . usually a re-analysis is done if required. But for the most part I must say we're pretty good with not having to do the re-analysis. We pretty much come up with the same conclusion.

Q. Did you review the work of Tony Aldridge bearing a complaint number of 20070324084802?

A. Yes.

Q. Within that complaint number did you review his work regarding two control numbers, one being 09933 and the other 09938?

A. Yes.

Q. When did you review that work?

A. On Friday initially and also again today before court.

Q. What tests were conducted on these particular specimens?

. . . .

A. On control number 200709933 a morphological exam was conducted as well as a GC and a mass spec.

Q. With respect to 9938 what tests were done?

. . . .

A. On control number 200709938 a color test, a GC mass spec, and a FTIR was done.

Q. Where the substances associated with those control number weighed?

A. Yes.

> Q. Are those tests in accordance with your lab's procedure?
>
> A. Yes.
>
> . . . .
>
> Q. Ms. Alloway, if you would at this point may I ask you to describe each of the tests in laymen's terms as much as possible so that we can all get a feel for it. If you would begin first with the color test.

Alloway then described the specific tests that were run in this case, which resulted in a conclusion that the two substances recovered from the crime scene were marijuana and cocaine. She also testified as to the weights of the drugs seized and explained that the drugs weighed less in the laboratory than at the crime scene because the substances were weighed without packaging in the lab. Alloway was asked: "Based on your experience and review of these test results is it your opinion that the results are correct as published in those two reports?" Alloway responded: "Yes." Alloway did not merely present the test results, or read verbatim from Aldridge's report; rather, she provided her own analysis and expert opinion regarding the accuracy of the reports based on her peer review.

Upon review of Alloway's testimony, we conclude that her expert opinion was based on an independent review and confirmation of test results, unlike the situations presented in *Melendez-Diaz*, *Locklear*, and *Galindo*. As noted in *Mobley*, "[w]ell-settled North Carolina case law allows an expert to testify to his or her own conclusions based on the testing of others in the field." *Id.* at ——, 684 S.E.2d at 511. The report at issue in this case formed the basis of Alloway's expert opinion, but was not offered for the proof of the matter asserted and was not prima facie evidence that the substances recovered from the crime scene were, in fact, marijuana and cocaine. It is not our position that every "peer review" will suffice to establish that the testifying expert is testifying to his or her expert opinion; however, in this case, we hold that Alloway's testimony was sufficient to establish that her expert opinion was based on her own analysis of the lab reports.

In reviewing North Carolina and federal cases that relied on *Crawford* and were decided prior to *Melendez-Diaz*, we do not find that *Melendez-Diaz* abrogates those cases where the analyst who testified asserted his or her own expert opinion. *See*, *e.g.*, *State v. Delaney*, 171 N.C. App. 141, 613 S.E.2d 699 (2005) (expert in analyzing controlled substances relied on a non-testifying chemist's analyses in forming his expert opinion); *State v. Walker*, 170 N.C. App. 632,

613 S.E.2d 330 (expert testified as to a forensic firearms report conducted by another), *disc. review denied*, 359 N.C. 856, 620 S.E.2d 196 (2005); *State v. Watts*, 172 N.C. App. 58, 616 S.E.2d 290 (2005), *modified on other grounds after remand*, 185 N.C. App. 539, 648 S.E.2d 862 (2007).[3]

Other federal courts have reached this same conclusion under similar facts. In *United States v. Richardson*, 537 F.3d 951, 960 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2378, 173 L. Ed. 2d 1299 (2009), the court held that while the testifying analyst did not perform the DNA testing, which established that the defendant's DNA was present on the gun he unlawfully possessed, she testified at trial concerning "her own independent conclusions and was subject to cross examination." Moreover, the testifying expert had conducted a "peer review," which was her independent responsibility. *Id.* The court found no Sixth Amendment violation. *Id.*; *see also United States v. Turner*, 591 F.3d 928 (7th Cir. 2010) (holding that the defendant's Sixth Amendment rights were not violated where a laboratory supervisor testified that his conclusions concerning cocaine identification were the same as the analyst who conducted the testing); *United States v. Moon*, 512 F.3d 359 (7th Cir. 2008) (holding the reviewing scientist "was entitled to analyze the data that [the first scientist] had obtained"; noting "the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself"), *cert. denied*, 129 S. Ct. 40, 172 L. Ed. 2d 19 (2008); *United States v. De La Cruz*, 514 F.3d 121 (1st Cir. 2008) (medical examiner could testify as to his opinion on a cause of death when opinion was based on an autopsy report prepared by another person).

In sum, we hold that defendant's Sixth Amendment right to confront the witnesses against him was not violated since Alloway's testimony was based on her own expert opinion, even though she did not conduct the original testing of the substances.

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3. The holding in *Watts* has since been reviewed by the Federal District Court for the Middle District of North Carolina in *Watts v. Thomas*, 2009 WL 3199891, at *5-6 (M.D.N.C. Sept. 25, 2009), upon a petition for *habeas corpus*. In *Watts*, 172 N.C. App. at 67, 648 S.E.2d at 297, this Court held that the defendant's right to confrontation under *Crawford* was not violated where the analyst who testified concerning DNA evidence testified to his own opinion based on tests run by another analyst. The federal court acknowledged that the parties made arguments based on the holding of *Melendez-Diaz*; however, the court's analysis focused on *Crawford* since that was the only Supreme Court precedent available at the time of the defendant's appeal in state court. *Watts*, 2009 WL 3199891, at *5-6. Ultimately, the federal court held that this Court's analysis was not contrary to the application of Supreme Court precedent and denied the defendant's *habeas* petition. *Id.* at *6.

B. Hearsay

[2] Defendant argues that Alloway's testimony amounted to impermissible hearsay since the analysis that formed the basis of her opinion was performed by another person.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c). "However, out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998). "Our standard of review on this issue is *de novo*." *State v. Miller*, ––– N.C. App. –––, –––, 676 S.E.2d 546, 552 (2009).

"This Court has held that evidence offered as the basis of an expert's opinion is not being offered for the truth of the matter asserted." *Mobley*, ––– N.C. App. at –––, 684 S.E.2d at 511; *see also State v. Bethea*, 173 N.C. App. 43, 55, 617 S.E.2d 687, 695 (2005). Accordingly, Alloway's testimony did not constitute hearsay even though it was based, in part, on reports generated by another expert. This assignment of error is without merit.

II. Motion to Dismiss

[3] Finally, defendant argues that the trial court erred in denying his motion to dismiss the charges at the close of evidence as there was insufficient evidence to establish that he constructively possessed the controlled substances.

> In determining the sufficiency of the evidence to withstand a motion to dismiss and to be submitted to the jury, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." We have previously defined substantial evidence as "such relevant evidence as is necessary to persuade a rational juror to accept a conclusion." When ruling on a defendant's motion to dismiss, the trial court must review the evidence in the light most favorable to the state and determine whether the evidence is sufficient to get the case to the jury.

State v. Banks, ––– N.C. App. –––, –––, 664 S.E.2d 355, 361 (2008) (quoting *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003), *cert. denied*, 124 S. Ct. 2818, 159 L. Ed. 2d 252 (2004)).

"[I]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials." *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986). "Proof of nonexclusive, constructive possession is sufficient. Constructive possession exists when the defendant, 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the narcotics." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989).

Here, the evidence tended to show that defendant and Camellia Garmon resided at the house where the controlled substances were seized. Defendant admitted to Officers Stansberry and Reid that he lived there, and upon searching the residence, personal items such as luggage, mail, and a cellular telephone were found with defendant's name on them. Defendant's car was also parked in the driveway. Though there was evidence that defendant did not exclusively control the premisses, there was sufficient evidence to establish constructive possession. At the time the officers arrived, there was no indication that anyone else was present in the house and the search revealed no other occupants. Moreover, defendant was pushing the trash can that contained the bulk of the marijuana seized, acted suspiciously when approached by the officers, and ran when Officer Stansberry attempted to lift the lid. In light of the circumstances, we hold that there was sufficient evidence to establish constructive possession. Therefore, the trial court did not err in denying defendant's motion to dismiss.

Conclusion

We hold that Alloway's testimony did not violate defendant's right to confrontation and did not constitute hearsay. We further hold that the trial court did not err in denying defendant's motion to dismiss.

No error.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. NATHANIEL JUMEL BARRON

No. COA09-770

(Filed 2 March 2010)

1. Drugs— constructive possession—insufficient evidence

The trial court erred in denying defendant's motion to dismiss charges of possession of controlled substances because there was insufficient evidence from which the jury could conclude that defendant constructively possessed marijuana and cocaine found by police officers in a residence which was not under defendant's exclusive control.

2. Fraud— identity—identifying information—sufficient evidence

The trial court did not err in denying defendant's motion to dismiss the charge of identity fraud as defendant's active acknowledgment to a police officer during an interview that the last four digits of his social security number were "2301" was a "use [of] identifying information" of another person, within the meaning of N.C.G.S. § 14-113.20(a).

3. Jury Instruction— identity fraud—failure to show prejudice

Even assuming *arguendo* that the trial court's instruction to the jury on identity fraud was erroneous, defendant failed to carry his burden of proof to show that he was prejudiced by the error.

4. Search and Seizure— motion to suppress—fruit of the poisonous tree—subsequent crime

The trial court did not err by denying defendant's motion to suppress statements to a police officer regarding defendant's name, date of birth, and social security number made after his arrest for possession of controlled substances. Even if defendant's arrest was not supported by probable cause, the exclusion-

ary rule would not operate to exclude evidence of defendant's subsequent commission of identity fraud.

Appeal by Defendant from judgment entered 19 February 2009 by Judge James F. Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 18 November 2009.

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

Kevin P. Bradley for Defendant.

STEPHENS, Judge.

I. Procedural History

On 12 May 2008, Defendant Nathaniel Jumel Barron was indicted for possession with intent to sell or deliver cocaine, marijuana, and a counterfeit controlled substance; identity theft; resisting, delaying, or obstructing a police officer; and having obtained habitual felon status. The case was tried in Cumberland County Superior Court on 18 and 19 February 2009.

Prior to trial, Defendant filed a motion to suppress statements he had made to police officers. The trial court summarily denied the motion before jury selection. Also before jury selection, the State dismissed the charge of resisting, delaying, or obstructing an officer.

On 19 February 2009, the jury found Defendant guilty of possession of cocaine and marijuana, guilty of identity theft, and not guilty of possession with intent to sell or deliver a counterfeit controlled substance. Defendant then pled guilty to having obtained habitual felon status.

The trial court entered judgment on the jury verdicts, consolidating the charges and sentencing Defendant to a prison term of 133 to 169 months. Defendant gave notice of appeal in open court.

II. Factual Background

On the night of 3 January 2008, Officer Brett Armstead of the Fayetteville Police Department was working a patrol shift. At approximately 9:55 p.m., he ran a vehicle tag through his onboard computer. The vehicle pulled into a driveway at 208 South Broad Street. Armstead continued down the road about a mile and a half until the computer signaled that the vehicle was stolen. Armstead turned around and drove back. The vehicle was still in the driveway.

The officer waited about 10 or 15 minutes and did not see any activity in the vehicle. He called for another officer, Officer Zimmerman, to assist with the stolen vehicle. Armstead and Zimmerman decided to knock on the door of the residence at 208 South Broad Street and ask routine questions of whoever answered.

Armstead first checked the vehicle. The window was open and he could see a handgun on the console. Zimmerman took possession of the weapon and called for another backup, Officer Herbert.

When Herbert arrived, he was stationed to watch the back of the house as Armstead and Zimmerman approached the front door. Armstead knocked on the front door and stepped back five or six feet. After about 10 to 12 seconds, a man answered the door and stepped outside. Armstead introduced himself and asked if he could have the man's name. The man identified himself as Clifton Dukes. Armstead then asked Dukes about the vehicle in the driveway. Dukes said that he did not know who was driving it and that it was not his. As they spoke, "the door had closed, not all the way but it was ajar. When the door reopened, the [D]efendant stepped to the door and was looking outside." Armstead could see Defendant's face, but couldn't see his hands or the rest of his body.

Armstead asked Defendant to step outside so he could speak with him. Defendant acquiesced and stepped outside, standing next to Dukes. When Armstead asked Defendant for his name, Defendant gave the name Charles Barron. Armstead then asked if the vehicle in the driveway belonged to him. Defendant replied that it was not his and he did not know who owned it. Armstead asked Dukes for identification, and Dukes said it was inside his residence. Armstead asked Dukes if he could go inside with Dukes to get it. Dukes said, "Sure, come on in." As Dukes turned around to walk inside the house, Armstead told Zimmerman to detain Defendant. Zimmerman immediately handcuffed Defendant.

Armstead called Herbert and they followed Dukes into the residence. As soon as they entered the residence, Herbert "detected a strong odor of marijuana in the house." They observed a couch to their right. Duke's girlfriend, Jacqueline Murphy, was sitting on the couch. There was also a mattress on the floor with a small child on it. Another man, Mr. Jones, was sitting behind the door to the left at the kitchen table.

Dukes leaned over to get his wallet, and as he was handing Armstead his identification, Herbert advised Armstead that he

observed narcotics on the couch to their right. Plastic baggies, which were later determined to contain marijuana and cocaine, were on the couch where Ms. Murphy was sitting and about three feet from where Defendant had been standing at the front door. Armstead informed everyone in the room that they would be detained. The officers handcuffed Dukes and Jones and brought them out of the house. Armstead left Murphy inside the house because of the small child, but told her that she was also being detained. A relative soon arrived to take the child, and Murphy was led outside as well.

After obtaining a search warrant, Armstead, Herbert, and Officer Durham searched the residence. During the search, the officers discovered a crack pipe, a metal push rod,[1] and a piece of copper Chore Boy scrubber.[2] The crack pipe was discovered about two-and-a-half feet from where Defendant had been standing at the front door. The push rod and Chore Boy were found in a trash can approximately 10 or 12 feet from where Defendant had been standing.

After the search was complete, Dukes, Jones, Murphy, and Defendant were taken to the county jail for booking. Armstead was filling out an arrest sheet regarding Defendant while Zimmerman was filling out a probable cause sheet on Defendant. Armstead was asking Defendant questions in order to complete the sheets. Defendant stated to Armstead that his name was "Charles Lee Barron," his date of birth was 2 August 1981, and his address was 213 Adams Street. Armstead asked Defendant if he knew his social security number, and Defendant replied that he did not. Armstead asked county booking to print off Charles Barron's last arrest sheet. Armstead looked at the social security number listed on that sheet and asked Defendant, "Is your last four 2301?" Defendant responded, "Yes." Armstead thus filled in the social security number on the arrest sheet for Defendant with the number listed on Charles Barron's arrest sheet. Charles Lee Barron and Defendant have the same mother. Charles' date of birth is 2 August 1981 while Defendant's date of birth is 19 November 1978.

The police subsequently discovered that Defendant had given his brother's information when they ran Defendant's electronic fingerprints through their computer system. They thus dropped the charges against Charles Barron and charged Defendant, adding the charges of identity theft and resisting, delaying, or obstructing an officer.

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1. A push rod can be used to clean out a crack pipe or to push cocaine into the pipe.

2. A Chore Boy can be used as a filter for crack cocaine.

III. Discussion

A. Motion to Dismiss

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charges of possession of controlled substances for insufficient evidence. Specifically, Defendant contends there was insufficient evidence that Defendant possessed the controlled substances found in the residence. We agree.

On appeal of a trial court's denial of a motion to dismiss for insufficient evidence, this Court considers "whether substantial evidence exists as to each essential element of the offense charged and of the defendant being the perpetrator of that offense." *State v. Glover*, 156 N.C. App. 139, 142, 575 S.E.2d 835, 837 (2003). " 'The existence of substantial evidence is a question of law for the trial court, which must determine whether there is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *State v. Barden*, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003)). In determining the existence of substantial evidence, "[t]he court must 'consider the evidence in the light most favorable to the State, take it to be true, and give the State the benefit of every reasonable inference to be drawn therefrom.' " *Id.* (quoting *State v. Martin*, 309 N.C. 465, 480, 308 S.E.2d 277, 286 (1983)). Thus, "[a] case should be submitted to a jury if there is any evidence tending to prove the fact in issue or reasonably leading to the jury's conclusion as a fairly logical and legitimate deduction." *State v. Harris*, 361 N.C. 400, 402-03, 646 S.E.2d 526, 528 (2007) (citations and internal quotation marks omitted). This is true "even though the evidence may support reasonable inferences of the defendant's innocence." *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (citations and internal quotation marks omitted). However, when the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009).

To send a charge of possession of a controlled substance, a violation of N.C. Gen. Stat. § 90-95(A), to the jury, the State must offer sufficient evidence that (1) the substance was controlled and (2) defendant knowingly possessed the substance. *See State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985). An accused's possession of a controlled substance may be actual or constructive. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972).

In this case, the State prosecuted Defendant upon a theory of constructive possession of marijuana and cocaine. A defendant constructively possesses a controlled substance when he or she has "the intent and capability to maintain control and dominion over" it. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). When narcotics "are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *Harvey*, 281 N.C. at 12, 187 S.E.2d at 714. However, unless a defendant has exclusive possession of the place where the contraband is found, the State must show "other incriminating circumstances" sufficient for the jury to find that a defendant had constructive possession. *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001).

In this case, there was no evidence that Defendant had " 'exclusive possession of the place where the narcotics [were] found[.]' " *Id.* (citation omitted). Indeed, the evidence established exactly the contrary.[3] Therefore, we must determine whether there was sufficient evidence of " 'other incriminating circumstances[,]' " *id.* (citation omitted), to show that Defendant had the "intent and capability to maintain control and dominion over" the contraband. *Beaver*, 317 N.C. at 648, 346 S.E.2d at 480. We conclude that there was not.

The State contends that the following evidence is sufficient to support the charges of possession of controlled substances: When Herbert entered the residence, he noticed some plastic baggies on the couch, about three feet away from where Defendant had been standing at the front door. The baggies were later determined to contain marijuana and cocaine. Additionally, in executing a search warrant, police found a crack pipe approximately two-and-a-half feet away from where Defendant had been standing, and a push rod and a piece of Chore Boy approximately 10 or 12 feet away from where Defendant had been standing. The State also contends that Defendant acted suspiciously by standing partially hidden behind the open front door while police spoke with Dukes. The State argues the fact that Defendant lied to the police about his identity further supports its theory of constructive possession. We are not persuaded by the State's argument.

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3. While officers found no evidence that Defendant was residing in the residence, bills found at the residence confirmed that Dukes and Murphy were residing in the home. Furthermore, Dukes, Murphy, and Jones were all present, in addition to Defendant, when officers discovered the drugs in the living room.

It is well-settled that the mere "fact that a person is present in a room where drugs are located, nothing else appearing, does not mean that person ha[d] constructive possession of the drugs." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986). Here, the only potential incriminating circumstance beyond Defendant's presence in the room[4] was the fact that "Defendant's actions and demeanor were suspect[.]"

The State's evidence tends to show that Armstead knocked on the door of the residence and introduced himself to Dukes when Dukes answered. Dukes gave Armstead his name and Armstead "asked him about the vehicle that was parked in his driveway." Dukes "said he didn't know who was driving that vehicle. It was not his." As they spoke, "the door had closed, not all the way but it was ajar." When the door opened again, "[D]efendant stepped to the door and was looking outside." Armstead asked Defendant "if he wouldn't mind stepping outside so I could speak with him." At that point, Defendant stepped outside and Armstead asked Defendant for his name. Defendant replied, "Charles Barron." Armstead asked Defendant "if that was his vehicle. He said no, he didn't know whose vehicle that was." The record reflects that Defendant's "actions and demeanor" resulted solely from Armstead's inquiry into the ownership of the vehicle in the driveway and, thus, are insufficient evidence of Defendant's "intent and capability to maintain control and dominion over" the controlled substances discovered in the residence. *Beaver*, 317 N.C. at 648, 346 S.E.2d at 480.

We conclude that the State's evidence showed nothing more than "[D]efendant had been in an area where he could have committed the crimes charged," and was insufficient to send the charge of possession of controlled substances to the jury. *State v. Minor*, 290 N.C. 68, 75, 224 S.E.2d 180, 185 (1976). Defendant's conviction for possession of marijuana and cocaine is reversed.

B. Identity Theft

[2] Defendant next argues that the trial court erred in denying Defendant's motion to dismiss the charge of identity theft for insufficient evidence. Specifically, Defendant contends there was insufficient evidence that he used "identifying information" of another person. We disagree.

A person is guilty of identity theft when that person

4. The evidence does not show when the drugs were placed on the couch.

> knowingly obtains, possesses, or uses identifying information of another person, living or dead, with the intent to fraudulently represent that the person is the other person . . . for the purpose of avoiding legal consequences . . . .

N.C. Gen. Stat. § 14-113.20(a) (2007). Identifying information for the purposes of this statute includes "[s]ocial security or employer taxpayer identification numbers[,]" N.C. Gen. Stat. § 14-113.20(b)(1), and "[a]ny other numbers or information that can be used to access a person's financial resources." N.C. Gen. Stat. § 14-113.22(b)(10) (2007).

In the present case, Armstead testified as follows:

> [State:] Tell the jury where the Social Security number [on Defendant's arrest sheet] came from. How did you fill—how did you come to fill out [xxx-xx]-2301 on the arrest report that night?
>
> [Armstead:] I asked the [D]efendant if he happened to know his Social Security number and he said no. Due to the fact that we have no I.D. on [Defendant], I asked county booking if they could print off the last arrest sheet or a sheet that would have some biographical information on it. While we were filling this out, I was looking from the information [Defendant] was giving me to the sheet to compare. When I got to the Social Security block [of the arrest sheet] and he said he did not know his Social Security number, which is not uncommon, I asked them—I gave him the last four of the Social that was on that sheet. I asked him, "Is your last four 2301?" And he said, "Yes." So I filled in the rest of the block.
>
> [State:] The sheet that you had that you were using that you asked the jail to give you, whose information did you give the jail to give the sheet back?
>
> [Armstead:] Gave the name [Defendant] gave me and date of birth.
>
> [State:] What was that name and date of birth? [Armstead:] Charles Lee Barron, August 2, 1981.
>
> [State:] And that was—is that the sheet the jail gave you to look at?
>
> [Armstead:] Yes. It was the last arrest sheet they had taken.
>
> [State:] So when you said 2301, what was the [D]efendant's response?
>
> [Armstead:] He said yes.

Defendant does not deny using his brother's name and birth date to identify himself to police. Defendant argues, however, that "agreeing with the police officer's recitation of the last four digits of that other person's social security number . . . is [not] 'use [of] identifying information' within N.C.G.S. § 14-113.20."

We decidedly disagree with Defendant's contention. We conclude that Defendant's active acknowledgment to Armstead that the last four digits of his social security number were "2301" was a "use [of] identifying information" of another person within the meaning of N.C. Gen. Stat. § 14-113.20(a).

Defendant also argues that a name or a birth date do not constitute "identifying information" within the meaning of the statute. However, having already determined that Defendant violated the statute by the use of his brother's social security number, we need not address this contention to overrule Defendant's argument that the trial court erred in denying his motion to dismiss the charge of identity theft. Defendant's identity theft argument is without merit.

