NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 205

6 JULY 2010

20 JULY 2010

RALEIGH
2013

CITE THIS VOLUME
205 N.C. APP.

TABLE OF CONTENTS

This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

JOHN C. MARTIN

Judges

LINDA M. McGEE
ROBERT C. HUNTER
WANDA G. BRYANT
ANN MARIE CALABRIA
RICHARD A. ELMORE
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS
DONNA S. STROUD
ROBERT N. HUNTER, JR.
SAMUEL J. ERVIN IV
CHERI BEASLEY[1]
CRESSIE H. THIGPEN, JR.[2]
J. DOUGLAS McCULLOUGH
CHRIS DILLON[3]
MARK DAVIS[4]

Emergency Recalled Judges

GERALD ARNOLD
JOHN B. LEWIS, JR.
DONALD L. SMITH
JOHN M. TYSON
RALPH A. WALKER

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ERIC L. LEVINSON
JOHN M. TYSON
JOHN S. ARROWOOD
JAMES A. WYNN, JR.
BARBARA A. JACKSON

1. Appointed to the Supreme Court.
2. Retired 31 December 2012.
3. Sworn in 1 January 2013.
4. Appointed and Sworn in 31 December 2012.

Administrative Counsel
DANIEL M. HORNE, JR.

Clerk
JOHN H. CONNELL

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
Daniel M. Horne, Jr.

Staff Attorneys
John L. Kelly
Shelley Lucas Edwards
Bryan A. Meer
Alyssa M. Chen
Eugene H. Soar
Yolanda Lawrence
Matthew Wunsche
Nikiann Tarantino Gray

ADMINISTRATIVE OFFICE OF THE COURTS

Director
John W. Smith

Assistant Director
David F. Hoke

APPELLATE DIVISION REPORTER
H. James Hutcheson

ASSISTANT APPELLATE DIVISION REPORTERS
Kimberly Woodell Sieredzki
Allegra Collins

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
	J. Carlton Cole	Hertford
2	Wayland Sermons	Washington
3A	W. Russell Duke, Jr.	Greenville
	Clifton W. Everett, Jr.[1]	Greenville
	Marvin Blount[2]	Greenville
6A	Alma L. Hinton	Roanoke Rapids
6B	Cy A. Grant, Sr.	Ahoskie
7A	Quentin T. Sumner	Rocky Mount
	Milton F. (Toby) Fitch, Jr.	Wilson
7BC	Walter H. Godwin, Jr.	Tarboro
	Second Division	
3B	Benjamin G. Alford	New Bern
	Kenneth F. Crow	New Bern
	John E. Nobles, Jr.	Morehead City
4A	Russell J. Lanier, Jr.[3]	Wallace
	W. Douglas Parsons[4]	Clinton
4B	Charles H. Henry	Jacksonville
5	W. Allen Cobb, Jr.	Wrightsville Beach
	Jay D. Hockenbury	Wilmington
	Phyllis M. Gorham	Wilmington
8A	Paul L. Jones	Kinston
8B	Arnold O. Jones II	Goldsboro
	Third Division	
9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
9A	W. Osmond Smith III	Semora
10	Donald W. Stephens	Raleigh
	Abraham P. Jones[5]	Raleigh
	Howard E. Manning, Jr.	Raleigh
	Michael R. Morgan	Raleigh
	Paul C. Gessner	Wake Forest
	Paul C. Ridgeway	Raleigh
	G. Bryan Collins, Jr.[6]	Raleigh
14	Orlando F. Hudson, Jr.	Durham
	Elaine Bushfan	Durham
	Michael O'Foghludha	Durham
	James E. Hardin, Jr.	Hillsborough
15A	Robert F. Johnson	Burlington
	Wayne Abernathy	Burlington

DISTRICT	JUDGES	ADDRESS
15B	Carl R. Fox	Chapel Hill
	R. Allen Baddour	Chapel Hill
	Fourth Division	
11A	Franklin F. Lanier[7]	Buies Creek
	C. Winston Gilchrist[8]	Buies Creek
11B	Thomas H. Lock	Smithfield
12	Claire Hill	Fayetteville
12B	Gregory A. Weeks[9]	Fayetteville
	Gale M. Adams[10]	Fayetteville
12C	James F. Ammons, Jr.[11]	Fayetteville
	Mary Ann Tally	Fayetteville
13A	Douglas B. Sasser	Whiteville
13B	Ola M. Lewis	Southport
16A	Richard T. Brown	Laurinburg
16B	Robert F. Floyd, Jr.	Lumberton
	James Gregory Bell	Lumberton
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
	Richard W. Stone	Eden
17B	A. Moses Massey	Mt. Airy
	Andy Cromer	King
18	Lindsay R. Davis, Jr.	Greensboro
	John O. Craig III	High Point
	R. Stuart Albright	Greensboro
	Patrice A. Hinnant	Greensboro
	Joseph E. Turner[12]	Greensboro
	Susan Bray[13]	Greensboro
19B	Vance Bradford Long	Asheboro
19D	James M. Webb	Whispering Pines
21	Judson D. DeRamus, Jr.[14]	Winston-Salem
	William Z. Wood, Jr.[15]	Troutman
	L. Todd Burke	Winston-Salem
	Ronald E. Spivey	Winston-Salem
	David L. Hall[16]	Winston-Salem
23	Edgar B. Gregory	Wilkesboro
	Sixth Division	
19A	W. Erwin Spainhour	Concord
19C	Anna Mills Wagoner	Salisbury
20A	Tanya T. Wallace	Rockingham
	Kevin M. Bridges	Oakboro
20B	W. David Lee	Monroe
	Christopher W. Bragg	Monroe
22A	Christopher Collier[17]	Statesville
	Joseph Crosswhite[18]	Statesville
	Alexander Mendaloff III[19]	Statesville
	Julia Lynn Gullett[20]	Statesville
22B	Mark E. Klass	Lexington
	Theodore S. Royster, Jr.	Lexington

DISTRICT	JUDGES	ADDRESS
	Seventh Division	
25A	Beverly T. Beal[21]	Lenoir
	Robert C. Ervin[22]	Morganton
	C. Thomas Edwards[23]	Lenoir
25B	Timothy S. Kincaid	Newton
	Nathaniel J. Poovey	Newton
26	Richard D. Boner	Charlotte
	W. Robert Bell	Charlotte
	Yvonne Mims Evans	Charlotte
	Linwood O. Foust	Charlotte
	Eric L. Levinson	Charlotte
	H. William Constangy	Charlotte
	Hugh Lewis	Charlotte
27A	Jesse B. Caldwell III	Gastonia
	Robert T. Sumner	Gastonia
27B	Forrest Donald Bridges	Shelby
	James W. Morgan	Shelby
	Eighth Division	
24	Charles Phillip Ginn	Boone
	Gary Gavenus	Boone
28	Alan Z. Thornburg	Asheville
	Marvin Pope	Asheville
29A	Laura J. Bridges[24]	Rutherfordton
	J. Thomas Davis[25]	Forest City
29B	Mark E. Powell	Hendersonville
30A	James U. Downs	Franklin
30B	Bradley B. Letts	Sylva

SPECIAL JUDGES

Sharon T. Barrett	Asheville
Marvin K. Blount	Greenville
Craig Croom[26]	Raleigh
Richard L. Doughton	Sparta
James L. Gale	Greensboro
A. Robinson Hassell	Greensboro
Kendra D. Hill[27]	Raleigh
D. Jack Hooks, Jr.	Whiteville
Lucy Noble Inman	Raleigh
Jack W. Jenkins	Morehead City
John R. Jolly, Jr.	Raleigh
Shannon R. Joseph	Raleigh
Calvin Murphy	Charlotte
William R. Pittman	Raleigh
Gary E. Trawick, Jr.	Burgaw
Reuben F. Young[28]	Raleigh

EMERGENCY JUDGES

DISTRICT	JUDGES	ADDRESS
	W. Douglas Albright	Greensboro
	James L. Baker, Jr.[29]	Marshall
	Steve A. Balog	Burlington
	Michael E. Beal[30]	Lenoir
	Michael E. Beale	Rockingham
	Henry V. Barnette, Jr.	Raleigh
	Stafford G. Bullock	Raleigh
	C. Preston Cornelius	Mooresville
	B. Craig Ellis	Laurinburg
	Clifton W. Everette, Jr.[31]	Greenville
	Ernest B. Fullwood	Wilmington
	Thomas D. Haigwood	Greenville
	Clarence E. Horton, Jr.	Kannapolis
	Charles C. Lamm, Jr.	Terrell
	Russell J. Lanier, Jr.[32]	Wallace
	Gary Lynn Locklear[33]	Pembroke
	Jerry Cash Martin	Mt. Airy
	J. Richard Parker	Manteo
	A. Leon Stanback[34]	Durham
	Ronald L. Stephens	Durham
	Kenneth C. Titus	Durham
	Jack A. Thompson	Fayetteville
	Joseph E. Turner[35]	Greensboro
	John M. Tyson	Fayetteville
	George L. Wainwright	Morehead City
	Dennis Winner	Asheville

RETIRED/RECALLED JUDGES

	J. B. Allen	Burlington
	Anthony M. Brannon	Durham
	Frank R. Brown	Tarboro
	James C. Davis	Concord
	Larry G. Ford	Salisbury
	Marvin K. Gray	Charlotte
	Zoro J. Guice, Jr.	Hendersonville
	Knox V. Jenkins	Four Oaks
	John B. Lewis, Jr.	Farmville
	Robert D. Lewis	Asheville
	Julius A. Rousseau, Jr.	Wilkesboro
	Thomas W. Seay	Spencer
	Ralph A. Walker, Jr.	Raleigh

1. Retired 21 December 2012.
2. Appointed 28 December 2012.
3. Retired 1 April 2012.
4. Appointed 1 June 2012.
5. Term ended 31 December 2012.
6. Sworn in 2 January 2013.
7. Retired 31 December 2011.
8. Appointed 12 April 2012.
9. Retired 31 December 2012.

10. Sworn in 1 January 2013.
11. Appointed Senior Resident Superior Court Judge 1 January 2013.
12. Appointed 1 April 2011; Retired 31 December 2012.
13. Sworn in 1 January 2013.
14. Retired 31 December 2012.
15. Appointed Senior Resident Superior Court Judge 1 January 2013.
16. Sworn in 1 January 2013.
17. Deceased 8 February 2012.
18. Appointed Senior Resident Superior Court Judge 13 February 2012.
19. Appointed 15 June 2012; Term ended 31 December 2012.
20. Sworn in 1 January 2013.
21. Retired 1 December 2012.
22. Appointed Senior Resident Superior Court Judge 2 December 2012.
23. Appointed 14 December 2012.
24. Retired 31 December 2012.
25. Sworn in 1 January 2013.
26. Term ended 30 December 2012.
27. Appointed 31 December 2012.
28. Appointed 31 December 2012.
29. Resigned 31 January 2012.
30. Appointed 17 December 2012.
31. Appointed 28 December 2012.
32. Appointed 5 April 2012.
33. Resigned 3 May 2011.
34. Resigned 4 February 2012.
35. Appointed 7 January 2013.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	C. Christopher Bean (Chief)	Edenton
	Edgar L. Barnes	Manteo
	Amber Davis	Wanchese
	Eula E. Reid	Elizabeth City
	Robert P. Trivette	Kitty Hawk
2	Michael A. Paul (Chief)	Washington
	Regina Rogers Parker	Williamston
	Christopher B. McLendon	Williamston
	Darrell B. Cayton, Jr.	Washington
3A	David A. Leech (Chief)	Greenville
	Patricia Gwynett Hilburn	Greenville
	Joseph A. Blick, Jr.	Greenville
	G. Galen Braddy	Grimesland
	Charles M. Vincent[1]	Greenville
	Brian DeSoto[2]	Greenville
3B	Jerry F. Waddell (Chief)[3]	New Bern
	Cheryl Lynn Spencer[4]	New Bern
	Paul M. Quinn	Atlantic Beach
	Karen A. Alexander	New Bern
	Peter Mack, Jr.	New Bern
	L. Walter Mills[5]	New Bern
	Kirby Smith, II[6]	New Bern
	Clinton Rowe[7]	New Bern
	W. David McFadyen III[8]	New Bern
4	Leonard W. Thagard (Chief)	Clinton
	Paul A. Hardison	Jacksonville
	William M. Cameron III	Richlands
	Louis F. Foy, Jr.	Pollocksville
	Sarah Cowen Seaton	Jacksonville
	Carol Jones Wilson	Kenansville
	Henry L. Stevens IV	Warsaw
	James L. Moore, Jr.	Jacksonville
5	J. H. Corpening II (Chief)	Wilmington
	John J. Carroll III[9]	Wilmington
	Rebecca W. Blackmore	Wilmington
	James H. Faison III	Wilmington
	Sandra Criner	Wilmington
	Richard Russell Davis	Wilmington
	Melinda Haynie Crouch	Wrightsville Beach
	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
	Robin W. Robinson[10]	Wilmington
6A	Brenda G. Branch (Chief)	Roanoke Rapids
	W. Turner Stephenson III	Roanoke Rapids
	Teresa R. Freeman	Roanoke Rapids
6B	Thomas R. J. Newbern (Chief)[11]	Aulander
	William Robert Lewis II	Winton
	Thomas L. Jones	Ashoskie
	Vershenia B. Moody[12]	Windsor
7	William Charles Farris (Chief)	Wilson

DISTRICT	JUDGES	ADDRESS
	Joseph John Harper, Jr.	Tarboro
	John M. Britt	Tarboro
	Pell C. Cooper	Rocky Mount
	William G. Stewart	Wilson
	John J. Covolo	Rocky Mount
	Anthony W. Brown	Spring Hope
8	David B. Brantley (Chief)	Goldsboro
	Lonnie W. Carraway[13]	Walstonburg
	R. Leslie Turner	Pink Hall
	Timothy I. Finan	Goldsboro
	Elizabeth A. Heath	Kinston
	Charles P. Gaylor III	Goldsboro
	Ericka Y. James[14]	Goldsboro
9	Daniel Frederick Finch (Chief)	Oxford
	J. Henry Banks	Henderson
	John W. Davis	Louisburg
	Randolph Baskerville	Warrenton
	S. Quon Bridges[15]	Oxford
	Carolyn J. Yancey	Creedmoor
	Amanda Stevenson[16]	Oxford
9A	Mark E. Galloway (Chief)	Roxboro
	L. Michael Gentry	Pelham
10	Robert Blackwell Rader (Chief)	Raleigh
	James R. Fullwood	Raleigh
	Kristin H. Ruth[17]	New Hill
	Jennifer M. Green	Raleigh
	Monica M. Bousman	Raleigh
	Jane Powell Gray[18]	Raleigh
	Jennifer Jane Knox	Raleigh
	Debra Ann Smith Sasser	Raleigh
	Lori G. Christian	Raleigh
	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Ned Wilson Mangum	Raleigh
	Jacqueline L. Brewer	Apex
	Anna Elena Worley	Raleigh
	Margaret Eagles	Raleigh
	Keith O. Gregory	Raleigh
	Vinston M. Rozier, Jr.	Raleigh
	Michael J. Denning	Raleigh
	Kris D. Bailey	Cary
	Erin M. Graber[19]	Raleigh
	Louis B. Meyer III[20]	Raleigh
	Dan Nagle[21]	Raleigh
11	Albert A. Corbett, Jr. (Chief)	Smithfield
	Jacquelyn L. Lee	Smithfield
	Jimmy L. Love, Jr.	Sanford
	O. Henry Willis, Jr.	Dunn
	Addie M. Harris-Rawls	Clayton
	Resson O. Faircloth II	Erwin
	Robert W. Bryant, Jr.	Selma
	R. Dale Stubbs	Clayton

DISTRICT	JUDGES	ADDRESS
	Charles Patrick Bullock[22]	Coats
	Paul A. Holcombe	Smithfield
	Charles Winston Gilchrist	Clayton
	Caron H. Stewart[23]	Smithfield
	Mary H. Wells[24]	Smithfield
12	A. Elizabeth Keever (Chief)	Fayetteville
	Robert J. Stiehl III	Fayetteville
	Edward A. Pone	Parkton
	Kimbrell Kelly Tucker	Fayetteville
	John W. Dickson[25]	Fayetteville
	Talmage Baggett	Fayetteville
	George J. Franks	Fayetteville
	David H. Hasty	Fayetteville
	Laura A. Devan	Fayetteville
	Toni S. King	Fayetteville
	Lou Oliveria[26]	Fayetteville
13	Jerry A. Jolly (Chief)	Tabor City
	Napoleon B. Barefoot, Jr.[27]	Supply
	Marion R. Warren	Ash
	William F. Fairley	Southport
	Scott Ussery	Elizabethtown
	Sherry D. Tyler	Tabor City
	Pauline Hankins[28]	Tabor City
14	Marcia H. Morey (Chief)	Durham
	James T. Hill	Durham
	Nancy E. Gordon	Durham
	William Andrew Marsh III	Durham
	Brian C. Wilks	Durham
	Pat Evans	Durham
	Doretta Walker	Durham
15A	James K. Roberson (Chief)	Burlington
	Bradley Reid Allen, Sr.	Burlington
	Kathryn W. Overby	Burlington
	David Thomas Lambeth, Jr.	Burlington
15B	Joseph M. Buckner (Chief)	Chapel Hill
	Charles T. Anderson	Chapel Hill
	Beverly A. Scarlett	Durham
	Page Vernon[29]	Chapel Hill
	Lunsford Long	Chapel Hill
	James T. Bryan[30]	Hillsborough
16A	William G. McIlwain (Chief)	Wagram
	Regina M. Joe	Raeford
	John H. Horne, Jr.	Laurinburg
16B	J. Stanley Carmical (Chief)	Lumberton
	Herbert L. Richardson	Lumberton
	John B. Carter, Jr.	Lumberton
	Judith Milsap Daniels	Lumberton
	William J. Moore	Maxton
17A	Fredrick B. Wilkins, Jr. (Chief)	Reidsville
	Stanley L. Allen	Sandy Ridge
	James A. Grogan	Reidsville
17B	Charles Mitchell Neaves, Jr. (Chief)	Elkin

DISTRICT	JUDGES	ADDRESS
	Spencer Gray Key, Jr.	Elkin
	Angela B. Puckett	Westfield
	William F. Southern III	King
18	Wendy M. Enochs (Chief)[31]	Greensboro
	Susan Elizabeth Bray[32]	Greensboro
	H. Thomas Jarrell, Jr.	High Point
	Susan R. Burch	High Point
	Theresa H. Vincent	Summerfield
	William K. Hunter	High Point
	Sherry Fowler Alloway	Greensboro
	Polly D. Sizemore[33]	Greensboro
	Kimberly Michelle Fletcher	Greensboro
	Betty J. Brown	Greensboro
	Angela C. Foster	Greensboro
	Avery Michelle Crump	Browns Summit
	Jan H. Samet	Greensboro
	Angela B. Fox[34]	Greensboro
	Tabatha Holloway[35]	Greensboro
	Linda L. Falls[36]	Greensboro
19A	William G. Hamby, Jr. (Chief)	Kannapolis
	Donna G. Hedgepeth Johnson	Concord
	Martin B. McGee	Concord
	Brent Cloninger	Mount Pleasant
19B	Michael A. Sabiston (Chief)[37]	Troy
	James P. Hill, Jr.	Asheboro
	Jayrene Russell Maness[38]	Carthage
	Lee W. Gavin	Asheboro
	Scott C. Etheridge	Asheboro
	Donald W. Creed, Jr.	Asheboro
	Robert M. Wilkins	Asheboro
	William Heafner[39]	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
	Beth Spencer Dixon	Salisbury
	William C. Kluttz, Jr.	Salisbury
	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.	Salisbury
20A	Lisa D. Thacker (Chief)	Polkton
	Scott T. Brewer	Monroe
	Amanda L. Wilson	Rockingham
	William Tucker	Albemarle
20B	N. Hunt Gwyn (Chief)	Monroe
	Joseph J. Williams	Monroe
	William F. Helms	Matthews
	Stephen V. Higdon	Monroe
21	William B. Reingold (Chief)	Clemmons
	Chester C. Davis[40]	Winston-Salem
	William Thomas Graham, Jr.	Kernersville
	Victoria Lane Roemer	Winston-Salem
	Laurie L. Hutchins	Winston-Salem
	Lisa V. L. Menefee	Winston-Salem
	Lawrence J. Fine	Clemmons
	Denise S. Hartsfield	Winston-Salem

DISTRICT	JUDGES	ADDRESS
	George Bedsworth	Winston-Salem
	Camille D. Banks-Payne	Winston-Salem
	David Sipprell[41]	Winston-Salem
22A	L. Dale Graham (Chief)	Taylorsville
	H. Thomas Church	Statesville
	Deborah Brown	Mooresville
	Edward L. Hendrick IV	Taylorsville
	Christine Underwood	Olin
22B	Wayne L. Michael (Chief)	Lexington
	Jimmy L. Myers	Advance
	April C. Wood	Lexington
	Mary F. Covington	Thomasville
	Carlton Terry	Advance
	J. Rodwell Penry	Lexington
23	Mitchell L. McLean (Chief)	Wilkesboro
	David V. Byrd	Wilkesboro
	Jeanie Reavis Houston	Yadkinville
	Michael D. Duncan	Wilkesboro
24	Alexander Lyerly (Chief)	Banner Elk
	William A. Leavell III[42]	Bakersville
	R. Gregory Horne	Boone
	Theodore Wright McEntire	Spruce Pine
	F. Warren Hughes[43]	Burnsville
25	Robert M. Brady (Chief)	Lenoir
	Gregory R. Hayes	Hickory
	L. Suzanne Owsley	Hickory
	C. Thomas Edwards[44]	Morganton
	Buford A. Cherry	Hickory
	Sherrie Wilson Elliott	Newton
	Amy R. Sigmon	Newton
	J. Gary Dellinger	Newton
	Robert A. Mullinax, Jr.	Newton
	Mark L. Killian[45]	Newton
26	Lisa C. Bell (Chief)	Charlotte
	Rickye McKoy-Mitchell	Charlotte
	Louis A. Trosch, Jr.	Charlotte
	Regan A. Miller	Charlotte
	Becky Thorne Tin	Charlotte
	Thomas Moore, Jr.[46]	Charlotte
	Christy Townley Mann	Charlotte
	Ronald C. Chapman	Charlotte
	Donnie Hoover	Charlotte
	Paige B. McThenia	Charlotte
	Jena P. Culler	Charlotte
	Kimberly Y. Best-Staton	Charlotte
	Charlotte Brown-Williams	Charlotte
	John Totten III[47]	Charlotte
	Elizabeth Thornton Trosch	Charlotte
	Theofanis X. Nixon	Charlotte
	Karen Eady-Williams	Charlotte
	Donald Cureton, Jr.	Charlotte
	Sean Smith	Charlotte