C. Jury Instruction

[3] Defendant next argues that the trial court erred in instructing the jury that "name and date of birth are 'identifying information of another person' " under N.C. Gen. Stat. § 14-113.20.

A trial court must instruct the jury on the law arising on the evidence. *State v. James*, 184 N.C. App. 149, 151, 646 S.E.2d 376, 377 (2007); *see* N.C. Gen. Stat. §§ 15A-1231 and -1232 (2007). "The chief purpose of a [jury] charge is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict." *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971). Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*. *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999).

On appeal, a defendant is required not only to show that a challenged jury instruction was erroneous, but also that such error prejudiced the defendant. N.C. Gen. Stat. § 15A-1442(4)(d) (2007); *see State v. Easterling*, 300 N.C. 594, 609, 268 S.E.2d 800, 809 (1980) (In order to warrant corrective relief by the appellate division, "error in the judge's instructions to the jury must be to the prejudice of defendant[.]"). "A defendant is prejudiced . . . when there is a reason-

able possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2007). "The burden of showing such prejudice . . . is upon the defendant." *Id.*

On the charge of identity theft, the trial court instructed the jury in pertinent part as follows:

> For you to find the [D]efendant guilty of [identity theft], the state must prove . . . beyond a reasonable doubt . . . that [D]efendant obtained or possessed or used personal identifying information of another person. The name, the date of birth[,] or the Social Security number would be personal identifying information.

"[D]efendant argues only that the trial court erred in its jury instructions and never addresses the effect of the error on the jury's verdict." *State v. Hutchinson*, 139 N.C. App. 132, 139, 532 S.E.2d 569, 574 (2000). Therefore, even assuming *arguendo* that the challenged instruction was erroneous as a matter of law, Defendant has failed to carry his burden of proof to show he was prejudiced by the alleged error. *Id.* The assignment of error upon which Defendant's argument is based is overruled.

D. Motion to Suppress

[4] By Defendant's final argument, he asserts that the trial court erred in denying his motion to suppress his statements regarding his false name, date of birth, and social security number. Specifically, Defendant argues that he was arrested without probable cause, in violation of his Fourth Amendment rights, and therefore, his false statements to the police should have been excluded as " 'fruit of the poisonous tree.' "

We need not determine whether Defendant was arrested without probable cause, however, because even if the arrest violated Defendant's Fourth Amendment rights, the exclusionary rule would not operate to exclude evidence of Defendant's subsequent identity theft.

The Fourth Amendment protects the right of individuals to be free from "unreasonable searches and seizures." U.S. Const. amend. IV. This protection is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090, *reh'g denied*, 368 U.S. 871, 7 L. Ed. 2d 72 (1961). "When evidence is obtained as the result of

illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed." *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992) (citing *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441 (1963)).

However, an invalid search and seizure, in violation of a defendant's Fourth Amendment rights, does not give that defendant a license to engage in subsequent criminal behavior. *See State v. Miller*, 282 N.C. 633, 194 S.E.2d 353 (1973) (defendant's subsequent criminal behavior not excused even though officers entered the premises on an invalid search warrant); *In re J.L.B.M.*, 176 N.C. App. 613, 625, 627 S.E.2d 239, 247 (2006) (officer's invalid stop of defendant's vehicle did not give defendant license to subsequently lie about his identity to the officer). Accordingly, the exclusionary rule does not operate to exclude evidence of crimes committed subsequent to an illegal search and seizure. *State v. Parker*, 188 N.C. App. 616, 618, 655 S.E.2d 860, 862 (2008).

In this case, Defendant made false statements to officers regarding his name, date of birth, and social security number after his arrest for possession of controlled substances. Therefore, even assuming *arguendo* that Defendant's arrest was not supported by probable cause, Defendant's false statements to the police would not have been excluded as " 'fruit of the poisonous tree.' " *Wong Sun*, 371 U.S. at 488, 9 L. Ed. 2d at 455. Defendant's argument is overruled.

REVERSED in part; NO ERROR in part; REMANDED for resentencing.[5]

McGEE and STEELMAN concur.

5. In light of the reversal of Defendant's convictions for possession of marijuana and possession of cocaine, the trial court must resentence Defendant based solely on his conviction for identity theft.

STATE OF NORTH CAROLINA v. YASMIN PECOLIA BREATHETTE, DEFENDANT

No. COA09-1007

(Filed 2 March 2010)

1. Indecent Liberties— denial of requested instruction—mistake of age—no mens rea requirement

The trial court did not err in an indecent liberties case by refusing to instruct the jury on defendant's requested instruction that mistake of age was a valid defense. There is no specific *mens rea* requirement in N.C.G.S. § 14-202.1.

2. Indecent Liberties— denial of requested instruction—willfully

The trial court did not err in an indecent liberties case by refusing to instruct the jury on defendant's requested instruction regarding the meaning of "willfully" in N.C.G.S. § 14-202.1(a). The trial court's instruction to the jury was a correct statement of law and was substantially similar to the one requested by defendant.

3. Criminal Law— denial of argument—mistake of age—willfulness

The trial court did not err in an indecent liberties case by preventing defense counsel from arguing the defense of mistake of age and willfulness to the jury. Mistake of age was not a valid defense to taking indecent liberties. Further, defendant's willfulness argument was premised on an incorrect view of the law.

Appeal by defendant from judgments entered 15 April 2009 by Judge Lindsay R. Davis in Forsyth County Superior Court. Heard in the Court of Appeals 11 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

Mark Montgomery for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Yasmin Pecolia Breathette appeals her convictions for taking indecent liberties with a minor. Defendant argues on appeal that the trial court erred by not giving the jury her requested instruction that mistake of age is a valid defense to the offense of indecent liberties. We conclude that mistake of age is not a defense applicable

to the charge, and, therefore, the trial court properly refused to instruct the jury on the defense. Consequently, we find no error.

Facts

The State presented evidence at trial tending to establish the following facts: B.W. ("Beth") was born in March 1995 and lived in Taylors, South Carolina with her mother.[1] When Beth was 13 years old she met defendant, who was 19 at the time, on the social networking website MySpace and the two began messaging. Beth's MySpace page indicated that she was 99 years old because she did not "want people to know [her] real age." When defendant asked how old Beth was, Beth told her that she was 17. The two discussed "chilling" together at defendant's apartment, exchanged cell phone numbers, and began texting and calling each other on a daily basis. Defendant, whose MySpace page indicated that she was a lesbian, asked Beth whether she was a lesbian, and Beth told her that she was gay. When texting or talking, they would sometimes discuss "sexual stuff." Sometimes Beth would initiate the sexual conversations and sometimes it was defendant.

Defendant and Beth decided that they wanted to meet in person, so defendant drove from her apartment in Winston-Salem, North Carolina on 4 June 2008, picked up Beth at a designated spot, and drove back to Winston-Salem for the weekend. When defendant and Beth got back to defendant's apartment, they watched TV together and "[t]ongue kiss[ed]."

The next day, 5 June 2008, defendant took Beth over to her friend Francesca's house, where they stayed most of the day. While watching TV, defendant and Beth "made out" on the couch and kissed. Later that night, defendant and Beth went back to defendant's apartment, where they ordered pizza and watched TV and movies. Defendant and Beth later got into defendant's bed, where Beth gave defendant a "hickey" on her neck. Defendant kissed Beth's breast, digitally penetrated her vagina, and performed oral sex on her. After about 10 minutes, they went to sleep.

Defendant and Beth got into an argument on Friday, 6 June 2008, because Beth was "acting childish" and "getting on [defendant's] nerves." Although defendant told Beth that she could not spend the night at defendant's apartment, Beth ultimately spent the night there.

1. The pseudonym "Beth" is used throughout the opinion to protect the minor's privacy and for ease of reading.

Defendant left for work on Saturday morning before Beth woke up and Beth texted and called defendant several times during the day, asking for a ride home. Defendant did not want to drive Beth home and the two fought over the phone while defendant was at work. When defendant's supervisor overheard her yelling loudly on the phone at work, she was fired from her job. Defendant came home, yelling at Beth that she made her lose her job. Defendant collected Beth's things, threw them out into the front yard, and locked her out of the apartment. Beth contacted Amanda, one of defendant's friends that she had met during the weekend, and Amanda let Beth spend Saturday night at her house.

The next day, 8 June 2008, Amanda dropped Beth off at Francesca's house, where Beth told Francesca's mother about her fight with defendant and that they had done "sexual stuff." Francesca's mother called the police, who came to get Beth. While there, the police interviewed Beth and she told them that she was 17. Officers took Beth to the police station, where she told them that nothing had happened. Beth's mother arrived in Winston-Salem that evening and drove her home.

Officer J.A. Sheets interviewed defendant on 9 June 2008, at her apartment. Defendant told him that she met Beth on MySpace and that they had met in person because they were interested in dating each other. Defendant also told Officer Sheets that Beth's MySpace page had been changed to indicate that she was 18, although it had originally indicated that she was 21. Defendant told Officer Sheets that they had "fingered" each other, but that only she had performed oral sex. Defendant later texted Beth, asking her why she did not tell defendant her "real age." When Beth responded that she did not know why, defendant texted back that "[Beth] was wrong."

Defendant was charged with two counts of taking indecent liberties with a minor and one count each of first degree kidnapping, first degree sexual offense, and attempted second degree sexual offense. Defendant pled not guilty and a jury trial was conducted 13-15 April 2009. At the close of the State's evidence, defendant moved to dismiss all five charges. The trial court dismissed the charges of kidnapping, first degree sexual offense, and attempted second degree sexual offense, but denied the motion as to the two counts of taking indecent liberties. Defendant then testified that she first came into contact with Beth through MySpace in May 2008. Defendant also found Beth on "downylink.com," a "straight, gay, lesbian, and bisexual Website

for people over the age of eighteen." Defendant explained that when she saw Beth on downylink.com, she believed that Beth was over 18 because the website requires all users to verify that they are 18 years old or over. The jury convicted defendant of both charges and the trial court sentenced defendant to two consecutive presumptive-range sentences of 14 to 17 months imprisonment, but suspended the second sentence and imposed 36 months of supervised probation. Defendant timely appealed to this Court.

I. Jury Instructions

A. Mistake of Age Defense

[1] In a written request, defendant asked the trial court to instruct the jury that

> [i]f you do find that the defendant was both acting under a belief that the alleged victim was older than 15 years old and that such belief was reasonable, albeit mistaken, then it would be your duty to render a verdict of not guilty to the charges of taking indecent liberties with a child as the defendant lacked the requisite guilty mind to formulate the specific intent to commit the crime.

Defendant argues that the trial court committed reversible error by not instructing the jury that mistake of age is a defense to the charge of taking indecent liberties with a minor.

If a request is made for an instruction that is a correct statement of the law and is supported by the evidence, the trial court must give the instruction, at least in substance. *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993). Failure to instruct on a substantive or material feature of the evidence and the applicable law generally results in reversible error. *State v. Ward*, 300 N.C. 150, 155, 266 S.E.2d 581, 585 (1980). Any defense raised by the evidence is deemed a substantial feature of the case and requires an instruction. *State v. Smarr*, 146 N.C. App. 44, 54, 551 S.E.2d 881, 888 (2001), *disc. review denied*, 355 N.C. 291, 561 S.E.2d 500 (2002).

The State argues that the trial court properly refused to instruct the jury on the mistake of age defense as the defense is inapplicable to the crime of taking indecent liberties with a minor. Relying on *Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 351 S.E.2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E.2d 383 (1987), the State maintains that this Court has "expressly recognized" that mis-

take of age is not a defense to indecent liberties.[2] In *Cinema I Video*, this Court stated:

> [M]istake of age is not a defense to prosecution for first degree rape, G.S. 14-27.2(a)(1), nor to first-degree sexual offense, G.S. 14-27(a)(1). Moreover, *mistake of age is not a defense to the offense of taking indecent liberties with a minor*. G.S. 14-202.1.

Id. at 569, 351 S.E.2d at 320 (internal citation omitted) (emphasis added). Defendant vigorously argues in her reply brief that *Cinema I Video's* language that mistake of age is not a valid defense to indecent liberties is *dicta* and thus we are not bound by *Cinema I Video*.

"Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985). As our Supreme Court has explained, " 'general expressions in every opinion are to be taken in connection with the case in which those expressions are used[;] [i]f they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision.' " *State v. Jackson*, 353 N.C. 495, 500, 546 S.E.2d 570, 573 (2001) (quoting *Moose v. Board of Comm'rs of Alexander County*, 172 N.C. 419, 433, 90 S.E. 441, 448-49 (1916)).

In setting out the language at issue here, the Court in *Cinema I Video* was addressing whether two of North Carolina's child pornography statutes—N.C. Gen. Stat. § 14-190.16 (first degree sexual exploitation of a minor) and N.C. Gen. Stat. § 14-190.17 (second degree sexual exploitation of a minor)—violated the plaintiffs' First Amendment and Due Process rights. 83 N.C. App. at 568, 351 S.E.2d at 320. The indecent liberties statute, N.C. Gen. Stat. § 14-202.1 (2009), was not one of the criminal statutes being challenged by the plaintiffs in *Cinema I Video*. Thus, the language in *Cinema I Video* that "mistake of age is not a defense to the offense of taking indecent liberties with a minor" was not necessary to the Court's decision regarding constitutionality of the child pornography statutes. Consequently, we are not bound by *Cinema I Video* in deciding this case where the precise issue—the applicability of the defense—"is presented for decision."

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2. In "affirm[ing]" this Court's decision, the Supreme Court did not address the issue of whether mistake of age is a defense to the offense of taking indecent liberties with a minor. *Cinema I Video*, 320 N.C. at 491, 358 S.E.2d at 385.

Defendant is correct that "[t]his is a case of first impression," as North Carolina's courts have not specifically addressed whether mistake of age is a recognized defense to a charge of taking indecent liberties with a minor. Generally, "[i]gnorance or mistake as to a matter of fact . . . is a defense if it negatives a mental state required to establish a material element of the crime . . . ." Wayne R. LeFave, *Substantive Criminal Law* § 5.6, at 394 (2d ed. 2003). In turn, "[w]hether a criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design." *State v. Hales*, 256 N.C. 27, 30, 122 S.E.2d 768, 771 (1961).

N.C. Gen. Stat. § 14-202.1 defines the offense of taking indecent liberties with a minor:

> 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. § 14-202.1(a)(1)-(2). The statute is unambiguous as to the elements of the crime: the State must prove that (1) the defendant was at least 16; (2) the defendant was five years older than the complainant; (3) the defendant willfully took or attempted to take an indecent liberty with the complainant; (4) the complainant was under 16 at the time the alleged act or attempted act occurred; and (5) the defendant's conduct was for the purpose of arousing or gratifying sexual desire. *State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987).

Defendant argues that a defendant's knowledge of the complainant's age is an element of taking indecent liberties with a minor, making mistake of age a valid defense to the crime. The plain language of N.C. Gen. Stat. § 14-202.1, however, does not support defendant's contention. The statute only requires that the complainant be "under the age of 16 years" at the time of defendant's conduct con-

stituting the offense. N.C. Gen. Stat. § 14-202.1(a), (b). There is no explicit *mens rea* requirement in N.C. Gen. Stat. § 14-202.1 as to the complainant's age. *See State v. Watterson*, —— N.C. App. ——, ——, 679 S.E.2d 897, 900 (2009) ("[I]n effectuating legislative intent, it is the duty of the courts to give effect to the words actually used in a statute and not to delete words used or to insert words not used.").

"When conduct is made criminal because the victim is under a certain age, it is no defense that the defendant was ignorant of or mistaken as to the victim's age; and it matters not that the defendant's mistaken belief was reasonable." 1 Charles E. Torcia, *Wharton's Criminal Law* § 78, at 563-64 (15th ed. 1996); *accord* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* § 7, at 919 (3rd ed. 1982) (explaining that " '[c]rimes such as . . . carnal knowledge, seduction, and the like, where the offense depends upon the [victim]'s being below a designated age . . . do require a *mens rea*,' although a reasonable mistake of fact as to [the victim's] age is no defense" (quoting Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 73-74 (1933))). *See also Morissette v. United States*, 342 U.S. 246, 251 n.8, 96 L. Ed. 288, 294 n.8 (1952) (noting "[e]xceptions [to *mens rea* requirement] . . . include sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent").

In *People v. Olsen*, 36 Cal. 3d 638, 685 P.2d 52, 205 Cal. Rptr. 492 (1984), the California Supreme Court confronted a virtually identical issue of legislative intent to the one presented in this case, holding that a good faith, reasonable mistake of age was not a defense to a charge of "willfully" committing "lewd or lascivious acts involving children." The California statute at issue in *Olsen*, similar to our indecent liberties statute, provides:

> Any person who *willfully* and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a *child who is under the age of 14 years*, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . .

Cal. Penal Code § 288(a) (2009) (emphasis added). Recognizing the "exist[ence] [of] a strong public policy to protect children of tender years[,]" the *Olsen* Court concluded that a mistake of age defense was "untenable," 36 Cal. 3d at 645, 685 P.2d at 56, 205 Cal. Rptr. at 496, and that "one who commits lewd or lascivious acts with a child, even with

a good faith belief that the child is [over the designated age], does so at his or her peril[,]" *id.* at 649, 685 P.2d at 59, 205 Cal. Rptr. at 499. *See also Childers v. State*, 100 Nev. 280, 282-83, 680 P.2d 598, 599 (1984) (holding mistake of fact as to victim's age was not valid defense to statutory offense of "willful" child abuse); *United States v. Wilson*, 66 M.J. 39, 43 (C.A.A.F.) (noting that "[t]wenty-two states have no provision in their statutory framework for a mistake of fact defense when the sexual activity involves children: there is neither a mens rea with respect to age nor an explicit defense"), *cert. denied*, ––– U.S. ––––, 171 L. Ed. 2d 889 (2008).

This Court has similarly noted "the legislative policy, inherent in [N.C. Gen. Stat. § 14-202.1], to provide broad protection to children from the sexual conduct of older persons, especially adults." *State v. Hicks*, 79 N.C. App. 599, 603, 339 S.E.2d 806, 809 (1986). Our Supreme Court has also recognized "the great breadth of protection against sexual contact the statute seeks to afford children and the reasons for it":

> Undoubtedly [N.C. Gen. Stat. § 14-202.1's] breadth is in recognition of the significantly greater risk of psychological damage to an impressionable child from overt sexual acts. We also bear in mind the enhanced power and control that adults, even strangers, may exercise over children who are outside the protection of home or school.

State v. Banks, 322 N.C. 753, 766, 370 S.E.2d 398, 407 (1988) (citation and quotation marks omitted); *accord State v. Harward*, 264 N.C. 746, 749, 142 S.E.2d 691, 694 (1965) (observing that legislative purpose of § 14-202.1 was to "supplement [existing law] and to give even broader protection to children"). We conclude, therefore, that a defendant's mistake as to the complainant's age is not a valid defense to a charge of taking indecent liberties with a minor under N.C. Gen. Stat. § 14-202.1. As the defense is inapplicable, the trial court properly refused to give defendant's proffered instruction on the defense. *See also Darden v. State*, 798 So.2d 632, 634 (Miss. Ct. App. 2001) (holding trial court did not err in refusing to give mistake of age instruction to jury in sexual battery case because mistake of age defense is not valid defense to sex crimes designed to protect children).

B. Meaning of "Willfully"

[2] Defendant also argues that the trial court erred by not giving the jury her requested instruction regarding the meaning of "willfully" in N.C. Gen. Stat. § 14-202.1(a). Basing her requested instruction on lan-

guage in the Supreme Court's decision in *State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940), defendant requested the trial court to instruct the jury that " 'willfully' means something more than an intention to commit the offense. It implies committing the offense purposely and designed in violation of law." The trial court declined to give defendant's proffered instruction, and, instead, instructed the jury that "[t]he term willfully means that the act is done purposely and without justification or excuse." The trial court's instruction on "willfulness" is taken from *State v. Maxwell*, 47 N.C. App. 658, 660, 267 S.E.2d 582, 584, *appeal dismissed and disc. review denied*, 301 N.C. 102, 273 S.E.2d 307 (1980), where this Court held that the term "willfully" in N.C. Gen. Stat. § 14-202.1 means "purposely and without justification or excuse."

Although the trial court is required to give a requested instruction if it is legally correct and supported by the evidence, *Harvell*, 334 N.C. at 364, 432 S.E.2d at 129, a defendant is not entitled to have the requested instruction given verbatim, so long as it is given in substance, *State v. Agnew*, 294 N.C. 382, 395, 241 S.E.2d 684, 692, *cert. denied*, 439 U.S. 830, 58 L. Ed. 2d 124 (1978). As this Court has observed: "Determining whether a requested instruction was given in substance is undeniably a very subjective undertaking. Our appellate courts have been loath to find reversible error based on failure to give a requested jury instruction when in the court's opinion the 'in substance' requirement has been fulfilled." *State v. Carson*, 80 N.C. App. 620, 625, 343 S.E.2d 275, 279 (1986).

Our Supreme Court recently defined the term "willfully" to mean " 'the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law.' " *State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 226 (2009) (quoting *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965) (per curiam)). As the trial court's instruction in this case—explaining that "willful[ness]" denotes an act "done purposely and without justification or excuse"—largely mirrors the Supreme Court's definition in *Ramos*, we conclude that the trial court's instruction to the jury is a correct statement of the law and substantially similar to the one requested by defendant. The trial court, therefore, did not err in refusing to give the specific instruction requested by defendant.

II. Arguments to Jury

[3] Based on her argument regarding her requested instruction on mistake of age, defendant argues that the trial court erred by pre-

venting defense counsel from arguing the defense to the jury. Under N.C. Gen. Stat. § 7A-97 (2009), "[c]ounsel is given wide latitude to argue the facts and all reasonable inferences which may be drawn therefrom, together with the relevant law, in presenting the case to the jury." *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977). N.C. Gen. Stat. § 7A-97, however, "does not authorize counsel to argue law which is not applicable to the issues, for such arguments 'could only lead to confusion in the minds of the jury.' " *In re Farr's Will*, 277 N.C. 86, 93, 175 S.E.2d 578, 583 (1970) (quoting *State v. Crisp*, 244 N.C. 407, 412, 94 S.E.2d 402, 406 (1956)). "When the remarks of counsel are not warranted by either the evidence or the law, . . . it is the duty of the judge to interfere." *Id.*

As the trial court correctly concluded that a mistake of age defense is not a valid defense to taking indecent liberties with a minor, it did not err by preventing defense counsel from arguing the defense to the jury at defendant's trial. *See Crisp*, 244 N.C. at 412-13, 94 S.E.2d at 406 (holding that where "law of self-defense was irrelevant to the case, and had no application to the facts," trial court properly prevented trial counsel from arguing defense to jury).

Defendant similarly argues that the trial court should have allowed defense counsel to argue to the jury that in order for defendant to have acted "willfully," she must have been "aware that [Beth] was underage and engaged in sexual activity with her anyway." Defendant's contention regarding "willfulness" is simply a variant of her "mistake of age" argument. The trial court properly refused to allow defendant's "willfulness" argument as it is premised on an incorrect view of the law. Accordingly, we uphold defendant's convictions.

No Error.

Chief Judge MARTIN and Judge ERVIN concur.

HAZEL S. HAWKINS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NEAL HAWKINS, JR., DECEASED, AND AS PERSONAL REPRESENTATIVE OF THE STATUTORY BENEFICIARIES, PLAINTIFF V. SSC HENDERSONVILLE OPERATING COMPANY, LLC D/B/A THE BRIAN CENTER HEALTH AND REHABILITATION-HENDERSONVILLE, DEFENDANT

No. COA09-23

(Filed 2 March 2010)

Medical Malpractice— expert witness—national standard of care—regulated nursing home

The trial court erred by denying defendant's motion for a directed verdict in a medical malpractice action involving a nursing home where plaintiff's experts testified that a national standard of care applied to all nursing homes due to federal regulations, but did not testify to any familiarity with the nursing home in question or the community in which it is located.

Appeal by defendant from judgment entered 6 December 2007 and order entered 22 February 2008 by Judge Dennis J. Winner in Henderson County Superior Court. Heard in the Court of Appeals 31 August 2009.

Poliakoff and Associates, P.A., by Gary Poliakoff and Raymond Mullman, Jr., for plaintiff-appellee.

Ellis & Winters, LLP, by Leslie C. O'Toole; Proskauer Rose LLP, by Malcolm J. Harkins, III; and Proctor & Ervin, P.C., by Lori Proctor, for defendant-appellant.

BRYANT, Judge.

The plaintiff in a medical malpractice action must tender an expert who can testify to a familiarity with the standards of practice in the same or a similar community as defendant.[1] In the present case, plaintiff sought to establish the standard of care applicable to the care provided to her 86-year-old husband by defendant nursing home through the testimony of three medical experts. Because these witnesses testified regarding a national standard of care rather than the standards of practice in the community in which defendant is located, we reverse the denial of defendant's motion for a directed verdict.

1. N.C. Gen. Stat. § 90-21.12; *see also Henry v. Southeastern Ob-Gyn Assocs., P.A.*, 145 N.C. App. 208, 211, 550 S.E.2d 245, 247, *aff'd* 354 N.C. 570, 557 S.E.2d 530 (2001).

Facts

Neal Hawkins Jr. was admitted to The Brian Center Health and Rehabilitation—Hendersonville (Brian Center) on 19 April 2004. He was 86 years old and suffered from dementia, peripheral vascular disease, hypothyroidism, high blood pressure, and chronic obstructive pulmonary disease. He had previously experienced several bouts of pneumonia. He was at high risk for falling and was believed to have fallen several times at home.

Hawkins' comprehensive care plan provided nine care measures to mitigate his risk of falling. On 4 September 2004, the Brian Center documented his first fall in the facility. Hawkins' care plan was not revised at that time. Brian Center staff reported a general noticeable deterioration in Hawkins' condition in December 2004, and on 7 January 2005 Hawkins was again diagnosed with pneumonia.[2]

On 11 February 2005, Hawkins fell three different times. At approximately 12:30 a.m., Hawkins was found on the floor next to his bed. A Brian Center nurse ascertained that Hawkins had no apparent injury. The nurse reported the incident to Dr. Murphy, Hawkins' personal physician, by fax.

Another nurse found Hawkins on the floor at approximately 11:15 a.m. Dr. Murphy was again notified of the fall. An x-ray was taken after the second fall; no fractures were found; and Hawkins denied being in pain.

At approximately 8:30 p.m. Hawkins was found on the floor a third time. A third nurse assessed Hawkins. He denied pain or discomfort, and could move his extremities well, but his blood pressure was found to be lower than normal. The following morning, the nurse on duty notified Dr. Murphy by fax that Hawkins had fallen.[3]

On 18 February 2005, Hawkins was transferred to Pardee Hospital where another x-ray revealed a fractured left hip. The next day, Hawkins underwent hip replacement surgery. On 23 February 2005, Hawkins left Pardee Hospital and was admitted to Pardee Care Nursing Home.

Hawkins was readmitted to Pardee Hospital on 13 March 2005 with a methicillin-resistant staphylococcus infection. He suffered

2. Defendant began operating the Brian Center on 1 January 2005.

3. Dr. Murphy later testified that 14 February 2005 was the first day he was notified that Hawkins had fallen three times the previous Friday; however, he was not notified about the drop in Hawkins's blood pressure.

from pneumonia secondary to that infection, and was admitted to hospice care. Hawkins died at Pardee Hospital on 22 March 2005. His death certificate lists pneumonia as the primary cause of death.

On 9 January 2006, Mrs. Hawkins (plaintiff), as a representative of Neal Hawkins' estate, filed a complaint against The Brian Center—Hendersonville, Inc., Brian Center Health & Rehabilitation—Hendersonville, Inc., and SavaSeniorCare, LLC. SSC Hendersonville Operating Company, LLC was later substituted for SavaSeniorCare, LLC. The complaint was subsequently amended to name Mariner Health Care Management Company as a defendant.[4] In the complaint, plaintiff alleged negligence and recklessness, negligence per se, breach of contract, and negligent spoliation of evidence.

A jury trial began on 5 November 2007. Before opening statements, plaintiff withdrew the claims for breach of contract and negligence per se. Three witnesses testified on plaintiff's behalf as to the standard of care applicable to defendant's care: Dr. Jonathan Klein—as an expert in the fields of internal medicine, geriatric medicine, and as a nursing home medical director board certified in internal medicine and geriatrics, licensed to practice in Virginia; Katherine Johnson—as an expert in the field of nursing, licensed in Florida; and Janet White—as an expert in the field of nursing administration, licensed in the state of Virginia. Each witness was a medical practitioner licensed outside of North Carolina. Each witness testified that defendant breached the nationwide standard for nursing home care established by the federal Omnibus Reconciliation Act ("OBRA").

After plaintiff's case-in-chief and again before submission of the matter to the jury, defendant made a motion under Rule 50 for a directed verdict. The trial court denied the motion. The jury returned a verdict finding that defendant caused Hawkins' injury but not his death and awarded Hawkins' estate $200,000.00. The jury determined defendant to be liable for punitive damages in the amount of $600,000.00. On 6 December 2006, the trial court entered judgment in accordance with the jury verdict.

On 17 December 2006, defendant filed a Rule 50 Motion for Judgment Notwithstanding the Verdict. Alternatively, plaintiff sought

4. At the time of Hawkins' admission, The Brian Center was operated by Mariner Health Care Management Company and Living Centers-Southeast, Inc. On 1 January 2005, the facility's operation was assumed by SSC Hendersonville Operating Company, LLC. The complaint against Mariner Health Care Management Company and Living Centers-Southeast, Inc. d/b/a Brian Center Health and Rehabilitation/Hendersonville was dismissed by consent order filed 1 December 2006.

a new trial and/or a set-off of the verdict amount. The trial court denied defendant's motion. From both the judgment entered in accordance with the jury verdict and the order denying defendant's Rule 50 motion, defendant appeals.

Defendant raises several arguments on appeal; however, because the following argument is dispositive, we address only that argument. Defendant argues that the trial court erred in denying its Rule 50 motion for a directed verdict in light of the fact that plaintiff failed to establish the standard of care in the same or a similar community as required by N.C. Gen. Stat. § 90-21.12. "On appeal our standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict; that is, whether the evidence was sufficient to go to the jury." *Whitaker v. Akers*, 137 N.C. App. 274, 277, 527 S.E.2d 721, 724 (citation and internal quotation marks omitted), *disc. review denied*, 352 N.C. 157, 544 S.E.2d 245 (2000).

"One of the essential elements of a claim for medical negligence is that the defendant breached the applicable standard of medical care owed to the plaintiff." *Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999). "Plaintiffs must establish the relevant standard of care through expert testimony." *Crocker v. Roethling*, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009) (citations omitted). "To meet their burden of proving the applicable standard of care, plaintiffs must satisfy the requirements of N.C.G.S. § 90-21.12 . . ." *Id.*

Under North Carolina General Statute, section 90-21.12:

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

N.C. Gen. Stat. § 90-21.12 (2007) (emphasis added).

We interpreted this statute in *Henry*, 145 N.C. App. 208, 550 S.E.2d 245, as requiring more from a plaintiff than testimony merely establishing a national standard of care. *Id.* at 211, 550 S.E.2d at 247.

In *Henry*, the plaintiffs brought a medical malpractice action to recover for the alleged negligent prenatal and obstetrical care rendered by defendants. *Id.* at 208, 550 S.E.2d at 246. The plaintiffs tendered one expert, an OB-GYN specialist licensed in South Carolina and Georgia. *Id.* at 208-09, 550 S.E.2d at 246. Although that expert testified he was familiar with the national standard of care, "he failed to testify in any instance that he was familiar with the standard of care in [the same community as the defendant] or similar communities." *Id.* at 210, 550 S.E.2d at 246. The trial court found that the plaintiffs failed to establish the relevant standard of care, and directed the verdict in the defendant's favor. *Id.* at 209, 550 S.E.2d at 446.

On appeal, the plaintiffs argued that their expert could establish the standard of care applicable to defendant because their expert was familiar with the national standard. *Id.* at 209, 550 S.E.2d at 246. They also argued that their expert's familiarity with the standard of care in Spartanburg, South Carolina enabled him to testify to the standard of care in Chapel Hill or Durham, North Carolina. *Id.* "Thus, argue[d] [the] plaintiffs, [the expert witness] could testify to the applicable standard of care in Wilmington even though he was unacquainted with its medical community." *Id.* This Court rejected the plaintiff's theory. "To adopt [the] plaintiffs' argument, this Court would have to ignore the plain language of N.C. Gen. Stat. § 90-21.12 and its evidentiary requirement that the 'similar community' rule imposes, as well as well-established case law." *Id.* at 212, 550 S.E.2d at 248. *Cf. Smith v. Whitmer*, 159 N.C. App. 192, 582 S.E.2d 669, (2003) (affirming a grant of summary judgment for defendant when plaintiff's expert could testify only to a national standard of care, but there was no evidence that a national standard of care was the same standard of care practiced in defendants' community).

We have elsewhere stated that "[w]here the standard of care is the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community." *Haney v. Alexander*, 71 N.C. App. 731, 736, 323 S.E.2d 430, 434 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 889-90 (1985); *see also Marley v. Graper*, 135 N.C. App. 423, 428-30, 521 S.E.2d 129, 133-34 (1999), *disc. review denied*, 351 N.C. 358, 542 S.E.2d 214 (2000); *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 656-57, 535 S.E.2d 55, 67 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 370, 547 S.E.2d 2 (2001). Responding to this trend, *Henry* stated that "[t]his Court, however, has recognized very few 'uniform procedures' to which a national standard may apply,

and to which an expert may testify." *Henry*, 145 N.C. App. at 211, 550 S.E.2d at 247.[5]

Henry produced three separate opinions from the Court of Appeals, with one judge concurring in the result and another dissenting. The North Carolina Supreme Court affirmed our holding without further comment. *Henry*, 354 N.C. 570, 557 S.E.2d 530. Because of the fractured disposition in *Henry*, a subsequent opinion of this Court questioned whether *Henry* constitutes controlling authority. See *Cox v. Steffes*, 161 N.C. App. 237, 245, 587 S.E.2d 908, 914 n.1 (2003), *disc. rev. denied*, 358 N.C. 233, 595 S.E.2d 148 (2004).

However, this issue appears to have been clarified by the more recent opinion in *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 605 S.E.2d 154 (2004), *aff'd* 359 N.C. 626, 614 S.E.2d 267 (2005). In *Pitts*, we stated,

> the critical inquiry is whether the doctor's testimony, taken as a whole, meets the requirements of N.C. Gen. Stat. § 90-21.12. In making such a determination, a court should consider whether an expert is familiar with a community that is similar to a defendant's community in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community.

Id. at 197, 605 S.E.2d at 156. *Pitts* recognizes that "[t]here appears to be some conflict concerning what testimony sufficiently obviates the need to show an expert's familiarity with a defendant's community under N.C. Gen. Stat. § 90-21.12." *Id.* at 197, 605 S.E.2d at 156 n.2. Nevertheless, *Pitts* stated that "*Henry* requires some level of familiarity with a defendant's community even if an expert testifies the standard is the same across the country." *Id.*[6]

Here, plaintiff presented three witnesses, admitted as experts in their respective fields, who testified to the standard of care ap-

5. Plaintiff argues that "[t]he type of care rendered in nursing homes is precisely the type of care that the Court in *Henry* suggested would support a national standard of care."[P4] On the contrary, the only procedures that *Henry* explicitly mentions as subject to a national standard are "the taking of vital signs or the placement of bedpans." *Henry*, 145 N.C. App. at 211, 550 S.E.2d at 247. We do not consider plaintiff's allegations of defendants' "reckless conduct, willful violation of policies and procedures, lack of training and competence, and intentional falsification of [Hawkins'] clinical record" to be analogous to the misplacement of bedpans.

6. We recognize that this issue has yet to be fully addressed by our Supreme Court and we are therefore bound by the holdings of this Court. We nonetheless further recognize that this issue is ripe for a definitive ruling by our Supreme Court and therefore urge our Supreme Court to grant discretionary review.

plicable to The Brian Center: Dr. Jonathan Klein, Katherine Johnson, and Janet White. Dr. Klein was tendered as an expert witness in the fields of internal medicine, geriatric medicine, and as a nursing home medical director. He testified to the existence of a standard that applies to all licensed nursing homes in the United States:

> Dr. Klein: That is called OBRA regulations for short; it's the Omnibus Reconciliation Act, which was a law that was enacted to consolidate and unify all the various, different standards that were, unfortunately, not quite up to par in many cases and this was to assure that the certain class of people, specifically, the vulnerable elderly, in nursing homes were taken care of correctly throughout the whole country.
>
> . . .
>
> Counsel: All right, sir. And, again, would that law also apply to the Brian Center in Hendersonville, North Carolina?
>
> Dr. Klein: Yes, it would.
>
> Counsel: Like all nursing homes in the United States?
>
> Dr. Klein: Correct.
>
> Counsel: And is that a standard you're talking about for the care of patients in nursing homes, that OBRA?
>
> Dr. Klein: Yes. It was utilized to, again, to unify under one heading all the things that nursing homes were supposed to do.
>
> Counsel: All right. And regardless of whether a nursing home is in Hendersonville, North Carolina, or in northern Virginia or in any other state, are all licensed nursing homes under that standard called OBRA?
>
> Dr. Klein: Yes.

Katherine Johnson was tendered as an expert in the field of nursing. She testified that Federal "OBRA" regulations established a standard of care that applied to all nursing homes, including The Brian Center. On *voir dire*, prior to her admission as an expert witness, Johnson testified that she had never been licensed in North Carolina, did not do any analysis of the level of training and experience of the nursing resources available to facilities in Hendersonville or communities similar to Hendersonville, was not acquainted in any way with the nursing home community in the Hendersonville area, did not

research the standard of care for facilities in the Hendersonville area as of February 2005, did not study the variations of facilities, available equipment, funding, or available hospitals in the Hendersonville area as of February 2005, and conducted no analysis of resources available in the Hendersonville community or of the standard of care practiced in communities with similar resources as the Brian Center in February 2005.

Finally, Janet White was admitted as an expert in the field of nursing home administration. She submitted the following testimony on the standard of care applicable to the Brian Center:

> White: In our industries the OBRA standards are the regulations that we consider to be a national standard, a community standard. We establish our policies to address those, to assure compliance and we utilize those in our day-to-day operations.
>
> Counsel: All right. Now, does OBRA also apply to the Brian Center in Hendersonville, North Carolina?
>
> White: Yes, sir.
>
> Counsel: Is it a nationwide standard?
>
> White: Yes, sir, it is.
>
> Counsel: And it's applied at all licensed nursing facilities in the United States?
>
> White: I would certainly think it would be. I suppose it's possible, if there was a strictly private pay facility, that might not receive government funding, it's possible that may not be the case, but I would say in every nursing home that receives any type of government funding, OBRA regulations would be the standard of care.
>
> Counsel: All right. And it's your understanding then that OBRA would apply to [The] Brian Center in Hendersonville, North Carolina?
>
> White: Absolutely.

This testimony indicates that the witnesses opined that a national standard of care applied to the Brian Center. But the witnesses did not testify to any familiarity with the Brian Center or the community in which it is located. They did not testify regarding whether its standards of practice were in fact the same or different from the national standard. In short, they did not demonstrate any level of familiarity

with defendant's community or a similar community as required by *Henry* and *Pitts*. The testimony presented by defendant's experts did not remedy the omission. *See Cox*, 161 N.C. App. at 246, 587 S.E.2d at 914.

We therefore hold that the trial court erred in denying defendant's motion for a directed verdict. Defendants were entitled to a directed verdict as a matter of law. In light of our holding, we need not address further argument by defendants.

Reversed.

Chief Judge MARTIN and Judge HUNTER, Robert C., concur.

STATE OF NORTH CAROLINA v. JYREE DOMINIC NOEL

No. COA09-784

(Filed 2 March 2010)

1. Assault— on a government official—spitting—evidence sufficient

The evidence, taken in the light most favorable to the State, was sufficient for the trial court to deny defendant's motion to dismiss charges of assault on a government official where an officer testified that defendant had spat upon him.

2. Indictment and Information— variance—essential element of offense not involved

There was no fatal variance between the evidence and indictments for assault on a government official and malicious conduct by a prisoner where the handcuffed defendant spat upon an officer. The duty being performed is not an essential element of either assaulting a government official or malicious conduct by a prisoner, unlike assaulting an officer in the performance of a duty.

3. Assault— on a government official—spitting—knowing and willful

The conduct and statements of defendant prior to and during an encounter with an officer supported a conclusion that defendant acted knowingly and willfully when he spat on the officer.

4. Prisons and Prisoners— malicious conduct by prisoner—evidence of custody sufficient

In a prosecution for malicious conduct by a prisoner, there was sufficient evidence to allow a jury to conclude that defendant would have believed that he was not free to leave at the time of the encounter with the officer, and thus that he was in custody.

5. Indictment and Information— malicious conduct by prisoner—notice of charges sufficient

An indictment for malicious conduct by a prisoner was sufficiently precise to fully apprise defendant of the charges against him.

Appeal by Defendant from judgment entered 11 February 2009 by Judge Benjamin G. Alford in Onslow County Superior Court. Heard in the Court of Appeals 18 November 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

Richard E. Jester for Defendant.

STEPHENS, Judge.

I. Procedural History

Defendant Jyree Dominic Noel was tried before a jury on charges of (1) assault on a government official, (2) malicious conduct by a prisoner, (3) resisting, obstructing, and delaying an officer, and (4) littering. Upon motion by Defendant at the close of the State's evidence, the trial court dismissed the charges of resisting, obstructing, and delaying an officer, and littering. Defendant's motion to dismiss the remaining charges at the close of all the evidence was denied. The jury found Defendant guilty of assault on a government official and malicious conduct by a prisoner. Defendant admitted his status as an habitual felon. The trial court entered judgment upon the jury verdict, sentencing Defendant to a term of 80 to 105 months in prison. From this judgment, Defendant appeals.

II. Factual Background

Relevant to the issues before this Court, the State's evidence tended to show the following: On 7 November 2008, Defendant was a passenger in a vehicle being driven by Tony Gary, Jr. Mr. Gary attempted to evade officers of the Jacksonville Police Department

who were seeking to stop the vehicle. During the pursuit, officers observed plastic bags being thrown from the vehicle into the river below. When officers succeeded in stopping the vehicle, Mr. Gary resisted arrest. Consequently, Officer Kim Carnes "issued him two taser shots to get him to comply with being taken into custody."

Officer Marc Holden testified that when the vehicle was stopped, he ran around to the passenger side. When he got there, he saw Defendant being removed from the vehicle by two officers, and refusing to keep his hands up. Defendant was handcuffed and placed sitting on the curb by the two officers, who did not testify. During this time, Defendant was belligerent and cursing at the officers.

Officer Kevin Doyle testified that Defendant was being "very belligerent, yelling at us, telling us we didn't have nothing on him, telling us, 'f—k you[,]' just continuously being very belligerent in his mannerisms."

Officer John Ervin testified that after taking Mr. Gary into custody, Officer Ervin approached Defendant, who at that time was handcuffed and sitting on the curb, to ask Defendant what had been thrown from the vehicle. As Officer Ervin approached Defendant, Defendant said, " 'F—k you, n——r. I ain't got nothing. You ain't got nothing on me.' " Before Officer Ervin was able to ask any questions, Defendant "spit and it struck me on my right leg, and I reflexed and I punched him in the jaw." Officer Ervin then walked away.

III. Discussion

A. Motion to Dismiss

Defendant first argues that the trial court erred in denying Defendant's motion to dismiss the charges of assault on a government official and malicious conduct by a defendant in custody. We disagree.

On appeal of a trial court's denial of a motion to dismiss for insufficient evidence, this Court considers "whether substantial evidence exists as to each essential element of the offense charged and of the defendant being the perpetrator of that offense." *State v. Glover*, 156 N.C. App. 139, 142, 575 S.E.2d 835, 837 (2003) (citing *State v. Barden*, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003)). " 'The existence of substantial evidence is a question of law for the trial court, which must determine whether there is relevant evidence that a reasonable mind might

accept as adequate to support a conclusion.' " *Id.* (quoting *Barden*, 356 N.C. at 351, 572 S.E.2d at 131). In determining the existence of substantial evidence, "[t]he court must 'consider the evidence in the light most favorable to the State, take it to be true, and give the State the benefit of every reasonable inference to be drawn therefrom.' " *Id.* (quoting *State v. Martin*, 309 N.C. 465, 480, 308 S.E.2d 277, 286 (1983)).

The essential elements of a charge of assault on a government official are: (1) an assault (2) on a government official (3) in the actual or attempted discharge of his duties. *State v. Crouse*, 169 N.C. App. 382, 387, 610 S.E.2d 454, 458, *disc. review denied*, 359 N.C. 637, 616 S.E.2d 923 (2005); N.C. Gen. Stat. § 14-33(c)(4) (2007). The essential elements of a charge of malicious conduct by a prisoner are:

> (1) the defendant threw, emitted, or caused to be used as a projectile a bodily fluid or excrement at the victim;
>
> (2) the victim was a State or local government employee;
>
> (3) the victim was in the performance of his or her State or local government duties at the time the fluid or excrement was released;
>
> (4) the defendant acted knowingly and willfully; and
>
> (5) the defendant was in the custody of . . . any law enforcement officer . . . .

State v. Robertson, 161 N.C. App. 288, 292-93, 587 S.E.2d 902, 905 (2003); N.C. Gen. Stat. § 14-258.4(a) (2007). A charge of malicious conduct by a prisoner need not include an assault and, thus, a charge of assault on a law enforcement officer may not necessarily be a lesser-included offense of a charge of malicious conduct by a prisoner. In the case *sub judice*, however, the charge of malicious conduct by a prisoner contains all the elements of the charge of assault on a government official as "bespattering a law enforcement official with bodily fluids . . . certainly includes an assault[.]" *Crouse*, 169 N.C. App. at 387, 610 S.E.2d at 458.