DISTRICT	JUDGES	ADDRESS
	Matt Osman	Charlotte
	Tyyawdi M. Hands[48]	Charlotte
	Gary Henderson[49]	Charlotte
	David Strickland[50]	Charlotte
27A	Ralph C. Gingles, Jr. (Chief)	Gastonia
	Angela G. Hoyle	Belmont
	John K. Greenlee	Gastonia
	James A. Jackson	Gastonia
	Thomas Gregory Taylor[51]	Belmont
	Michael K. Lands	Gastonia
	Richard Abernethy	Gastonia
	Pennie M. Thrower[52]	Gastonia
27B	Larry James Wilson (Chief)	Shelby
	Anna F. Foster	Shelby
	K. Dean Black	Denver
	Ali B. Paksoy, Jr.	Shelby
	Meredith A. Shuford	Lincolnton
28	J. Calvin Hill (Chief)	Asheville
	Rebecca B. Knight[53]	Asheville
	Patricia Kaufmann Young	Asheville
	Sharon Tracey Barrett	Asheville
	Ward D. Scott[54]	Asheville
	Edwin D. Clontz[55]	Candler
	Julie M. Kepple	Asheville
	Andrea Dray	Asheville
	Susan Marie Dotson-Smith[56]	Asheville
29A	C. Randy Pool (Chief)	Marion
	Laura Anne Powell	Rutherfordton
	J. Thomas Davis[57]	Forest City
	Robert K. Martelle[58]	Rutherfordton
29B	Athena F. Brooks (Chief)	Fletcher
	David Kennedy Fox[59]	Hendersonville
	Thomas M. Brittain, Jr.	Mills River
	Peter Knight	Hendersonville
	Emily Cowan[60]	Hendersonville
30	Richlyn D. Holt (Chief)	Waynesville
	Monica Hayes Leslie	Waynesville
	Richard K. Walker	Hayesville
	Donna Forga	Clyde
	Roy Wijewickrama	Waynesville
	Kristina L. Earwood	Waynesville

EMERGENCY DISTRICT COURT JUDGES

Thomas V. Aldridge, Jr.	Ocean Isle Beach
Kyle D. Austin	Pineola
Sarah P. Bailey	Rocky Mount
Grafton G. Beaman	Elizabeth City
Ronald E. Bogle[61]	Raleigh
Steven J. Bryant[62]	Bryson City
Samuel Cathey	Charlotte
Chester C. Davis[63]	Winston-Salem

DISTRICT	JUDGES	ADDRESS
	Danny E. Davis[64]	Waynesville
	Shelly H. Desvouges	Raleigh
	M. Patricia DeVine	Hillsborough
	John W. Dickerson[65]	Fayettesville
	J. Keaton Fonvielle	Shelby
	Thomas G. Foster, Jr.	Pleasant Green
	Earl J. Fowler, Jr.	Asheville
	David K. Fox[66]	Hendersonville
	Jane Powell Gray[67]	Raleigh
	Samuel G. Grimes[68]	Washington
	Joyce A. Hamilton	Raleigh
	Lawrence Hammond, Jr.	Asheboro
	Jane V. Harper	Charlotte
	Resa Harris[69]	Charlotte
	Robert E. Hodges	Nebo
	Shelly S. Holt	Wilmington
	James M. Honeycutt	Lexington
	William G. Jones[70]	Charlotte
	Wayne G. Kimble	Jacksonville
	David Q. LaBarre	Durham
	William C. Lawton	Raleigh
	Harold Paul McCoy, Jr.	Halifax
	Lawrence McSwain	Greensboro
	Fritz Y. Mercer, Jr.	Summerfield
	Thomas F. Moore[71]	Charlotte
	William M. Neely[72]	Asheboro
	Thomas R.J. Newbern[73]	Aulander
	Nancy C. Phillips	Elizabethtown
	Dennis J. Redwing	Gastonia
	Michael A. Sabiston[74]	Troy
	Anne B. Salisbury	Cary
	J. Larry Senter	Raleigh
	Joseph E. Setzer, Jr.	Franklinton
	Russell Sherrill III	Raleigh
	Polly D. Sizemore[75]	Greensboro
	Catherine C. Stevens	Chapel Hill
	J. Kent Washburn	Burlington
	Charles W. Wilkinson, Jr.	Oxford

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Donald L. Boone	High Point
Joyce A. Brown	Supply
Hugh B. Campbell, Jr.	Charlotte
Daphene L. Cantrell[76]	Huntersville
T. Yates Dobson, Jr.	Smithfield
Harley B. Gaston, Jr.[77]	Belmont
James W. Hardison	Williamston
Jane V. Harper	Charlotte
James A. Harrill, Jr.	Winston-Salem

DISTRICT	JUDGES	ADDRESS
	ROLAND H. HAYES	Gastonia
	PHILIP F. HOWERTON, JR.	Charlotte
	LILLIAN B. JORDAN	Randleman
	JAMES E. MARTIN	Greenville
	EDWARD H. MCCORMICK	Lillington
	J. BRUCE MORTON	Greensboro
	OTIS M. OLIVER	Dobson
	STANLEY PEELE	Chapel Hill
	MARGARET L. SHARPE	Greensboro
	SAMUEL M. TATE	Morganton
	JOHN L. WHITLEY	Wilson

1. Retired November 2012.
2. Sworn in 2 January 2013.
3. Retired 31 January 2012.
4. Term ended 31 December 2012.
5. Appointed Chief District Court Judge 8 February 2012.
6. Appointed 11 April 2012; Term ended 31 December 2012.
7. Sworn in 1 January 2013.
8. Sworn in 1 January 2013.
9. Deceased 25 May 2011.
10. Appointed 31 August 2011.
11. Retired 31 December 2012.
12. Sworn in 1 January 2013.
13. Term ended 31 December 2012.
14. Sworn in 1 January 2013.
15. Term ended 31 December 2012.
16. Sworn in 1 January 2013.
17. Resigned 18 May 2012.
18. Retired 28 February 2012.
19. Appointed 15 May 2012; Term ended 31 December 2012.
20. Appointed 30 August 2012.
21. Sworn in 1 January 2013.
22. Term ended 31 December 2012.
23. Appointed 11 June 2012.
24. Sworn in 2 January 2013.
25. Retired 31 December 2012.
26. Sworn in 1 January 2013.
27. Retired 31 December 2012.
28. Sworn in 1 January 2013.
29. Resigned 31 October 2011.
30. Appointed 3 February 2012.
31. Appointed Chief District Court Judge 6 May 2011.
32. Term ended 31 December 2012.
33. Term ended 31 December 2012.
34. Appointed 22 August 2011.
35. Sworn in 1 January 2013.
36. Sworn in 1 January 2013.
37. Retired 31 August 2012.
38. Appointed Chief District Court Judge 1 September 2012.
39. Appointed 1 December 2012.
40. Retired 31 December 2012.
41. Sworn in 1 January 2013.
42. Retired 1 August 2011.
43. Appointed 31 October 2011.
44. Appointed to Superior Court 14 December 2012.
45. Appointed 14 January 2013.
46. Retired 31 December 2012.
47. Term ended 31 December 2012.
48. Appointed 14 April 2011.
49. Sworn in 1 January 2013.
50. Sworn in 1 January 2013.
51. Term ended 31 December 2012.
52. Sworn in 1 January 2013.
53. Retired 1 August 2012.

54. Appointed 20 April 2011.
55. Appointed 21 April 2011.
56. Appointed 8 November 2012.
57. Term ended 31 December 2012.
58. Appointed 5 April 2013.
59. Retired 31 December 2012.
60. Sworn in 1 January 2013.
61. Resigned 24 May 2011.
62. Resigned 22 May 2012.
63. Appointed 10 January 2013.
64. Resigned 9 January 2012; Reappointed 6 August 2012; Resigned 17 April 2013.
65. Appointed 4 January 2013.
66. Appointed 8 January 2013.
67. Appointed 4 May 2012.
68. Appointed 11 March 2011.
69. Deceased 2 May 2011.
70. Resigned 12 April 2012.
71. Appointed 8 April 2013.
72. Resigned 28 July 2011.
73. Appointed 7 January 2013.
74. Appointed 5 September 2012.
75. Appointed 7 January 2013; Resigned 28 February 2013.
76. Deceased 16 October 2011.
77. Deceased 31 December 2011.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
KRISTI HYMAN

Deputy Chief of Staff
NELS ROSELAND

Chief Deputy Attorney General
GRAYSON G. KELLEY

Senior Policy Advisor
JULIA WHITE

Solicitor General
JOHN F. MADDREY

Senior Deputy Attorneys General

JAMES J. COMAN
ROBERT T. HARGETT
ROBIN P. PENDERGRAFT
WILLIAM P. HART
THOMAS J. ZIKO
REGINALD L. WATKINS
KEVIN L. ANDERSON
KATHLEEN WAYLETT

Special Deputy Attorneys General

DANIEL D. ADDISON
DAVID J. ADINOLFI II
STEVEN M. ARBOGAST
JOHN J. ALDRIDGE III
HAL F. ASKINS
JONATHAN P. BABB
GRADY L. BALENTINE, JR.
VALERIE L. BATEMAN
MARC D. BERNSTEIN
AMY L. BIRCHER
DAVID W. BOONE
WILLIAM H. BORDEN
HAROLD D. BOWMAN
DAVID P. BRENSKILLE
ANNE J. BROWN
MABEL Y. BULLOCK
SONYA M. CALLOWAY-DURHAM
JILL LEDFORD CHEEK
LEONIDAS CHESTNUT
KATHRYN J. COOPER
FRANCIS W. CRAWLEY
ROBERT M. CURRAN
NEIL C. DALTON
LEONARD DODD
DAVID B. EFIRD
AIMEE ESCUETA
JUNE S. FERRELL
JOSEPH FINARELLI
VIRGINIA L. FULLER
GARY R. GOVERT
RYAN HAIGH
ARDEN HARRIS
RICHARD L. HARRISON
JENNIE W. HAUSER
E. BURKE HAYWOOD
JOSEPH E. HERRIN
ISHAM FAISON HICKS
TINA L. HLABSE
KAY MILLER-HOBART
DANIEL S. JOHNSON
FREEMAN E. KIRBY, JR.
TINA A. KRASNER
FREDERICK C. LAMAR
ROBERT M. LODGE
MARY L. LUCASSE
AMAR MAJMUNDAR
ALANA MARQUIS-ELDER
ELIZABETH L. MCKAY
ROBERT C. MONTGOMERY
LARS F. NANCE
SUSAN K. NICHOLS
SHARON PATRICK-WILSON
ALEXANDER M. PETERS
KIMBERLY D. POTTER
GERALD K. ROBBINS
BUREN R. SHIELDS III
RICHARD E. SLIPSKY
BELINDA A. SMITH
IAIN M. STAUFFER
ELIZABETH N. STRICKLAND
DONALD R. TEETER
KATHRYN J. THOMAS
DOUGLAS P. THOREN
VANESSA N. TOTTEN
MELISSA L. TRIPPE
NANCY VECCHIA
VICTORIA L. VOIGHT
SANDRA WALLACE-SMITH
JOHN H. WATTERS
JAMES A. WELLONS
PHILLIP K. WOODS
THOMAS M. WOODWARD

Assistant Attorneys General

STANLEY G. ABRAMS
RUFUS C. ALLEN
ALLISON A. ANGELL
STEVEN A. ARMSTRONG
LAURA ASKINS
NATALIE BACON
ALESIA BALSHAKOVA
JOHN P. BARKLEY
SCOTT K. BEAVER
BRITNE BECKER
MICHAEL BERGER
BRIAN R. BERMAN
CAROLE BIGGERS
ERICA C. BING
KATHLEEN N. BOLTON
BARRY H. BLOCH
KAREN A. BLUM
TAMMY BOUCHELLE
RICHARD H. BRADFORD
LISA B. BRADLEY
STEPHANIE A. BRENNAN
CHRISTOPHER BROOKS
MATTHEW BOYATT
JILL A. BRYAN
MICHAEL BULLERI
BETHANY A. BURGON
HILDA BURNETTE-BAKER
MICHEAL BUTLER
KIMBERLY CALLAHAN
JASON T. CAMPBELL
THOMAS CAMPBELL
STACY T. CARTER
LAUREN M. CLEMMONS
JOHN CONGLETON
SCOTT A. CONKLIN
LISA G. CORBETT

Douglas W. Corkhill
Jill Cramer
Robert D. Croom
Laura E. Crumpler
Lora Cubbage
Kimberly A. D'Arruda
Clarence J. DelForge III
Adrian Dellinger
Torrey Dixon
Brenda Eaddy
Lauren Earnhardt
Letitia C. Echols
Daphne Edwards
Joseph E. Elder
David L. Elliott
Jennifer Epperson
Caroline Farmer
Margaret A. Force
Heather H. Freeman
Terrence D. Friedman
Andrew Furuseth
Lisa Glover
Christine Goebel
Scott Goodson
Michael David Gordon
David Gore
Richard A. Graham
Kimberly Grande
Angel E. Gray
John R. Green, Jr.
Deborah Greene
Alexandra S. Gruber
Mary E. Guzman
Melody R. Hairston
Nancy Dunn Hardison
Lisa H. Harper
Jodi Harrison
Richard L. Harrison
William P. Hart, Jr.
Kathryne Hathcock
Christina S. Hayes
Ernest Michael Heavner
Thomas D. Henry
Clinton C. Hicks
Alexander M. Hightower
Tammera S. Hill
Charles H. Hobgood
Mary C. Hollis
James C. Holloway
Susannah P. Holloway
Sherri Horner
Derek Hunter
Joseph Hyde
Amy Kunstling Irene
Tenisha S. Ja cobs
Creecy C. Johnson
Joel L. Johnson
Durwin P. Jones
Catherine F. Jordan
Thomas Kelly
Linda J. Kimbell
Anne E. Kirby
David N. Kirkman
Brent D. Kiziah
Benjamin Kull
Lewis Lamar
Laura L. Lansford
Donald W. Laton
Philip A. Lehman
Rebecca E. Lem
Anita Leveaux-Quigless
Amanda P. Little
Tiffany Lucas
Steven McAllister
Martin T. McCracken
Neal McHenry
Carolyn McLain
Christopher McClennan
Kevin G. Mahoney
Ann W. Matthews
Thomas G. Meacham, Jr.
Jess D. Mekeel
Brenda E. Menard
Mary S. Mercer
Derick Mertz
Anne M. Middleton
Thomas H. Moore
Katherine Murphy
Ellen A. Newby
John F. Oates
Daniel O'Brien
Jane L. Oliver
Jay L. Osborne
Donald O'Toole
Roberta A. Ouellette
Sondra C. Panico
Laura Parker
John A. Payne
Perry Palaez
John Parris
Jacqueline M. Perez
Cheryl A. Perry
Donald K. Phillips
Lareena Phillips
LaShawn L. Piquant
Ebony J. Pittman
Sandra Postell
Rajeev K. Premakumar
Brian Rabinovitz
Stacy Race
Carrie Randa
Peter A. Regulaski
Phillip T. Reynolds
Yvonne B. Ricci
Charlene B. Richardson
Timothy Rodgers
Jason Rosser
Kenneth Sack
Stuart Saunders
Nancy E. Scott
Jonathan D. Shaw
Kathryn Shields
Adam Shestak
Christina Simpson
Scott T. Slusser
Donna D. Smith
Robert K. Smith
Marc X. Sneed
M. Janette Soles
Richard G. Sowerby, Jr.
Daniel Spillman
Denise Stanford
James M. Stanley
Angenette R. Stephenson
Mary Ann Stone
Jennifer J. Strickland
Scott Stroud
Sarah Y. Meacham
Kip D. Sturgis
Sueanna P. Sumpter
Dahr J. Tanoury
Gary M. Teague
Jane R. Thompson
Judith L. Tillman
Teresa L. Townsend
Brandon L. Truman
Matthew Tulchin
Phyllis A. Turner
Janelle Varley
Nicholaos G. Vlahos
Richard James Votta
Gaines M. Weaver
Margaret L. Weaver
James A. Webster
Elizabeth J. Weese
Oliver G.Wheeler
Charles G. Whitehead
Larissa S. Williamson
Christopher H. Wilson
Donna B. Wojcik
Michael Wood
Patrick Wooten
Harriet F. Worley
Arthur Yancey
Claude N. Young, Jr.
Ryan Zellar
Ward A. Zimmerman
Tamara S. Zmuda

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	Frank R. Parrish	Elizabeth City
2	Seth H. Edwards	Washington
3A	Kimberly J. Robb	Greenville
3B	Scott Thomas	New Bern
4	Ernie Lee	Jacksonville
5	Benjamin Russell David	Wilmington
6A	Melissa Pelfrey	Halifax
6B	Valerie Asbell	Ahoskie
7	Robert Evans	Tarboro
8	C. Branson Vickory III	Goldsboro
9	Samuel B. Currin III	Oxford
9A	Wallace Bradsher, Jr.	Roxboro
10	C. Colon Willoughby, Jr.	Raleigh
11A	Vernon Stewart	Lillington
11B	Susan Doyle	Smithfield
12	Billy West	Fayetteville
13	Jon David	Bolivia
14	A. Leon Stanback	Durham
15A	Pat Nadolski	Graham
15B	James R. Woodall, Jr.	Hillsborough
16A	Kristy McMillan Newton	Raeford
16B	L. Johnson Britt III	Lumberton
17A	Phil Berger, Jr.	Wentworth
17B	C. Ricky Bowman	Dobson
18	J. Douglas Henderson	Greensboro
19A	Roxann L. Vaneekhoven	Concord
19B	Garland N. Yates	Asheboro
19C	Brandy Cook	Salisbury
19D	Maureen Krueger	Carthage
20A	Reece Saunders	Wadesboro
20B	Trey Robinson	Monroe
21	Jim O'Neill	Winston-Salem
22	Sarah Kirkman	Lexington
22B	Garry Frank	Lexington
23	Thomas E. Horner	Wilkesboro
24	Gerald W. Wilson	Boone
25	James Gaither, Jr.	Newton
26	Andrew Murray	Charlotte
27A	R. Locke Bell	Gastonia
27B	Richard L. Shaffer	Shelby
28	Ronald L. Moore	Asheville
29A	Bradley K. Greenway	Marion
29B	Jeff Hunt	Hendersonville
30	Michael Bonfoey	Waynesville

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
1	Andy Womble	Elizabeth City
2	R. Andrew Womble	Washington
3A	Robert C. Kemp III	Greenville
3B	James Q. Wallace III	Beaufort
5	Jennifer Harjo	Wilmington
10	Charles F. Caldwell	Raleigh
12	Ron D. McSwain	Fayetteville
14	Lawrence M. Campbell	Durham
15B	James E. Williams, Jr.	Carrboro
16A	Jonathan L. McInnis	Laurinburg
16B	Angus B. Thompson II	Lumberton
18	Frederick G. Lind	Greensboro
21	George R. Clary	Winston-Salem
26	Kevin P. Tully	Charlotte
27A	Kellum Morris	Gastonia
28	M. LeAnn Melton	Asheville
29B	Paul B. Welch	Brevard

CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. KENNETH WAYNE MAREADY

No. COA07-171-2

(Filed 6 July 2010)

1. Constitutional Law— per se ineffective assistance of counsel—admission of guilt—failure to procure defendant's consent

Trial counsel's assistance was *per se* ineffective and defendant was awarded a new trial on his convictions for second-degree murder and two counts of misdemeanor assault with a deadly weapon. The findings of fact made by the trial court at a hearing held pursuant to *State v. Harbison*, 315 N.C. 175, clearly and unequivocally indicated that defendant never gave his counsel explicit consent to admit defendant's guilt to those charges prior to the closing arguments.

2. Appeal and Error— preservation of issues—argument deemed abandoned—no factual or legal support

Defendant's argument that he received ineffective assistance of counsel because his trial attorney failed to object to inadmissible evidence, improper jury instructions, and unconstitutional entry of judgment was deemed abandoned where defendant failed to make a prejudice argument supported by factual or legal support.

3. Criminal Law— instructions—erroneous answer to jury question—definition of intent

The trial court committed prejudicial error in its answer to the jury's question about the meaning of the word "intent" in the

context of the jury instruction for assault with a deadly weapon and assault with a deadly weapon inflicting serious injury. The trial court's answer allowed the jury to convict defendant based on an improperly broad definition of intent.

4. Evidence— lay opinion testimony—accident reconstruction—no plain error

The trial court erred in admitting opinion testimony from two police officers concerning a car accident based on their examination of the scene after the accident. The officers did not witness the accident and were not offered as experts in accident reconstruction. However, defendant failed to show plain error as he elicited the same testimony on cross-examination.

5. Evidence— prior jail sentence—no error—no prejudicial error

The trial court did not err in admitting a police officer's testimony that defendant had just gotten out of jail recently. Even assuming *arguendo* that the admission of this evidence was improper, defendant failed to show prejudice where defendant's driving record was admitted at trial and showed that he had previously been sentenced to 12 months incarceration for driving while intoxicated.

6. Jury— instructions—operating a vehicle to elude arrest—no plain error

The trial court did not commit plain error in its instructions to the jury on the charge of operating a vehicle to elude arrest. Defendant failed to show how the trial court's omission of the fourth element of the offense in one of four times it instructed the jury on the charge was prejudicial.

7. Appeal and Error— preservation of issues—argument deemed abandoned—no factual or legal support

Defendant's argument that his convictions for multiple offenses violated the prohibition against double jeopardy was deemed abandoned where defendant failed to make any argument with factual or legal support.

ERVIN, Judge, concurring in part and concurring in the result in part.

Appeal by Defendant from judgments entered 24 April 2006 by Judge Abraham P. Jones in Superior Court, Durham County. Heard in

the Court of Appeals originally on 19 September 2007, and opinion filed 15 January 2008. Remanded to the Court of Appeals for reconsideration by order of the North Carolina Supreme Court on 12 December 2008.

Attorney General Roy Cooper, by Special Counsel Isaac T. Avery, III, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for Defendant-Appellant.

McGEE, Judge.