1. Emission of a Bodily Fluid/Assault

[1] First, Defendant argues that Officer Ervin's "many statements about the spitting incident do not establish that [Defendant] spit a bodily fluid on him." We disagree.

Officer Ervin testified regarding "the spitting incident" as follows: Officer Ervin approached Defendant to ask Defendant what had been

thrown out of the car window. Defendant was sitting on the curb with his hands behind his back in handcuffs and his legs in front of him with his knees up. Officer Ervin stood "directly in front of" Defendant. Officer Ervin testified that Defendant "spit and it struck me on my right leg[.]" Officer Ervin "seen it when he spit on me[,]" and testified that "it landed on my pants leg . . . [b]etween my knee and my ankle."

Defendant argues that "there should be far more proof than one officer's statement and unfounded conclusion as to what a substance is[,]" and hypothesizes that "[a] drop of water could have splashed on the officer" since the arrest occurred next to a river. However, "consider[ing] the evidence in the light most favorable to the State, tak[ing] it to be true, and giv[ing] the State the benefit of every reasonable inference to be drawn therefrom[,]" *Martin*, 309 N.C. at 480, 308 S.E.2d at 286, we conclude that Officer Ervin's testimony was sufficient to allow a reasonable inference that Defendant "emitted . . . a bodily fluid[,]" *Robertson*, 161 N.C. App. at 292, 587 S.E.2d at 905, onto Officer Ervin and, thus, assaulted Officer Ervin. Defendant's argument is overruled.

2. Performance of Governmental Duties

[2] Defendant next argues that the State offered insufficient evidence that Officer Ervin was taking Defendant into custody for littering, as alleged in the indictments. Defendant asserts that there was a fatal variance between the charges as alleged in the indictments and the evidence adduced at trial, which tended to show that "[i]f Officer Ervin was performing any duty, it was interrogation."

Defendant further asserts that indictments charging a person with assault on a government official under N.C. Gen. Stat. § 14-33(c)(4) and malicious conduct by a prisoner under N.C. Gen. Stat. § 14-258.4 must meet the same requirements as one charging a person with the offense of resisting, delaying, or obstructing an officer under N.C. Gen. Stat. § 14-223. We disagree.

N.C. Gen. Stat. § 14-223 states that "[i]f any person shall willfully and unlawfully resist, delay[,] or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2007). It is well established that "[a]n indictment fails under N.C. Gen. Stat. § 14-223 if it does not describe the duty the named officer was discharging or attempting to discharge." *State v. Ellis*, 168 N.C. App. 651, 655, 608 S.E.2d 803, 806 (2005). This is required because

> [i]n the offense of resisting an officer, the *resisting* of the public officer in the *performance* of some duty is the primary conduct proscribed by that statute and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defendant's defense[.]

State v. Kirby, 15 N.C. App. 480, 488, 190 S.E.2d 320, 325, *appeal dismissed*, 281 N.C. 761, 191 S.E.2d 363 (1972).

However, in the offense of assaulting a government official, " 'the *assault* on the officer is the primary conduct proscribed by the statute and the particular duty that the officer is performing while being assaulted is of secondary importance.' " *State v. Waller*, 37 N.C. App. 133, 135, 245 S.E.2d 808, 810 (1978) (quoting *Kirby*, 15 N.C. App. at 488, 190 S.E.2d at 325). Accordingly, the specific duty the officer was performing while being assaulted is not an essential element of assault on a government official, as defined in N.C. Gen. Stat. § 14-33(c)(4), and is not required to be set out in the indictment. *See id.* (warrants charging defendant with assault on a government official and alleging that the officers were discharging or attempting to discharge duties of their office were sufficient without further specifying the particular duty which the officers were discharging or attempting to discharge at the time of the assaults).

Likewise, in the offense of malicious conduct by a prisoner, the malicious conduct toward the officer is the primary conduct proscribed by the statute, and the particular duty that the officer is performing at the time of the offense is of secondary importance. Accordingly, the specific duty the officer was performing at the time of the offense is not an essential element of malicious conduct by a prisoner, as defined in N.C. Gen. Stat. § 14-258.4, and is not required to be set out in the indictment. In this respect, the offense of malicious conduct by a prisoner is comparable to the offense of fleeing to elude arrest. *See State v. Teel*, 180 N.C. App. 446, 449, 637 S.E.2d 288, 290 (2006) ("[T]he offense of fleeing to elude arrest is not dependent upon the *specific* duty the officer was performing at the time of the offense. Therefore, the specific duty the officer was performing . . . is not an essential element of the offense . . . and was not required to be set out in the indictment.").

In this case, the indictments charged, *inter alia*:

> [Defendant] unlawfully and willfully did assault and strike Detective J.L. Ervin, a government officer . . . by spitting on

> Detective Ervin. At the time of the offense the officer was attempting to discharge the following duty of that employment: taking the [D]efendant into custody for littering.
>
> [Defendant] knowingly, while in custody of a law enforcement officer . . . [did] emit and cause to be used as a projectile a bodily fluid, spittle, sputum, or phlegm at Detective J.L. Ervin, an employee of a local government . . . while the employee was in the performance of the employee's duties, taking the defendant into custody for littering.

The evidence adduced at trial tended to show that Officer Ervin was interrogating Defendant when Defendant spit on him. We agree there is variance between the allegations in the indictment and the proof offered, but the variance is not material. The indictments alleged that Officer Ervin was performing his duties as a government employee. Proof was offered to support the material allegation that Officer Ervin was performing a government duty when he was spit upon. The additional allegation as to the exact duty being performed by Officer Ervin was surplusage and must be disregarded. *See State v. Rogers*, 273 N.C. 208, 213, 159 S.E.2d 525, 529 (1968) ("The indictment charged the essential elements of the crime of armed robbery. Proof was offered to support the material allegations. The additional allegations as to ownership of the property were surplusage and must be disregarded.").[1] Accordingly, as there was no fatal variance between the indictments and the proof adduced at trial, and there was sufficient evidence that Officer Ervin was performing a government duty at the time of the offense, Defendant's argument is overruled.

3. Knowingly and Willfully

[3] Defendant next challenges the sufficiency of the evidence to support a finding that Defendant acted knowingly and willfully when he spit on Officer Ervin.

Whether a defendant acted knowingly and willfully may be inferred from the circumstances. *Crouse*, 169 N.C. App. at 389, 610 S.E.2d at 459. "Knowledge is a mental state and may be proved by the conduct and statements of the defendant, by statements made to him by others, by evidence of reputation which it may be inferred had

1. Although *Rogers* was overruled by *State v. Hurst*, 320 N.C. 589, 359 S.E.2d 776 (1987), on grounds irrelevant to the case *sub judice*, *Hurst* was subsequently overruled by *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988), reinstating the law in *Rogers*.

come to his attention, and by circumstantial evidence from which an inference of knowledge might reasonably be drawn." *State v. Boone*, 310 N.C. 284, 294-95, 311 S.E.2d 552, 559 (1984). "Likewise, the willfulness of a defendant's conduct may be inferred from the circumstances surrounding the crime." *Crouse*, 169 N.C. App. at 389, 610 S.E.2d at 459.

In this case, Defendant was uncooperative with the law enforcement officers, refusing to keep his hands up, as officers removed him from the vehicle. While Defendant was sitting on the curb in handcuffs, Defendant was "belligerent and cussing at the officers." As Officer Ervin approached Defendant, and immediately before Defendant spit on him, Defendant said, "F—k you, n——r. I ain't got nothing. You ain't got nothing on me." We conclude that the conduct and statements of Defendant prior to and during the encounter with Officer Ervin supports a conclusion that Defendant acted knowingly and willfully when he spit on Officer Ervin. Defendant's argument is without merit.

4. In Custody

[4] Defendant additionally argues that the State offered insufficient evidence that Defendant was in custody within the meaning of N.C. Gen. Stat. § 14-258.4 at the time of the encounter.

The standard for determining whether a defendant is in custody for purposes of N.C. Gen. Stat. § 14-258.4 is whether, " 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *State v. Ellis*, 168 N.C. App. 651, 658, 608 S.E.2d 803, 808 (2005) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509, *reh'g denied*, 448 U.S. 908, 65 L. Ed. 2d 1138 (1980)).

The evidence presented in this case tends to show that Defendant was "extricated from the vehicle and refusing to give up his hands[.]" After "struggling to get [Defendant's] arms" out from underneath Defendant, officers put Defendant's arms behind his back and handcuffed him. Officers then sat Defendant down on the curb. Officer Holden testified that there were numerous uniformed officers, including himself, at the scene. When asked if Defendant was free to leave, Officer Holden replied, "No, he was not." Officer Ervin likewise testified that Defendant "was not free to leave, due to the extent of the investigation for the vehicle chase and checking the vehicle for other contraband or weapons that may have been in there."

This evidence is sufficient to allow a jury to conclude that Defendant would have believed he was not free to leave the scene and, thus, to conclude that Defendant was in custody at the time of the encounter. *See id.* at 659, 608 S.E.2d at 808-09 (holding the defendant was in custody when officers chased and verbally and physically subdued defendant). Defendant's argument is overruled.

B. Indictment

[5] Defendant next argues that the trial court lacked jurisdiction because the indictment charging malicious conduct by a prisoner was insufficiently precise to fully apprise Defendant of the charges against him. Specifically, Defendant argues that the indictment is inherently inconsistent as it alleges that Defendant spat on Officer Ervin "while in custody of a law enforcement officer" while also alleging that Defendant spat on Officer Ervin while Officer Ervin was "taking the [D]efendant into custody for littering[.]" Defendant contends that this "circular conundrum" causes the indictment to fail. We disagree.

"The purpose of a bill of indictment is to put a defendant on such notice that he is reasonably certain of the crime of which he is accused." *State v. McGriff*, 151 N.C. App. 631, 634, 566 S.E.2d 776, 778 (2002). "An indictment is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *Id.* (citation and quotation marks omitted). "In general, an indictment couched in the language of the statute is sufficient to charge the statutory offense." *State v. Blackmon*, 130 N.C. App. 692, 699, 507 S.E.2d 42, 46, *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998). "It is also generally true that an indictment need only allege the ultimate facts constituting the elements of the criminal offense and that evidentiary matters need not be alleged." *Id.*

The applicable statute in this case provides:

> Any person in the custody of . . . any law enforcement officer . . . who knowingly and willfully throws, emits, or causes to be used as a projectile, bodily fluids or excrement at a person who is an employee of the State or a local government while the employee is in the performance of the employee's duties is guilty of a Class F felony.

N.C. Gen. Stat. § 14-258.4(a). The indictment in this case charges as follows:

> [Defendant] unlawfully, willfully and feloniously did knowingly, while in custody of a law enforcement officer, Detective J.L. Ervin of Jacksonville Police Department, emit and cause to be used as a projectile a bodily fluid, spittle, sputum, or phlegm at Detective J.L. Ervin, an employee of a local government, City of Jacksonville, North Carolina, while the employee was in the performance of the employee's duties, taking the defendant into custody for littering.

The indictment in this case charges the offense in the language of N.C. Gen. Stat. § 14-258.4 and alleges the ultimate facts constituting the elements of the criminal offense. Furthermore, as discussed *supra*, the additional allegation as to the exact duty being performed by Officer Ervin was mere surplusage and must be disregarded. *See Rogers*, 273 N.C. at 213, 159 S.E.2d at 529.

We hold that the indictment, which was properly couched in the language of N.C. Gen. Stat. § 14-258.4, was sufficient to identify the offense of malicious conduct by a prisoner; to protect Defendant from double jeopardy; to enable Defendant to prepare for trial and present a defense; and to support the judgment in this case. Accordingly, we overrule this assignment of error. Defendant received a fair trial, free of error.

NO ERROR.

Judges McGEE and STEELMAN concur.

JAMES SODER, EMPLOYEE, PLAINTIFF-APPELLANT v. CORVEL CORPORATION, EMPLOYER, AND THE TRAVELERS, CARRIER, DEFENDANTS-APPELLEES

No. COA09-542

(Filed 2 March 2010)

1. Workers' Compensation— Form 44 and brief—not timely

The Industrial Commission did not err by granting a motion to dismiss by defendants where plaintiff's statement of grounds for the appeal was not timely. Although plaintiff argued that Workers' Compensation Rule 701 requires dismissal only when no Form 44 and brief are filed and not when they are merely untimely filed, the Commission's interpretation of its rule is persuasive.

2. Appeal and Error— preservation of issues—different argument raised below

The argument of a workers' compensation plaintiff concerning the Industrial Commission's authority under Workers' Compensation Rule 801 was overruled where the ruling by the Commission was based on Rule 701.

3. Appeal and Error— preservation of issues—different argument raised below

An argument in a workers' compensation case concerning the Industrial Commission's denial of plaintiff's motion for reconsideration was dismissed where the argument on appeal was based on excusable neglect but the argument before the Commission involved the failure to consider documents.

Appeal by Plaintiff from orders entered 8 January 2009 and 22 January 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 October 2009.

Gray Newell, LLP, by Angela Newell Gray, for Plaintiff-Appellant.

Mullen Holland & Cooper P.A., by J. Reid McGraw, Jason R. Shoemaker, and Shantel A. Boone, for Defendants-Appellees.

McGEE, Judge.

James Soder (Plaintiff) filed a Form 33 with the Industrial Commission requesting that his workers' compensation claim for an injury occurring on 1 February 2001 be assigned for hearing. CorVel Corporation (Defendant) filed a Form 33R contesting Plaintiff's claim. Deputy Commissioner George Glenn, II, heard Plaintiff's claim with the hearing being completed in Cabarrus County on 30 August 2006. Deputy Commissioner Glenn ruled in favor of Defendants on 28 August 2008, concluding that Plaintiff had "failed to establish that he developed an occupational disease as a result of his employment with defendant-employer." Plaintiff appealed to the Industrial Commission. The Industrial Commission issued a notice that the matter was scheduled for hearing on the 9, 11, and 12 February 2009 docket.

Defendants filed a motion to dismiss Plaintiff's appeal on 17 December 2008, stating that Plaintiff failed to timely file and serve his Form 44 and his appellant's brief within twenty-five days of receipt of the transcript, "[pursuant] to Rule 701(2)" of the Workers' Compen-

sation Rules of the North Carolina Industrial Commission. Plaintiff submitted a response dated 29 December 2008 and received by the Industrial Commission 5 January 2009 entitled "Plaintiff's Response in Opposition to Defendant[s'] Motion to Dismiss, Motion for Continuance of Hearing and Motion to Deem Brief to Full Commission as Timely Filed." Plaintiff also filed his Form 44 and his appellant's brief with the Industrial Commission on 29 December 2008. Plaintiff concedes in his brief to our Court that "the Defendants received a copy of [Plaintiff's] Brief and Form 44 approximately twenty-one (21) days after the appropriate filing date, but forty-four (44) days prior to the date set for oral argument."

The Industrial Commission filed an order dismissing Plaintiff's appeal on 8 January 2009, stating "due to [Plaintiff's] failure to file any documentation identifying the particular grounds for [Plaintiff's] appeal, the Full Commission finds that Plaintiff has abandoned his appeal." Plaintiff filed a motion for reconsideration on 12 January 2009, which was denied in an order filed 22 January 2009. Plaintiff appeals the Industrial Commission's 8 and 22 January 2009 orders.

Motion to Dismiss

[1] Plaintiff argues the Industrial Commission committed reversible error by granting Defendants' motion to dismiss, citing abuse of discretion and insufficient evidence to support Defendants' motion. Plaintiff argues that Workers' Compensation Rule 701 authorizes dismissal only where no Form 44 and appellant's brief are filed at all. Plaintiff further argues that the Industrial Commission is required by Workers' Compensation Rule 801 and N.C. Gen. Stat. § 1A-1, Rule 37 "to consider a less severe sanction prior to dismissing an action with prejudice." We disagree.

Workers' Compensation Rule 701 provides:

> (2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3). Appellant's completed Form 44 and brief must be filed and served within 25 days of appellant's receipt of the transcript or receipt of notice that

there will be no transcript, unless the Industrial Commission, in its discretion, waives the use of the Form 44. The time for filing a notice of appeal from the decision of the Deputy Commissioner under these rules shall be tolled until a timely motion to amend the decision has been ruled upon by the Deputy Commissioner.

(3) Particular grounds for appeal not set forth in the application for review shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission.

Workers' Comp. R. of N.C. Indus. Comm'n 701, 2009 Ann. R. (N.C.) 1006.

In *Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 619 S.E.2d 907 (2005), our Court addressed the requirement of filing a Form 44 and an appellant's brief. In *Roberts*, the plaintiff gave notice of appeal but failed to file any documents with the Industrial Commission. *Id.* at 742, 619 S.E.2d at 909. The defendant likewise failed to file any documents, and after the time for filing had passed, the Industrial Commission gave notice to the parties that it would decide the matter on the record. *Id.* The defendant moved to be allowed to brief any matter to be decided. *Id.* The Industrial Commission did not rule on the defendant's motion and instead entered an award in favor of the plaintiff. *Id.* at 742-43, 619 S.E.2d at 909. The defendant moved for reconsideration, which was denied. *Id.* at 743, 619 S.E.2d at 909. The defendant appealed. *Id.*

On appeal, our Court noted that the plaintiff failed to file a "Form 44, brief, or any other document with the Full Commission setting forth grounds for appeal with particularity." *Id.* at 744, 619 S.E.2d at 910. We noted that the Industrial Commission "apparently waived the filing of Form 44 and expressly waived the holding of an oral argument, as permitted by Rule 701." *Id.* We held, however, that "the portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission." *Id.* Our Court reversed the Industrial Commission and vacated the opinion and award. *Id.*

Our Court addressed a similar issue in *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 652 S.E.2d 713 (2007). In *Wade*, the plaintiff's workers' compensation claim was denied, and her attorney thereafter moved to withdraw from representation. *Id.* at 247, 652 S.E.2d at 714. The plaintiff then filed a *pro se* notice of appeal and was informed that she must file a Form 44 and appellant's brief within twenty-five days of receipt of the transcript. *Id.* at 247, 652 S.E.2d at 714-15. The plaintiff made no such filings, and the defendants moved

to dismiss. *Id.* at 247, 652 S.E.2d at 715. The Industrial Commission denied the defendants' motion and invoked Workers' Compensation Rule 801 to waive the requirements of Rule 701 on the grounds that the plaintiff lacked representation. *Id.*

In *Wade*, our Court noted "the penalty for non-compliance with the particularity requirement is waiver of the grounds, and, where no grounds are stated, the appeal is abandoned." *Id.* at 249, 652 S.E.2d at 715. We held that Workers' Compensation Rule 801 did not authorize the Industrial Commission to waive the requirement that the plaintiff assert with particularity the grounds for review. *Id.* at 248, 652 S.E.2d at 715. We held

> that the Commission's application of Rule 801, in light of plaintiff's '*pro se* status,' to waive compliance with the provisions of Rule 701 in the interest of justice was an abuse of discretion. Its actions [were] incompatible with the fundamental right of defendants to notice of the grounds for plaintiff's appeal.

Id. at 252, 652 S.E.2d at 718.

Thus, it is clear that, where a party fails to file any document whatsoever setting forth the grounds for appeal, the appeal is deemed abandoned. Plaintiff argues that the case before us is distinguishable from *Roberts* and *Wade* in that Plaintiff "**did** file a brief and a Form 44 approximately twenty-one (21) days after the appropriate deadline. In addition, [Plaintiff] filed a motion to continue the hearing and to deem the brief as timely filed." Plaintiff contends that, "[w]hen read in proper context, it is apparent that the [Workers' Compensation] rule regarding the filing of the Form 44 and the Appellant's brief pertains to the failure to file a brief **entirely** rather than to the untimely filing of a brief."

Our Supreme Court has held that

> [t]he North Carolina Industrial Commission has the power not only to make rules governing its administration of the act, but also to construe and apply such rules. Its construction and application of its rules, duly made and promulgated, in proceedings pending before the said Commission, ordinarily are final and conclusive and not subject to review by the courts of this State, on an appeal from an award made by said Industrial Commission.

Winslow v. Carolina Conference Association, 211 N.C. 571, 579-80, 191 S.E. 403, 408 (1937). However, "[w]hile the construction of

statutes adopted by those who execute and administer them is evidence of what they mean, . . . that interpretation is not binding on the courts." *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 433, 444 S.E.2d 191, 195 (1994) (citations omitted); *but see Putman v. Alexander* —— N.C. App. ——, ——, 670 S.E.2d 610, 620 (2009) ("while we recognize that the Commission's legal interpretation of a particular provision is not binding, . . . the Commission's decisions in this and other cases . . . are persuasive authority on the issue") (citations omitted).

Plaintiff argues that the Industrial Commission erred in reading Workers' Compensation Rule 701 as requiring the *timely* filing of a statement of the grounds for the appeal, but he cites no authority for this contention. We find that the Industrial Commission's interpretation of Workers' Compensation Rule 701 "is evidence of what [it] mean[s]," and though "that interpretation is not binding on [this Court,]" we are not persuaded that the Industrial Commission erred in so construing Rule 701. *Id.*; *see also Stubbs v. Woodard*, I. C. No. 711692, 1999 WL 1211307, 1999 N.C. Wrk. Comp. LEXIS 1133 (1999) (Industrial Commission granted the defendants' motion to dismiss where the plaintiff filed her Form 44 and Brief approximately six months after the due date). Therefore, we agree with the Industrial Commission's interpretation of Workers' Compensation Rule 701 to require the timely filing of a statement of the grounds for an appeal, and failure to comply with that requirement will result in abandonment of the appeal.

In the case before us, Plaintiff failed to timely file a Form 44 and an appellant's brief setting forth the grounds for appeal and Defendants moved to dismiss the appeal. The Industrial Commission, citing *Roberts*, dismissed the appeal on the grounds that Plaintiff failed to timely file any documents setting forth the grounds for his appeal, thereby abandoning the appeal. In light of *Roberts* and the Industrial Commission's interpretation of Workers' Compensation Rule 701, we hold this interpretation was proper.

[2] Plaintiff further argues that "Rule 701 should not have been strictly applied in this particular incidence because he essentially complied with the rule, albeit untimely." Plaintiff then cites to Workers' Compensation Rule 801 and argues that the Industrial Commission may "relieve the parties from strict compliance with the rules of the Commission where strict compliance causes a harsh, uneven and unnecessarily prejudicial result." Workers' Compensation Rule 801 provides:

> In the interest of justice, these rules may be waived by the Industrial Commission. The rights of any unrepresented plaintiff will be given special consideration in this regard, to the end that a plaintiff without an attorney shall not be prejudiced by mere failure to strictly comply with any one of these Rules.

Workers' Comp. R. of N.C. Indus. Comm'n 801, 2009 Ann. R. (N.C.) 1009. The Industrial Commission's authority "under Rule 801 to waive violations of the rules in the interest of justice is discretionary and not obligatory . . . . Our standard of review of the Commission's exercise of a discretionary power is a deferential one, and the Commission's decision will not be overturned absent an abuse of discretion." *Wade*, 187 N.C. App. At 251, 652 S.E.2d at 717.