Kenneth Wayne Maready (Defendant) was convicted on 24 April 2006 of second-degree murder, felony eluding arrest, assault with a deadly weapon inflicting serious injury, two counts of assault with a deadly weapon, DWI, reckless driving, DWLR, misdemeanor larceny, and misdemeanor possession of stolen goods. The jury also found that Defendant had attained habitual felon status and further found, as an aggravating factor, that "[D]efendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person[.]" The trial court sentenced Defendant to prison terms of 270 months to 333 months for second-degree murder, 150 months to 189 months for assault with a deadly weapon inflicting serious injury, 150 months to 189 months for felony eluding arrest, 24 months for DWI, 150 days for each count of assault with a deadly weapon, 120 days for DWLR, 120 days for misdemeanor larceny, and 60 days for reckless driving; all sentences were to run consecutively and credit was given for time served. Judgment was arrested for misdemeanor possession of stolen goods.

Defendant appealed. A divided panel of our Court reversed and remanded to the trial court for a new trial based upon our holdings that a law enforcement stop of Defendant just prior to the traffic accident was improper, that the trial court erroneously instructed the jury on the element of intent, and that the trial court erroneously admitted several of Defendant's prior convictions of DWI into evidence. *State v. Maready*, 188 N.C. App. 169, 654 S.E.2d 769 (2008) (*Maready I*). The North Carolina Supreme Court reversed and remanded to our Court for consideration of assignments of error not addressed in *Maready I*. *State v. Maready*, 362 N.C. 614, 669 S.E.2d 564 (2008) (*Maready II*). More detailed statements of the facts may be found in *Maready I* and *Maready II*, and additional relevant facts will be discussed in the body of this opinion.

I.

[1] In Defendant's tenth argument, he contended his trial counsel's assistance was *per se* ineffective, and he should therefore be awarded a new trial on his convictions for second-degree murder, and two counts of misdemeanor assault with a deadly weapon. In the alternative, Defendant requested that we remand to the trial court for a hearing to determine whether Defendant had properly consented to his trial counsel's admission of guilt to these three charges under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985). Defendant requested no relief pursuant to *Harbison* for the remaining charges, and we therefore do not address them. *See State v. Millsaps*, 356 N.C. 556, 569-70, 572 S.E.2d 767, 776-77 (2002). We agreed that a hearing was required to determine whether Defendant gave informed consent for his counsel's admissions of guilt to the three above-listed charges. We remanded the matter to the trial court for a hearing by order entered 6 April 2009. We instructed the trial court to make findings of fact based upon the evidence presented at the hearing. The hearing was conducted by the trial court on 14 September 2009, and the trial court entered its order on the hearing on 14 October 2009. We allowed the parties to file supplemental briefs to augment their original arguments on appeal in light of the findings made by the trial court in its 14 October 2009 order.

Defendant initially pled not guilty to the charges for which he was tried. During closing argument, Defendant's counsel conceded that the State had met its burden with respect to the charges of DWI, reckless driving, DWLR and misdemeanor "larceny and/or possession of stolen property." Defendant's counsel also made the following statements:

> We do have the two misdemeanor assaults. . . . We don't contest those. They are inclusive in the events that have significant issues associated with them, but we don't contest those. And you can go and make your decisions accordingly. . . . [Defendant] holds absolute—holds responsibility for [the death of the victim]. I just argue it's not murder. It's Involuntary Manslaughter.

Defendant's counsel discussed the elements of involuntary manslaughter with the jury, stating that the second element was "that . . . [D]efendant's impaired driving proximately caused the victim's death. That's true. [Defendant's] guilty of that and should be found guilty of that." Defendant's counsel also stated that: "[Defendant's]

already admitted to you guilt . . . to . . . Assault with a Deadly Weapon times two[.]"

At the close of all the evidence and after closing arguments, but before jury instruction, Defendant's counsel again admitted Defendant's guilt to the charges of reckless driving, DWI, DWLR and misdemeanor possession of stolen goods. The trial court asked Defendant: "Have you agreed that your attorney [concedes guilt to reckless driving, DWI, DWLR and misdemeanor possession of stolen goods]?" and Defendant answered, "Yes, sir." Defendant also volunteered that he had consented to admit his guilt to the charge of misdemeanor larceny, and the following colloquy occurred:

> [The State]: Misdemeanor Larceny. And there might even be the Involuntary Manslaughter, I believe, at one point. Maybe I misunderstood that part of the argument, but I thought when he was arguing—
>
> The Court: There was also misdemeanor larceny, that's correct.
>
> [Defense Counsel]: Your Honor, I argued that's what [Defendant] should be convicted of.
>
> [The State]: Okay. Never mind then. I won't go there.

The matter was then dropped, and the trial court never asked Defendant if he had agreed to his counsel's admitting guilt on the charges of involuntary manslaughter or the two counts of assault with a deadly weapon.

The record of the trial was devoid of any evidence that Defendant gave informed consent to his counsel's admission of guilt for the charges of involuntary manslaughter or the two counts of assault with a deadly weapon. For this reason, we remanded to the trial court for an evidentiary hearing to determine whether Defendant gave his counsel the consent required by *Harbison* and its progeny, discussed below, for the admissions of guilt made at trial by Defendant's counsel. Our Supreme Court has stated that:

> A defendant's right to plead "not guilty" has been carefully guarded by the courts. When a defendant enters a plea of "not guilty," he preserves two fundamental rights. First, he preserves the right to a fair trial as provided by the Sixth Amendment. Second, he preserves the right to hold the government to proof beyond a reasonable doubt. A plea decision must be made exclu-

> sively by the defendant. "A plea of guilty or no contest involves the waiver of various fundamental rights such as the privilege against self-incrimination, the right of confrontation and the right to trial by jury." *State v. Sinclair*, 301 N.C. 193, 197, 270 S.E.2d 418, 421 (1980). Because of the gravity of the consequences, a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L. Ed. 2d 274 (1969); N.C.G.S. § 15A-1011 through § 15A-1026; *State v. Sinclair*, 301 N.C. 193, 270 S.E.2d 418 (1980).

Harbison, 315 N.C. at 180, 337 S.E.2d at 507 (citations omitted). The *Harbison* Court held that a defendant establishes a *per se* claim of ineffective assistance of counsel where the evidence shows the defendant's counsel admitted guilt to any charge without the defendant's informed consent. *Id.*, 337 S.E.2d at 507-08. The Court in *Harbison* further held that this violation required that the defendant receive a new trial. *Id.* at 180-81, 337 S.E.2d at 508.

In *State v. Matthews*, 358 N.C. 102, 591 S.E.2d 535 (2004), the defendant's counsel argued to the jury that it should find his client guilty of second-degree murder, not first-degree murder. The record did not indicate that the defendant had given consent to his attorney to make this concession. The defendant was found guilty of first-degree murder and appealed. The defendant argued that his counsel's admission of the defendant's guilt to second-degree murder without the defendant's consent violated the holding in *Harbison*. The *Matthews* Court decided it did not have enough evidence in the record to make a determination concerning whether the defendant had consented to the admission of guilt, and remanded to the trial court for a hearing on the matter.

In *Matthews*, the trial court conducted a hearing and filed an order ruling that the defendant had consented to a strategy of arguing for a conviction on the lesser included charge of second-degree murder in order to avoid a first-degree murder conviction. The trial court's findings indicated that the defendant had never *expressly* agreed to the strategy, but he had been present in numerous meetings where this strategy was discussed and never objected or voiced any reservations. In fact, the defendant's counsel "was certain that defendant concurred with [the strategy.]" *Id.* at 107, 591 S.E.2d at 539. Our Supreme Court disagreed with the ruling of the trial court and remanded for a new trial.

> The trial court found that defense counsel's trial strategy was "to convince the jury that defendant was guilty of something other than first degree murder." The trial court found that, because defendant consented to this overall strategy, and because "[d]efendant's IQ was high," defendant implicitly allowed his trial counsel to concede his guilt. However, we conclude that *Harbison* requires more than implicit consent based on an overall trial strategy and defendant's intelligence. "[T]he gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507.

Matthews, 358 N.C. at 108-09, 591 S.E.2d at 540.

Harbison cites N.C. Gen. Stat. §§ 15A-1011 through 1026, which concern acceptance of guilty pleas by the superior court. *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507 ("Because of the gravity of the consequences, a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L. Ed. 2d 274 (1969); N.C.G.S. § 15A-1011 through § 15A-1026; *State v. Sinclair*, 301 N.C. 193, 270 S.E.2d 418 (1980)."). Although our Supreme Court has not required that the mandates of N.C. Gen. Stat. §§ 15A-1011 through 1026 be strictly followed before a defendant's counsel be allowed to concede the guilt of his client at trial, *Harbison* and *Matthews* clearly indicate that the trial court must be satisfied that, prior to any admissions of guilt at trial by a defendant's counsel, the defendant must have given knowing and informed consent, and the defendant must be aware of the potential consequences of his decision. *See also State v. Thompson*, 359 N.C. 77, 118-20, 604 S.E.2d 850, 878-79 (2004); *State v. McDowell*, 329 N.C. 363, 385-86, 407 S.E.2d 200, 212-13 (1991).

N.C. Gen. Stat. § 15A-1011(a) states: "A defendant may plead not guilty, guilty, or no contest '(nolo contendere).' A plea may be received only from the defendant himself in open court except [under circumstances not relevant to this case.]" N.C. Gen. Stat. § 15A-1011(a) (2005). N.C. Gen. Stat. § 15A-1022 states in relevant part:

> [A] superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:
>
> (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
>
> (2) Determining that he understands the nature of the charge;
>
> (3) Informing him that he has a right to plead not guilty;
>
> (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
>
> (5) Determining that the defendant, if represented by counsel, is satisfied with his representation;
>
> (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge; and
>
> . . . .
>
> (b) . . . . The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice.

N.C. Gen. Stat. § 15A-1022 (2005).

Subsequent to our Supreme Court's decisions in *Harbison* and *Matthews*, the United States Supreme Court decided *Florida v. Nixon*, 543 U.S. 175, 160 L. Ed. 2d 565 (2004). In *Nixon*, the Supreme Court held that, because of the unique nature of death penalty cases, in certain circumstances involving trial strategy, admission of guilt to an offense at trial by a defendant's counsel without defendant's express consent will not constitute *per se* ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. *Id.*

> To summarize, *in a capital case*, counsel must consider in conjunction both the guilt and penalty-phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not im-

> peded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.

Nixon, 543 U.S. at 192, 160 L. Ed. 2d at 581 (citations omitted) (emphasis added). The *Nixon* Court further stated that:

> *Although such a concession [of guilt by a defendant's attorney] in a run-of-the-mine trial might present a closer question*, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. In such cases, "avoiding execution [may be] the best and only realistic result possible."

Id. at 190-91, 160 L. Ed. 2d at 580-81 (citations omitted) (emphasis added). The case before us is not a death penalty case, and the United States Supreme Court has not addressed the specific Sixth Amendment issue presented in the "run-of-the-mine" case before us. *See State v. Allen*, 360 N.C. 297, 315, 626 S.E.2d 271, 285 (2006) ("*See Florida v. Nixon*, 543 U.S. 175, 178 (2004) ('This *capital case* concerns defense counsel's strategic decision to concede, at the guilt phase of the trial, the defendant's commission of murder, and to concentrate the defense on establishing, at the penalty phase, *cause for sparing the defendant's life*.')") (emphasis added); *State v. Simmons*, 2009 Minn. App. Unpub. LEXIS 21, 7 (Minn. Ct. App. Jan. 6, 2009) ("The *Nixon* holding is inapplicable here because this is not a murder case, nor is the death penalty at stake."). We find the case before us distinguishable from *Nixon*, as it is not a death penalty case.[1] Further, subsequent to *Nixon*, the North Carolina Supreme Court has continued to apply the analysis set forth in *Harbison*, even in death penalty

1. In the concurring opinion it is argued that the holding in *Nixon* should be applied to non-capital cases. However, as the concurring opinion's mention of the United States Supreme Court's order granting certiorari makes clear, the United States Supreme Court granted certiorari "to resolve an important question of constitutional law, *i.e.*, whether counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt *in a capital trial* automatically renders counsel's performance deficient[.]" *Nixon*, 543 U.S. at 186, 160 L. Ed. 2d at 578 (emphasis added).

cases. *See State v. Goss*, 361 N.C. 610, 651 S.E.2d 867 (2007); *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1 (2005). Because our Supreme Court has not overruled *Harbison* and, in fact, continues to apply its holding after *Nixon*, we are bound by this precedent.[2]

We are similarly bound by the post-*Nixon* precedent set by our Court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Our Court has continued to apply the *Harbison* analysis since the *Nixon* opinion was filed. *See State v. Goode*, —— N.C. App. ——, ——, 677 S.E.2d 507, 510 (2009) (" 'a counsel's admission of his client's guilt, without the client's knowing consent and despite the client's plea of not guilty, constitutes ineffective assistance of counsel.' *State v. Harbison*, 315 N.C. 175, 179, 337 S.E.2d 504, 506-07 (1985). When this occurs, 'the harm is so likely and so apparent that the issue of prejudice need not be addressed.' *Id.* at 180, 337 S.E.2d at 507. We reiterate that '[a] plea decision must be made exclusively by the defendant. . . . Because of the gravity of the consequences, a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences.' *Id.*"); *State v. Harrington*, 171 N.C. App. 17, 32, 614 S.E.2d 337, 349 (2005); *State v. Alvarez*, 168 N.C. App. 487, 501, 608 S.E.2d 371, 380 (2005) ("Harbison applies when defense counsel concedes defendant's guilt to either the charged offense or a lesser included offense.") (citation omitted); *State v. Randle*, 167 N.C. App. 547, 550 n.1, 605 S.E.2d 692, 694 n.1 (2004) (after applying the *Harbison* analysis, noting "that the United States Supreme Court has recently discussed whether a concession of guilt by defense counsel constitutes ineffective assistance of counsel *per se*. *See Florida v. Nixon* [.]"); *see also unpublished opinions of our Court State v. Amick*, 2009 N.C. App. LEXIS 388 (Apr. 21,

2. The only mention of *Nixon* we find in any opinion of our Supreme Court is in *State v. Al-Bayyinah*, 359 N.C. 741, 757, 616 S.E.2d 500, 512 (2005), where, in *dicta*, our Supreme Court stated: "The United States Supreme Court has found that whether or not a defendant expressly consented to counsel's argument was not dispositive in finding ineffective assistance." *Al-Bayyinah* was filed on the same date as *Campbell*, which applied the *Harbison* analysis. *Goss* was filed after *Al-Bayyinah*. Furthermore, *Al-Bayyinah was* a capital case, and the defendant's objection was to admissions made by his attorney during the sentencing phase of the trial. "[Our Supreme] Court has held that the rule in *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986), precluding defense counsel from admitting a defendant's guilt to the jury without the defendant's consent does not apply to sentencing proceedings." *Al-Bayyinah*, 359 N.C. at 757, 616 S.E.2d at 512 (citation omitted).

2009); *State v. Barlowe*, 2008 N.C. App. LEXIS 599 (Apr. 1, 2008); *State v. Jacobs*, 2008 N.C. App. LEXIS 7 (Jan. 15, 2008); *State v. Graves*, 2007 N.C. App. LEXIS 1962 (Sept. 18, 2007); *State v. Wright*, 2007 N.C. App. LEXIS 1460, 15-18 (July 3, 2007); *State v. Manning*, 2007 N.C. App. LEXIS 390, 6-8 (Feb. 20, 2007); *State v. Verbal*, 2006 N.C. App. LEXIS 865 (Apr. 18, 2006); *State v. Ivey*, 2006 N.C. App. LEXIS 682, 12-14 (Mar. 21, 2006); *State v. Cameron*, 2005 N.C. App. LEXIS 2700 (Dec. 20, 2005); *State v. Sinclair*, 2005 N.C. App. LEXIS 2597 (Dec. 6, 2005); *State v. Cotten*, 2005 N.C. App. LEXIS 1246 (July 5, 2005); *State v. Martin*, 2005 N.C. App. LEXIS 1126, 6-7 (June 7, 2005) ("A defense attorney's specific admission of a defendant's guilt as to the crime for which defendant is being tried, or a lesser included offense, absent the defendant's consent, is a *per se* violation of a defendant's constitutional right to effective assistance of counsel under the Sixth Amendment. *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507."); *State v. Moorefield*, 2005 N.C. App. LEXIS 1102 (June 7, 2005); *State v. Miles*, 2005 N.C. App. LEXIS 1020 (May 17, 2005); *State v. Barr*, 2005 N.C. App. LEXIS 640, 7-8 (Apr. 5, 2005); *State v. Culler*, 2005 N.C. App. LEXIS 105 (Jan. 18, 2005).[3]

In the case before us, Defendant's counsel admitted Defendant's guilt to involuntary manslaughter, and two counts of assault with a deadly weapon. There was no indication at trial that Defendant was asked if he consented to these admissions, or that Defendant had given informed and voluntary consent to these admissions of his guilt.

In its 14 October 2009 order subsequent to the hearing on remand, the trial court made the following relevant findings of fact:

---

3. We disagree with the concurring opinion to the degree that it finds *Nixon* could control, and thus overturn, prior decisions of this Court or our Supreme Court. While this would be the case if *Nixon* held that a decision of our appellate courts (or a practice endorsed by our appellate courts) ran afoul of the United States Constitution, our appellate courts may set procedural and substantive requirements for our trial courts that exceed the constitutional minimum established by the United States Supreme Court. *Mills v. Rogers*, 457 U.S. 291, 300, 73 L. Ed. 2d 16, 23 (1982) ("For purposes of determining actual rights and obligations, however, questions of state law cannot be avoided. Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution. *See Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7, 12 (1979); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *see also* Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977). If so, the broader state protections would define the actual substantive rights possessed by a person living within that State."). As long as *Harbison* sets a standard that meets or exceeds that set forth in *Nixon*, *Nixon* does not overrule *Harbison* in any manner, and *Harbison* controls.

1. This court has had the opportunity to observe the testimony and demeanor of the witnesses and assess their credibility. In this regard the court finds the testimony of [Defendant's counsel] to be credible in all respects.

. . . .

11. Prior to closing arguments, [Defendant's counsel] informed the Defendant that he was going to concentrate his closing arguments on the more serious offenses and admit the lesser offenses. This conversation occurred in the courtroom at the defense counsel table after all the evidence had been heard and immediately prior to the arguments.

12. [Defendant's counsel] informed the Defendant that he believed the closing argument strategy was in the best interest of the Defendant.

13. Defendant raised no questions and did not express any objections to [his counsel] regarding [his counsel's] closing argument strategy prior to the argument being made.

14. After the closing argument the Defendant had no questions and did not raise any objections to [his counsel] or the court about the concessions that were made in the closing argument.

15. After the closing arguments, and outside the presence of the jury, counsel for the State requested that the trial judge conduct an inquiry with the Defendant regarding the concessions.

16. The trial judge asked the Defendant if he agreed to the concessions and he stated "Yes, sir."

17. Defendant expressed no objections to [his counsel] about the concessions while the trial judge made the inquiry of the Defendant.

18. At no time during, or after, the trial court's inquiry of the Defendant did the Defendant express to [his counsel] that he did not understand what the trial court was asking him.

. . . .

21. At no time during the sentencing proceeding did the Defendant express any questions or objections to the concessions made by his counsel in the closing arguments.

These findings are supported by substantial evidence presented at the hearing, except finding sixteen, which stated: "The trial judge

asked the Defendant if he agreed to the concessions and he stated 'Yes, sir.' " Finding sixteen may be misleading, as Defendant only responded "Yes, sir[]" when asked at trial if he had agreed to concede guilt to the charges of DWI, reckless driving, DWLR, and misdemeanor possession of stolen goods. Defendant then volunteered that he also conceded guilt to misdemeanor larceny. Defendant never agreed at trial that he conceded guilt to any of the remaining charges.

Although this Court only ordered the trial court to conduct a *Harbison* hearing and make appropriate findings of fact, the trial court stated that "out of an abundance of caution[,]" it also made six "conclusions of law." Several of these are properly considered findings of fact, and we will treat them as such. *Dunevant v. Dunevant*, 142 N.C. App. 169, 173, 542 S.E.2d 242, 245 (2001) ("[A] pronouncement by the trial court which does not require the employment of legal principles will be treated as a finding of fact, regardless of how it is denominated in the court's order." (citations omitted)).

The trial court made the following determinative "conclusion": "2. Defendant's trial counsel did not obtain the Defendant's explicit consent to the concessions of guilt prior to the closing argument." We hold that the findings of fact made by the trial court at the *Harbison* hearing clearly and unequivocally indicate that Defendant never gave his counsel explicit consent to admit Defendant's guilt to involuntary manslaughter and two counts of assault with a deadly weapon.

> *Harbison* requires more than implicit consent based on an overall trial strategy[.] "[T]he gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507.

Matthews, 358 N.C. at 108-09, 591 S.E.2d at 540. Therefore, though we do not doubt that Defendant's counsel was acting in a manner he believed to be the best trial strategy for Defendant, because Defendant's counsel failed to obtain Defendant's express consent before admitting Defendant's guilt to three charges before the jury, the rule set forth in *Harbison* and *Matthews* was violated. These admissions

of Defendant's counsel to the jury thus constituted *per se* ineffective assistance of counsel.

Because we hold that Defendant's counsel was *per se* ineffective for admitting Defendant's guilt to two counts of assault with a deadly weapon and one count of involuntary manslaughter, a lesser included offense of second-degree murder, without obtaining Defendant's consent, we must vacate those judgments and grant Defendant's request for a new trial on counts 05 CRS 004158, 05 CRS 004159, and 05 CRS 042094.[4] Because we do not vacate all of Defendant's convictions, we address Defendant's remaining arguments.

II.

[2] Defendant further argues that he received ineffective assistance of counsel "because his trial attorney failed to object to inadmissible State evidence, improper jury instructions, and unconstitutional entry of judgment." We disagree.

> In order to prove ineffective assistance of counsel, a
>
> 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. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); *see also State v. Lawson*, 159 N.C. App. 534, 543, 583 S.E.2d 354, 360 (2003). Concerning the second prong of the *Strickland* test, Defendant's argument is as follows:

---

4. In his supplemental brief, Defendant argues that he should be awarded a new trial on all counts. Defendant did not make this argument in his initial brief, and our remand was in response to, and limited by, the relief requested by Defendant in his initial brief. The only issue before the trial court on remand was whether Defendant had provided his counsel with informed consent to admit guilt to the two charges of assault with a deadly weapon and the single charge of involuntary manslaughter. We therefore make no determination concerning the adequacy of Defendant's admissions to these other charges. Defendant's attempt, through his supplemental brief, to change his argument on appeal, and the relief requested, is improper. We do not address Defendant's new arguments.

> [T]he question of prejudice is still open. If on appeal this Court refuses to review [D]efendant's appellate arguments or applies the harsh "plain error" test to deny them on the ground they are not preserved for normal appellate review by virtue of counsel's failure to object, counsel's deficient performance will have been prejudicial.

Defendant makes no argument that any of the errors Defendant attributes to his counsel in this portion of his brief deprived him of a fair trial. Defendant does not make a prejudice argument, but a conclusory statement, for which Defendant offers no factual or legal support. "Issues . . . in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6). "The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies." *Id.* This argument has been abandoned. *Id.*; *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008).

III.

[3] In Defendant's eighth argument, he contends the trial court committed prejudicial error in its instruction on the intent element for the three charges of assault with a deadly weapon. We agree.

During the trial court's charge to the jury, it instructed the jury, *inter alia*, that, in order to convict Defendant of assault with a deadly weapon inflicting serious injury, the jury had to determine beyond a reasonable doubt that Defendant "assaulted the victim by intentionally and without justification or excuse, by using [Defendant's vehicle to cause] an auto collision in which [the victim was seriously injured]." After the trial court had instructed the jury on all charges, and the jury began its deliberation, the jury sent the trial court a note asking the trial court to re-read certain instructions, including the instruction for assault with a deadly weapon inflicting serious injury, which the trial court did. Subsequently, the jury sent the trial court another note which read: "In the definition of assault there's an issue with the word 'intent.' Can this be interpreted strictly only as absolutely intended . . . to hit the other cars or can this be interpreted as the sum total of the actions caused the collision and this implies [intent]?" The trial court brought out the jury, read the question back to the jury, and then stated: "The answer is, the latter portion of your question." "It can be interpreted as the sum total of the actions caused the collision and this implies intent." The jury then

found Defendant guilty of assault with a deadly weapon inflicting serious injury.

We hold that, in answering the jury's question involving the meaning of intent, the trial court allowed the jury to convict Defendant based upon an improperly broad definition of intent. In order for a jury to convict a defendant of assault with a deadly weapon inflicting serious injury, it must find that it was the defendant's actual intent to strike the victim with his vehicle, or that the defendant acted with culpable negligence from which intent may be implied. *State v. Jones*, 353 N.C. 159, 164-65, 538 S.E.2d 917, 922-93 (2000) ("Thus, a driver who operates a motor vehicle in a manner such that it constitutes a deadly weapon, thereby proximately causing serious injury to another, may be convicted of AWDWISI provided there is either an actual intent to inflict injury or culpable or criminal negligence from which such intent may be implied."). In the present case, the trial court's answer to the jury's question could have allowed the jury to convict Defendant without a finding of either actual intent or culpable negligence. Because the trial court's instruction allowed the jury to convict Defendant of assault with a deadly weapon inflicting serious injury without a finding of the requisite intent, we must assume prejudice. *State v. Weston*, 273 N.C. 275, 283, 159 S.E.2d 883, 888 (1968).

We note that a determination by a jury that a defendant was driving while impaired, pursuant to N.C. Gen. Stat. § 20-138.1, can provide the requisite finding of culpable negligence. *Jones*, 353 N.C. at 165, 538 S.E.2d at 923. However, the trial court did not instruct the jury that it could find the requisite culpable negligence by making a determination that Defendant was driving while impaired. We further note that Defendant contends that the two convictions for misdemeanor assault with a deadly weapon should be overturned for the same erroneous instruction on intent. We agree, and so hold, though this holding will only be relevant if our holding above concerning the *Harbison* errors is overturned. We overturn Defendant's conviction for assault with a deadly weapon inflicting serious injury and remand for a new trial on count 05 CRS 04160.

IV.

[4] In Defendant's third argument, he contends the trial court committed plain error by admitting opinion testimony from State's witnesses without the witnesses first being admitted at trial as experts. We disagree.

The State called two police officers to testify concerning their opinions of how the accident occurred. These officers did not witness the accident, but gave their opinions indicating Defendant was at fault based upon their examination of the scene of the accident. The officers were not proffered as experts in accident reconstruction. This Court has held that opinion testimony of this kind is incompetent. *Seay v. Snyder*, 181 N.C. App. 248, 257-58, 638 S.E.2d 584, 590-91 (2007); *see also Hughes v. Vestal*, 264 N.C. 500, 503-07, 142 S.E.2d 361, 364-66 (1965). Defendant did not object to the testimony of the officers at trial, and thus waived regular review on appeal. *State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 856-57 (2003). Defendant does, however, expressly argue plain error on appeal, thus preserving the argument for plain error review. *State v. Dennison*, 359 N.C. 312, 312-13, 608 S.E.2d 756, 757 (2005).

We hold that the admission of the officers' opinion testimony concerning their purported accident reconstruction conclusions was error. Accident reconstruction opinion testimony may only be admitted by experts, who have proven to the trial court's satisfaction that they have a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury. *Hughes v. Vestal*, 264 N.C. at 503-07, 142 S.E.2d at 364-66; *Seay*, 181 N.C. App. at 257-58, 638 S.E.2d at 590-91. However, we hold that Defendant fails in his burden of proving plain error. First, not only did Defendant fail to object to the opinion testimony during the State's direct examination of the officers, he elicited much of the same testimony on cross-examination. Had Defendant objected, his subsequent questioning of the State's witnesses on cross-examination would not have necessarily constituted a waiver of his prior objections for the purposes of appeal. *State v. Wells*, 52 N.C. App. 311, 314-15, 278 S.E.2d 527, 529-30 (1981). However, Defendant failed to object and then elicited the same testimony on cross-examination. Therefore, there is nothing in the record to indicate to us that this line of questioning was not one Defendant wished to pursue at trial. Furthermore, by failing to object, Defendant deprived the State of the opportunity to correct the error, and to proffer its witnesses as experts. We hold that Defendant has failed to prove plain error on the facts before us.

V.

[5] In Defendant's fourth argument, he contends that the trial court committed reversible error by admitting an officer's testimony that Defendant "had just gotten out of jail recently." We disagree.

We first note that our Supreme Court referenced this testimony in *Maready II*. In support of its holding that the trial court's intent instruction, which allowed Defendant's prior convictions to be considered by the jury as proof of intent did not amount to prejudicial error, our Supreme Court said:

> Irrespective of defendant's prior convictions, the State presented such significant evidence of intent with regard to all the charges against defendant that we cannot say the challenged instruction probably affected the jury's verdicts. We call particular attention to the testimony regarding defendant's own statements on the day of the incident. During an earlier encounter with another deputy several hours before the wreck, *defendant stated he had recently been released from jail*, that his driver's license was suspended, and that "he didn't drive." Later, during the investigatory traffic stop, defendant admitted he had been drinking. Then, as he fled the scene of the stop, defendant "said that he was not going back to the penitentiary." These statements strongly demonstrate defendant's knowledge and understanding that he was driving illegally and was not going to stop.

Maready II, 362 N.C. 614, 621, 669 S.E.2d 564, 568-69 (2008) (emphasis added). Because our Supreme Court used this testimony in support of its holding in this matter, we conclude our Supreme Court determined it was properly admitted. Even assuming *arguendo* the testimony was improper, we hold Defendant has failed in his burden of showing "prejudice such that a different result [at trial] would have been likely had the evidence been excluded." *State v. Barber*, 93 N.C. App. 42, 45, 376 S.E.2d 497, 499 (1989). Defendant's driving record, which was admitted at trial, shows that Defendant had been sentenced to twelve months for DWI on 27 August 2004. The traffic crash occurred on 12 February 2005. Evidence that Defendant had recently "gotten out of jail" was already before the jury. This argument is without merit.

VI.

In Defendant's sixth argument, he contends that the trial court committed prejudicial error in allowing the State to allude to the trial court's ruling concerning reasonable suspicion for the initial stop of Defendant. We disagree.

First, our Supreme Court has already determined that the initial stop of Defendant was supported by reasonable suspicion. *Maready II*, 362 N.C. at 620, 669 S.E.2d at 568. Second, assuming *arguendo* the

State's argument was improper, upon a thorough review of the record, we hold that Defendant has failed to "show that there is a reasonable possibility a different result would have been reached had the error not occurred. N.C.G.S. § 15A-1443(a) (1999)." *State v. Allen*, 353 N.C. 504, 509, 546 S.E.2d 372, 375 (2001). This argument is without merit.

VII.

[6] In Defendant's seventh argument, he contends that the trial court committed plain error in instructing the jury on the charge of "operating a vehicle to elude arrest." We disagree.

The jury was correctly instructed on the charge of operating a vehicle to elude arrest. The jury then sent a request for re-instruction on the charge, specifically asking for re-instruction on the third element of the charge—that Defendant was fleeing or attempting to elude a law enforcement officer who was in the lawful performance of his duties. The trial court decided to re-instruct the jury on all four elements of the charge, and again correctly instructed the jury on the charge. The trial court repeated the correct charge in condensed form, then repeated it again, but did not include reference to the fourth element. Based on the facts of the case before it, the trial court's instruction concerning the fourth element required the jury to find two of the following beyond a reasonable doubt:

> gross impairment of [Defendant's] faculties while driving, due to the consumption of an impairing substance; a blood alcohol level of 0.14 or more within a relevant time after driving; reckless driving; negligent driving leading to an accident, causing . . . property damage in excess of $1,000 or personal injury; [or] driving while license revoked.

See N.C. Gen. Stat. § 20-141.5 (2005). In light of the jury's request to be re-instructed on only the third element of the charge, and the trial court's correct instruction on that element three times in close succession, and because Defendant admitted guilt at trial to at least two of the factors—reckless driving, and driving while license revoked—we do not find that the trial court's failure to include the fourth element in one of those three instructions amounts to plain error. Defendant has failed in his burden to prove any error was " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Wood*, 174 N.C. App. 790, 793, 622 S.E.2d 120, 123 (2005) (citations omitted).

VIII.

[7] In Defendant's ninth argument, he contends that his convictions for DWI, DWLR, and reckless driving "must be vacated because entry of judgment in them and in the murder, operating a vehicle, and felony assault cases violates double jeopardy." Defendant has not preserved this argument for appellate review.

> The Double Jeopardy Clause plays only a limited role in deciding whether cumulative punishments may be imposed under different statutes at a single criminal proceeding—that role being only to prevent the sentencing court from prescribing greater punishments than the legislature intended. We further reiterate that where our legislature "specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger* [*v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 309 (1932)], a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." *Missouri v. Hunter*, 459 U.S. at 368-69, 74 L. Ed. 2d at 544. *See State v. Price*, 313 N.C. 297, 327 S.E.2d 863 (1985).

State v. Gardner, 315 N.C. 444, 460-61, 340 S.E.2d 701, 712 (1986). Because the case before us involves convictions obtained at a single criminal proceeding, the outcome of Defendant's argument turns on whether our General Assembly intended to authorize cumulative punishment for the relevant statutes. Defendant states in his brief: "[O]ur Legislature did not intend for multiple punishment in this situation." This is not an argument, but a conclusory statement for which Defendant offers no factual or legal support. "Issues . . . in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6). "The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies." *Id.* This argument has been abandoned. *Id.*; *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008).

No prejudicial error in part, new trial in part.

Judge ELMORE concurs.

Judge ERVIN concurs in part and concurs in the result in part by separate opinion.

ERVIN, Judge, concurring in part and concurring in the result in part.

Although I concur in the Court's conclusion that defendant is entitled to a new trial in the cases in which he was convicted of second degree murder based on his trial counsel's unconsented-to concession of guilt to involuntary manslaughter and in the remainder of the Court's opinion, I am unable to fully join in the logic by which the Court reaches its decision with respect to the "concession of guilt" issue. As a result, I concur in part and concur in the result in part.

As the record clearly shows, defendant's trial counsel conceded his client's guilt of involuntary manslaughter, two counts of assault with a deadly weapon, driving while impaired, driving while license revoked, misdemeanor larceny, and misdemeanor possession of stolen property in his final argument to the jury.[5] In making these concessions, defendant's trial counsel argued that he did "not contest" the misdemeanor assault charges, so "you can go and make your decisions accordingly." After arguing that the jury should not convict defendant of assault with a deadly weapon with intent to kill inflicting serious injury, defendant's trial counsel discussed the second degree murder charge and argued that "it's not murder," "[i]t's Involuntary Manslaughter."[6] As a result, defendant's trial counsel clearly conceded defendant's guilt of involuntary manslaughter and both counts of assault with a deadly weapon in his concluding argument to the jury.

After all of the arguments of counsel had been completed, the prosecutor noted that "there were several charges that were either conceded or not contested by the defendant in the closing" and asked the trial court to inquire as to whether defendant had consented to those concessions. At that point, the following proceedings occurred:

THE COURT:	[Defense Counsel], I believe you did concede DWI, Driving While License Revoked, Reckless Driving, and Misdemeanor Possession of Stolen Goods; is that correct?

5. As the Court notes, an extensive discussion of the facts of this case can be found in the earlier opinions of this Court and the Supreme Court in *State v. Maready*, 188 N.C. App. 169, 654 S.E.2d 769 (2008), and *State v. Maready*, 362 N.C. 614, 669 S.E.2d 564 (2008).

6. In addition, defendant's trial counsel suggested at one point in his summation that defendant was also guilty of misdemeanor death by vehicle, another lesser included offense of second degree murder.

[DEF COUNSEL]: That is correct, Your Honor.

THE COURT: So that's on the record.

[PROSECUTOR]: Well, I think, Your Honor, what should be on the record is the defendant that he agreed for his attorney to do that.

THE COURT: Yes. Have the defendant stand up, please. Stand up here, Mr. Maready. Have you agreed that your attorney concede the—your guilt to Driving While Impaired, Driving While License Revoked, Reckless Driving, and Misdemeanor Possession of Stolen Goods?

THE DEFENDANT: Yes, sir.

THE COURT: All right, thank you very much.

[PROSECUTOR]: Your Honor, I think there may actually be more one. I think—

THE DEFENDANT: Misdemeanor Larceny.

[PROSECUTOR]: Misdemeanor Larceny. And there might even be the Involuntary Manslaughter, I believe, at one point. Maybe I misunderstood that part of the argument, but I thought when he was arguing—

THE COURT: There was also Misdemeanor Larceny, that's correct.

[DEF COUNSEL]: Your Honor, I've argued that's what he should be convicted of.

[PROSECUTOR]: Okay. Never mind then. I won't go there.

Since the issue of the extent, if any, to which defendant consented to the concessions of guilt made by his trial counsel during closing arguments was not fully explored during defendant's original trial, we remanded this case to the Durham County Superior Court for a further exploration of the consent issue.

As requested, the remand court took evidence and made findings of fact concerning the extent, if any, to which defendant and his trial counsel discussed the manner in which defendant's trial counsel would argue defendant's case to the jury and the extent to which

defendant consented to the concessions which were made during his trial counsel's closing argument. On the basis of the evidence received at this remand hearing, the trial court made the following findings of fact:

5. [Defendant's trial counsel] met with the Defendant on numerous occasions for trial preparation.

6. There were numerous discussions and plea negotiations between the State and defense.

7. All plea negotiations failed and the matter was tried in April of 2006.

8. [Defendant's trial counsel's] primary trial strategy and goal was to focus on reducing the second degree murder offense to some lesser offense.

9. The Defendant did not have any objections or questions about the trial strategy when it was discussed with [his trial counsel].

10. Faced with the overwhelming evidence of guilt to the lesser offenses, [Defendant's trial counsel] sought to avoid offending the sensibilities of the jurors by denying that the lesser offenses occurred.

11. Prior to closing arguments, [Defendant's trial counsel] informed the Defendant that he was going to concentrate his closing argument on the more serious offenses and admit the lesser offenses. This conversation occurred in the courtroom at the defense table after all the evidence had been heard and immediately prior to the arguments.

12. [Defendant's trial counsel] informed the Defendant that he believed that the closing argument strategy was in the best interest of the Defendant.

13. The Defendant raised no questions and did not express any objections to [Defendant's trial counsel] regarding [Defendant's trial counsel's] closing argument strategy prior to the argument being made.

14. After the closing argument the Defendant had no questions and did not raise any objections to [Defendant's trial counsel] or the court about the concessions that were made in the closing argument.

15. After the closing arguments and outside the presence of the jury, counsel for the State requested that the trial judge conduct an inquiry with the Defendant regarding the concessions.

16. The trial judge asked the Defendant if he agreed to the concessions and he stated "Yes, sir."

17. The Defendant expressed no objections to [Defendant's trial counsel] about the concessions while the trial judge made inquiry of the Defendant.

18. At no time during, or after, the trial court's inquiry of the Defendant did the Defendant express to [his trial counsel] that he did not understand what the trial court was asking him.

19. After the jury returned verdicts of guilty to second degree murder; misdemeanor larceny; misdemeanor possession of stolen goods; assault with a deadly weapon inflicting serious injury; two counts of assault with a deadly weapon; driving while impaired; driving while license revoked; careless and reckless driving; and felony eluding arrest, the court conducted a sentencing hearing.

20. At the sentencing hearing that was held on April 24, 2006 the Defendant executed a Transcript of Plea form in which he admitted aggravating and grossly aggravating factors which related to the Driving While Impaired conviction; that he was satisfied with his attorney and his legal services; and that he did not have any questions about anything that had just been said or about anything else involving his case.

21. At no time during the sentencing proceeding did the Defendant express any questions or objections to the concessions made by his counsel in the closing arguments.

In essence, the remand court found that, while defendant did not explicitly consent to all of the concessions that his trial counsel made during closing arguments, he was aware of and in general agreement with the strategy that his trial counsel followed throughout the trial, including the strategy that his trial counsel employed during closing arguments. Based on this factual information, we are now required to determine whether the concessions made by defendant's trial counsel during his final argument to the jury constituted ineffective assistance of counsel.

The Supreme Court has clearly indicated that the standards for determining whether a criminal defendant received constitutionally deficient representation are the same under both the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (stating that, while the defendant has "perhaps suggest[ed] that the North Carolina test for ineffective assistance of counsel is separate from and less stringent than the standards for ineffective assistance of counsel under the federal constitution, as interpreted by *Strickland v. Washington*," 466 U.S. 668, 80 L. Ed. 2d 674 (1984), "[w]e disagree"). For that reason, despite the fact that this Court and the Supreme Court generally address ineffective assistance of counsel claims in Sixth Amendment terms, I believe that *Braswell* clearly indicates that such discussions implicate both federal and state constitutional protections.

At the time that the Supreme Court initially addressed the constitutional implications of a decision by a criminal defendant's trial counsel to concede guilt of one or more of the offenses with which that defendant had been charged or of a lesser included offense, the United States Supreme Court had not had the occasion to directly address that issue. As a result, when it decided *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672-73 (1986), the Supreme Court was writing on a relatively clean slate. In that case, the trial court found that defendant's trial counsel argued to the jury in a non-capital first degree murder case that:

> Ladies and Gentlemen of the Jury, I know some of you and have had dealings with some of you. I know that you want to leave here with a clear [conscience] and I want to leave here also with a clear [conscience]. I have my opinion as to what happened on that April night, and I don't feel that [the defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree.

Harbison, 315 N.C. at 177-78, 337 S.E.2d at 506. In analyzing the defendant's ineffectiveness claim, the Supreme Court stated that the relevant test was the two-part inquiry enunciated in *Braswell* and *Strickland*. However, the Supreme Court pointed out that "there exist 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified,' "

such as cases in which " 'counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding.' " *Harbison*, 315 N.C. at 179, 337 S.E.2d at 507 (quoting *United States v. Cronic*, 466 U.S. 648, 659, ftn. 25, 80 L. Ed. 2d 657, 667, 668, ftn. 25 (1984).[7] For that reason, the Supreme Court concluded that, "when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507. In addition, the Supreme Court noted that "[a] plea decision must be made exclusively by the defendant" and that, "[b]ecause of the gravity of the consequences, a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507. Thus, the Supreme Court held that, "[w]hen counsel admits his client's guilt without first obtaining the client's consent," "[t]he practical effect is the same as if counsel had entered a plea of guilty without the client's consent." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507. As a result, for these reasons, the Supreme Court held "that ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-08.

Almost two decades later, the United States Supreme Court addressed the Sixth and Fourteenth Amendment implications of a decision by a criminal defendant's trial counsel to admit his client's guilt of a criminal offense without the client's express consent in *Florida v. Nixon*, 543 U.S. 175, 160 L. Ed. 2d 565 (2004). In *Nixon*, the defendant's trial counsel was faced with the daunting task of representing a defendant in a capital case in which the prosecution had a very strong case on the issue of guilt, leading the defendant's trial counsel to conclude that his only hope of saving his client's life was to concede his client's guilt of first degree murder and to focus his efforts on the capital sentencing proceeding. Although the defendant's trial counsel attempted to discuss this proposed strategy with his client on several occasions, the defendant would neither object nor consent to the recommended approach. As a result, the defendant's

7. As examples, the *Harbison* Court cited situations such as when the defendant's trial counsel is not allowed to make a closing argument, *Geders v. United States*, 425 U.S. 80, 47 L. Ed. 2d 592 (1975), or when the defendant's counsel labors under an actual conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 64 L. Ed. 2d 333 (1980). *Harbison*, 315 N.C. at 179, 337 S.E.2d at 507.

trial counsel followed his preferred strategy at trial in an ultimately unsuccessful attempt to save the defendant's life. After the Florida Supreme Court granted the defendant a new trial on the grounds that the defendant's trial counsel had provided him with constitutionally deficient representation in reliance on logic similar to that employed in *Harbison*,[8] *Nixon v. State*, 857 So. 2d 172 (Fla. 2003), *cert. granted*, 540 U.S. 1217, 158 L. Ed. 2d 152, *rev'd and remanded*, 543 U.S. 175, 160 L. Ed. 2d 565 (2004), the United States Supreme Court granted *certiorari* "to resolve an important question of constitutional law, *i.e.*, whether counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial automatically renders counsel's performance deficient, and whether counsel's effectiveness should be evaluated under *Cronic* or *Strickland*." *Nixon*, 543 U.S. at 186, 160 L. Ed. 2d at 578.[9]

---

8. In fact, the Florida Supreme Court cited *Harbison* in deciding to remand the defendant's case for an evidentiary hearing on the consent issue in *Nixon v. State*, 758 So. 2d 618, 625 (2000), *overruled by Philmore v. State*, 937 So. 2d 578.