We note, however, that the Industrial Commission's order granting Defendants' motion to dismiss was not based upon Workers' Compensation Rule 801. The Industrial Commission's order in this case stated that: "*Pursuant to Rule 701* of the Workers' Compensation Rules, Roberts v. Wal-Mart Stores, Inc., 173 N.C. App. 740, 619 S.E.2d 907 (2005), and other applicable law, Defendants' motion to dismiss Plaintiff's appeal is hereby GRANTED." (Emphasis added). Our rules of appellate procedure provide:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. *It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.* Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

N.C. R. App. P. 10(b)(1) (emphasis added); *see also Gilreath v. North Carolina Dept. of Health and Human Servs.*, 177 N.C. App. 499, 501, 629 S.E.2d 293, 294, *aff'd per curiam*, 361 N.C. 109, 637 S.E.2d 537 (2006) (overruling the plaintiff's assignment of error regarding a motion to strike where there was no indication in the record that the trial court ruled on the plaintiff's motion to strike). Plaintiff cites no authority for his argument that the Industrial Commission should have used its authority under Workers' Compensation Rule 801 to

waive the requirements of Workers' Compensation Rule 701; instead, Plaintiff merely distinguishes his case from those cases on which Defendants relied in their motion to dismiss. Because Plaintiff failed to obtain a ruling on his request that the Industrial Commission exercise its authority under Rule 801 and further failed to properly argue that this was error, we overrule this portion of his argument.

Motion for Reconsideration

[3] Plaintiff next argues that the Industrial Commission committed reversible error by denying his motion for reconsideration. Plaintiff argues that denying this motion "was an abuse of discretion and there was insufficient evidence to support the denial[.]" Specifically, Plaintiff argues that our Court should reverse the Commission's order based on N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) and (6), on the grounds that he showed excusable neglect to support his motion to reconsider. We disagree.

Again, we look to N.C.R. App. P. 10(b)(1), which provides in pertinent part:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, *stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.*

N.C.R. App. P. 10(b)(1) (emphasis added). Where a party before the Industrial Commission fails to present an issue to the Industrial Commission and "thus . . . raises this issue for the first time here on appeal[,] . . . [that] failure to raise the issue below result[s] in a waiver of the issue." *Carey v. Norment Sec. Industries*, ––– N.C. App. ––, ––, 669 S.E.2d 1, 7 (2008).

Plaintiff's motion for reconsideration contained the following language:

> In support of this motion, . . . Plaintiff shows the Commission as follows:
>
> 1) [Plaintiff's] Brief was scheduled to be filed on or before December 8, 2008, however it was not filed at that time;
>
> 2) According to the certificate of service, . . . Defendant served its Motion to Dismiss to the undersigned counsel via regular mail on or about December 17, 2008. . . . Plaintiff received the motion

on approximately December 22, 2008 since December 20, 2008 was a Saturday;

3) [Plaintiff] timely responded to [Defendants'] motion by serving a Response to [Defendants'] Motion to Dismiss, a Motion for Continuance of Hearing, a Motion to Deem Brief to the Full Commission as Timely Filed, a Form 44 and the Appellant's Brief to the Full Commission upon counsel for [Defendants] via facsimile and first class mail on December 29, 2008. The same was submitted to the Full Commission via overnight mail to Linda Langdon and Layla Santa Rosa as evidenced by the attached Exhibit A[;]

4) [Plaintiff's] Response to [Defendants'] Motion to Dismiss, Motion for a Continuance of Hearing, and Motion to Deem Brief to the Full Commission as Timely Filed was file stamped by the Commission on January 5, 2009;

5) In its order of January 8, 2009, the Commission determined that [Plaintiff] had not filed any documents in support of its appeal. Consequently, it dismissed . . . Plaintiff's Appeal; and,

6) The facts show however that [Plaintiff] had filed documents with the Commission prior to the dismissal of the appeal which the Commission did not consider before dismissing [Plaintiff's] appeal.

WHEREFORE, in light of the foregoing and in the essence of substantial justice, we respectfully request that the Commission reconsider its order of January 8, 2009 dismissing [Plaintiff's] appeal.

A review of Plaintiff's motion to reconsider reveals no mention of excusable neglect. Rather, Plaintiff argued that the Industrial Commission failed to consider documents which had been filed. Because Plaintiff failed to raise his excusable neglect argument before the Industrial Commission, he failed to preserve the issue for appeal. We therefore dismiss this argument. Because Plaintiff makes no further argument related to this assignment of error, this assignment of error is overruled.

Affirmed.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. JEREMIAH BATCHELOR, III, DEFENDANT

No. COA09-366

(Filed 2 March 2010)

1. Evidence— hearsay—right to confrontation—no error

The trial court did not err in allowing into evidence a police officer's testimony that an informant told the officer to approach defendant to make a drug buy because the officer's testimony was not offered for the truth of the matter asserted: that defendant was a drug dealer. The testimony was not inadmissible hearsay and did not violate defendant's Sixth Amendment right to confrontation.

2. Evidence— character evidence—plain error—failure to show prejudice

The trial court did not commit plain error in allowing a police detective to testify that defendant was a "known drug dealer[.]" Even assuming *arguendo* that the testimony was inadmissible character evidence under N.C.G.S. § 8C-1, Rule 404(a), defendant failed to show "that absent the error, the jury probably would have reached a different result."

3. Identification of Defendants— in-court—failure to show prejudice

The trial court did not commit plain error by allowing a police officer's in-court identification of defendant where two other police detectives identified defendant as the individual from whom the police officer received crack cocaine.

4. Constitutional Law— effective assistance of counsel—failure to show prejudice

Defendant's argument that he did not receive effective assistance of counsel was overruled as defendant failed to demonstrate that, but for his counsel's alleged errors, there was a reasonable probability that there would have been a different result in the proceedings.

Appeal by defendant from judgment entered on or about 2 October 2008 by Judge Ronald L. Stephens in Superior Court, Person County. Heard in the Court of Appeals 16 September 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General James M. Stanley, Jr., for the State.

S. Hannah Demeritt, for defendant-appellant.

STROUD, Judge.

Defendant was convicted by a jury of possession with intent to sell and deliver cocaine and the sale of cocaine. Defendant appeals, arguing he must receive a new trial as the trial court erred in (1) admitting hearsay evidence regarding defendant being a drug dealer, (2) allowing character evidence regarding defendant being a drug dealer, and (3) allowing a tainted in-court identification of defendant. Defendant also claims ineffective assistance of counsel. For the following reasons, we find no prejudicial error.

I. Background

The State's evidence tended to show that on 22 March 2007, Detective Mark Massey, formerly a narcotics investigator with the Roxboro Police Department, was observing a controlled buy involving defendant and Deputy James Shell, formerly of the Yanceyville Police Department. The controlled buy was done by getting information from an informant and "hav[ing] an undercover officer who goes and purchases the crack or whatever drug it be from the actual seller." Deputy Shell's informant told him he "recognized someone" at a car wash. The informant approached defendant's vehicle and then returned to Deputy Shell and told him they needed to come back in a minute. Deputy Shell and the informant went through the Timberland Motel parking lot and then returned to the car wash where defendant was waving at them. Deputy Shell approached defendant's vehicle and requested $50.00 worth of crack cocaine. Defendant took some crack cocaine from the driver's side floorboard and gave it to Deputy Shell in exchange for the $50.00.

On or about 14 November 2007, defendant was indicted for possession with intent to sell and deliver cocaine and selling and delivering cocaine. On or about 2 October 2008, the jury found defendant guilty on both charges. Defendant was sentenced to a minimum of 20 months and a maximum of 24 months imprisonment. Defendant appeals, arguing he must receive a new trial as the trial court erred in (1) admitting hearsay evidence regarding defendant being a drug dealer, (2) allowing character evidence regarding defendant being a drug dealer, and (3) allowing a tainted in-court identification of

defendant. Defendant also claims ineffective assistance of counsel. For the following reasons, we find no prejudicial error.

II. Hearsay and the Confrontation Clause

[1] Defendant first argues that when

> the trial court allowed Officer Shell to testify that the informant told him to approach . . . [defendant] to make a drug buy; in the context of the other evidence offered at trial, this testimony amounted to Shell testifying that the informant said that . . . [defendant] was a drug dealer. Instead of having the informant testify, the State had the officer testify about what the anonymous informant allegedly said to him. The admission of this testimonial hearsay violated the North Carolina Rules of Evidence and . . . [defendant]'s rights under the 6th Amendment to the United States Constitution.

Defendant refers us to the following testimony by Deputy Shell:

> Q. Now, if you could, set the scene for the jury that day and kind of tell what happened leading up to your encounter?
>
> A. On this day I was driving my vehicle assigned to me by my department. I was riding around with an informant attempting to locate persons known to sell controlled substances.
>
> . . . .
>
> Q. Now, Officer, tell me exactly how you proceeded that day.
>
> A. Um, after we done our preliminary interdiction with the informant, decided the location that we was going to attempt to target and then assigned which officer was going to be in which vehicle and how to proceed, I left our meeting location with the informant. I rode around checking the locations that we had discussed, one being the Colony car wash. As we was passing by the Colony car wash, my informant advised—
>
> MR. BRADSHER: Objection.
>
> THE COURT: Overruled. Go ahead.
>
> A. The informant stated, um, they recognized someone there at the car wash. I pulled into the car wash. My informant got out and spoke with the [defendant] for a minute or so, come back to the vehicle. They said that we would need to come back in a minute.
>
> . . . .

Q. And then you were asked to fill out an after action report?

A. Yes.

Q. And you put a name in the after action report, didn't you?

A. Yes.

Q. Somebody gave you that name, didn't they?

A. Yes.

Q. Who was that person?

A. The informant.

Q. And you had no way of knowing at that point whether that was true or not?

A. I did not, but the surveilling officer was familiar with him.

Even assuming *arguendo* defendant properly preserved the confrontation and hearsay issues for appeal *and* should receive *de novo* review as he argues, the statements were not hearsay and did not violate the Confrontation Clause because they were not offered for their truth: that defendant was a drug dealer. *See* N.C. Gen. Stat. § 8C-1, Rule 801; *State v. Wiggins*, 185 N.C. App. 376, 384, 648 S.E.2d 865, 871 (citation omitted), *disc. review denied*, 361 N.C. 703, 653 S.E.2d 160 (2007), —— N.C. ——, 674 S.E.2d 421 (2009). Hearsay statements may violate the Sixth Amendment right to confrontation if offered for their truth. *See Wiggins* at 376, 384 S.E.2d at 871. In *State v. Leyva*, the

> [d]efendant argues that the admission of Detective Whitzel's testimony about the information given to Detective Almond by the confidential informant violated [the] defendant's Sixth Amendment rights and constitutes plain error. . . . However, [the] defendant incorrectly categorizes the evidence as testimonial. Here, the evidence was introduced to explain the officers' presence at Salsa's Restaurant that night, not for the truth of the matter asserted. . . .
>
> A later witness, Detective Briggs, testified that he participated in the surveillance of defendant's apartment at the request of Detective Almond, which request was founded on information provided by the confidential informant. When asked to explain why he was outside defendant's home, Detective Briggs responded that, 'On that day, I was given information by Detective Almond that this subject was going to deliver a half kilo to

> Detective Little and a confidential informant.' Defendant did not object to this testimony during the trial, and so must prove the admission of Briggs' testimony was plain error. However, analysis of the plain error argument is again unnecessary because, as with the previous statement, this testimony was introduced to explain Detective Briggs' presence outside of defendant's apartment rather than the truth of the matter asserted.
>
> [The] [d]efendant also asserts that these two statements violated Rule 802 of the North Carolina Rules of Evidence because they are inadmissible hearsay. As previously articulated, the statements were admissible to explain the presence of the detectives, rather than to prove that defendant sought to sell cocaine.

Id. 181 N.C. App. 491, 500, 640 S.E.2d 394, 399 (citation, quotation marks, brackets, and ellipses omitted), *disc. review denied and appeal dismissed*, 361 N.C. 573, 651 S.E.2d 370 (2007), *disc. review dismissed*, —— N.C. ——, 673 S.E.2d 872 (2009); *see Wiggins* at 383-85, 648 S.E.2d 870-72.

Just as the law enforcement officer's testimony in *Leyva* was offered to show why the officer went to a particular location, Deputy Shell's quoted testimony in the first two statements regarding the informant was offered to explain his presence at Colony car wash rather than to prove that defendant was a known drug dealer, *see Leyva* at 500, 640 S.E.2d at 399. Furthermore, Deputy Shell's last contested statement, regarding what he wrote on the after-action report only, explains why Deputy Shell wrote down what he did and cannot be read to assert that the defendant is a known drug dealer. All of Deputy Shell's contested statements explain why Deputy Shell was doing what he did; the statements were not inadmissible hearsay nor was the Confrontation Clause of the Sixth Amendment violated. *See id.* Accordingly, this argument is overruled.

III. Character Evidence

[2] Defendant next contends that "Detective Massey testified that . . . [defendant] was a 'known drug dealer.' . . . This inadmissible and highly prejudicial character evidence violates Rule 404(a) of the North Carolina Rules of Evidence and requires that . . . [defendant] receive a new trial." In describing what took place after the controlled buy Detective Massey testified, "Do a little debrief. The discussion probably goes by A, what happened, how much did you get, and we talked about who it was. I mean, like I said, we know him

personally. Like I say, small town. We know him personally as a drug dealer."

Defendant concedes that "[e]vidence admitted in the absence of an objection is reviewed for plain error[,]" and thus we review for plain error which "arises when the error is so basic, so prejudicial, so lacking in its elements that justice cannot have been done. Defendant, therefore, must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Wells*, ___ N.C. App. ___, ___, 675 S.E.2d 85, 87 (2009) (citations, quotation marks, and brackets omitted).

"Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a). However, even assuming *arguendo* that the trial court erred in allowing Detective Massey to testify that defendant was a "known drug dealer[,]" defendant has failed to show any prejudice, much less "that absent the error, the jury probably would have reached a different result." *Wells* at ___, 675 S.E.2d at 87. Defendant directs our attention to *State v. Yancey*, where this Court determined that a "characterization of defendant as an 'asset' was tantamount to identifying defendant as a drug dealer," and therefore defendant was granted a new trial. 155 N.C. App. 609, 611, 573 S.E.2d 243, 245 (2002), *disc. review denied*, 356 N.C. 694, 579 S.E.2d 99 (2003). However, in *Yancey* there was no other evidence that the defendant sold drugs; this Court noted that "the evidence against defendant tends to show that defendant was a drug user, [but] none of the evidence conclusively establishes that defendant trafficked in drugs, much less trafficked or conspired to traffic the drugs seized[.]" *Id.* at 612, 573 S.E.2d at 245. However, in this case, defendant actually sold crack cocaine to Deputy Shell. We therefore do not find *Yancey* to be controlling. *See id.*, 155 N.C. App. 609, 573 S.E.2d 243. Although the trial court may have erred by allowing Detective Massey to testify that defendant was a "known drug dealer[,]" defendant has not demonstrated that this was plain error; he was not prejudiced by this error, considering the other evidence against him. This argument is overruled.

IV. In-Court Identification

[3] Defendant next contends that "the trial court committed plain error in allowing Officer Shell's in-court identification of . . . [defendant], as it was tainted by and not independent of the impermis-

sibly suggestive and unreliable pre-trial identification procedure." (Original in all caps). Defendant concedes that he failed to object at trial and requests that we review this argument for plain error. However, defendant has again failed to show prejudice as required for plain error. *See Wells* at ——, 675 S.E.2d at 87. Here, Detective Massey and Detective Hughes both identified defendant as the individual in the car from whom Deputy Shell testified he received crack cocaine. These eyewitness identifications alone are enough to conclude that the jury probably would have reached the same result. *See id.* This argument is overruled.

V. Ineffective Assistance of Counsel

[4] Lastly, defendant contends that he received ineffective assistance of counsel for his attorney's failure to: (1) "file any pre-trial motions in limine[,]" (2) "object to the prosecuting witness's pre-trial photo identification and in-court identification of . . . [defendant,]" (3) "object to highly prejudicial evidence concerning . . . [defendant]'s past involvement with the police and the officer's belief that . . . [defendant] is a known drug-dealer[,]" (4) "request limiting jury instructions following the admission of character evidence under Rule 404(a)[,]" and (5) "have jury selection, opening statements, and closing arguments recorded."

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

State v. Blakeney, 352 N.C. 287, 307-08, 531 S.E.2d 799, 814-15 (2000) (citations omitted), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). However,

> [t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. This determination must be based on the totality of the evidence before the finder of fact.

State v. Braswell, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) (citations omitted).

Defendant has not demonstrated that despite his counsel's alleged "errors, there would have been a different result in the proceedings." *Id.* As to defendant's five issues with his counsel: (1) Defendant has failed to specify on what basis his trial counsel should have made a motion in limine and how this would have changed his case. (2) We have already concluded that any tainted in-court identification did not prejudice defendant's case as two other law enforcement officials also testified as to defendant's identification. (3-4) Again, we have already concluded that any statements as to defendant being a "known drug dealer" were not prejudicial in light of eyewitness testimony to the sale of drugs. (5) Defendant has failed to show or even forecast how a recorded jury selection, opening statement, or closing statement would in any way change his case. As we do not conclude that "there is a reasonable probability that, but for counsel's [alleged] errors, there would have been a different result in the proceedings[,] *id.*, we overrule defendant's argument.

VI. Conclusion

For the foregoing reasons, we conclude that defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges GEER and ERVIN concur.

STATE OF NORTH CAROLINA v. ARTIVES JEROD FREEMAN

No. COA09-774

(Filed 2 March 2010)

1. Homicide— felony murder—attempted drug sale—not covered by Uniform Commercial Code

Although remanded on other grounds, the trial court did not err by denying defendant's motion to dismiss a charge of first-degree murder on a felony murder theory where defendant was trying to collect money for the delivery of cocaine when he shot and killed the victim. Although defendant argued that the sale was governed by the Uniform Commercial Code and was therefore completed before the shooting, under North Carolina con-

trolled substances statutes and cases, the sale was not complete because payment was never made. Defendant was therefore engaged in the attempted sale of cocaine at the time of the shooting and there was no break in the chain of events from the attempted sale to the killing.

2. Homicide— felony murder—indictment—short-form

Although remanded on other grounds, the trial court did not err by instructing the jury on felony murder on a short-form indictment.

3. Criminal Law— impasse between defendant and counsel—use of peremptory challenge

The trial court erred by allowing defense counsel to make the final decision about use of a peremptory challenge when defendant and defense counsel disagreed. When defendant is denied his fundamental right to exercise the full number of his peremptory challenges, the defendant is entitled to a new trial.

Appeal by defendant from judgments entered 2 September 2008 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Edwin W. Welch, for the State.

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

STEELMAN, Judge.

Where defendant was attempting to collect money due for the delivery of cocaine at the time he shot and killed the victim, the trial court did not err in submitting the murder charge to the jury on the theory of felony murder. The short-form murder indictment alleging first-degree murder put defendant on notice of a possible felony murder theory. Where defendant and his trial counsel had reached an absolute impasse on whether to exercise a peremptory challenge as to a juror, it was error for the trial court to allow counsel to override defendant's wishes, and defendant is entitled to a new trial.

I. Factual and Procedural Background

On 8 April 2006 and 10 April 2006, Jason Baker (Baker) or Artives Jerod Freeman (defendant) sold crack cocaine to Latahnya Berry

(Berry). On 17 April 2006, Baker telephoned Berry and told her that he was on the way over to her apartment to collect the thirty dollars owed for the two previous cocaine transactions, and there would be trouble if she did not have the money. Baker and defendant subsequently arrived at Berry's apartment. Berry did not have the money. Baker or defendant threatened to "shoot your house up" if Berry did not have the money in half an hour. As Baker and defendant began to leave the apartment, defendant turned around and fired several shots at Berry. Two bullets struck her, resulting in her death. Defendant shot Berry because "I felt like they was playing with our money and we wasn't gonna get paid."

Defendant was indicted on the charges of possession of a firearm by a felon and murder. The murder charge was submitted to the jury on first-degree murder based upon premeditation and deliberation, and felony murder based upon the attempted sale of a controlled substance and discharging a firearm into occupied property. The lesser-included offense of second-degree murder was also submitted to the jury. The jury found defendant guilty of first-degree murder based upon felony murder, which was based upon the attempted sale of a controlled substance. Defendant was also found guilty of possession of a firearm by a felon. The trial court entered concurrent active sentences of life imprisonment for first-degree murder and 16-20 months for possession of a firearm by a felon.

Defendant appeals.

II. Motion to Dismiss

[1] Although we are remanding this case for a new trial as set forth in section IV of this opinion, the issues raised in this assignment of error will undoubtedly be raised at a new trial. We therefore address this argument. *State v. Lloyd*, 354 N.C. 76, 128, 552 S.E.2d 596, 631 (2001); *State v. Nobles*, 350 N.C. 483, 516, 515 S.E.2d 885, 905 (1999).

Defendant contends that the trial court erred in not dismissing the charges at the close of the State's evidence and at the close of all the evidence. The principal argument made by defendant is that the trial court improperly submitted felony murder to the jury based upon the attempted sale of a controlled substance. We disagree.

We first note that defendant presented evidence before the jury, and thereby waived appellate review of his motion to dismiss at the close of the State's evidence. *State v. Smith*, 320 N.C. 404, 407, 358 S.E.2d 329, 331 (1987). Our review is limited to the denial of defend-

ant's motion to dismiss at the close of all the evidence. *Id.* at 408, 358 S.E.2d at 331.

The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted). The question for this Court is "whether substantial evidence of each element of the offense charged has been presented, and that defendant was the perpetrator of the offense." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citation omitted). "Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted). In considering the motion, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in favor of the State. *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004). "Contradictions and discrepancies must be resolved in favor of the State, and the defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984) (citations omitted).

First-degree murder under the theory of felony murder is a killing "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." N.C. Gen. Stat. § 14-17 (2007). No proof of premeditation or deliberation is required. *State. v. Wright*, 282 N.C. 364, 369, 192 S.E.2d 818, 822 (1972). The sale or attempted sale of a controlled substance qualifies as an underlying felony for the purposes of N.C. Gen. Stat. § 14-17 if a deadly weapon is used in its commission. *See Squires*, 357 N.C. at 534-36, 591 S.E.2d at 840-42. "A murder occurs during the 'perpetration of a felony for purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction.' " *State v. Mann*, 355 N.C. 294, 304, 560 S.E.2d 776, 783 (quoting *State v. Trull*, 349 N.C. 428, 449, 509 S.E.2d 178, 192 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999)), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002).

Defendant makes the creative argument that the sale of cocaine by Baker to Berry is governed by the provisions of the Uniform Commercial Code under N.C. Gen. Stat. §§ 25-2-106 and 25-2-401. Defendant argues that under N.C. Gen. Stat. § 25-2-401(2), a "sale" is

complete upon delivery of the goods, and therefore, the sale of cocaine to Berry was completed prior to the time of the shooting. The sale, distribution, manufacture, possession, and transport of controlled substances in North Carolina is governed by the North Carolina Controlled Substances Act (Article 5 of Chapter 90 of the General Statutes) and not by the Uniform Commercial Code.