9. The Court treats *Nixon* as irrelevant to the present case on the grounds, at least in part, that the principles enunciated in that decision are only applicable in capital cases. Although there is no question but that *Nixon* itself was a capital case, that the capital nature of the case itself was referenced in the question posed by the United States Supreme Court in granting *certiorari*, and that the factual context against which the United States Supreme Court addressed the issues under consideration there affected the Court's analysis, I do not believe that the principles discussed in *Nixon* have no application outside the capital context. In fact, as the majority notes, *Nixon* discusses the fact that "such a concession in a run-of-the-mine trial might present a closer question" than it does in the capital context. *Nixon*, 543 U.S. 190, 160 L. Ed. 2d at 580. In addition, the United States Supreme Court has clearly held that the same principles govern ineffectiveness claims in capital and non-capital cases. *Strickland*, 466 U.S. at 686-87, 80 L. Ed. 2d at 693. Finally, *Nixon* has been cited repeatedly in non-capital cases, see *Valenzuela v. United States*, 217 Fed. App. 486, 490 (2007) (citing *Nixon* in § 2255 proceeding arising from federal drug conspiracy case); *United States v. Thomas*, 417 F.3d 1053, 1057-58, *cert. denied*, 546 U.S. 1121, 163 L. Ed. 2d 909 (2006) (9th Cir. 2005) (citing *Nixon* in § 2255 proceeding arising from federal bank robbery convictions); *D'Agostino v. Budge*, 163 Fed. Appx. 456, 457 (9th Cir. 2005), *cert. denied*, 547 U.S. 148, 164 L. Ed. 2d 815 (2006) (citing *Nixon* in § 2254 proceeding arising from state larceny and arson charges); *Pennsylvania v. Cousin*, 585 Pa. 287, 305-06, 888 A.2d 710, 721-22 (2005) (stating that, while *Nixon* was a capital case, "it does not follow that the Court's holding in that case was meant to apply only in death penalty cases, particularly as the specific justification for the attorney's chosen strategy was not central to the [*Nixon*] Court's conclusion that counsel's course of action should be tested by reference to the actual prejudice standard of *Strickland*"), although other courts have reached a conclusion consistent with that reached by the Court here. See *People v. Bergerud*, 223 P.3d 686, 699-700, ftn. 11 (2010) (finding *Nixon* inapplicable in a somewhat different factual situation because "the death penalty has been abandoned by the prosecution and the defendant *explicitly* objected to counsel's actions on his behalf"). As a result, I am not persuaded that *Nixon* is only relevant in the capital context.

At the beginning of its analysis, the United States Supreme Court pointed out that "[a]n attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy;" *Nixon*, 543 U.S. at 187, 160 L. Ed. 2d at 578 (quoting *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 674; that counsel's obligation to consult "does not require counsel to obtain the defendant's consent to 'every tactical decision;' " *Nixon*, 543 U.S. at 187, 160 L. Ed. 2d at 578 (quoting *Taylor v. Illinois*, 484 U.S. 400, 417-18, 98 L. Ed. 2d 798, 816 (1988); and that "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate," including the right to plead guilty, waive a jury trial, testify on his or her own behalf, or note an appeal. *Nixon*, 543 U.S. at 187, 160 L. Ed. 2d at 578. After rejecting the equation between a concession of guilt and a guilty plea enunciated in *Harbison*, *Nixon*, 543 U.S. 189, 160 L. Ed. 2d at 579, and concluding that the defendant's trial counsel's "concession of [the defendant's] guilt does not rank as a 'fail[ure] to function in any meaningful sense as the Government's adversary," *Nixon*, 543 U.S. at 190, 160 L. Ed. 2d at 580, the United States Supreme Court concluded that, "in a capital case, counsel must consider in conjunction both the guilt and penalty-phases in determining how best to proceed;" that "[w]hen counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent;" and that, "[i]nstead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter," since "no tenable claim of ineffective assistance of counsel would remain." *Nixon*, 543 U.S. at 192, 160 L. Ed. 2d at 581. As a result, *Nixon* suggests that the Sixth and Fourteenth Amendments require a criminal defendant's trial counsel to consult with him or her regarding matters of "overarching defense strategy," to implement such strategic decisions upon which they are in agreement, to abide by the client's wishes in instances in which they are unable to agree,[10] and to adopt whatever approach he

10. "The full impact of *Nixon* upon the legal guarantee of effective assistance of counsel is still unclear," S Scudder, "Comment: With Friends Like You, Who Needs a Jury? A Response to the Legitimization of Conceding a Client's Guilt," 29 *Campbell Law Review* 137, 164 (2006). However, at least two principal approaches appear to have developed in the decisions that have been rendered in reliance on *Nixon*. On the one hand, a number of decisions have applied the traditional *Strickland* standard to concession of guilt issues without giving any apparent weight to the extent to which the defendant's trial counsel consulted with the defendant. *See United States v. Jones*,

or she reasonably deems appropriate in the event that the defendant refuses to engage in such strategic discussions.

At this point, contrary to the Court, I do not believe that either this Court or the Supreme Court has directly and clearly addressed the extent, if any, to which *Nixon* has altered the approach that the North Carolina courts have traditionally taken to the concession of guilt issue.[11] To be sure, as the Court notes, this issue has been alluded to on several occasions in opinions of the Supreme Court and this Court. For example, in *State v. Al-Bayyinah*, 359 N.C. 741, 757, 616 S.E.2d 500, 512 (2005), *cert. denied*, 547 U.S. 1076, 165 L. Ed. 23 528 (2006), the Supreme Court stated that "the United States Supreme Court has found that whether or not a defendant expressly consented to counsel's argument was not dispositive in finding ineffective assistance," citing *Nixon*, while "this Court has held that the rule in" *Harbison* "precluding defense counsel from admitting a defendant's guilt to the jury without the defendant's consent does not apply to sentencing hearings." *See State v. Walls*, 342 N.C. 1, 57, 463 S.E.2d 738, 768 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). Similarly, we noted in *State v. Randle*, 167 N.C. App. 547, 550, ftn. 1, 605 S.E.2d 692, 694, ftn. 1 (2004), in the course of addressing a *Harbison* claim, that "the United States Supreme Court has recently discussed whether a concession of guilt by defense counsel consti-

---

482 F.3d 60, 76-78 (5th Cir. 2006); *Cousin*, 585 Pa. at 308, 888 A.2d at 724. Conversely, other courts have emphasized *Nixon's* reference to the "duty to consult" language found in *Strickland* and have adopted an approach similar to that set forth in the text. *See Valenzuela*, 217 Fed. Appx. at 490 (stating that the duty to consult "may include obtaining a client's consent to certain strategies" while noting that "Valenzuela has not introduced any evidence that Gold did not seek Valenzuela's consent or did not consult with Valenzuela about defense strategy"); *Cooke v. State*, 977 A.2d 803, 840-53 (Del. 2009) (holding, in an opinion couched as a finding that *Nixon* was inapplicable, that trial counsel were ineffective for pursuing a guilty but mentally ill verdict in opposition to defendant's insistence upon the pursuit of a not guilty verdict). The United States Supreme Court has yet to address the manner in which *Nixon* should be applied in cases, such as this one, in which a defendant's trial counsel failed to consult with the defendant about the use of a concession of guilt as a trial strategy. However, given the emphasis upon the duty to consult found in *Nixon* and the Court's emphasis upon the defendant's failure to respond to his trial counsel's efforts to obtain consent in its analysis in *Nixon*, I believe that the better reading of *Nixon* is one that requires a defendant's trial counsel to consult with the defendant about the use of a concession of guilt strategy and to make reasonable efforts to obtain the defendant's consent.

11. I feel compelled to mention and discuss *Nixon* because both the remand court and the State in its supplemental brief appear to rely on *Nixon* in urging us to find that no Sixth Amendment violation occurred in this case and because, once *Nixon* has been introduced into the discussion in this case, I find myself unable to agree with the Court's treatment of that decision.

tutes ineffective assistance of counsel *per se*," citing *Nixon*. Finally, this Court has discussed the interrelationship of *Harbison* and *Nixon* in at least one unpublished opinion. *State v. LeGrand*, 2006 N.C. App. LEXIS 2465 (2006) (noting that *Nixon* was decided after *Harbison* and concluding "that the trial court's failure to document defendant's express consent to defense counsel's admission that he had a prior felony conviction does not require us to find that defense counsel was *per se* ineffective" and "that defense counsel's strategy, to admit to the jury that defendant was guilty of possession of a firearm by a convicted felon, while asserting self-defense, was not unreasonable"). However, to the best of my knowledge, neither this Court nor the Supreme Court has directly addressed and resolved the issue of the continued viability of the "express consent" rule enunciated in *Harbison* in the aftermath of *Nixon*.

After a careful review of the foundational decisions relating to ineffective assistance of counsel issues in this jurisdiction, I am inclined to believe that the test enunciated in *Nixon* has, to the extent that it is inconsistent with the test enunciated in *Harbison*, superseded it.[12] I reach this conclusion primarily because I believe, as the Supreme Court stated in *Braswell*, that there is no difference between the tests to be applied in identifying the presence of ineffective assistance of counsel under the federal and state constitutions in the North Carolina courts. A careful examination of the Supreme Court's opinion in *Harbison* makes it abundantly clear that the Court believed that it was deciding that case under the Sixth and Fourteenth Amendments.[13] The clear implication of the Supreme

12. The Court concludes that, since the Supreme Court and this Court have continued to apply the analysis required by *Harbison* even after the United States Supreme Court decided *Nixon*, we would be violating the fundamental principles that we are bound by the decisions of the Supreme Court, *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985), and our own prior decisions, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), in the event that we were to conclude that *Nixon* in any way impinged upon *Harbison*. However, since neither the Supreme Court nor this Court has directly addressed the impact of *Nixon* on *Harbison* and since the Supreme Court in *Braswell* clearly indicated that the same ineffectiveness standards applied under both the federal and state constitutions, I do not believe that we are required to ignore *Nixon* for purposes of deciding this case in the event that we were to conclude that it is otherwise relevant.

13. The Court correctly notes that a state may, if it chooses, establish greater protections under its own constitution than are available under the United States Constitution and suggests that *Harbison* reflects such an exercise of state authority. The fundamental problem with this argument is that nothing in *Harbison* or its progeny suggests that the Supreme Court was exercising its authority to act in that manner when it decided *Harbison*. Instead, as I have already noted, *Harbison* was decided under the Sixth and Fourteenth Amendments to the United States Constitution and makes no reference to any provision of the North Carolina Constitution.

Court's decision to adopt a unitary federal-state ineffectiveness standard in *Braswell* is that, when the United States Supreme Court addresses an ineffectiveness issue under the Sixth Amendment, its decision is controlling under both the federal and state constitutions.[14] As a result, since the United States Supreme Court has now addressed the "concession of guilt" issue for Sixth Amendment purposes, I am inclined to believe that the approach to that issue enunciated in *Nixon* is, to the extent that it differs from the approach enunciated in *Harbison*, controlling.[15] However, since *Nixon* emphasizes the need for counsel to consult with his or her client about significant questions of "overarching defense strategy" and since conceding guilt to one or more offenses during final argument is, without question, an exceedingly important strategic question, I do not believe that we need to definitively resolve the issue of whether *Nixon* works a significant change in the analysis required by *Harbison* in order to decide this case.[16]

Aside from the fact that the only "concession of guilt" issues that are properly before us relate to defendant's convictions for second degree murder and assault with a deadly weapon, the record developed at trial demonstrates that defendant expressed consent to his trial counsel's decision to concede guilt to driving while impaired,

---

14. Such a unitary standard does not, needless to say, apply in all instances involving similar provisions of the federal and state constitutions. *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988).

15. The case for treating *Nixon* as at least somewhat inconsistent with *Harbison* is particularly persuasive to me given that *Nixon* rejects two of the fundamental propositions on which *Harbison* rests, i.e., that an unconsented-to concession of guilt is tantamount to a plea of guilty and that such a concession of guilt constitutes a failure on the part of defense counsel to perform the required adversarial testing of the prosecutor's case.

16. At this point, in the absence of further guidance from the United States Supreme Court or our Supreme Court, I believe that *Nixon* would allow an attorney to make a tactically justified concession of guilt in the event that his or her client refused to either agree or disagree to his or her request for authorization to make such a concession without fear of being found to be constitutionally ineffective. Beyond that, however, it is not clear to me that *Nixon* requires a dramatic change in existing North Carolina constitutional jurisprudence, given its emphasis upon the importance of attorney-client consultation about crucial strategic issues and the fact that defense counsel are bound by their client's instructions with respect to fundamentally important strategic issues. Since the present case does not appear to involve a situation in which the client refused to consult with his or her attorney concerning the strategic wisdom of conceding guilt of certain offenses during closing argument and since we have awarded defendant a new trial in the misdemeanor assault cases on other grounds, I do not believe that we need to directly address the extent to which *Nixon* requires a new approach to the "concession" issue in North Carolina in order to resolve this case.

driving while license revoked, reckless driving, and misdemeanor possession of stolen goods[17] in the immediate aftermath of the closing arguments.[18] In addition, defendant's injection of a reference to misdemeanor larceny, taken in context, amounts to acceptance of his trial counsel's concession of guilt to that offense as well. Although defendant testified at the hearing on remand that he did not understand what the trial court meant by "concession" and that he specifically objected to his trial counsel's concessions immediately after the conclusion of his closing argument, the remand court did not adopt this testimony in its findings of fact. Given that the remand court had an opportunity to evaluate the defendant's demeanor and given that other components of defendant's testimony were of questionable credibility,[19] the remand court had ample basis for declining to accept defendant's testimony to this effect. We have expressly held such after-the-fact expressions of consent to be sufficient compliance with *Harbison*, *State v. Johnson*, 161 N.C. App. 68, 76-78, 587 S.E.2d 445, 451 (2003), *disc. review denied and appeal dismissed*, 358 N.C. 239 (2004), and I see no reason why they should be deemed ineffective under *Nixon*. As a result, aside from the fact that this issue is not properly before us, I conclude that the record adequately reflects that defendant consented to his trial counsel's decision to concede his guilt of driving while impaired, driving while license revoked, reckless driving, and misdemeanor larceny.

The same cannot be said, however, of the decision by defendant's trial counsel to concede his client's guilt of involuntary manslaughter and two counts of assault with a deadly weapon. Although the involuntary manslaughter concession was mentioned during the post-argument colloquy between the trial court, counsel, and defendant, defendant never indicated his consent to his trial counsel's

---

17. In view of the fact that the trial court arrested judgment in the misdemeanor possession of stolen property case, defendant has not pursued a challenge to the decision of his trial counsel to concede his guilt of that offense on appeal.

18. The remand court found that defendant agreed with the concessions that his trial counsel made during his closing argument during the post-argument colloquy, which suggests that the remand court believed that defendant had approved of all of his counsel's concessions. However, to the extent that this finding represents a determination to that effect by the remand court, it lacks adequate evidentiary support, since the transcript of that colloquy clearly indicates that defendant only expressed approval of some, but not all, of the concessions of guilt made during his trial counsel's final argument. As a result, this particular factual finding lacks adequate evidentiary support.

19. For example, defendant denied having consumed any alcohol on the date of the incident from which the present charges resulted.

decision to concede defendant's guilt of that offense at that time. Instead, the most that can be said is that the prosecutor mentioned that concession in defendant's presence without any response from defendant. Although the record developed at the remand hearing reflects that defendant and his trial counsel had discussed issues of trial strategy prior to trial and that both defendant and his trial counsel were aware of the strength of the State's evidence, defendant's trial counsel admitted during the remand hearing that the defense had not conceded defendant's guilt of anything during the evidentiary portion of the trial. Furthermore, despite the fact that defendant's trial counsel did speak with defendant about the nature of the argument which he planned to make before he began speaking to the jury in very general terms,[20] it is clear from the record that they had not discussed the possibility that defendant's trial counsel would concede defendant's guilt of any specific offense in his closing argument at any time before that point. In addition, the record does not contain any indication that defendant refused to consult with his trial counsel about fundamental questions of trial strategy or tactics prior to or during the trial. Had defendant simply refused to engage in such discussions, *Nixon* might permit me to vote to uphold defendant's convictions for second degree murder and two counts of assault with a deadly weapon in the event that such an outcome was otherwise appropriate under a traditional *Strickland* analysis. In this instance, however, the record reflects that defendant's trial counsel did not broach the subject of how to handle the final argument to the jury until immediately prior to the time when the parties made their summations, when defendant did not have sufficient time to discuss this subject with his trial counsel,[21] and that defendant did not ratify his trial counsel's concessions in his subsequent colloquy with the trial court. As a result, despite the fact that defendant did not, according to the findings of fact made at the remand hearing, respond to his

---

20. The record developed at the hearing on remand does not suggest that defendant's trial counsel told defendant of the exact concessions that he planned to make in advance of summation or that he asked defendant's authorization to make these concessions in the conversation which he had with defendant immediately prior to the beginning of his closing argument. Instead, the record simply reflects that defendant's trial counsel merely told defendant in very general terms what he was going to do.

21. The fact that defendant's trial counsel adopted a "primary strategy and goal [of] focus[ing] on reducing the second degree murder offense to lesser offense" and that defendant "did not have any objections or questions about the trial strategy when it was discussed with" his trial counsel is not tantamount to an agreement that it would be appropriate for defendant's trial counsel to concede defendant's guilt of a series of specific offenses during his closing argument to the jury.

counsel's statement that he was going to concede guilt of certain offenses during his closing argument, I do not believe that a "non-response" under this set of circumstances is what the United States Supreme Court had in mind when it found the representation at issue in *Nixon* to be constitutionally adequate. Thus, I conclude that, in light of my understanding of *Nixon*, defendant's trial counsel did not adequately consult with him prior to conceding his guilt of involuntary manslaughter and two counts of assault with a deadly weapon; that the record does not adequately reflect that defendant would have been uncooperative had such consultation been attempted; that defendant did not provide any "after the fact" consent to the making of these concessions;[22] and that the absence of consent to the making of these concessions deprived defendant of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution as interpreted in *Nixon*.

Furthermore, given that the Court, with my concurrence, has already decided that defendant is entitled to a new trial in the cases in which he has been convicted of two counts of assault with a deadly weapon because of an instructional error, I need not address the extent to which the unconsented-to concession of guilt justifies an award of a new trial in those cases under *Nixon*. In addition, given that defendant's trial counsel put his principal emphasis on persuading the jury to refrain from convicting defendant of second degree murder and given that the principal difference between second degree murder and the lesser included offenses that were submitted for the jury's consideration revolved around the existence of the required *mens rea*, an element that is difficult to reduce to a quantifiable set of facts, I also conclude that defendant would be entitled to a new trial in the homicide case even if the traditional *Strickland* prejudice standard applies under *Nixon*.[23] As a result, given my ulti-

---

22. Although the trial court found at the remand hearing that defendant did not tell his trial counsel or the trial court that he had any objections to the manner in which his case had been argued to the jury and that defendant expressed satisfaction with his lawyer at the time that "he admitted aggravating and grossly aggravating factors" relating to his driving while impaired convictions, I am not comfortable concluding that the absence of such objections is tantamount to consent given the difficulty of "unringing the bell" at the time that the "non-objections" to which the remand court points occurred.

23. Since *Nixon* does not address a situation in which a defendant's trial counsel concedes guilt without making an adequate attempt to consult with his client, the Supreme Court has not addressed the prejudice standard which should be applied in such instances. At least one state court has concluded that the *Cronic* automatic prejudice standard should be applied in such instances. *Cooke*, 977 A.2d 855.

mate conclusion that we do not need to address the issue of whether *Nixon* applies in lieu of *Harbison* in cases involving concession of guilt issues on this set of facts, I concur in the Court's conclusion that defendant is entitled to a new trial in the cases in which he was convicted of second degree murder and two counts of assault with a deadly weapon without adopting all of its logic. Thus, I concur in the Court's decision in part and concur in the result in part.

MISSION HOSPITALS, INC., PETITIONER, AND NORTH CAROLINA RADIATION THERAPY MANAGEMENT SERVICES, INC., D/B/A 21ST CENTURY ONCOLOGY, PETITIONER-INTERVENOR v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION (FORMERLY DIVISION OF FACILITY SERVICES[),] CERTIFICATE OF NEED SECTION, RESPONDENT, AND ASHEVILLE HEMATOLOGY AND ONCOLOGY ASSOCIATES, P.A., RESPONDENT-INTERVENOR

No. COA08-1478

(Filed 6 July 2010)

1. **Hospitals and Other Medical Facilities— certificate of need—prior law applicable**

   The parties' lease created a vested right in applying the prior certificate of need (CON) law based on respondent intervenor's vested rights in the pertinent equipment as of June 2005. Further, the Department of Health and Human Services rendered its no review decision on 2 August 2005 determining that respondent's project did not require a CON prior to the 26 August 2005 effective date of the amendment to the CON law.

2. **Hospitals and Other Medical Facilities— certificate of need—record and verify system—linear accelerator**

   The Department of Health and Human Services' determination that the record and verify system was not essential to acquiring and making operational a linear accelerator was supported by substantial evidence in the record and was consistent with certificate of need law.

3. **Hospitals and Other Medical Facilities— certificate of need—CT scanner**

   The Department of Health and Human Services did not err by concluding that respondent intervenor's acquisition of a CT scanner was exempt from certificate of need requirements.

4. Hospitals and Other Medical Facilities— certificate of need—expansion of existing oncology treatment center

The Department of Health and Human Services (DHHS) did not err by concluding that respondent intervenor's expansion of its existing oncology treatment center was exempt from certificate of need requirements. DHHS properly focused on whether the costs essential to acquiring the pertinent equipment and making it operational exceeded the $2,000,000 threshold under N.C.G.S. § 131E-176(16)b, and excluded the part of the project that was exempt as a physician office building.

5. Hospitals and Other Medical Facilities— certificate of need—actual construction costs—certified cost estimate

In light of the Department of Health and Human Services' finding that the actual construction costs for the pertinent project would not exceed the relevant cost thresholds of certificate of need (CON) law and the Court of Appeals' holding that DHHS properly determined the project did not require a CON, the Court of Appeals was not required to decide whether respondent intervenor's cost estimate constituted a certified cost estimate.

Appeal by Petitioners from the final agency decision signed 30 May 2008 by Jeff Horton, Acting Director for the North Carolina Department of Health and Human Services, Division of Health Service Regulation. Heard in the Court of Appeals 8 June 2009.

Smith Moore Leatherwood LLP, by Maureen Demarest Murray and Allyson Jones Labban, for Petitioner.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Susan H. Hargrove, Sean A. Timmons, and Courtney H. Mischen, for Petitioner-Intervenor.

Attorney General Roy Cooper, by Assistant Attorney General June S. Ferrell, for Respondent.

Bode, Call & Stroupe, L.L.P., by Robert V. Bode, S. Todd Hemphill, Diana Evans Ricketts, and Matthew A. Fisher, for Respondent-Intervenor.

STEPHENS, Judge.

The present matter was before this Court on a prior appeal from a Final Agency Decision ("the first FAD") entered 7 August 2006 by

the North Carolina Department of Health and Human Services ("DHHS" or "the Agency"). The pertinent factual background of this matter up to the time of that appeal is set out in our opinion in *Mission Hospitals, Inc. v. N.C. Dep't of Health and Human Services*, 189 N.C. App. 263, 658 S.E.2d 277 (2008) ("*Mission I*").[1] However, to aid understanding of the current appeal, we find it useful to set forth the factual background and procedural history which brought this matter to our Court.

Factual Background and Procedural History

On 1 February 2005, Asheville Hematology ("AHO" or appellant), an oncology treatment center, sought a "no-review" determination from the Certificate of Need ("CON") Section of the North Carolina Department of Health and Human Services, Division of Facility Services ("Agency"), for a proposed relocation of its offices and acquisition of medical equipment that would allow AHO to provide radiation therapy. AHO presented four proposals: acquisition of a linear accelerator ("LINAC"), acquisition of a CT scanner, acquisition of treatment planning equipment, and relocation of their oncology treatment center. AHO sought a ruling that its proposals "do not require certificate of need review and are not new institutional health services, within the meaning of the CON law."

In determining the allocable costs for the CT scanner and LINAC projects, AHO applied upfitting costs to accommodate the CT scanner and LINAC and did not allocate general office construction costs, which were instead attributed to the base costs of the developer. AHO clearly specified in its letter which costs were attributed to each project and which costs were attributed to the developer's base costs. The submitted costs for the four projects, and associated thresholds against which AHO analyzed each of the proposals as a new institutional health service under the statute, were as follows:

---

1. Since the entry of our Court's decision in *Mission I*, the name of Respondent North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section has been changed to "North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section."

Project	AHO's Cost Projection	Statutory Threshold for "No Review"
CT Scanner	$488,547	$500,000[2]
LINAC	$746,416	$750,000[3]
Treatment Planning	$381,135	$750,000[4]
Relocation	$1,985,278	$2,000,000[5]

On 2 August 2005, the CON Section issued four "no-review" letters, reviewing each proposal separately and confirming that none required a Certificate of Need. Each letter stated that "this determination is binding only for the facts represented by you." Shortly thereafter, the General Assembly amended N.C. Gen. Stat. § 131E-176(16) to require a CON for the acquisition of linear accelerators, regardless of cost, as a new institutional health service. (2005 Sess. Laws ch. 325, § 1). The relevant portion of the amendment became effective on 26 August 2005.

On 1 September 2005, Mission Hospitals, Inc. ("Mission" or "petitioner"), a nonprofit hospital in Asheville, North Carolina, filed a petition for a contested case hearing in the Office of Administrative Hearings ("OAH"), challenging each of the No-Review Determinations. North Carolina Radiation Therapy Management Services, Inc. d/b/a 21st Century Oncology ("21st Century" and, with Mission, "petitioners"), an oncology treatment center in Asheville, North Carolina, intervened in the proceeding, also contesting the No-Review Determinations. AHO intervened in support of the CON Section's No-Review Determinations.

On 26 May 2006, the ALJ entered a 65-page Recommended Decision affirming the No-Review Determinations. The ALJ agreed with the CON Section that the relocation of the existing oncology treatment center and the acquisition of equipment as proposed by AHO and addressed in the August 2005 No-Review determinations did not require Certificates of Need. The ALJ recommended that no CON was necessary because neither the relocation nor the acquisition projects "constitute[d] a 'new institutional health service' as defined by N.C. Gen. Stat.

---

2. *See* N.C. Gen. Stat. § 131E-176(7a) (2003) (governing diagnostic centers).

3. *See* N.C. Gen. Stat. § 131E-176(14f) (2003) (governing acquisition of major medical equipment).

4. *Id.*

5. *See* N.C. Gen. Stat. § 131E-176(16) (2003) (governing capital expenditures).

> § 131E-176 at the time that [AHO] acquired vested rights to develop these services."

Mission I, 189 N.C. App. at 265-67, 658 S.E.2d at 278-79.

On 7 August 2006, DHHS entered the first FAD reversing the ALJ's recommended decision. AHO appealed from the first FAD to the Court of Appeals. *See id.* This Court vacated the first FAD upon holding that the Division of Facility Services of DHHS erred by engaging in *ex parte* communications with one party without notice to the other parties or affording an opportunity to all parties to be heard, and that these *ex parte* communications were prejudicial. *Id.* at 276, 658 S.E.2d at 285.

On remand from this Court, Jeff Horton, Acting Director of the Division of Health Service Regulation of DHHS, entered a second FAD ("FAD") on 30 May 2008. In its FAD, DHHS adopted Administrative Law Judge ("ALJ") Beecher R. Gray's Recommended Decision that AHO's acquisition of a LINAC and a CT scanner and expansion of the oncology treatment center did not require a CON. From the FAD adopting the recommendations of the ALJ, Petitioners appeal.

Standard of Review

Pursuant to N.C. Gen. Stat. § 150B-34(c),

> in cases arising under Article 9 of Chapter 131E of the General Statutes, the administrative law judge shall make a recommended decision or order that contains findings of fact and conclusions of law. A final decision shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. The final agency decision shall recite and address all of the facts set forth in the recommended decision. For each finding of fact in the recommended decision not adopted by the agency, the agency shall state the specific reason, based on the evidence, for not adopting the findings of fact and the agency's findings shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31. The provisions of G.S. 150B-36(b), (b1), (b2), (b3), and (d), and G.S. 150B-51 do not apply to cases decided under this subsection.

N.C. Gen. Stat. § 150B-34(c) (2007).

> It is well settled that in cases appealed from administrative tribunals, "[q]uestions of law receive *de novo* review," whereas fact-

> intensive issues "such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test." *In re Greens of Pine Glen Ltd. Part.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). Thus, where the gravamen of an assigned error is that the agency violated subsections 150B-51(b)(1), (2), (3), or (4) of the APA, a court engages in *de novo* review. Where the substance of the alleged error implicates subsection 150B-51(b)(5) or (6), on the other hand, the reviewing court applies the "whole record test."

N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 659, 599 S.E.2d 888, 894-95 (2004) (internal citations omitted). Under whole record review, the Agency's decision should be reversed only if it is not supported by substantial evidence. *Total Renal Care of N.C. v. N.C. Dep't of Health & Human Servs.*, 171 N.C. App. 734, 739, 615 S.E.2d 81, 84 (2005).

North Carolina law gives great weight to the Agency's interpretation of a law it administers. *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999); *see also Carpenter v. N.C. Dep't of Human Res.*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992) (When a court reviews an agency's interpretation of a statute it administers, so long as the agency's interpretation is reasonable and based on a permissible construction of the statute, the court should defer to the agency's interpretation of the statute.); *High Rock Lake Ass'n. v. N.C. Envtl. Mgmt. Comm'n*, 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981) (The interpretation of a statute given by the agency charged with carrying it out is entitled to great weight.).

Discussion

I. Amendment to the CON Law

[1] A CON is "a written order which affords the person so designated as the legal proponent of the proposed project the opportunity to proceed with the development of such project." N.C. Gen. Stat. § 131E-176(3) (2007). The CON Law, *inter alia*, regulates the acquisition of certain types of equipment. *See Total Renal Care v. Dep't of Health & Human Servs.*, ––– N.C. App. –––, –––, 673 S.E.2d 137, 139-40 (2009) (setting forth the history and purpose of the CON Law and the procedure involved in obtaining a CON in North Carolina).

AHO submitted a request for a CON determination to the Agency on 1 February 2005. This submission was made in good faith reliance on the CON Law then in existence, N.C. Gen. Stat. § 131E-175, *et. seq.*

(2003) (the "prior CON Law"). The CON Law was amended effective 26 August 2005 ("the amended CON Law"), more than six months after AHO's initial submission to the Agency. The amended CON Law changed certain definitions regarding oncology treatment centers and the acquisition and operation of new LINACs. As a result of the amendment, the statutory definition for oncology treatment center was stricken from the text of N.C. Gen. Stat. § 131E-176(18a), and a new definition was added to section 131E-176 defining LINACs.

Petitioners argue that the amended CON Law applies to AHO's acquisition of medical equipment and expansion of its oncology center. Specifically, Petitioners argue that AHO did not have a vested right in the prior CON Law and that AHO acquired the LINAC and CT scanner for purposes of the CON Law after the amendment became effective. We are not persuaded by Petitioners' contentions, as addressed below.

A. Building Lease

On 6 June 2005, AOR Management, as managing agent for AHO, entered into a lease with CC Asheville MOB for the building to which AHO would relocate. AOR Management and CC Asheville MOB modified this lease by amendment twice after the CON Law was amended on 26 August 2005. In its FAD, the Agency found that "the only reasonable reading of the Lease and its subsequent amendments is to view all three writings as one contract memorialized by multiple writings, as contemplated by the Statute of Frauds in North Carolina." Furthermore, the Agency found that "for the purposes of determining the vesting of rights in the Lease of the Building, as set forth above, [AHO] had vested rights in such Lease as of June 6, 200[5]."

A vested right is a common law right that is based upon the constitutional right prohibiting Congress or the State from enacting laws which would impair a party's right to contract. U.S. Const. amends. V, XIV; N.C. Const. Art. 1, § 19; *see Lester Bros., Inc. v. Pope Realty & Ins. Co.*, 250 N.C. 565, 567-68, 109 S.E.2d 263, 265-66 (1959) (Plaintiff had a vested right in the individual liability of defendant, a stockholder of a corporation, stemming from purchases made from the corporation in 1955, when a 1957 amendment to the law would have relieved defendant of individual liability.). The common law of North Carolina has addressed the issue of vested rights within the context of amendments to statutory law impacting government-issued permits. *See generally Booker v. Duke Med. Ctr.*, 297 N.C. 458, 256 S.E.2d 189 (1979); *Lester Bros.*, 250 N.C. 565, 109 S.E.2d 263. "The proper

question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect." *Booker*, 297 N.C. at 467, 256 S.E.2d at 195. Furthermore, the good faith reliance of the concerned parties upon the then-existing state of the law is a consideration in determining whether such rights have vested. *See Michael Weinman Assocs. Gen. P'ship v. Town of Huntersville*, 147 N.C. App. 231, 234, 555 S.E.2d 342, 345 (2001) ("[W]here property owners have reasonably made a substantial expenditure of money, time, labor or energy in a good faith reliance of a government approved land-use, they have a vested right.").

A lease of real estate is the type of contract which creates a vested right. *Carolina Mineral Co. v. Young*, 220 N.C. 287, 290-91, 17 S.E.2d 119, 121-22 (1941) (right to partition land may be lost or suspended where contractual obligations between tenants are "manifestly inconsistent with partition, especially by sale of the land, and where such a sale would destroy a property right growing out of the lease and guaranteed by it"). Furthermore, the terms of leases "are interpreted according to general principles of contract law." *Wal-Mart Stores, Inc. v. Ingles Markets, Inc.*, 158 N.C. App. 414, 418, 581 S.E.2d 111, 115 (2003). Under contract law, a modification to a lease does not necessarily create a new contract, and rather, the intention of the parties governs. *Id.* at 419, 581 S.E.2d at 115 ("[T]he heart of a contract is the intention of the parties as determined from its language, purposes, and subject matter and the situation of the parties at the time of execution." (internal citation and quotation marks omitted)).

In accordance with our case law, we agree with the Agency's interpretation of AOR Management's lease and conclude that the parties' lease created a vested right in applying the prior CON Law. Accordingly, we analyze the additional issues regarding AHO's building lease under the prior CON Law. The Agency also found that AHO had a vested right in the purchase contracts for the LINAC and CT scanner. We address the applicability of the appropriate CON Law to these purchase contracts below.

B. Acquisition of Equipment

An acquisition of equipment can occur "by donation, lease, transfer or comparable arrangement[.]" N.C. Gen. Stat. § 131E-178(b) (2003). The prior CON Law tied its requirement of a CON for the acquisition of a LINAC or CT scanner to the total cost of the equipment. N.C. Gen. Stat. § 131E-176(7a) and (14f) (2003). The amended

CON Law, however, requires a CON prior to acquiring a LINAC or CT scanner, regardless of cost. N.C. Gen. Stat. § 131E-176(16)f1.5a. and f1.9. (2007). The amended CON Law requires a CON prior to making an acquisition of a "new institutional health service" by donation, lease or transfer, or comparable arrangement "if the acquisition would have been a new institutional health service if it had been made by purchase." N.C. Gen. Stat. § 131E-178(b) (2007). The definition of "[n]ew institutional health services" includes "[t]he acquisition by purchase, donation, lease, transfer, or comparable arrangement of . . . [a] [l]inear accelerator[, or a] [s]imulator [by or on behalf of any person.]" N.C. Gen. Stat. § 131E-176(16)f1.5a and f1.9.

In its FAD, the Agency made the following pertinent findings of fact:

> 241. Pursuant to the Management Agreement between AOR Management and Asheville Hematology, US Oncology, through its subsidiary AOR Management, will own the equipment located at Asheville Hematology's relocated oncology treatment center. . . .
>
> . . . .
>
> 243. *Whether the equipment is owned by Asheville Hematology or its manager would not impact the CON Section's Determination. Whether a provider acquires medical equipment for purposes of the CON Law by purchase, lease, or other comparable arrangement, the CON Section's treatment of that acquisition is the same under the CON law. Such a comparable arrangement could be through a management agreement. . . . Through its Management Agreement with US Oncology, Asheville Hematology will acquire the equipment to be located in the facility.*
>
> . . . .
>
> 248. On June 3, 2005, US Oncology issued a purchase order to Varian for the linear accelerator described in Quotation No. EHD20050511-002. . . .
>
> 249. Once US Oncology has issued a purchase order, that binds it to purchase the equipment described in the purchase order. . . .
>
> . . . .
>
> 261. On June 8, 2005, US Oncology issued a purchase order to GE for the CT scanner . . . .

(emphasis added).

Thus, DHHS concluded that AHO acquired the LINAC and CT scanner on 3 June and 8 June 2005, respectively, when the purchase agreements were issued. The Agency further concluded that AHO had vested rights in this equipment as of the date each piece of equipment was acquired.

Our Court's opinion in *Koltis v. N.C. Dep't of Human Res.*, 125 N.C. App. 268, 480 S.E.2d 702 (1997), defined the scope of inquiry with regard to a determination as to whether binding contracts predating a change in the laws of this State continue to be vested. In *Koltis*, the petitioners

> proposed to develop and operate a new oncology treatment center in Pitt County, North Carolina. To that end, petitioners notified the North Carolina Department of Human Resources, Division of Facility Services, Certificate of Need Section (DHR) of their ongoing efforts to develop the center and requested DHR's confirmation that the project was exempt from obtaining the certificate of need required for a "new institutional health service" under N.C. Gen. Stat. § 131E-178. DHR responded that no certificate of need was required since the project did not meet the current statutory definition of a "new institutional health service" under N.C. Gen. Stat. § 131E-176(16) but warned that pending legislation would significantly change that definition and if enacted, the project would have to be reevaluated in light of the statutory amendment.

Id. at 269, 480 S.E.2d at 703. Section 131E-176 was amended effective 18 March 1993 "so that an oncology treatment center fell within the definition of a 'new institutional health service' requiring a certificate of need under N.C.G.S. § 131E-178." *Id.* at 270, 480 S.E.2d at 703. The General Assembly included a "grandfather" provision, however, "which excepted from application of the amended statute 'any person . . . [or] corporation . . . who has lawfully entered into a binding legal contract to develop and offer any service that was not a new institutional health service requiring a certificate of need prior to the ratification of this act.' " *Id.* (quoting 1993 N.C. Sess. Laws ch. 7, sec. 12.). On appeal, our Court held that a mere binding contract for "consulting services related to development of the proposed oncology treatment center" which was entered into prior to the amendment to the CON Law was sufficient to create vested rights on the part of the petitioners. *Id.* at 272, 480 S.E.2d at 705.

In the present case, the Agency found that AHO's purchase contracts for the LINAC and the CT scanner met the definition set forth

in *Koltis* of valid, binding contracts, and thus, these contracts gave AHO vested rights in the equipment as of June 2005 under the prior CON Law. Petitioners argue, however, that AHO acquired the equipment after the amended CON Law went into effect, and thus, that AHO did not have any vested rights in the prior CON Law. Petitioners contend that the *purchase* of equipment by US Oncology and the *transfer* of that equipment to AHO were two separate events. Thus, Petitioners argue that although US Oncology acquired the LINAC and CT scanner in June 2005, AHO acquired the equipment when it was transferred to AHO for installation and use at AHO's oncology treatment center after 26 August 2005.

In support of their position, Petitioners argue further that the FAD in the present case contradicts the Agency's decision in 2006 in which DHHS concluded that an acquisition of a LINAC at Thomasville Medical Center ("Thomasville") occurred after the effective date of the CON Law amendment. In that case, although Forsyth Medical Center ("Forsyth") purchased a LINAC with the intended purpose of installing and using the LINAC at Thomasville, DHHS concluded that Thomasville did not acquire the LINAC until it was actually installed. Thus, although Forsyth purchased the LINAC before the amendment went into effect, DHHS concluded that the amended CON Law applied to Thomasville since the LINAC was installed at Thomasville after the new law went into effect.

In a letter titled "Review Determination & Notice to Cease and Desist" from DHHS to Thomasville, DHHS stated that

> [t]he Certificate of Need Section received a December 19, 2005 letter from Forsyth Medical Center . . . stating that Forsyth Medical Center had purchased a linear accelerator which it intends to install at Thomasville Medical Center. However, the proposal is a new institutional health service within the meaning of N.C. Gen. Stat. §[]131E-176(16)f1.5a because it results in the acquisition of a linear accelerator by Thomasville Medical Center by donation, lease, transfer or comparable arrangement.

The record before us does not reveal any relationship between Forsyth and Thomasville beyond Forsyth's intent to donate a LINAC to Thomasville, nor does the record include any written agreement between the two.

We conclude that Petitioners' reliance on the 2006 Agency decision is misplaced. Unlike Thomasville and Forsyth, AHO and US Oncology share a symbiotic relationship in which US Oncology serves

as AHO's "Business Manager." Under the "Management Services Agreement" ("MSA"), US Oncology "provide[s] all Management Services as are necessary and appropriate for the day-to-day administration of the business aspects of AHO's operations[.]" US Oncology's responsibilities as AHO's business manager include: (1) ordering and purchasing medical supplies for AHO; (2) repairing and maintaining AHO's office; and (3) exercising special power of attorney for various purposes including billing AHO's patients. US Oncology purchased the LINAC and CT Scanner on behalf of AHO. Unlike Thomasville's relationship with Forsyth, AHO and US Oncology enjoyed a reciprocal relationship that extended far beyond the donation of a LINAC.

Thus, we conclude that AHO acquired the LINAC and CT scanner by a "comparable arrangement" (*i.e.*, its management agreement with US Oncology) when US Oncology acquired the LINAC and CT scanner, on 3 June and 8 June 2005, respectively. Accordingly, AHO had vested rights in the equipment as of June 2005 under the prior CON Law. Furthermore, the Agency rendered its no-review decision on 2 August 2005 determining that AHO's project did not require a CON, prior to the 26 August 2005 effective date of the amendment to the CON Law. Accordingly, we hold that the prior CON Law applies to the determination of whether AHO's project requires a CON.

II. AHO's Acquisition of the LINAC

[2] The Agency found the costs "essential to acquiring and making operational" the LINAC to total $746,416.62. N.C. Gen. Stat. § 131E-176(14f) (2003). Because the total cost of the LINAC was found to be less than the $750,000 statutory threshold, the Agency determined that AHO's acquisition of the LINAC did not require a CON. Petitioners argue that the Agency erroneously excluded the record and verify system and the construction costs from this total and that the inclusion of either of these omitted costs would have caused the cost of the LINAC to exceed the statutory threshold and require a CON. We are not persuaded by Petitioners' contention.

A. Record and Verify System

The record and verify system's primary role is to assure that the patient is treated within the proper parameters as described in the treatment plan. The Agency describes the record and verify system as a single system consisting of a data processing computer and software that processes raw data, including numerical values generated from the views of a tumor and tissues taken by the CT simulator and the data making up the different numerical parameters

of the treatment plan, verifying dosage, rate and time of delivery, and creating a record in the computer memory of what transpired during a patient's treatment.

N.C. Gen. Stat. § 131E-178 requires that a CON be obtained before any person acquires "a new institutional health service[.]" N.C. Gen. Stat. § 131E-178 (2003). An "acquisition by purchase, donation, lease, transfer, or comparable arrangement . . . of major medical equipment" constitutes a "new institutional health service[.]" N.C. Gen. Stat. § 131E-176(16)p. (2003).

> "Major medical equipment" means *a single unit or single system of components with related functions* which is used to provide medical and other health services and which costs more than seven hundred fifty thousand dollars ($750,000). In determining whether the major medical equipment costs more than seven hundred fifty thousand dollars ($750,000), the costs of the equipment, studies, surveys, designs, plans, working drawings, specifications, construction, installation, and other activities *essential to acquiring and making operational the major medical equipment shall be included*. The capital expenditure for the equipment shall be deemed to be the fair market value of the equipment or the cost of the equipment, whichever is greater.

N.C. Gen. Stat. § 131E-176(14f) (2003) (now subsection (14o), effective 26 August 2005) (emphasis added).

In its brief on appeal, the Agency contends that in applying the statutory phrase, "activities essential to acquiring and making operational the major medical equipment[,]" the Agency applied the customary meaning of "essential" which is "those items which are indispensable, the absence of which renders the equipment useless." N.C. Admin. Code tit. 10A, r. 14C.3102(1) (January 1994). This definition tracks the ordinary meaning of the word, "essential," which is customarily defined to mean "necessary," "indispensable," "inherent," and constituting the "intrinsic character" of a thing. *Webster's Third New International Dictionary* 777 (2002).

The Agency concluded that the record and verify system was not "essential to acquiring and making operational" the LINAC, and thus the costs associated with the record and verify system were excluded from the total cost of the LINAC. *See* N.C. Gen. Stat. § 131E-176(14f). The Agency instead allocated the costs of the record and verify system to the treatment planning equipment.