N.C. Gen. Stat. § 90-95 provides that it is "unlawful for any person: (1) to manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." N.C. Gen. Stat. § 90-95(a) (2007). The terms "sell" and "deliver" are not synonymous, and " 'the *sale* of narcotics and the *delivery* of narcotics are separate offenses' " under N.C. Gen. Stat. § 90-95(a)(1). *State v. Moore*, 327 N.C. 378, 382, 395 S.E.2d 124, 127 (1990) (quoting *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985)). A sale of a controlled substance is a "*transfer* of property for a specified price payable in money." *Creason*, 313 N.C. at 129, 326 S.E.2d at 28 (emphasis in original). A delivery of a controlled substance is the "actual, constructive, or attempted *transfer* from one person to another of a controlled substance." N.C. Gen. Stat. § 90-87(7) (2007) (emphasis added). Thus, as interpreted by our Supreme Court in *Creason* and *Moore*, the distinction between delivery and sale of a controlled substance under the Controlled Substances Act is the payment for the controlled substance. Payment can be either in cash or in kind. *Carr*, 145 N.C. App. at 344, 549 S.E.2d at 902-03. As applied to the facts of the instant case, the sale was not complete because payment for the crack cocaine was never made. This is true even though the delivery of the crack cocaine took place approximately one week prior to defendant's efforts to collect the sales price that resulted in Berry's death. Defendant's actions on 17 April 2006 constituted an attempt to complete the transaction of the sale of cocaine.

Taken in the light most favorable to the State, there was substantial evidence showing that defendant was engaged in the attempted sale of cocaine at the time of the shooting. Defendant admitted that he was at Berry's apartment for the purpose of collecting money due for the cocaine. Defendant was armed with a .25 caliber handgun, which he used to shoot the victim. There was no break in the chain of events leading from the attempted sale to the killing of the victim. Defendant began shooting before he left the room in which the victim was located. The trial court did not err in submitting the issue of felony murder with the underlying felony of attempted sale of cocaine to the jury. This argument is without merit.

III. Notice of Charges

[2] We address this argument because the issue will undoubtedly be raised at a new trial. Defendant contends that the trial court erred in instructing the jury on felony murder based upon the attempted sale of cocaine when defendant did not have notice that the State would be proceeding on the theory of felony murder. We disagree.

Short-form murder indictments are sufficient to charge first-degree murder on the basis of any theory set forth in N.C. Gen. Stat. § 14-17, including felony murder. *State v. Hall*, 187 N.C. App. 308, 323, 653 S.E.2d 200, 211 (2007) (citing *State v. Garcia*, 358 N.C. 382, 388, 597 S.E.2d 724, 731-32 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005)). "When first-degree murder is charged, the State is not required to elect between theories of prosecution prior to trial. Moreover, when the factual basis for prosecution is sufficiently pled, 'a defendant must be prepared to defend against any and all legal theories which [the] facts may support.' " *Garcia*, 358 N.C. at 389, 597 S.E.2d at 732 (quoting *State v. Holden*, 321 N.C. 125, 135, 362 S.E.2d 513, 522 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988)) (internal citations omitted). This argument is without merit.

IV. Right to Make Final Decisions

[3] Defendant argues that the trial court erred by allowing defense counsel to make the final decision regarding the use of a peremptory challenge when defendant and defense counsel disagreed over the striking of a juror. We agree and remand this case for a new trial.

Tactical decisions in trial, "such as which witnesses to call, 'whether and how to conduct cross examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer . . . .' " *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991) (quoting *State v. Luker*, 65 N.C. App. 644, 649, 310 S.E.2d 63, 66 (1983), *rev'd on other grounds by*, 311 N.C. 301, 316 S.E.2d 309 (1984)).

> However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, *the client's wishes must control*; this rule is in accord with the principal-agent nature of the attorney-client relationship. In such situations, however, defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached.

Id. (emphasis added).

In the instant case, defendant was fully informed, and he and his counsel reached an absolute impasse regarding whether to accept or strike Juror L.H. Defendant had been removed from the courtroom for misconduct and was watching jury selection on a video feed. Defendant's counsel consulted with defendant during a recess after examining Juror L.H. After consulting with defendant, counsel made "a record of the circumstances, the advice given to the defendant, the reasons for the advice, the defendant's decision, and the conclusion reached." *State v. White*, 349 N.C. 535, 567, 508 S.E.2d 253, 273 (1998) (citing *Ali*, 329 N.C. at 404, 407 S.E.2d at 189), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). Defense counsel stated to the court:

> Your Honor, we have a bit of an issue, that I told Mr. Freeman that I suggested that we accept this juror, that he says he wants to strike her. I told him that that's against my legal advice just because I generally don't like using my last strike when we don't know who else we're going to get, especially when we do have a large pool and we don't know who we're going to get.

Defendant's counsel informed the court that defendant wished to be heard on this matter. The court denied defendant's request to be heard saying, "I don't see how that's my issue. You consult with your client and you decide how to proceed. I can't decide that for you . . ." and "Well, you're his lawyer. I'm not going to hear from him." Defense counsel then proceeded to accept the juror, contrary to his client's express wishes. It was error for the trial court to allow counsel's decision to control when an absolute impasse was reached on this tactical decision, and the matter had been brought to the trial court's attention.

The denial of defendant's *Ali* right to make tactical decisions regarding the use of peremptory challenges is analogous to the erroneous denial of a peremptory challenge. " 'The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused . . . .' " *State v. Locklear*, 145 N.C. App. 447, 451, 551 S.E.2d 196, 198 (2001) (quoting *State v. Freeman*, 314 N.C. 432, 438, 333 S.E.2d 743, 747 (1985)). When a defendant is denied his fundamental right to exercise the full number of his peremptory challenges, the defendant is entitled to a new trial. *Id.*; *see also State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992) (depriving defendant of right to peremptory challenge warrants a new trial). Here, defendant attempted to exercise his right to challenge Juror L.H. Defendant was denied the oppor-

tunity to exercise his peremptory challenge in violation of *Ali*. Defendant is entitled to a new trial.

NEW TRIAL.

Judges McGEE and STEPHENS concur.

ROCKINGHAM COUNTY DSS o/b/o BRITTANY P. WALKER, Plaintiff v. WILLIAM D. TATE, Defendant

No. COA09-394

(Filed 2 March 2010)

Child Support, Custody, and Visitation— reinstatement— improper entry of consent judgment—nunc pro tunc order

The trial court erred in a case seeking to reinstate child support by entering a consent judgment. There was no consent by defendant father. Entry of the order *nunc pro tunc* did not correct the defect when there was no substantive hearing upon which to base the order, and thus, the order was vacated.

Appeal by defendant from order entered 23 October 2008 by Judge Frederick Wilkins in District Court, Rockingham County. Heard in the Court of Appeals 30 September 2009.

Brumbaugh & Stroupe, PLLC, by Samantha K. Brumbaugh, for plaintiff-appellee.

Farver, Skidmore & McDonough, LLP, by Darren A. McDonough, for defendant-appellant.

STROUD, Judge.

Defendant's previous child support order was reinstated and defendant was ordered to pay $200.00 a month in child support. Defendant appeals, arguing the trial court erred because there was not sufficient evidence to support the findings of fact and because there were not sufficient conclusions of law. For the following reasons, we vacate.

I. Background

On 23 October 2008, based upon plaintiff's motion to reinstate child support, the trial court entered an order *nunc pro tunc* to 7 December 2007 reinstating a child support order from 19 December 2000 and requiring defendant to pay $200.00 per month in child support. The order was based entirely upon the following findings of fact:

> 1. By Order entered December 19, 2000, Defendant was ordered to pay $200.00 per month to the individual Plaintiff for the use and benefit of the parties' minor children. By Order[] entered January 8, 2001, the Defendant was ordered to pay an additional $25.00 per month towards outstanding child support arrears.
>
> 2. By Consent Agreement and Order to Modify Child Support Order, entered September 28, 2001, the individual Plaintiff and Defendant agreed to suspend child support payments under the current support order of December 19, 2000 and "deal directly with one another regarding child support and arrearage". Said Consent further stated that ongoing support and enforcement of arrears were temporarily suspended. Defendant's arrears as of the date of said Consent were $6,079.89. A copy of said Consent is attached as Exhibit A and incorporated by reference.
>
> 3. A Motion to Reinstate the Defendant's ongoing child support obligation of $200.00 per month was filed on behalf of the individual Plaintiff on November 2, 2007 and duly served on Defendant on November 14, 2007.
>
> 4. On November 14, 2007, Defendant signed a statement whereby he agreed to have his "child support case with Brittany Walker Stanley reinstated at $200.00 a month, effective December 1, 2007." A copy of said statement is attached as Exhibit B and incorporated by reference.

Defendant appeals, arguing there was not sufficient evidence to support the findings of fact nor did the order contain conclusions of law; thus, defendant is contesting the entire order. For the following reasons, we vacate.

II. Order

Defendant contends that the trial court erred as to the entire trial court order. The hearing as to the motion for modification of child support was held on 7 December 2007. The *entire* hearing upon

which the order was based consisted of plaintiff's counsel stating, "Number ninety—sorry. 98 CvD 2183, Brittany Tate, William Tate. That party's [sic] being resolved by a consent agreement[,]" to which the trial court responded, "All right." Neither Ms. Walker, defendant, nor his counsel were present for this hearing. At the hearing, defendant points out that "[n]o evidence was admitted; neither party testified; no exhibits, statements or affidavits were presented; and the Court did not take judicial notice of any matters of record." The order was signed and filed by the trial court on 23 October 2008, approximately ten months after the hearing, and the order included only four findings of fact and no conclusions of law.

The trial court's findings of fact refer to two court orders and a motion to reinstate child support, all documents which were in the trial court file. Other than setting out the procedural history of the case by reference to these documents, the trial court based its order entirely on a "consent statement." The record does not reflect how the trial court obtained the "consent statement" as it was not presented as an exhibit at the hearing and the statement has no filing date to indicate when it was officially filed with the trial court. The "consent statement" is a handwritten document which reads in its entirety as follows: "I William Darrell Tate, am in full agreement to have my child support case with Brittany Walker Stanley reinstated at $200.00 a month effective December 1st 2007[.]" The "consent statement" was signed by William Darrell Tate, dated 14 November 2007, and notarized.[1]

Thus, although the trial court's order is entitled "ORDER," it is in effect a "consent judgment" as it is based solely upon a "consent statement" and contains no independent findings of fact or conclusions of law. *See Buckingham v. Buckingham*, 134 N.C. App. 82, 89, 516 S.E.2d 869, 875, *disc. review denied*, 351 N.C. 100, 540 S.E.2d 353 (1999).

Any judgment by consent

> is the agreement of the parties, their decree, entered upon the record with the sanction of the court. It is not a judicial determi-

1. We note that it is not obvious from the brief description of the "consent statement" that plaintiff even intended to have the court enter an order at all. In fact, the 28 September 2001 "Consent Agreement and Order to Modify Child Support Order" provided that Ms. Walker and Mr. Tate would " 'deal directly with one another regarding child support and arrearage' " and there was no court-ordered child support. However, we will assume for purposes of this opinion that plaintiff did intend to submit a consent agreement in the form of an order.

> nation of the rights of the parties and does not purport to represent the judgment of the court, but merely records the preexisting agreement of the parties. It acquires the status of a judgment, with all its incidents, through the approval of the judge and its recordation in the records of the court.
>
> This Court specifically stated that a consent judgment need not contain findings of fact or conclusions of law in *In re Estate of Peebles*, 118 N.C. App. 296, 454 S.E.2d 854 (1995):
>
> A consent judgment is merely a recital of the parties' agreement and not an adjudication of rights. This type of judgment does not contain findings of fact and conclusions of law because the judge merely sanctions the agreement of the parties.

Id. (citation, quotation, and brackets omitted). Furthermore, in the case *sub judice*, independent findings or conclusions would have been impossible as no evidence or testimony was presented. Accordingly, we will analyze the order as a consent judgment.

The trial court's authority to enter a consent judgment depends upon the consent of all parties to entry of the order at the time the court approves it. *See*, *e.g.*, *Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 492-93, 521 S.E.2d 117, 120 (1999).

> The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment. There is no requirement with consent judgments, including consent judgments relating to property, support and custody rights of married persons, that the parties, at the time of the entry of the judgment, actually appear in court and acknowledge to the court their continuing consent to the entry of the consent judgment. The parties' failure, however, to acknowledge their continuing consent to the proposed judgment, before the judge who is to sign the consent judgment, subjects the judgment to being set aside on the ground the consent of the parties was not subsisting at the time of its entry.

Id. (citations, quotation marks, ellipses, and footnotes omitted). *Brundage v. Foye*, 118 N.C. App. 138, 140, 454 S.E.2d 669, 670 (1995) ("A consent judgment is a contract of the parties entered upon the records of a court of competent jurisdiction with its sanction and approval. The power of the court to sign a consent judgment depends

upon the unqualified consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment." (citations and quotation marks omitted)). In *Lalanne v. Lalanne*, this Court noted that

> [t]he agreement dictated to the court on 5 September 1978 did not constitute a consent judgment[] [as] [n]either party nor the judge signed the memorandum. There was no consent by the defendant to the entry of judgment by the judge in January 1979, and the judge had no authority to enter the same. If the writing entered by the court on that date is a contract between the parties, it must be litigated in another suit on another date.

Lalanne v. Lalanne, 43 N.C. App. 528, 530, 259 S.E.2d 402, 403-04 (1979). For these reasons, in *Lalanne* this Court vacated the judgment. *See id.* at 530, 259 S.E.2d at 404.

Here, there was not a written memorandum of the terms of the order signed by all parties and the trial court.[2] No order was dictated in the record at the time of the hearing, and even if it had been, defendant was not present to indicate his consent to any terms dictated. The trial court did not have authority to enter the consent order because there was no consent by defendant for the trial court to enter the order. The order as executed on 23 October 2008 was apparently prepared long after the hearing. Furthermore, the record does not contain any indication that defendant consented to entry of the order approximately ten months later, when the order was signed.

Entry of the order *nunc pro tunc* does not correct the defect. *Nunc pro tunc* means "now for then;" Black's Law Dictionary 1174 (9th ed. 2009). What the court did not do then, 7 December 2007, cannot be done now, on 23 October 2008, simply by use of these words. *See Walton v. N.C. State Treasurer*, 176 N.C. App. 273, 276, 625 S.E.2d 883, 885 (2006).

> The power of a court to open, modify, or vacate the judgment rendered by it must be distinguished from the power of a court to

2. This case is distinguished from those in which a written memorandum of a consent order has been presented to the trial court with the consent of all parties and approved by the trial court, although the formal order is prepared and signed later. *See Buckingham v. Buckingham*, 134 N.C. App. 82, 84, 516 S.E.2d 869, 872 (1999) ("[B]oth [parties] consented to the consent judgment memo which was presented to the court on 14 October 1997, signed by Judge Payne as 'approved,' and filed by the clerk of court.) Here, no written memorandum of the consent order was agreed upon or presented to the court on 7 December 2007.

> amend records of its judgments by correcting mistakes or supplying omissions in it, and to apply such amendment retroactively by an entry nunc pro tunc. Nunc pro tunc is merely descriptive of the inherent power of the court to make its records speak the truth, to record that which was actually done, but omitted to be recorded. A nunc pro tunc order is a correcting order. The function of an entry nunc pro tunc is to correct the record to reflect a prior ruling made in fact but defectively recorded. A nunc pro tunc order merely recites court actions previously taken, but not properly or adequately recorded. A court may rightfully exercise its power merely to amend or correct the record of the judgment, so as to make the court[']s record speak the truth or to show that which actually occurred, under circumstances which would not at all justify it in exercising its power to vacate the judgment. However, a nunc pro tunc entry may not be used to accomplish something which ought to have been done but was not done.

Id. In this instance, the trial court attempted to use entry *nunc pro tunc* "to accomplish something which ought to have been done but was not done." *Id.* No substantive hearing was held on 7 December 2007 upon which the trial court could base its order; no order, by consent or otherwise, was entered in open court or presented to the trial court at the time of the hearing. Defendant never consented to entry of the order. Accordingly, we must vacate the order.

III. Conclusion

As the trial court did not have authority to enter a consent judgment, we vacate the order.

VACATED.

Judges GEER and ERVIN concur.

STATE OF NORTH CAROLINA v. KYEEM AMIR BEST, DEFENDANT

No. COA09-439

(Filed 2 March 2010)

Sentencing— prior record level—printed-out email

The trial court did not err in an attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury case by considering defendant's prior assault conviction when determining his prior record level. A printed-out email, containing a screenshot of the Administrative Office of the Courts' (AOC) record of the conviction, was a copy of a record maintained electronically by the AOC, and was sufficient to prove defendant's prior conviction under N.C.G.S. § 15A-1340.14(f)(3).

Appeal by defendant from judgments entered on or about 11 July 2008 by Judge Timothy L. Patti in Superior Court, Mecklenburg County. Heard in the Court of Appeals 30 September 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Amy C. Kunstling, for the State.

Haral E. Carlin, for defendant-appellant.

STROUD, Judge.

Defendant was convicted of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant appeals, arguing that the trial court erred in sentencing by considering defendant's prior conviction for assault. For the following reasons, we affirm.

Because defendant's sole assignment of error brought forward in defendant's brief is directed to the sentencing proceeding, we need not recite the evidence in detail. We have reviewed the transcript carefully and conclude the State offered sufficient evidence to show that on 3 August 2006, defendant walked up to Ahmesha, the mother of his daughter, pulled out a handgun, cocked the gun, pointed it at and threatened to kill Ahmesha. Defendant then slapped Ahmesha. Subsequently, Ahmesha swore out a warrant against defendant and obtained a restraining order against defendant. On 19 August 2006, Ahmesha and her aunt were walking down Albemarle Road in Charlotte, North Carolina when defendant ran up to

Ahmesha, pointed a handgun at her, and shot Ahmesha three times. Due to the gunshot wounds Ahmesha sustained, she is permanently quadriplegic.

Defendant testified in his own defense. Defendant admitted to slapping Ahmesha on 3 August 2006. Defendant claimed that members of Ahmesha's family were threatening him and his family, and defendant was told that Ahmesha would not let him see his daughter. On 19 August 2007, defendant walked up to Ahmesha and asked her if he could see his daughter. Ahmesha told him "no" and he shot Ahmesha. Defendant stated that it was not his intent to shoot Ahmesha when he walked up to her. Keyo Carter also testified for the defense. Mr. Carter stated that, on 19 August 2006, he had been driving defendant around in his car; defendant saw Ahmesha walking down the street; defendant asked Mr. Carter to pull over in a parking lot; and defendant asked Mr. Carter to go talk to Ahmesha, which he did. After Mr. Carter returned to the car, they left the parking lot, but defendant asked Mr. Carter to pull into another parking lot and defendant exited the car to talk to Ahmesha. Mr. Carter did not see defendant shoot Ahmesha, but when defendant returned to the car he was distraught, crying, and hysterically telling Mr. Carter that he shot his baby's mother.

On 11 September 2006, defendant was indicted for attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was tried on these charges at the 7 July 2008 Criminal Session of the Superior Court, Mecklenburg County, and a jury found defendant guilty of both charges. At sentencing, the trial court found mitigating factors and defendant stipulated to an aggravating factor. The trial court sentenced defendant as a Record Level III offender in the aggravated range to concurrent sentences of 276 to 341 months imprisonment for the attempted first degree murder and 145 to 183 months imprisonment for the assault with a deadly weapon with intent to kill inflicting serious injury. Defendant gave oral notice of appeal at trial.

In his only assignment of error brought forth on appeal, defendant contends that the trial court committed reversible error by not requiring the State to prove by a preponderance of the evidence that a prior conviction exists and that defendant is the same person as the offender named in the prior conviction. Specifically, defendant argues that the State did not provide sufficient proof of his 4 December 2006 conviction for assault by pointing a gun, which was included in defendant's prior record level calculation. Therefore,

defendant's prior record points were computed incorrectly, placing him in a higher prior record level.

When reviewing alleged errors in the computation of a defendant's prior record level "[o]ur standard of review is whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Jeffery*, 167 N.C. App. 575, 578, 605 S.E.2d 672, 674 (2004) (citation, quotation marks, and brackets omitted). At sentencing "[t]he State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (2005). The State can meet its burden through any of the following methods:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.
>
> . . .
>
> The original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true. For purposes of this subsection, "a copy" includes a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment, and a document produced by a facsimile machine. The prosecutor shall make all feasible efforts to obtain and present to the court the offender's full record. Evidence presented by either party at trial may be utilized to prove prior convictions . . . .

N.C. Gen. Stat. § 15A-1340.14(f).

At sentencing, defendant did not stipulate to his prior record level. The State presented to the trial court defendant's prior record level worksheet, a Division of Criminal Information ("DCI") report

and a print-out of an email from the prosecutor to defendant's prior counsel. Inserted into the email is a screen-shot from the Administrative Office of the Courts ("AOC") computerized criminal record system showing defendant's prior conviction for assault by pointing a gun in Mecklenburg County. This conviction was not included in the DCI report. Defense counsel did not contest the convictions on the DCI report but argued that defendant's prior conviction for assault reflected on the printed-out email should not be considered in calculating defendant's prior record level points.

In *State v. Rich*, 130 N.C. App. 113, 502 S.E.2d 49, *disc. review denied*, 349 N.C. 237, 516 S.E.2d 605 (1998), this Court addressed a similar issue. In *Rich*, the trial court, in determining the defendant's prior conviction level, considered an unverified computerized printout that contained "the heading 'DCI-Record' (Division of Criminal Information)[,] . . . a detailed description of defendant including his fingerprint identifier number and FBI number, and showed that defendant had been convicted of multiple offenses in North Carolina, New Jersey, and New York." *Id.* at 115, 502 S.E.2d at 51. The defendant argued that the trial court erred "by accepting the State's offer of 'an unverified computerized printout not under seal' to prove defendant's prior criminal convictions." *Id.* This Court noted that "the computerized printout was a detailed record of defendant's criminal history as maintained by the Division of Criminal Information." *Id.* at 116, 502 S.E.2d at 51. In affirming the trial court's consideration of the printout in calculating defendant's prior record level, this Court held that

> [a] 'copy', includes 'a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment . . . .' N.C. Gen. Stat. § 15A-1340.14(f). The computerized record contained sufficient identifying information with respect to defendant to give it the indicia of reliability. Thus, we believe use of the printout to prove defendant's prior convictions was proper under G.S. § 15A-1340.14(f)(3) and, in addition, under G.S. § 15A-1340.14(f)(4).

Id.

Here, as in *Rich*, the printed-out email contains a copy of the AOC record of the defendant's conviction. *Id.* The email printout contains defendant's name, date of birth, case number, charged offense, arrest date, location of arrest and the names of defendant's attorney and the victim. Defendant's name, address, and date of birth are confirmed by

warrants for defendant's arrest, the indictment, the trial court's orders included in the record and defendant's own testimony. Trial testimony regarding defendant's confrontation with Ahmesha on 3 August 2006 also verifies the victim and charged offense as listed on the printed-out email.

N.C. Gen. Stat. § 15A-1340.14(f) specifically provides that "a copy" can include "a paper writing containing a reproduction of a record maintained electronically on a computer[.]" We hold that the printed-out email, which contains a screenshot of the AOC record of the conviction, is "a copy" of a "record maintained electronically" by the Administrative Office of the Courts, which is sufficient to prove defendant's prior conviction under N.C. Gen. Stat. § 15A-1340.14(f)(3). In addition, the information contained in the printed-out email provides sufficient identifying information with respect to defendant to give it the indicia of reliability to prove defendant's prior convictions under N.C. Gen. Stat. § 15A-1340.14(f)(4); indeed, defendant does not argue that the email or screenshot is incorrect or inaccurate in any way. Therefore, the trial court did not err in considering defendant's prior convictions shown on the printed-out email and did not err in calculating defendant's prior conviction level.

NO ERROR.

Judges GEER and ERVIN concur.

FIFTH THIRD MORTGAGE COMPANY, PLAINTIFF v. ALAN MILLER, PHYLLIS A. MILLER, BRANCH BANKING AND TRUST COMPANY AND JEFF D. ROGERS, SUBSTITUTE TRUSTEE, DEFENDANTS

No. COA09-961

(Filed 2 March 2010)

Mortgages and Deeds of Trust— priority of deed of trust— defective description

The trial court correctly granted summary judgment for defendant and declared that BB&T's deed of trust had priority over any interest created by plaintiff's deed of trust. Plaintiff's deed of trust contained a defective description; although defend-

ant asserted that its deed of trust should be reformed and thereby retain its priority position over BB&T, a deed of trust containing a defective description of property provides no notice, actual or constructive, under our recordation statutes.

Appeal by plaintiff from judgment entered 16 March 2009 by Judge W. Erwin Spainhour in Union County Superior Court. Heard in the Court of Appeals 2 December 2009.

Koehler & Cordes, PLLC, by David C. Cordes, for plaintiff-appellant.

Horack, Talley, Pharr & Lowndes, P.A., by Robert B. McNeill and Amy P. Hunt, for defendant-appellees.

BRYANT, Judge.

Plaintiff Fifth Third Mortgage Company (Fifth Third) appeals from an order granting summary judgment in favor of defendant Branch Banking and Trust Company (BB&T) which declared that a deed of trust filed by BB&T in the Union County Public Registry had priority over and was superior to any interest created by a deed of trust filed by Fifth Third for the property located at 9911 Strike The Gold Lane, Waxhaw, North Carolina. For the reasons stated herein, we affirm.

Facts

On 20 March 2007, defendant Alan Miller executed and delivered to Fifth Third a promissory note for the principal sum of $1,177,500.00, and Fifth Third prepared a deed of trust for the real property located at 9911 Strike The Gold Lane, Waxhaw, in Union County, North Carolina. However, the deed of trust failed to name a trustee and improperly described the property as "Being all of Lot 4 in Block 1 of LEACROFT SUBDIVISION, PHASE 1, MAP 1, as same is shown on a map thereof recorded in Map Book 26 at Page 163 in the Mecklenburg County Public Registry."[1] Fifth Third filed the deed of trust with the Register of Deeds of Union County on 21 March 2007.

On 18 June 2007, defendants Alan and Phyllis Miller entered into an agreement with BB&T for an equity line of credit with the maximum principal amount of $500,000.00. To secure the debt, the Millers executed a deed of trust naming BB&T the beneficiary and trustee.

1. Fifth Third stipulated before the trial court that its deed of trust failed to contain the correct description of the real property.

BB&T filed the deed of trust 25 June 2007. The property securing the debt was pertinently described as follows:

> SITUATED IN UNION COUNTY, NORTH CAROLINA AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:
>
> BEING ALL OF LOT 151 OF McGEE VALLEY, MAP 1, AKA PROVIDENCE DOWNS SOUTH, AS SHOWN ON PLAT THEREOF RECORDED IN PLAT CABINET 1 AT FILES 104 THRU 106, UNION COUNTY REGISTRY, REFERENCE TO WHICH PLAT IS HEREBY MADE FOR A MORE PARTICULAR METES AND BOUNDS DESCRIPTION.

Thereafter, the Millers defaulted with respect to the promissory notes of both Fifth Third and BB&T.

Based on the default, Fifth Third made a demand for the outstanding principal amount of $1,260,128.20 with interest at a rate of $277.7485 per day from 18 April 2008 until paid. BB&T initiated foreclosure proceedings.

Fifth Third filed a complaint on 27 June 2008 seeking a reformation of Fifth Third's deed of trust to include the correct legal description of the real property, a declaratory judgment, quiet title, a judicial sale, and monetary judgment. After hearings held 7 and 17 July 2008, the trial court granted a motion for a temporary restraining order and preliminary injunction and enjoined BB&T from finalizing the foreclosure action. After BB&T filed a motion to dismiss, an answer, and affirmative defenses on 2 September 2008, both Fifth Third and BB&T filed cross-motions for summary judgment. Subsequently, the trial court entered an order which granted BB&T's motion for summary judgment, decreeing that BB&T's deed of trust had priority over and was superior to any interest that may have been created by Fifth Third's deed of trust. Fifth Third appeals.

On appeal, Fifth Third raises two arguments premised on two assignments of error: the trial court erred by granting BB&T's motion for summary judgment where (I) Fifth Third was entitled to reformation of its deed of trust and priority over BB&T's deed of trust; and (II) BB&T was not a bona fide purchaser for value without notice of Fifth Third's recorded deed of trust.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c) (2007). "We review a trial court's order granting or denying summary judgment de novo. Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal citations and quotations omitted).

I & II

Fifth Third argues that the trial court erred in granting BB&T summary judgment where Fifth Third was entitled to reformation of its deed of trust and that BB&T should not be recognized as a bona fide purchaser for value without notice of Fifth Third's prior recorded deed of trust. Fifth Third argues that BB&T is not a bona fide purchaser because it had constructive notice of Fifth Third's deed of trust. We disagree.

Under North Carolina General Statutes, section 47-20, "[n]o deed of trust or mortgage of real or personal property . . . shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof . . . ." N.C. Gen. Stat. § 47-20(a) (2007).

> In the construction of our registration laws [our Supreme Court] has very insistently held that no notice, however full and formal, will supply the place of registration. . . . When properly probated and registered, [deeds of trust and mortgages on real and personal property] are constructive notice to all the world. Creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, obtain no title as against a properly probated and registered conveyance, *sufficiently describing the property*.

Lowery v. Wilson, 214 N.C. 800, 804, 200 S.E. 861, 864 (1939) (internal citations and quotations omitted) (emphasis added); *see also New Home Bldg. Supply Co. v. Nations*, 259 N.C. 681, 687, 131 S.E.2d 425, 429 (1963) ("The registration of an improperly acknowledged or defectively probated deed imports no constructive notice and the deed will be treated as if unregistered.") (citations omitted); *Cowan v. Dale*, 189 N.C. 684, 128 S.E. 155 (1925) (where the registration of a mortgage instrument is defective, the instrument is ineffective to pass

title and "may be regarded a nullity as to subsequent purchasers or encumbrancers"). A deed of trust containing a defective description of the subject property is a defective deed of trust and provides no notice, actual or constructive, under our recordation statutes. *Lowery*, 214 N.C. at 805, 200 S.E. at 864.

Fifth Third acknowledges that the deed of trust it filed on 21 March 2007 fails to name a Trustee and "failed to contain a proper description of the real property to be conveyed to the Trustee . . . ."[2] However, Fifth Third asserts that its deed of trust should be allowed to be reformed and, thereby, retain its priority position over BB&T. However, "[a]s a general rule, reformation will not be granted if the rights of an innocent bona fide purchaser would be prejudiced thereby." *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 653, 273 S.E.2d 268, 272 (1981) (citations omitted).

Therefore, we affirm the trial court's order declaring that BB&T's deed of trust recorded 25 June 2007 has priority over and is superior to any interest created by Fifth Third's deed of trust. Accordingly, we overrule Fifth Third's assignments of error.

Affirmed.

Judges HUNTER, Robert C. and JACKSON concur.

IN THE MATTER OF: E.M.

No. COA09-1370

(Filed 2 March 2010)

1. Appeal and Error— notice of appeal—timely filed

The guardian *ad litem's* motion to dismiss respondent mother's appeal from the termination of her parental rights was denied because respondent's notice of appeal was timely filed by operation of N.C. R. App. P. 27(a).

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2. Fifth Third's deed of trust described the property securing the Miller's debt as "[b]eing all of Lot 4 in Block 1 of LEACROFT SUBDIVISION, PHASE 1, MAP 1, as same is shown on a map thereof recorded in Map Book 26 at Page 163 in the Mecklenburg County Public Registry." Whereas, the property was properly described as "[b]eing all of Lot 151 of McGee Valley, Map 1, AKA Providence Downs South, as shown on plat thereof recorded in Plat Cabinet 1 at files 104 thru 106, Union County Registry, reference to which plat is hereby made for a particular metes and bounds description."

2. Termination of Parental Rights— best interests of the child—statutorily mandated factors

Because the trial court's order terminating respondent mother's parental rights did not address all the statutorily mandated factors enumerated in N.C.G.S. § 7B-1110(a), and the record contains evidence from which the court could make findings of fact concerning those factors, the case was remanded to the trial court for additional findings of fact.

Appeal by respondent from order filed 31 July 2009 by Judge Rickye McKoy-Mitchell in District Court, Mecklenburg County. Heard in the Court of Appeals 15 February 2010.

Kathleen Arundell Widelski, for Mecklenburg County Department of Social Services, Youth and Family Services, petitioner-appellee.

Pamela Newell Williams, GAL Appellate Counsel, for guardian ad litem.

Peter Wood, for respondent-appellant.

WYNN, Judge.

When determining whether the termination of parental rights is in the best interest of a minor child, the trial court is required to consider, *inter alia*, "[t]he likelihood of adoption of the juvenile," "[t]he bond between the juvenile and the parent," and "[t]he quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement."[1] Because we find no evidence that the trial court considered these statutorily mandated factors prior to terminating Respondent's parental rights, we remand for additional findings of fact.

Respondent appeals from an order terminating her parental rights to E.M. ("the juvenile"). Respondent gave birth to the juvenile in 2006. The juvenile tested positive for cocaine at birth and lived with respondent and respondent's mother for less than four months after her birth. On 21 February 2007 the juvenile was removed from the custody of Respondent because of Respondent's ongoing substance abuse and failure to receive substance abuse treatment. On 2 April 2007 the court adjudicated the juvenile as neglected and dependent. The court ordered the Department of Social Services to

1. N.C. Gen. Stat. § 7B-1110(a) (2009).

"make reasonable efforts to eliminate the need for placement of the juvenile and make it possible for the child to safely return to his/her own home and the parent's care." The court also adopted a mediated case plan which included several components designed to achieve the goal of reunification. Respondent failed to satisfactorily comply with the mediated case plan, and on 18 September 2008 the court changed the permanent plan from reunification to termination of parental rights and adoption. Petitioner filed a petition to terminate parental rights on 14 November 2008. After hearings on 10 March 2009 and 1 June 2009, the court entered an order finding the existence of grounds to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1)-(3) and (5)-(6). The court concluded that it is in the best interest of the juvenile that Respondent's parental rights be terminated. The court signed and filed the order on 31 July 2009, Petitioner served the order on the parties of record on 6 August 2009, and Respondent filed notice of appeal on 8 September 2009.

[1] Initially, we note that the guardian ad litem has filed a motion to dismiss the appeal arguing that notice thereof was not given in a timely manner. To appeal an order terminating parental rights, a party must give notice of appeal in writing "within 30 days after entry and service of the order in accordance with G.S. 1A-1, Rule 58." N.C. Gen. Stat. § 7B-1001(b) (2009). "Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2009). In computing the period of time within which an action must be taken, "[t]he last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or a legal holiday." N.C. R. App. P. 27(a) (2009). Thus for notice of appeal in this case to have been timely, it must have been filed and served within 30 days after service of the order, thereby making filing of notice of appeal due on or before 6 September 2009.

We take judicial notice that 6 September 2009 was a Sunday and that the next business day was a legal holiday, namely Labor Day. The next business day which was not a legal holiday was Tuesday, September 8; thus, by operation of Appellate Rule 27(a), the notice of appeal filed 8 September 2009 was timely. The motion to dismiss is therefore denied.

Termination of one's parental rights must be based upon findings of fact, supported by clear, cogent, and convincing evidence, which

establish the existence of a statutory ground for termination. N.C. Gen. Stat. § 7B-1109 (2009); *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). If the court concludes that a ground exists, it must then determine whether termination of parental rights is in the best interest of the child. N.C. Gen. Stat. § 7B-1110 (2009); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). The court's determination of the juvenile's best interest will not be disturbed absent a showing of an abuse of discretion. *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406-07 (2003). A court abuses its discretion when an action 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).

[2] Respondent contends that the court abused its discretion for two reasons: (1) the court failed to demonstrate consideration of statutory factors in its order terminating her parental rights, and (2) termination of parental rights is not in the best interest of the juvenile. The governing statute provides in pertinent 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.
>
> (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) (2009) (emphasis added). "This Court has held that use of the language 'shall' is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error." *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001). Of the factors listed above, the court's order only reflects consideration of the juvenile's age and the permanent plan of adoption. The court's order does not consider the likelihood of adoption of the juvenile, the

bond between the juvenile and the parent, or the quality of the relationship between any prospective adoptive parents, custodian, or guardian and the juvenile. We note that the record contains evidence from which the court could make findings as to these factors and we accordingly remand the matter to the trial court for entry of appropriate findings pursuant to N.C. Gen. Stat. § 7B-1110(a).

Remanded.

Judges HUNTER, JR. and BEASLEY concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER WAYNE JOHNSON

No. COA09-696

(Filed 2 March 2010)

Indictment and Information— variance—different names relating to same person—identity—jury question

The trial court did not err by denying defendant's motion to dismiss drug charges even though he contends there was a fatal variance between the indictment and the evidence produced during the case-in-chief. Where different names are alleged to relate to the same person, the question is one of identity and is exclusively for the jury to decide. The indictment and the evidence sufficiently established the identity of the purchaser to meet constitutional standards and requirements of proof.

Appeal by defendant from judgment entered 5 February 2009 by Judge Anderson D. Cromer in Surry County Superior Court. Heard in the Court of Appeals 28 October 2009.

Attorney General Roy Cooper, by Assistant Attorney General Ebony J. Pittman, for the State.

Irving Joyner for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Christopher Wayne Johnson ("defendant") appeals the trial court's denial of his motion to dismiss the charges alleged in the indictment of "unlawfully, willfully and feloniously" selling and deliv-

ering cocaine to "Detective Dunabro" at the close of the State's case-in-chief. Defendant contends that there was a fatal variance between the indictment and the proof with respect to the name of the purchaser, because the State's evidence tended to show that the purchaser was "Agent Amy Gaulden," not "Detective Dunabro." Since Detective Dunabro and Agent Amy Gaulden are the same person, and she was commonly known by both her maiden and married name, we find the description contained in the indictment and the evidence adduced at trial sufficiently identifies the purchaser to meet the jurisdictional requirements of our case law. For the reasons discussed herein, we find no error.

I. FACTUAL BACKGROUND

On 5 September 2006, defendant was indicted for two offenses arising from violations of N.C. Gen. Stat. § 90-95(a)(1): (1) possession with intent to manufacture, sell and deliver cocaine, a controlled substance under Schedule II and (2) sale and delivery of a controlled substance to "Detective Dunabro." Defendant was tried on 5 February 2009.

In pertinent part, the State's evidence, as presented during its case-in-chief, tended to show the following: Officer Mark Ward, a Surry County Deputy Sheriff, asked SBI Dectective Amy Gaulden, then stationed in Winston-Salem, to come to Surry County to participate in an undercover drug transaction. Deputy Sheriff Ward and Detective Gaulden previously attended a Drug Enforcement Administration ("DEA") school which sponsored a two-week course for local law enforcement officers. Officer Ward identified Detective Gaulden for the jury, stating that they attended DEA school together; however, he clarified that "[s]he wasn't a Gaulden then." Subsequently, Detective Gaulden testified that her name was Amy Gaulden; however, the prosecutor did not inquire as to Detective Gaulden's maiden name or other names by which she was known. Detective Gaulden testified that she purchased cocaine from defendant during a drug transaction arranged by the Surry County Sheriff's office. She further testified that it was necessary for her to make the purchase to protect the identity of a confidential informant working with the Surry County Sheriff's office.

At the close of the State's case-in-chief, defendant moved to dismiss the charges and this motion was denied by the trial court. Following the defense's evidence, including defendant's testimony wherein he denied the charges, the State, during its rebuttal case,

introduced testimony from Deputy Sheriff Ward that Detective Gaulden's name was Dunabro when she and Deputy Sheriff Ward met, but that she was married in July 2006. Defendant did not object to the State's rebuttal evidence. At the close of all the evidence, defendant was found guilty of the drug charges. Defendant was also found guilty of, and pled guilty to, the offense of being an habitual felon and was sentenced to an active term of 120 to 153 months' imprisonment. On appeal, defendant initially made three assignments of error; however, all but one have been abandoned.

II. Analysis

Defendant argues that his motion to dismiss should have been granted based on his contention that there was a fatal variance between the indictment and the evidence produced during the State's case-in-chief. Specifically, defendant argues that the indictment names "Detective Dunabro" as the purchaser of the cocaine; however, he contends that no evidence was supplied during the State's case-in-chief regarding a "Detective Dunabro." In support of this argument, defendant relies upon *State v. Bissette*, 250 N.C. 514, 108 S.E.2d 858 (1959) and *State v. Bennett*, 280 N.C. 167, 185 S.E.2d 147 (1971).

In *Bissette* the Court held that an indictment charging a defendant with unlawfully selling tobacco seed must aver that the sale was made to some particular person or persons, or to some person or persons unknown. 250 N.C. at 518-19, 108 S.E.2d at 861. The Court reasoned that an indictment must clearly and accurately allege all of the essential elements of the offense to be charged in order to

> (1) . . . identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial[;] and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case.

Id. at 516, 108 S.E.2d at 860. Moreover, in *Bennett* the Court held that an indictment must contain the name of the purchaser where there is a statute outlawing sales of contraband which does not modify "the common-law requirement that the name of the person, to whom the accused allegedly sold narcotics unlawfully, be stated in the indictment when it is known." 280 N.C. at 169, 185 S.E.2d at 149.

Based on the aforementioned, the general rule appears to be the following: Where a sale is prohibited, it is necessary for a conviction

to allege in the bill of indictment the name of the person to whom the sale was made, or that his name is unknown, unless some statute eliminates that requirement. *See Bissette*, 250 N.C. 514, 108 S.E.2d 858; *Bennett*, 280 N.C. 167, 185 S.E.2d 147. Moreover, the proof must conform to the allegations and establish a sale to the named person or state that the purchaser was in fact unknown. *See id.*

In this case, both requirements of *Bissette* and *Bennett* have been met given that the indictment named "Detective Dunabro" as the purchaser of the drugs. First, the name of a purchaser was included in the indictment, thus meeting the pleading requirement of *Bissette*. Secondly, the purchaser was sufficiently identified in the indictment to meet the constitutional requirements that the defendant be able to prepare for trial and avoid double jeopardy.

The object and purpose of describing a person by that person's name is to identify the person. *State v. Salter*, 29 N.C. App. 372, 374, 224 S.E.2d 247, 249 (1976); *see also* 54 Am. Jur. 2d *Names* § 64 (2009). As a general rule, and at common law, a person may be designated in a legal proceeding by the name by which the person is commonly known, even though it may not constitute the person's "true name." *Id.* Moreover, it is not necessary that the person be known as well by the one name as by the other, and it is sufficient if the person is known by both names. *See id.*

A person has a common law right to assume any name he or she lawfully chooses. *In re Mohlman*, 26 N.C. App. 220, 225, 216 S.E.2d 147, 150 (1975). A married woman acquires her husband's surname by repute only, as a matter of custom, rather than as a matter of law.[1] Here, Detective Dunabro and Amy Gaulden are the same person and she is known by both names. The use of either name is merely a legal identification. It is common in today's society for persons to have professional names by which they are known. For instance, law enforcement officers and persons engaged in any other occupation are entitled to use their professional names at work. Moreover, defendant has not established any prejudice arising from the indictment's use of the purchaser's maiden name, nor is there any evidence of fraud or misrepresentation in the use of more than one name.

Where different names are alleged to relate to the same person, the question is one of identity and is exclusively for the jury to

1. *See* Romeo and Juliet (II, ii, 1-2)

"What's in a name? That which we call a rose By any other name would smell as sweet."

decide. *See Toole v. Peterson*, 31 N.C. 180, 9 Ired. 180 (1848); *State v. Walls*, 4 N.C. App. 661, 167 S.E.2d 547 (1969). Here, the jury resolved the issue. The indictment and the evidence sufficiently established the identity of the purchaser to meet constitutional standards and requirements of proof. Accordingly, we find

No error.