Petitioners argue that the record and verify system is not separate from the LINAC, and that "[l]ike four-wheel drive in a vehicle, [the record and verify system] has no independent purpose or function, and record and verify services cannot be separated or occur apart from the delivery of radiation by the LINAC." Petitioners contend that the following features of the record and verify system make it essential to the operation of the LINAC: (1) where the parameters of a patient's radiation plan differ from the parameters set on the LINAC, the record and verify system will not allow the LINAC to operate unless manually overridden or disengaged by the radiation therapist; (2) the record and verify system is physically connected or hardwired to the LINAC; (3) the record and verify system communicates with the LINAC and not with the treatment planning system; and (4) and the only use for a record and verify system is for use with a LINAC in providing radiation therapy.

Petitioners' argument is inconsistent with this Court's interpretation of the CON Law, however. "[T]he overriding legislative intent behind the CON process [is the] regulation of major capital expenditures which may adversely impact the cost of health care services to the patient." *Cape Fear Mem. Hosp. v. N.C. Dep't of Human Res.*, 121 N.C. App. 492, 494, 466 S.E.2d 299, 301 (1996). In *Cape Fear*, our Court reversed the Agency's determination that Cape Fear Memorial Hospital ("Cape Fear") was required to obtain a CON prior to purchasing an image intensifier and cine camera in an effort to upgrade and expand the capabilities of its existing Angiostar cardiac catheterization equipment ("Angiostar"). *Id.* at 492-93, 466 S.E.2d at 300. This Court held that the Agency's decision would have the effect of allowing micro-management over relatively minor capital expenditures,[6] and that "the legislature clearly did not intend to impose unreasonable limitations on maintaining . . . *or* expanding . . . presently offered health services." *Id.* at 494, 466 S.E.2d at 301 (citing N.C. Gen. Stat. § 131E-176(14f) (1994) (CON not required for purchase of unit or system to provide new health service which costs less than $750,000)). Accordingly, we construed N.C. Gen. Stat. § 131E-175, *et. seq.*, as a whole to mean "that the legislature intended 'cardiac catheterization equipment' to include only the actual unit capable of performing cardiac catheterization procedures, not the component parts used to maintain, upgrade, or expand a unit." *Id.*

---

6. The cost of acquiring the image intensifier and cine camera was found to be $232,510. *Id.* at 495, 466 S.E.2d at 301. In the present case, the fair market value of the record and verify system was found to be $230,000.

Although the present case involves the purchase of a new LINAC and not an existing piece of equipment, our holding in *Cape Fear* is nevertheless instructive to our decision in the case *sub judice*. The Agency's determination that N.C. Gen. Stat. § 131E-176(14f) was intended to include only the LINAC and not the component parts used to maintain, upgrade, or expand the unit is consistent with our interpretation in *Cape Fear*. In determining that the record and verify system was a separate unit and not an essential part of the LINAC, the Agency made the following pertinent findings of fact:

> 34. . . . The Agency has interpreted [N.C. Gen. Stat. § 131E-176(14f)] to mean that if an equipment component is not required for the operation of the proposed item of major medical equipment and it is operated separately from such equipment, then the two items of equipment are not a single system of components, and the equipment component is not essential to making operational the major medical equipment. . . .
>
> . . . .
>
> 41. In correspondence to the Agency prior to the Determination, Asheville Hematology described the record and verify system as follows:
>
> > *When treating patients with radiation on a linear accelerator, the use of a record and verify system serves as an optional component of a quality control system for the radiation therapists. The record and verify system provides electronic validation of the daily treatment parameters but is not necessary in administration of radiation therapy. As such, it is an optional part of the treatment planning system, which is a separate piece of medical equipment . . . .*
>
> . . . .
>
> 43. Asheville Hematology also notified the CON Section that it can operate the treatment planning system without this record and verify system. . . .
>
> 44. Only 74 of the 94 radiation sites US Oncology manages have chosen to install a record and verify system. . . .
>
> 45. The record and verify system is a separate piece of equipment from and is not attached to the linear accelerator. It is manufactured by a company other than Varian, the manufacturer of Asheville Hematology's proposed linear accelerator. . . .

> 46. The record and verify system's primary role is to assure that the patient is treated with the proper parameters as described in the treatment plan. . . .
>
> 47. The record and verify system does not turn the linear accelerator "on" for the purpose of delivering radiation. Rather, it sets up the linear accelerator so that it is ready to deliver radiation, by ensuring that treatment parameters contained in the treatment plan are accurate. In that regard, the record and verify system is an extension of the treatment planning system, because it manages the data contained in the treatment plan and provides it to the linear accelerator for delivery. . . .
>
> . . . .
>
> 51. [Lee Hoffman, Chief of the CON Section,] saw the record and verify system as a communication link or a bridge between the treatment plan and the delivery of the treatment. As a result, she determined that it was part of the treatment planning [equipment] because it was to assure that the treatment delivered was consistent with the treatment plan. . . .

The Agency's findings are supported by the testimony of AHO witnesses, Mission's expert witnesses, and by the testimony of Lee Hoffman ("Hoffman"), the Chief of the CON Section. Prior to making the no-review determination, Hoffman visited Duke Health Raleigh Hospital's radiation oncology program. Hoffman met with Duke Health Raleigh staff, viewed the LINAC, and reviewed the documentation for their record and verify system. Duke Health Raleigh treated the record and verify system consistently with the way that AHO had represented to the Agency: that is, as a separate treatment planning system apart from the LINAC.

Accordingly, the Agency's determination that the record and verify system was not "essential to acquiring and making operational" the LINAC is supported by substantial evidence in the record and is consistent with the CON Law. Petitioners' argument regarding the record and verify system is overruled.

B. Construction Costs

Petitioners also argue that the Agency erroneously excluded two categories of construction costs when calculating the total costs for the LINAC: (1) the "general conditions" costs, and (2) the costs associated with construction of the space to house the mechanical room or the mold room. Timothy Knapp, an architect and witness for 21st

Century, testified that general conditions are the general contractor's costs related to the overall construction of a project which are not specifically related to any one particular aspect of the construction project. Bryan Royal ("Royal"), a project manager for one of the contractors involved with the AHO Project and a witness for AHO, testified that general conditions costs include costs such as contractor employee salaries, construction trailer, office supplies, porta-johns, storage trailers, temporary utilities, waste receptacles, and clean-up.

The Agency found that the projected cost for the LINAC was $746,416.62. Royal testified that the general conditions costs attributable to the LINAC vault totaled $23,418.00. Thus, had the Agency included these costs in calculating the cost of the LINAC, the total would have exceeded the $750,000 statutory threshold and required a CON.

Petitioners' argument is flawed, however, as the general conditions costs attributable to the LINAC vault did not increase the cost of general conditions related to the cost of construction for the medical office building. In its FAD, the Agency found that "[h]ad the vault not been constructed, total general conditions would have been the same. Consequently, there [were] no additional general condition cost[s] incurred to build the [LINAC] vault." In addition, a new medical office building is not "essential" to acquiring and making operational a LINAC. *See* N.C. Gen. Stat. § 131E-176(14f). Accordingly, the general conditions costs of the LINAC vault were properly excluded from the projected cost of the LINAC.

Petitioners also contend that the costs associated with constructing the space to house the mechanical room and mold room were erroneously excluded from the total cost of the LINAC. The Agency classified these costs as "developer's base costs" which Hoffman testified are not included in the cost of health service. The Agency made the following findings of fact with regard to the developer's base costs:

> 61. Ms. Hoffman explained her reasoning during the contested case hearing as to why developer's base costs are not included in the cost of the health service. She explained that the development of an office building, including a medical office building, is not a capital expenditure falling within the statutory definition of "new institutional health service" under the CON Law. . . .
>
> 62. If the builder is unrelated to the entity which will be providing the health service, and is only leasing space to the health

> service, then the CON Section only will look at what costs are going to be incurred to make that office building a health service facility. That is consistent with the way exemptions are handled in G.S. §[]131E-184(a), so the CON Section looks at no review requests the same way. . . .
>
> 63. If the builder is a party which is related to the provider of the health service, the CON Section considers the builder to be developing the health service facility, and therefore, the entire cost of the facility would be considered. . . .
>
> . . . .
>
> 70. Neither Asheville Hematology nor US Oncology owns the Building or the land on which it is being constructed. Both are owned by CC Asheville MOB. . . .

Based on the record before us, the Agency's findings are supported by the evidence and support the Agency's conclusion that the developer's base costs were not attributable to the LINAC. Petitioners' argument is overruled.

III. AHO's Acquisition of the CT Scanner

[3] Next, Petitioners contend the Agency erroneously concluded that AHO's acquisition of the CT scanner was exempt from the CON requirements. We disagree.

Under the CON Law, a CON must be obtained before establishing a diagnostic center, which is defined as

> a freestanding facility, program, or provider, including but not limited to, physicians' offices, clinical laboratories, radiology centers, and mobile diagnostic programs, in which the total cost of all the medical diagnostic equipment utilized by the facility which cost ten thousand dollars ($10,000) or more exceeds five hundred thousand dollars ($500,000). In determining whether the medical diagnostic equipment in a diagnostic center costs more than five hundred thousand dollars ($500,000), the costs of the equipment, studies, surveys, designs, plans, working drawings, specifications, construction, installation, and other activities essential to acquiring and making operational the equipment shall be included. The capital expenditure for the equipment shall be deemed to be the fair market value of the equipment or the cost of the equipment, whichever is greater.

N.C. Gen. Stat. § 131E-176(7a) (2003).

Because a CT scanner is considered medical diagnostic equipment, the Agency found that

> the utilization of any medical diagnostic equipment, including a diagnostic CT scanner, which cost in excess of $500,000, would cause Asheville Hematology to be a diagnostic center, which is a new institutional health service. Because Asheville Hematology is not currently a diagnostic center, it would not be able to acquire a diagnostic CT scanner without a CON, if the cost to acquire and make operational the CT scanner and the cost of any other medical diagnostic equipment currently utilized or proposed to be utilized at the facility would exceed $500,000. . . .

The Agency determined the total cost to acquire and make operational the CT scanner to be $488,547.62. Because the total cost was less than $500,000, the Agency concluded that the acquisition of the CT scanner did not require a CON. The Agency made the following findings of fact with regard to the costs associated with the CT scanner:

> 310. . . . [T]he final purchase price for the diagnostic CT scanner of $308,500 is reasonable and supported by the preponderance of the evidence.
>
> 311. Mr. Royal's and Mr. Kury's[7] estimates and allocations of total construction costs related to the CT scanner as presented at the hearing properly included the construction of all space essential to the installation and operation of the CT scanner. Petitioners were given a thorough opportunity to cross examine Mr. Royal and Mr. Kury on the bases for those estimates, and the witnesses were able to demonstrate that all of the essential construction costs were included and supported by back-up documentation.
>
> 312. Further, . . . equipment used for simulation which is not essential to the performance of diagnostic CT scans should not be included in the $500,000 diagnostic center cost threshold, because such equipment is not medical diagnostic equipment within the meaning of the CON Law.
>
> 313. Asheville Hematology's estimate of equipment and other costs essential to the operation of the CT scanner as presented at the hearing properly identified all such essential equipment, and the cost attributed to that equipment was reasonable.

---

7. "Mr. Kury" refers to Mark Kury, Vice President of Centex-Concord, the developer of the AHO project.

> 314. The preponderance of the evidence demonstrates that the actual cost to acquire and make operational the Asheville Hematology diagnostic CT scanner will not exceed $500,000.

The above findings of fact support the Agency's conclusion that AHO's acquisition of the CT scanner did not require a CON. Petitioners, however, argue that several necessary costs were excluded from the Agency's determination, and that had any of these costs been included, the cost of the CT scanner would have exceeded the $500,000 threshold. Among these excluded costs are: (1) the entire cost of CT diagnostic contrast equipment valued at $21,000; (2) presently owned diagnostic equipment totaling $20,598; (3) the cost of constructing the CT room and control room totaling $118,745 or alternatively $104,716; and (4) the portion of the capital lease attributable to the CT scanner valued at $165,156. We address each of these contested items below.

A. Total Cost of CT Diagnostic Contrast Equipment

Included in the cost of the CT scanner was certain used diagnostic contrast equipment. This equipment was to be transferred from another US Oncology facility to AHO's new facility. The Agency found that

> this equipment is fully depreciated and has no market value, because there is not a secondary market where it could be sold. Asheville Hematology's estimate of 40% [of the original cost of the equipment] was a conservative estimate of the equipment's value. In reality, if it could not be relocated to another US Oncology facility, it would be thrown away.

Thus, the Agency allocated $8,400, or 40% of the original price of $21,000, to the CT scanner for this diagnostic contrast equipment.

Petitioners argue that the entire $21,000 should have been allocated to the CT scanner. This would add $12,600 to the total cost of the CT scanner, bringing the total cost of the CT scanner to $501,147.62, which is in excess of the $500,000 CON threshold.

N.C. Gen. Stat. § 131E-176(7a) provides that "[t]he capital expenditure for the equipment shall be deemed to be the fair market value of the equipment or the cost of the equipment, whichever is greater." N.C. Gen. Stat. § 131E-176(7a). Petitioners contend that for purposes of the statute, "the cost" of the diagnostic contrast equipment was the cost of the equipment when it was originally purchased, $21,000,

which was greater than the fair market value of the equipment, $8,400. Thus, Petitioners argue that the Agency erroneously excluded $12,600 from its calculation of the total cost of the CT scanner. We are not persuaded by Petitioners' argument.

The diagnostic contrast equipment to be used with the CT scanner was estimated to be three to four years old and had fully depreciated by the time it was acquired by AHO. The equipment was estimated to be worth 40% of the cost of purchasing new equipment, and the Agency found that the equipment had no market value because there was no secondary market in which it could be sold. Thus, "the greater" of the cost or fair market value of the used diagnostic contrast equipment was properly determined to be $8,400, which was properly allocated to the cost of the CT scanner.

B. Presently Owned Diagnostic Equipment

At AHO's existing facility, AHO housed a type of diagnostic equipment called a "Coulter counter," which AHO purchased in 2003 for $20,598. Petitioners argue that the Agency erroneously excluded this amount from the total cost of the CT scanner. Petitioners, however, have identified no evidence, nor have they argued, that this piece of equipment was essential to acquiring and making operational the CT scanner. Thus, we cannot conclude that the Agency erred in excluding the presently owned diagnostic equipment from the cost of the CT scanner.

C. Construction Costs for the CT Room

The Agency found that "Mr. Royal's and Mr. Kury's estimates and allocations of total construction costs related to the CT scanner as presented at the hearing properly included the construction of all space essential to the installation and operation of the CT scanner." The Agency further found that "Petitioners were given a thorough opportunity to cross examine Mr. Royal and Mr. Kury on the bases for those estimates, and the witnesses were able to demonstrate that all of the essential construction costs were included and supported by back-up documentation." Petitioners now contend that construction costs for the CT room and control room were erroneously omitted from the total cost of the CT scanner. Petitioners fail to demonstrate, however, that the Agency's findings were in error, and argue only that "[n]one of these spaces would be necessary except for the CT [scanner]." Petitioners have not shown that either the CT room or the control room was essential to the installation and operation of the CT scanner. Accordingly, the construction costs for these spaces

were properly omitted from the determination of the total cost of the CT scanner.

D. Portion of Building Lease Attributable to CT Scanner

Petitioners also argue that a portion of AHO's lease of its new facility should be allocated to the CT scanner. Petitioners' argument is based on their incorrect assumption that AHO's lease was a capital lease. As we discuss *infra*, AHO's building lease is an *operating* lease, not a *capital* lease, which is not subject to CON review. Thus, no part of AHO's lease was attributable to the CT scanner and this was properly excluded.

Based on the foregoing, we conclude that the Agency correctly determined that AHO's acquisition of a CT scanner for its new facility did not require a CON. Petitioners' argument is overruled.

IV. Expansion of Oncology Treatment Center

[4] Petitioners also argue that the Agency erroneously concluded that AHO's expansion of its existing oncology treatment center was exempt. We disagree.

A. Physician Office Building

AHO was formed in 1982 to engage in the practice of medical oncology. Thus, AHO was in existence as a physician practice specializing in oncology 11 years prior to the 1993 enactment of the CON requirements for new oncology treatment centers, diagnostic centers, and acquisition of major medical equipment. In 1984, the physician owners of AHO formed a partnership[8] in order to purchase real estate in Asheville, North Carolina, construct a building for a medical oncology practice ("the Facility"), and lease the Facility to AHO. In its 1 February 2005 letter, AHO informed the Agency that AHO had entered into a tentative lease agreement with CC Asheville MOB[9] to relocate the Facility to a new building which was constructed by CC Asheville MOB. CC Asheville MOB incurred all construction costs and would maintain ownership of the new building while AHO leased its space pursuant to an operating lease.

---

8. The partnership formed by the physician owners of AHO is Paschal, Jackson, Puckett and Davis General Partnership.

9. In AHO's 1 February 2005 letter to the Agency, the building developer and owner is referred to as "Centex Development Company." In the Agency's FAD, CC Asheville MOB is referred to as the owner of AHO's new facility. CC Asheville MOB is a subsidiary of Centex-Concord, and while it appears that Centex-Concord is affiliated with Centex Development Company, the record does not confirm this relation.

It is undisputed that AHO is an oncology treatment center within the meaning of N.C. Gen. Stat. § 131E-176(18a). The Agency found that because of this, AHO is an existing health service facility. The Agency further found that

> [u]nder the law applicable to the CON Section's Determination, an existing oncology treatment center may relocate its oncology treatment center and acquire certain items of medical equipment without obtaining a certificate of need, so long as the cost to acquire and make operational each unit of equipment does not exceed $750,000, and so long as the combination of the costs to acquire and make operational all such equipment and all other costs related to relocating the oncology treatment center, do not exceed $2,000,000.

Thus, the Agency treated AHO's expansion and relocation of its office building as a "physician office building" which does not require a CON so long as the total cost of expansion and relocation of said office building does not exceed $2,000,000. *See* N.C. Gen. Stat. § 131E-176(16)b. and 184(a)(9) (2003).

Petitioners, however, argue that because AHO was an existing oncology treatment center, AHO's expanded and relocated office building must be treated as a "health service facility," defined by N.C. Gen. Stat. § 131E-176(9b), rather than an unregulated "physician office building." If AHO's new office building was deemed a "health service facility," the entire cost of the land and building for the relocated AHO office would be included as a "capital expenditure" which would count toward the expansion of an oncology treatment center. Thus, no part of AHO's project would be exempt under the "physician office building" exemption. Petitioners' argument is contrary to the CON Law, however. The CON Law provides that an exempt physician office building may include certain non-exempt portions, such as an oncology treatment center, which is the case here.

N.C. Gen. Stat. § 131E-184(a)(9) provides in pertinent part that

> the Department shall exempt from certificate of need review a new institutional health service if it receives prior written notice from the entity proposing the new institutional health service, which notice includes an explanation of why the new institutional health service is required . . . . [t]o develop or acquire a physician office building regardless of cost, unless a new institutional health service other than defined in G.S. 131E-176(16)b. is offered or developed in the building.

N.C. Gen. Stat. § 131E-184(a)(9) (2003). If another type of "new institutional health service" is developed in the building, N.C. Gen. Stat. § 131E-184(b) nonetheless preserves the exemption for the physician office building while allowing regulation of the non-exempt portions.

> Those portions of a proposed project which are not proposed for one or more of the purposes under subsection (a) of this section are subject to certificate of need review, if these non-exempt portions of the project are new institutional health services under G.S. 131E-176(16).

N.C. Gen. Stat. § 131E-184(b) (2003).

The physician office building exemption applies to (1) developing or acquiring a physician office building regardless of cost, and (2) offering or developing "in the building" a new institutional health service as defined by N.C. Gen. Stat. § 131E-176(16)b. Thus, the following projects in a physician office building are exempt:

> [t]he obligation by any person of a capital expenditure exceeding two million dollars ($2,000,000) to develop or expand a health service or a health service facility, or which relates to the provision of a health service. The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities, including staff effort and consulting and other services, essential to the acquisition, improvement, expansion, or replacement of any plant or equipment with respect to which an expenditure is made shall be included in determining if the expenditure exceeds two million dollars ($2,000,000).

N.C. Gen. Stat. § 131E-176(16)b. (2003).

Reading N.C. Gen. Stat. §§ 131E-176(16)b., 184(a)(9), and 184(b) together, the CON Law therefore exempts "a capital expenditure . . . to develop or expand a health service or a health service facility, or which relates to the provision of a health service[,]" N.C. Gen. Stat. § 131E-176(16)b., if it is "in the [physician office] building." N.C. Gen. Stat. § 131E-184(a)(9). Accordingly, the Agency here considered the equipment which would expand the services of the oncology treatment center—the LINAC, the CT scanner, and the treatment planning equipment. The Agency found that

> [t]he CON Section's "no review" determination for relocation of the existing oncology treatment center, including the acquisition of the radiation oncology treatment equipment, attributed the

following activities for purpose of determining the applicability of CON review:

$381,135.62	Costs of the treatment planning equipment
$488,547.62	Costs of the CT simulator equipment
$746,416.62	Costs of the linear accelerator equipment
$364,301.00	Costs of the construction/relocation (in letter dated 2/01/05)
$1,500.000	Costs of the view boxes (in letter dated 6/16/05)
$4,277.62	Costs for 1/4 of staff effort (in letter dated 7/11/05)
($900.00)	Less 1/4 of legal fees for no review prep (in letter dated 7/26/05)
$1,985,278.49	Total costs

Thus, the Agency properly focused on whether the costs *essential* to acquiring this equipment and making it operational exceeded the $2,000,000 threshold, and excluded the part of the project that was exempt as a physician office building. The Agency defines "essential" to mean "those items which are indispensible, the absence of which renders the equipment useless." N.C. Admin. Code tit. 10A, r. 14C.3102(1) (January 1994). The Agency's definition of "essential" as applied to major medical equipment has been in effect since 1993 and has not been modified by the General Assembly which suggests agreement with the Agency's interpretation. Further, the Agency's interpretation is consistent with the General Assembly's intention because Agency

> micro-management over relatively minor capital expenditures . . . does not effectuate the overriding legislative intent behind the CON process, *i.e.*, regulation of major capital expenditures which may adversely impact the cost of health care services to the patient. . . . Nevertheless, the legislature clearly did not intend to impose unreasonable limitations on maintaining . . . *or* expanding . . . presently offered health services.

Cape Fear Mem. Hosp., 121 N.C. App. at 494, 466 S.E.2d at 301. Accordingly, Petitioners' argument is overruled.