Judges ELMORE and STEELMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 MARCH 2010)

BOWLES v. NORANDAL USA, INC. No. 09-384	Indus. Comm. (IC226563)	Affirmed
BRODIE v. EXCEL STAFFING SERVS. No. 09-754	Indus. Comm. (454421)	Remanded for further proceedings as described herein
GIAMBELLI v. HANSEN No. 09-461	Wake (03CVD12165)	Affirmed in part; dismissed in part
GRIFFITH v. KELLER No. 09-1045	Anson (09CVS386)	Affirmed
HALLMAN v. NC DEP'T OF CORR. No. 09-1049	Indus. Comm. (396614)	Affirmed
IN RE A.D.E. & M.R.E. No. 09-1184	Buncombe (09JT29-30)	Affirmed
IN RE A.S.S. No. 09-1183	Randolph (08JT117)	Affirmed
IN RE D.B., H.B., F.B. No. 09-1033	Jackson (07JA40-42)	Affirmed
IN RE EDWARDS No. 09-329	Cumberland (04E585)	Affirmed
IN RE G.I.W. No. 09-1167	Wilkes (08JA137)	Affirmed
IN RE J.N. No. 09-1239	Mecklenburg (99JT344)	Affirmed
IN RE J.P. & J.C.C. No. 09-1086	Davidson (08J71-72)	Dismissed in part; vacated and remanded in part
IN RE J.P. & J.C.C. No. 09-1341	Davidson (08J71-72)	Dismissed
IN RE R.L.T., JR. No. 09-1457	Sampson (06JT52)	Vacated and remanded
IN RE T.C.N.M. No. 09-1121	Cherokee (07JT03)	Affirmed
JARRETT v. SAIN No. 09-965	Catawba (07CVS4506)	Dismissed
LYLES v. TURNER No. 09-932	Polk (08CVD131)	Dismissed

McKENZIE v. ESC No. 09-590	Gaston (08CVS3447)	Reversed
McKYER v. McKYER No. 09-695	Mecklenburg (00CVD9237)	Affirmed
PEPPER v. NORANDAL USA, INC. No. 09-383	Indus. Comm. (IC014133)	Affirmed
PLUMMER v. NORANDAL USA, INC. No. 09-382	Indus. Comm. (IC226564)	Affirmed
SHORT v. TURNER No. 09-618	Mecklenburg (08CVS2067)	Reverse
STATE v. AGHAEI No. 09-840	Pitt (07CRS61504)	No Error
STATE v. ARRINGTON No. 09-660	Edgecombe (07CRS53463) (08CRS3237) (07CRS53462)	No Error
STATE v. BLACKWELL No. 09-916	Johnston (08CRS56711) (08CRS56710)	Affirmed
STATE v. BROOKS No. 09-560	Hertford (07CRS3939) (08CRS129)	No Error
STATE v. CARTER No. 09-609	Mecklenburg (08CRS205486) (08CRS24344)	No error in part; remanded for correction of judgment in part
STATE v. DUKES No. 09-1002	Orange (07CRS1220)	No Error
STATE v. ELLERBEE No. 09-729	Mecklenburg (06CRS216115) (06CRS216156) (06CRS216114)	No Error
STATE v. ENGLAND No. 09-853	Mecklenburg (08CRS207490)	No Error
STATE v. GREENE No. 09-829	Buncombe (07CRS61722) (08CRS1) (07CRS61721)	No Error
STATE v. HALLEY No. 09-1051	Cabarrus (07CRS53055)	No Error
STATE v. HAMRICK No. 09-315	Cleveland (08CVS1919)	Affirmed

STATE v. HERNANDEZ No. 09-722	Durham (07CRS54334) (07CRS54333)	No Error
STATE v. HOSCH No. 09-866	Cleveland (06CRS6576)	No Error
STATE v. KIMBROUGH No. 09-822	Forsyth (07CRS46212)	No Error
STATE v. LEE No. 09-834	Guilford (07CRS101911) (07CRS107641) (08CRS24772) (07CRS107640)	Affirmed
STATE v. MITCHELL No. 09-955	Wayne (08crs52417)	No Error
STATE v. MOODY No. 09-769	Burke (06CRS6958) (06CRS7185-86) (06CRS6956)	No Error
STATE v. NANCE No. 09-745	Wayne (07CRS57040)	No Error
STATE v. PARKER No. 09-907	Sampson (07CRS50227)	No Error
STATE v. SMITH No. 09-881	Cabarrus (08CRS6812)	Reversed and Remanded
STATE v. STEWART No. 09-928	Lincoln (02CRS848)	Vacated in part, affirmed in part, remanded for further proceedings

APPENDIXES

JUDICIAL STANDARDS COMMISSION
ADVISORY OPINIONS—FORMAL
ADVISORY OPINION: 2011-01

JUDICIAL STANDARDS COMMISSION
ADVISORY OPINIONS—FORMAL
ADVISORY OPINION: 2011-02

CITE AS: COMMUNITY ACTIVITIES
FORMAL ADVISORY OPINION: 2011-01

March 11, 2011

Refer to 202 N.C. App. 775

QUESTION:

May an emergency or retired/recalled judge ethically accept an appointment to serve on a municipal airport authority?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined an emergency or retired/recalled state court judge may ethically accept an appointment to serve as a member of a municipal airport authority. Such service is conditional upon the impartial, independent and proper discharge of the judge's state court judicial duties.

DISCUSSION:

Canon 5G of the Code of Judicial Conduct restricts extra-judicial appointments to bodies relating to cultural or historical matters, the economic, educational, legal or governmental system, or the administration of justice. The Commission reasoned the function of a municipal airport authority is inextricably related to the local governmental system and economic development.

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 appointment to the airport authority would conflict with part-time judicial service. During the term of appointment to the airport authority, the judge should be vigilant and disqualify from any matter in which his/her impartiality could reasonably be called into question by reason of his/her extra-judicial service.

Reference:

North Carolina Code of Judicial Conduct
Canon 1
Canon 2A
Canon 3
Canon 5G

CITE AS: DISQUALIFICATION—NON-FAMILIAL RELATIONSHIP TO ATTORNEY, PARTY, OR WITNESS

FORMAL ADVISORY OPINION: 2011-02

March 11, 2011

Refer to 202 N.C. App. 776

QUESTION:

How should a judge address disclosure and disqualification issues where counsel in a proceeding before the judge either currently or previously provided legal representation for the judge or is employed by a law firm which currently or previously provided legal representation for the judge in a personal matter?

The specific circumstances giving rise to this inquiry are as follow:

> Prior to becoming a judge, and while employed as an assistant district attorney, the judge and the judge's then-spouse separated. The judge was referred to an attorney by a mutual friend and entered into an attorney-client relationship with the attorney, through which the attorney was employed to draft a separation agreement, the terms of which had been agreed upon by the judge and spouse, and to bring an action for an absolute divorce, which was uncontested. Prior to employing the attorney, the judge had no prior relationship with any member of the firm to which the attorney belonged. The judge's spouse retained counsel after execution of the separation agreement. The attorney client relationship began July 27, 2006 and concluded March 16, 2007, the date upon which the judgment of absolute divorce was entered. The judge was billed for, and paid, the fee for the attorney's services in full, without receiving any discount. More than a year later, in April 2008, the judge was appointed to the District Court bench. For a period of time after taking office, the judge did not handle matters involving the attorney, but did preside over matters involving other members of the attorney's firm, and after an additional period of time the judge began to hear matters involving the attorney, after disclosing the fact of the prior representation and upon consent of all parties. The judge did not form any ongoing relationship with the attorney and does not consider himself/herself to be biased as a result of the prior representation. Since taking office, the judge has presided over more than one hundred cases involving the firm's attorneys, and has ruled against the firm in a number of those matters. In 2010, the judge

was assigned to preside over all matters pending between the parties to a family court case. The action did not involve the attorney who represented the judge, but did involve two other attorneys who practice in the same firm. Neither of those attorneys had any involvement in the judge's personal matter. The judge did not disclose the prior representation to the parties or counsel. A motion was filed to disqualify the judge.

COMMISSION CONCLUSION:

The Judicial Standards Commission determined the judge's disqualification was not required in this matter, nor was the judge required to disclose the prior representation. The Commission determined that while legal representation is ongoing, and for a reasonable period of time after the conclusion of the representation (a minimum of six months), a judge must disclose the relationship and disqualify him/herself upon the request of either party or follow the remittal of disqualification procedure set forth in Canon 3D of the Code of Judicial Conduct. After a reasonable time has lapsed, provided the judge believes he/she can remain impartial, continued disqualification will not be required. The Commission advises the better practice to be continued disclosure of the prior representation for an additional period of time depending upon the specifics of both the prior representation and the matter currently before the court, and upon motion for disqualification, to permit another judge to rule on the motion if the judge declines to recuse. In the exercise of discretion, based upon a consideration of all relevant factors at the time, the judge may at some point cease disclosure of the prior representation.

DISCUSSION:

This inquiry involves several provisions of the North Carolina Code of Judicial Conduct. Canons 1 and 2A of the Code address the requirements that a judge conduct himself/herself in such a manner as to promotes public confidence in and ensure the preservation of the independence, integrity and impartiality of the judiciary. Canon 2B of the Code provide that a judge should not allow "family, social or other relationships to influence the judge's judicial conduct or judgment" nor "convey or permit others to convey the impression that they are in a special position to influence the judge." 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 . . ."

For as long as a judge's personal legal representation is ongoing and for a reasonable time thereafter, the judge's impartiality may reasonably be questioned in other matters wherein the attorney who repre-

sents the judge, or members of the attorney's firm, appear as counsel before the judge. Therefore disqualification either upon motion of a party or sua sponte is appropriate and unquestioned. In the alternative, a judge may disclose the conflict and follow the remittal of disqualification procedures of Canon 3D of the Code.

The difficult issue is the determination of "a reasonable time". In Formal Advisory Opinion 2009-02, the Commission adopted "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." While any pre-determined period of disqualification will be subject to criticism as arbitrary, the Commission concluded a defined period was needed to provide a baseline for guidance and to allow reasonable questions of partiality to abate. A longer period of presumptive disqualification would be burdensome upon the judicial system, particularly in the many rural judicial districts in North Carolina where there are limited numbers of judges and lawyers.

While disqualification will usually not be required following the end of the six month period following conclusion of the relationship, the particular circumstances of the representation may necessitate continued disqualification. As stated by the Colorado Judicial Ethics Advisory Board, "The judge first should consult his or her own emotions and conscience to determine freedom from disabling prejudice. The judge also should consider whether an objective, disinterested person aware of all the circumstances would reasonably question the judge's partiality because of the past representation. Among the circumstances the judge should take into consideration are the length of time he or she was represented by the attorney, the nature and extent of the representation (e.g., was the subject of the representation a simple transactional matter or did it involve protracted litigation), the amount of money paid to the attorney, and how much time has elapsed since the representation." C.J.E.A.B. Ad. Op. 2006-05.

In the specific circumstances under consideration, the representation involved an essentially uncontested separation agreement and divorce which ended more than three years prior to the filing of the action in which the motion to disqualify was filed. There was no relationship between the judge and the attorney or the attorney's firm prior to initiation of the representation or subsequent to its completion. Customary counsel fees related to the representation were charged to and paid by the judge. The judge has presided over numerous cases wherein the attorney and other members of the attorney's firm appeared as counsel without objection or motion to disqualify

after disclosure. The Commission determined the totality of the circumstances do not provide grounds upon with the judge's impartiality may reasonably be questioned.

References:

North Carolina Code of Judicial Conduct
Canon 1
Canon 2A
Canon 2B
Canon 3C(1)

HEADNOTE INDEX

WORD AND PHRASE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

record on appeal, and defendant's motion to strike these documents was granted. **N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co., 334.**

Attorney fees—restoration of competency—original jurisdiction—clerk of superior court—Motions for attorney fees made on appeal in an action to restore competency were dismissed without prejudice to petitioner's right to submit a request for such fees to the clerk of superior court, who has original jurisdiction over matters involving management by a guardian of her ward's estate. **In re Clark, 151.**

Attorney fees as sanction—denied—appeal not frivolous—A motion for remand of an award of attorney fees as a sanction for a frivolous appeal was denied, even though all of appellants' arguments were rejected in the appeal, where the arguments were not so totally without merit that they could be branded completely frivolous. Additionally, there was no evidence that the appeal was taken for an improper purpose. **In re Clark, 151.**

Collateral estoppel—substantial right—argument not made—An appeal from summary judgment in the Industrial Commission on collateral estoppel was dismissed as from an interlocutory order where defendant did not make a legal or factual argument that a substantial right would be affected if the merits were not reached before final judgment. **Barfield v. N.C. Dep't of Crime Control & Pub. Safety, 114.**

Interlocutory order—based on statute of limitations rather than immunity—An appeal was from an interlocutory order where it involved an action resulting from a highway patrol trooper's alleged use of excessive force that was grounded in the statute of limitations and not immunity, as defendant contended. The Legislature passed a Session Law concerning waiver of the State's immunity in such cases, but defendant's argument here is that the officer was not acting within the scope of his employment, so that plaintiff's claim was not within the Session Law and was barred by the statute of limitations. **Barfield v. N.C. Dep't of Crime Control & Pub. Safety, 114.**

Interlocutory order—discovery—patient files—substantial right—A dentist's appeal from an order granting the Dental Board's motion to enforce subpoenas for her patient records affected a substantial right and was subject to immediate appellate review where she asserted a statutory privilege under the Health Insurance Portability and Accountability Act (HIPAA). Arguments on appeal not grounded in HIPAA were dismissed. **N.C. State Bd. of Dental Exam'rs v. Woods, 89.**

Interlocutory order—discovery denied—no proceeding filed—no substantial right affected—No substantial right was affected, and defendant's appeal was dismissed as from an interlocutory order, where the trial court quashed notices of deposition and subpoenas defendant had served upon the Dental Board while it was investigating defendant's conduct as a dentist. The applicable statute governing disciplinary proceedings for dentists does not permit a defendant to engage in discovery until a Notice of Hearing is filed. Defendant cannot create an action in which to conduct discovery by filing motions in superior court. **N.C. State Bd. of Dental Exam'rs v. Woods, 89.**

APPEAL AND ERROR—Continued

Interlocutory order—lack of jurisdiction—Plaintiff's appeal from the trial court's order granting defendant's motion to dismiss was dismissed for lack of jurisdiction. Plaintiff did not recognize that the trial court's order was interlocutory and failed to address which, if any, substantial right would be affected absent immediate review. **Pentecostal Pilgrims & Strangers Corp. v. Connor, 128.**

Interlocutory order—no substantial right affected—no possibility of inconsistent verdicts—Defendants' appeal from an interlocutory order denying their motion to dismiss plaintiff's claims was not properly before the Court of Appeals because the order does not affect a substantial right. As there was no possibility of inconsistent verdicts resulting from a state court action and a federal Part 16 proceeding, defendants will not be prejudiced by having to defend in both forums. **Asheville Jet, Inc. v. City of Asheville, 1.**

Interlocutory order—no substantial right affected—no possibility of inconsistent verdicts—no preemption—Plaintiff's claims brought in state court are not preempted by his Part 16 proceeding initiated with the Federal Aviation Administration. Plaintiff cannot obtain any of the relief sought in his state court action in the Part 16 proceeding. **Asheville Jet, Inc. v. City of Asheville, 1.**

Interlocutory order—no substantial right affected—no possibility of inconsistent verdicts—no preemption—Plaintiff's state court claims are not preempted by a conflict with a Congressional enactment. Plaintiff's claims and the redress plaintiff seeks in the Part 16 proceeding and the state court action are so dissimilar that there is no danger that the state court action will conflict with the Part 16 proceeding. **Asheville Jet, Inc. v. City of Asheville, 1.**

Interlocutory order—no substantial right affected—no possibility of inconsistent verdicts—no preemption—Plaintiff's state court claims are not preempted by any express language in a Congressional enactment. The express language in the Airport and Airway Improvement Act preserves appropriate state court action involving disputes between federally funded airports and their tenants. **Asheville Jet, Inc. v. City of Asheville, 1.**

Interlocutory order—no substantial right affected—no possibility of inconsistent verdicts—no preemption—Plaintiff's state court claims are not preempted by implication from the depth and breadth with which the Airport and Airway Improvement Act occupies the legislative fields of aviation and federally funded airports. **Asheville Jet, Inc. v. City of Asheville, 1.**

Interlocutory orders—governmental immunity—public duty doctrine—The denial of summary judgment for a city affected a substantial right and was immediately appealable under the doctrine of governmental immunity and the public duty doctrine. **Beckles-Palomares v. Logan, 235.**

Interlocutory orders—workers' compensation—expedited medical treatment—An appeal by defendants in a workers' compensation case from an order for expedited medical treatment was from an interlocutory order and did not affect a substantial right. Rulings in compliance with N.C.G.S. § 97-78(f) and (g) must necessarily be expedited, are interlocutory, and are entered without prejudice to the subsequent resolution of the contested issues in the case. **Beradi v. Craven Cnty. Sch., 364.**

APPEAL AND ERROR—Continued

Issue not preserved for appellate review—failure to object—In a felony breaking or entering a motor vehicle prosecution, defendant waived his objection to the admission of a copy of the vehicle's registration, offered to prove ownership of the vehicle and the owner's lack of consent to defendant's breaking or entering the vehicle, by failing to object to other evidence admitted for the same purpose. The evidence was sufficient to submit the element of lack of consent to the jury. **State v. Jacobs, 350.**

Notice of appeal—timely filed—The guardian *ad litem's* motion to dismiss respondent mother's appeal from the termination of her parental rights was denied because respondent's notice of appeal was timely filed by operation of N.C. R. App. P. 27(a). **In re E.M., 761.**

Petition for certiorari granted—ancillary errors not considered—Where defendant's petition for *certiorari* from the adjudication of his guilty plea was granted, the appellate court did not decide whether he had a direct right of appeal for ancillary errors. **State v. Salvetti, 18.**

Plain error—not argued in brief—waived—Defendant waived appellate review of whether there was plain error in the trial court's failure to instruct the jury on a lesser included offense where defendant did not argue plain error in his brief. **State v. Wheeler, 61.**

Preservation of issues—abandonment of argument—In an automobile accident case where it was alleged that the City had allowed vegetation to become overgrown, a statute of repose argument was abandoned on appeal where it was pled, assigned as error, and raised in the reply brief, but not in the principal brief. Even if the argument had been properly raised, it had no merit as the City has a duty to exercise continuing supervision of its streets. **Beckles-Palomares v. Logan, 235.**

Preservation of issues—abandonment of argument—facts not applied to law—An argument on appeal was deemed abandoned where facts from the record were not applied to the case law cited. **Moss Creek Homeowners Ass'n, Inc. v. Bissette, 222.**

Preservation of issues—claim not preserved—claim preclusion—Defendant did not preserve for appeal his argument that plaintiffs presented insufficient evidence that mobile billboard sales/lease-back investments sold by defendant were "securities" as defined by N.C.G.S. §§ 78A-1 to -66. Moreover, a federal district court's prior holding that the investments at issue were securities precluded defendant from relitigating the issue in the present case. **Latta v. Rainey, 587.**

Preservation of issues—constitutional challenge—The allegations in petitioner father's motion were sufficient under N.C. R. App. P. 10(b)(1) to preserve his constitutional challenge to the procedure for placing names of individuals who have allegedly abused or neglected children on the Responsible Individual's List under N.C.G.S. § 7B-323. **In re W.B.M., 606.**

Preservation of issues—different argument presented below—supporting authority not cited—Defendants did not properly raise on appeal the question of whether the bankruptcy of the developer and an assignment of rights rendered a covenant unenforceable where a different argument was presented at trial. Moreover, defendants did not cite supporting authority. **Moss Creek Homeowners Ass'n, Inc. v. Bissette, 222.**

CONSTITUTIONAL LAW—Continued

CRIMINAL LAW—Continued

EVIDENCE—Continued

Character evidence—plain error—failure to show prejudice—The trial court did not commit plain error in allowing a police detective to testify that defendant was a "known drug dealer[.]" Even assuming *arguendo* that the testimony was inadmissible character evidence under N.C.G.S. § 8C-1, Rule 404(a), defendant failed to show "that absent the error, the jury probably would have reached a different result." **State v. Batchelor, 733.**

Cross-examination—defense of involuntary intoxication—pre- and post-arrest silence—The trial court did not commit plain error in an indecent liberties and statutory rape case by allowing the prosecutor to cross-examine defendant about his pre- and post-arrest silence regarding his belief that he had been drugged because the record reflected substantial evidence of defendant's guilt including testimony from the victim, the results of the paternity testing, and defendant's own testimony that he did not deny being the father of the victim's child. **State v. Jackson**, **564.**

Cross-examination—guilty plea to lesser charge—plea bargain—harmless error—Although defendant contends the trial court erred by allowing the prosecutor to cross-examine defendant concerning pleading guilty to a lesser charge as part of a plea bargain, defendant failed to meet his burden of showing that a different result would have been reached at trial absent the alleged error. **State v. Riley**, **299.**

Cross-examination—opinion testimony—invited error—The trial court did not commit plain error in a case involving the solicitation of a person believed to be a child by means of a computer for the purpose of committing an unlawful sex act by allowing a detective to give opinion testimony that defendant was going to have sex with a fourteen-year-old. Even assuming the elicited statements were error, defendant cannot be prejudiced by them as a matter of law when he invited them during cross-examination. **State v. Fraley**, **457.**

Cross-examinations—waiver of objection—The trial court did not commit plain error in a prosecution for performing a notarial act without a commission by admitting testimony from three witnesses that defendant's actions were not legal and that certain legal standards had not been met. Defense counsel elicited the same testimony on cross-examination, thus constituting waiver of defendant's challenge to its admission on direct examination. **State v. West**, **479.**

Hearsay—drug analysis—nontestifying chemist—Testimony by a forensic chemist that was based on an analysis by another chemist was not hearsay. Evidence offered as the basis of an expert's opinion is not offered for the truth of the matter asserted. **State v. Hough, 674.**

Hearsay—right to confrontation—no error—The trial court did not err in allowing into evidence a police officer's testimony that an informant told the officer to approach defendant to make a drug buy because the officer's testimony was not offered for the truth of the matter asserted: that defendant was a drug dealer. The testimony was not inadmissible hearsay and did not violate defendant's Sixth Amendment right to confrontation. **State v. Batchelor, 733.**

Hearsay—state of mind exception—prior crimes or bad acts—The trial court did not err in a first-degree murder case by allowing the State to introduce alleged hearsay testimony about defendant's other bad acts because the pertinent statements concerned defendant's previous violence toward the victim, were not

WORKERS' COMPENSATION—Continued

Disability—unsuccessful return to work—findings—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff showed substantial evidence that she was disabled following her unsuccessful return to work in 2006. No findings by the Commission supported defendants' claim that Dr. Rauck intended plaintiff's disability status to be temporary pending some future appointment. **Davis v. Hospice & Palliative Care of Winston-Salem, 660.**

Disability established—Defendant's argument that the Full Commission erred in concluding that plaintiff was entitled to ongoing total disability compensation was overruled. The Full Commission's challenged findings of fact were supported by competent evidence, and the findings supported the conclusion of law that plaintiff established his disability pursuant to the second and third tests set forth in *Russell v. Lowe's Prod. Distrib.*, 108 N.C. App. 762, and that defendant failed to rebut the presumption of disability. **Freeman v. Rothrock, 273.**

Form 44 and brief—not timely—The Industrial Commission did not err by granting a motion to dismiss by defendants where plaintiff's statement of grounds for the appeal was not timely. Although plaintiff argued that Workers' Compensation Rule 701 requires dismissal only when no Form 44 and brief are filed and not when they are merely untimely filed, the Commission's interpretation of its rule is persuasive. **Soder v. Corvel Corp., 724.**

Motion to reinstate total disability compensation—unsuccessful trial return to work—automatic duty after notice—The Industrial Commission did not err in a workers' compensation case by denying defendants the ability to present evidence on plaintiff employee's motion to reinstate total disability compensation after her unsuccessful trial return to work. Defendants had an automatic duty under N.C.G.S. § 97-32.1 to reinstate total disability compensation to plaintiff following notice, and defendants were required to follow the procedures in Chapter 97 if they wanted to cease making the reinstated disability payments. **Davis v. Hospice & Palliative Care of Winston-Salem, 660.**

No credit for earlier payments received—clincher settlement agreements—The Full Industrial Commission did not err in concluding that defendant was not entitled to credit pursuant to N.C.G.S. § 97-33 for payments plaintiff received under "clincher" settlement agreements for workers' compensation claims with previous employers. The amounts paid pursuant to the clincher agreements were not accelerated payments of compensation for total disability and the record was void of any evidence that would support apportionment. **Freeman v. Rothrock, 273.**

ZONING

Board of adjustment—de novo standard of review—The superior court did not err by finding that a city zoning board of adjustment's interpretation of a zoning ordinance was entitled to some deference under a *de novo* standard of review. It was consistent with the standard of review for interpretation of a local zoning ordinance. **Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjust., 631.**

Board of adjustment decision—competent, material, and substantial evidence—whole record test—A whole record test revealed the superior court did not

ZONING—Continued

WORD AND PHRASE INDEX