B. Building Lease

Petitioners also argue that AHO's lease of the building which was to house AHO's relocated oncology treatment center was a capital lease, and thus it was a capital expenditure which should be

counted toward the $2,000,000 threshold pursuant to N.C. Gen. Stat. § 131E-176(16)b. We disagree.

In its FAD, the Agency explained that under generally accepted accounting principles ("GAAP"), a building lease may be classified as an operating lease or a capital lease, depending upon certain circumstances. A capital lease is treated differently on a company's books than an operating lease. A capital lease is considered a financing arrangement under GAAP, such that it is an asset in the balance sheet of the lessee, with an off-setting debt in the balance sheet liabilities. An operating lease, however, would not be shown in the balance sheet. Rather, the expense of an operating lease would be shown in the company's income statement.

On 6 June 2005, AOR Management, a subsidiary of US Oncology and managing agent for AHO, entered into a lease with CC Asheville MOB, for a building and the land on which it was located to be used for its oncology treatment center. On 2 September 2005, AOR Management and CC Asheville MOB entered into a "First Amendment to Lease Agreement[.]" In its FAD, the Agency found that at the time the lease and the first amendment were executed, US Oncology believed the lease to be an operating lease. However, Kevin Krenzke ("Krenzke"), a certified public accountant and Vice President and Controller of US Oncology, later concluded that under GAAP, the lease and first amendment constituted a capital lease.

On 31 March 2006, AOR Management and CC Asheville MOB entered into a "Second Amendment to Lease Agreement[,]" in which the parties renegotiated the lease in a manner that changed the minimum lease payments. Krenzke applied GAAP, and concluded that the second amendment was an operating lease.

The Agency's findings in the FAD establish that AHO's lease is an operating lease and not a capital lease. Specifically, the Agency made the following pertinent findings:

> 281. Under FASB 13, a lease would be a capital lease if (a) the lease transfers ownership of the property at the end of the term; (b) the lease contains a bargain purchase option; (c) the lease term is equal to 75% or more of the estimated life of the leased property; or (d) the present value at the beginning of the lease term of the minimum lease payments equals or exceeds 90% of the fair market value of the leased property. . . .
>
> . . . .

283. Centex-Concord, the parent company of CC Asheville MOB, is a development company engaged in the primary business of constructing, owning, leasing, and selling real estate development properties. As such, it meets the definition of a manufacturer for determining the fair market value of the property. For the same reason, the value defined in an appraisal would be the proper basis for determining whether a lease for property developed by Centex-Concord is a capital lease or an operating lease under the 90% test. . . .

284. An appraisal of the property owned by CC Asheville MOB was conducted by Fred H. Beck and Associates ("Beck") in August 2005. Beck appraised the fair market value of the leased property as $8,500,000. . . .

. . . .

288. At the time the Lease and the First Amendment were executed, it was US Oncology's understanding that the Lease was an operating lease. After the First Amendment was executed, it and the Lease were submitted by US Oncology's capital planning group to Mr. Krenzke in his financial reporting capacity, to confirm whether or not that conclusion was correct. By the time his analysis was completed, he concluded that the Lease and the First Amendment as structured constituted a capital lease. . . .

. . . .

290. [Because US Oncology prefers all leases to be operating leases,] US Oncology and Centex-Concord renegotiated the Lease so that the minimum lease payments were changed under the Second Amendment. Instead of a 2.5% annual increase in the minimum rental payment, the annual increase would be tied to the Consumer Price Index ("CPI"), with a minimum annual increase of 1% and a maximum annual increase of 4%. . . .

. . . .

296. For purposes of determining whether the Second Amendment is a capital lease, it is appropriate to value the property at $8,500,000, as per the Beck appraisal. The preponderance of the evidence shows that the terms of the Second Amendment would not cause the appraised value in the Beck appraisal to decrease.

297. Further, under the Second Amendment, the present value at the beginning of the lease term of the minimum lease payments

> would be calculated under GAAP based upon a 1% annual increase. Using those assumptions, the present value at the beginning of the lease term of the minimum lease payments would be less than 90% of the fair market value of the leased property. . . . *Therefore, the Second Amendment is an operating lease.*

(Emphasis added).

Petitioners argue that for purposes of the CON Law, AHO incurred the expense of the lease when it first entered into the lease on 6 June 2005. Thus, Petitioners contend that when deciding whether AHO's lease constituted a capital expenditure, the Agency should have looked at the initial lease—a *capital* lease—which, by its nature, constituted a capital expenditure. We disagree.

N.C. Gen. Stat. § 131E-176(16)b. requires a CON for a capital expenditure exceeding $2,000,000. The CON Law defines a "capital expenditure" as

> an expenditure for a project, including but not limited to the cost of construction, engineering, and equipment which under generally accepted accounting principles is not properly chargeable as an expense of operation and maintenance. *Capital expenditure includes*, in addition, *the fair market value of an acquisition made by* donation, *lease*, or comparable arrangement *by which a person obtains equipment*, the expenditure for which would have been considered a capital expenditure under this Article if the person had acquired it by purchase.

N.C. Gen. Stat. § 131E-176(2d) (2003) (emphasis added). Furthermore, the Agency found that a capital lease would not be "an acquisition made by donation, lease, or comparable arrangement by which a person obtains equipment," N.C. Gen. Stat. § 131E-176(2d), and therefore would not be a capital expenditure under N.C. Gen. Stat. § 131E-176(2d), because it is not a lease of equipment. Thus, even assuming *arguendo* that AHO's lease constituted a capital lease, it would not have been a capital expenditure for purposes of the CON Law. Accordingly, Petitioners' argument is overruled.

C. Staff Costs

Petitioners argue that staff costs which were attributable to the relocation and expansion of AHO's oncology treatment center were erroneously excluded in the CON determination. We disagree.

The Agency considered AHO's staff costs irrespective of the relocation and expansion of its oncology treatment center and determined that AHO did not incur any additional staff costs as a result of its project. The Agency made the following findings of fact:

> 216. In its July 11, 2005 letter, Asheville Hematology provided documentation of $17,110.49 in internal staff costs as of that date. . . .
>
> . . . .
>
> 221. Ultimately, the evidence offered indicated that all actual internal staff costs incurred by Asheville Hematology/US Oncology to date, along with the prospective staff costs reasonably anticipated to be incurred prior to the treatment of the first patient at the new Asheville Hematology facility, total $30,402.41. . . .
>
> . . . .
>
> 227. All the foregoing staff members were salaried employees of Asheville Hematology/US Oncology and that no additional cost was incurred as a result of their efforts in furtherance of the project. Their salaries would have been paid irrespective of the Asheville Hematology Project. . . .
>
> 228. Neither G.S. § 131E-176(7a) ("diagnostic centers") nor G.S. § 131E-176(14d) ("major medical equipment") specifically includes staff costs among the costs which are deemed essential to the operation of that equipment. Only G.S. § 131E-176(16)b ("New Institutional Health Service" / $2 million total capital expenditure) specifically mentions staff costs in the cost threshold determination.
>
> 229. [Lee] Hoffman stated, however, that in her opinion these staff costs were nonetheless attributable to the linear accelerator, the CT scanner, the treatment planning equipment, and total capital costs for the Asheville Hematology Project, despite the fact that no additional cost was incurred by Asheville Hematology/US Oncology as a result of their efforts in furtherance of the project. . . .
>
> 230. Furthermore, Ms. Hoffman admitted that, in numerous prior no-review determinations, the Agency had not included the cost of internal staff time in furtherance of a project in the total capital costs essential to making a health service operational. . . .

231. In light of the foregoing, there were no staff costs, above and beyond staff costs which would have otherwise been incurred by Asheville Hematology or US Oncology irrespective of the Asheville Hematology Project, and therefore, there were no additional capital costs attributable to the Asheville Hematology Project, for the efforts of salaried staff in furtherance of the Asheville Hematology Project.

232. Notwithstanding this fact, even if costs related to the efforts of salaried staff in the employ of Asheville Hematology or US Oncology in furtherance of the Asheville Hematology Project are attributable, the allocations of the staff costs associated with the development of the Asheville Hematology Project are reasonable in light of the evidence adduced.

Petitioners contend that the Agency erroneously excluded the $30,402.41 AHO reported in internal staff costs as of 11 July 2005 from its CON determination. Petitioners do not, however, demonstrate that the Agency's findings were unsupported by substantial evidence or otherwise erroneous, and thus, this argument is overruled.

V. Certified Cost Estimate

[5] Under the CON Law, if a licensed architect or engineer provides a valid cost estimate and certifies that the costs contained in the estimate are "equal to or less than the expenditure minimum for capital expenditure for new institutional health services, such expenditure shall be deemed not to exceed the amount for new institutional health services regardless of the actual amount expended," provided that the following requirements are met: (1) the licensed architect or engineer must certify the costs; (2) the certified cost estimate must be issued in writing at least 60 days before the obligation for the capital expenditure is incurred; and (3) the proponent must notify the Agency in writing within 30 days of any expenditure that exceeds the expenditure minimum. N.C. Gen. Stat. § 131E-178(d) (2003).

As part of its 1 February 2005 submission to the Agency, AHO provided an architect's estimate of the expected costs and a series of cost breakdowns for the proposed cancer center. AHO provided a letter and supporting materials from the licensed architect responsible for the design and management of the project as a certified estimate of the construction costs with the attached cost breakdowns. AHO's architect estimated the costs for the project to be less than the applicable thresholds in the CON Law.

Petitioners argue that AHO's estimate did not qualify as a certified estimate under section 131E-178(d). The Agency did not ultimately decide whether the estimate provided by AHO's architect qualified as a certified cost estimate under this section, because the Agency found that the evidence established that the actual construction costs for the project would not exceed the relevant cost thresholds in the CON Law. Thus, the Agency found that section 131E-178(d) was not applicable in this instance. In light of the Agency's finding and based on our holding that the Agency properly determined the AHO project did not require a CON, we need not decide whether AHO's cost estimate constituted a certified cost estimate under section 131E-178(d).[10]

Conclusion

For the foregoing reasons, we affirm the Final Agency Decision adopting the recommended decision of the Administrative Law Judge.

AFFIRMED.

Chief Judge MARTIN and Judge HUNTER, JR. concur.

FOUR SEASONS MANAGEMENT SERVICES, INC., PETITIONER v. TOWN OF WRIGHTSVILLE BEACH, BOARD OF ADJUSTMENT AND THE TOWN OF WRIGHTSVILLE BEACH, RESPONDENTS

No. COA09-777

(Filed 6 July 2010)

1. Zoning— conditional use permit—new parking deck—amendment required

The trial court did not err by upholding the Wrightsville Beach Board of Adjustment's decision that petitioner could not build a proposed parking deck without seeking and obtaining an amendment to its conditional use permit. Neither the ordinance nor the decisions upon which petitioner relied supported the argument that accessory structures are permitted as a matter of right regardless of the nature or size of the structure.

10. Nonetheless, it is obvious from the Agency's findings set out above, which are supported by substantial evidence in the record, that Petitioners' argument lacks merit.

2. Zoning— new parking deck—non-conforming use—expansion

The trial court did not err by upholding the Wrightsville Beach Board of Adjustment's conclusion that the Town had properly denied petitioner's request to build a multi-story parking deck because the deck would constitute expansion of a non-conforming use.

3. Estoppel— judicial—challenge to ruling heard

The question of whether petitioner was judicially estopped from challenging the Town's decision that petitioner must obtain an amendment to its conditional use permit to build a parking deck was not addressed where petitioner was not prevented from challenging that determination before the Board of Adjustment, the trial court, or the Court of Appeals.

Appeal by petitioner from judgment entered 17 February 2009 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 11 January 2010.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin, and Matthew A. Nichols, for Petitioner-Appellant.

Wessell & Raney, L.L.P., by John C. Wessell, III, for Respondents-Appellees.

ERVIN, Judge.

Petitioner Four Seasons Management Services, Inc., appeals from the trial court's order upholding a decision by Respondents Town of Wrightsville Beach and the Town of Wrightsville Beach Board of Adjustment denying Petitioner's request to build a four-story parking deck at a hotel which it owns in Wrightsville Beach, North Carolina, without seeking and obtaining an amendment to its conditional use permit. After careful consideration of Petitioner's challenges to Respondent's decision in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

On 15 May 1972, the Town adopted a zoning ordinance, which became effective on the date of enactment. The zoning ordinance includes detailed provisions defining various zoning districts and the

types of structures,[1] buildings,[2] and uses[3] permitted in each district and establishing specific requirements relating to a number of subjects, including, but not limited to, the necessity for obtaining approval prior to undertaking certain construction projects, the number of parking spaces required at hotels and motels, and landscaping. The zoning ordinance also includes provisions addressing administration and enforcement issues.

Petitioner owns and operates a hotel known as the Blockade Runner in Wrightsville Beach. A hotel has been operated at the site of the Blockade Runner for over a century. The Blockade Runner is not in compliance with the zoning ordinance in a number of respects. For example, the Blockade Runner does not have the required number of off-street parking spaces and violates the applicable setback requirements on its south side. Because it was constructed prior to the effective date of the zoning ordinance, the Blockade Runner is classified as a nonconforming use[4] and is entitled, for that reason, to operate despite its noncompliance with various provisions of the zoning ordinance.

The Blockade Runner is located in a "C-4" zoning district, which allows "accessory uses"[5] as a matter of right and permits the operation of hotels as a "conditional use." As a nonconforming use, the Blockade Runner did not obtain a conditional use permit[6] prior to

1. A "structure" is defined in § 155.002 of the zoning ordinance as "[a]nything constructed or erected, the use of which requires more or less permanent location on the ground, or attached to something having more or less permanent location on the ground."

2. A "building" is defined in § 155.002 of the zoning ordinance as "[a]ny structure enclosed and isolated by exterior walls constructed or used for residence, business, industry, or other public or private purpose, or accessory thereto."

3. A "use" is defined in § 155.002 of the zoning ordinance as "[t]he specific activity or function, for which land, a building, or a structure is designated, arranged, intended, occupied, or maintained."

4. According to § 155.002 of the zoning ordinance, a "nonconforming use" is defined as "[a]ny building, land or other areas subject to this chapter lawfully occupied by a use on the effective date of this chapter or amendment thereto which does not conform after the passage of this chapter or amendment with the use requirements of the district in which it is situated," including "the activity that constitutes the use made of the property."

5. An "accessory use" is defined in § 155.002 of the zoning ordinance as "[a] use customarily incidental and subordinate to the principal use or building and located on the same lot with the principal use or building."

6. A "conditional use permit" is "[r]equired for all stated conditional uses including building, development, land use, and the like" and involves the use of a process that

construction. However, Petitioner applied for and obtained a conditional use permit authorizing the enclosing of a portion of the lobby area for use as a solarium on 26 April 1984. Subsequently, Petitioner obtained an amendment authorizing the construction of stairs associated with a health spa on 24 January 1985 and another amendment authorizing the construction of an open-air gazebo on 24 June 1991.

On 25 April 2006, Petitioner requested authorization to "construct a one-story parking deck" over its existing parking area. In addition, Petitioner sought approval for variances relating to setbacks and parking requirements. On 26 April 2006, the Town's Development Code Administrator denied Petitioner's request for the following reasons:

> After conferring with the Town Attorney, it has been determined that construction of the parking deck requires an amendment to the Blockade Runner's existing conditional use permit. The Town of Wrightsville Beach Table of Uses lists hotels and motels as a conditional-use in the C-4, Commercial District. It has been the practice of the Town to require amendments to existing conditional-use permits for changes or additions to structures requiring a conditional-use permit. In addition, the Town does not agree with your classification of the parking deck as an accessory structure[7] or accessory use. . . .
>
> In addition, as acknowledged in your application, the parking deck as proposed violates the requirements of § 155.047 regarding setbacks and § 155.060 regarding required parking. Furthermore, the proposed parking deck encroaches into the 20-ft. sight triangle required by § 155.014. It should be noted that the plans as proposed do not bring the parking lot into compliance with the Landscaping Ordinance as required by § 155.181(5).

On 5 May 2006, Petitioner appealed from the Administrator's decision to the Board of Adjustment.

"requires that certain stipulations, projections, prerequisites, qualifications, and the like will be fulfilled if the proposed project is to be permitted" according to § 155.002 of the zoning ordinance. The zoning ordinance, in § 155.025(A), requires conditional use permits for certain land uses which, "because of their unique characteristics, cannot be properly classified in any particular district, or districts, without consideration, in each case of the impact of those uses upon neighboring land uses and of the public need for the particular use in the particular location."

7. An "accessory structure" is defined in § 155.002 of the zoning ordinance as a "detached subordinate structure(s), the use of which is incidental to that of the principal structure and located on the same lot therewith."

On 12 October 2006, Petitioner submitted revised plans and requested authorization to build a four-story parking deck over its existing parking area.[8] On 19 October 2006, the Town's Director of Planning and Parks denied Petitioner's revised request. In denying Petitioner's revised request, the Director restated the Town's previously-enunciated position that Petitioner could not "construct the parking deck without going through the conditional-use process"; reiterated the Town's disagreement with "classification of the parking deck as an accessory structure or accessory use"; and pointed out that the proposed parking deck violated the requirements for the number of parking spaces and did "not bring the parking lot into conformity with the Landscaping Ordinance as required by § 155.181(5)." Finally, the Director noted that the proposed plans would not bring the parking lot into conformity with the requirements for fire sprinklers contained in § 94.46 of the zoning ordinance. On 25 October 2006, Petitioner supplemented its 5 May 2006 appeal by appealing to the Board from the Director's 19 October 2006 decision.

On 29 November 2006, the Board conducted a hearing on Petitioner's appeal, at which it received testimony and considered the arguments of counsel. At the conclusion of the hearing, the Board voted not to reverse the Director's decision. On 29 February 2008, the Board issued a written order in which it stated the following conclusions:

> 24. It is the Board's position that the issues to be addressed by it include the following:
>
> a. Was the Administrator correct in denying the request to construct the 4-story parking deck without the Petitioner first seeking an amendment to its existing conditional use permit?
>
> b. Was the Administrator correct in denying the request to construct the 4-story parking deck because the construction of the proposed parking deck constitutes an expansion of a permitted non-conforming use?
>
> c. Is the Petitioner judicially estopped to challenge the requirement for a conditional use permit when the Petitioner, on at least three prior occasions, has accepted benefits under the ordinance requiring an amendment to its conditional use permit

8. The transition from a one story parking deck to a four story parking deck obviated the necessity for Petitioner to obtain the variances that had been requested in its original application.

d. Was the Administrator correct in denying the request to construct the 4-story parking deck because the plan for the proposed parking deck fails to comply with the landscaping ordinance of the Town as set forth in § 155.180 *et seq*. Of the zoning ordinance?

25. WAS THE ADMINISTRATOR CORRECT IN DENYING THE REQUEST TO CONSTRUCT THE 4-STORY PARKING DECK WITHOUT THE PETITIONER FIRST SEEKING AN AMENDMENT TO ITS EXISTING CONDITIONAL USE PERMIT?

ANSWER: Yes.

26. This Board is of the opinion and concludes that the Petitioner must secure an amendment to its existing conditional use permit in order to construct the proposed parking deck. In support of this position, the Board concludes as follows:

a. The zoning ordinances permit accessory uses in all zoning districts. The table of uses does not address accessory buildings or accessory structures. Neither accessory buildings nor accessory structures are indicated as permitted in any district.

b. The proposed parking deck is an accessory building. While parking may constitute an accessory use, a 4-story parking deck does not constitute an accessory use.

c. In the alternative, the Board finds that the proposed parking deck is not accessory to the principal use, that being a hotel, but rather the proposed parking deck is part of the principal use of the property. It is clear from the testimony of the Petitioner's representatives that the hotel cannot exist without available parking.

d. In attempting to discern the intent of the Town ordinances, the Board took into consideration the testimony of the Administrator that it has been the practice of the Town during the Administrator's ten years of employment to require property owners wishing to expand structures that are subject to an existing conditional use [permit] to secure an amendment to the existing conditional use permit.

27. WAS THE ADMINISTRATOR CORRECT IN DENYING THE REQUEST TO CONSTRUCT THE 4-STORY PARKING DECK BECAUSE THE CONSTRUCTION OF THE PROPOSED PARKING

DECK CONSTITUTES AN EXPANSION OF A PERMITTED NON-CONFORMING USE?

ANSWER: Yes.

a. The existing hotel is non-conforming in that it violates the setbacks on at least one side of the structure and because the parking requirements are not currently met and will not be met even if the 4-story parking deck is constructed.

b. Section 155.009 of the zoning ordinances prohibits the expansion of a permitted non-conforming use.

C. The only way in which the parking deck can be constructed is for the hotel to be brought into compliance with current ordinances. Otherwise, the construction of the parking deck is an expansion of a permitted non-conforming use.

28. IS THE PETITIONER JUDICIALLY ESTOPPED TO CHALLENGE THE REQUIREMENT FOR A CONDITIONAL USE PERMIT WHEN THE PETITIONER, ON AT LEAST THREE PRIOR OCCASIONS, HAS ACCEPTED BENEFITS UNDER THE ORDINANCE REQUIRING AN AMENDMENT TO ITS CONDITIONAL USE PERMIT?

ANSWER: Yes.

a. The Petitioner has previously applied for and been granted three conditional use permits or amendments to the existing conditional use permit.

b. On each of these occasions, the Petitioner has acknowledged the need to secure an amendment to its existing conditional use permit in order to make additions or changes to its hotel.

c. The Petitioner has taken advantage of each of the three previously issued conditional use permits and has constructed additions to the hotel pursuant to the authority granted by those permits.

d. Having taken advantage of the prior permits, the Petitioner is estopped to now challenge the requirement to secure an amendment to its existing conditional use permit.

29. WAS THE ADMINISTRATOR CORRECT IN DENYING THE REQUEST TO CONSTRUCT THE 4-STORY PARKING DECK

BECAUSE THE PLAN FOR THE PROPOSED PARKING DECK FAILS TO COMPLY WITH THE LANDSCAPING ORDINANCE OF THE TOWN AS SET FORTH IN § 155.180 *ET SEQ*. OF THE ZONING ORDINANCES?

ANSWER: Yes.

a. The Petitioner's witnesses at the hearing admitted that the proposed plan did not comply with the Town's landscaping ordinances.

b. There is nothing in the Town's ordinances to excuse this proposed plan from the provisions of the landscaping ordinances as set forth in the Town ordinances.

On 29 December 2006, Petitioner filed a petition seeking the issuance of a writ of *certiorari* permitting review of the Board's decision in the New Hanover County Superior Court. On 6 March 2008, the trial court held a hearing for the purpose of allowing the parties to be heard with respect to the validity of the Board's decision. On 17 February 2009, the trial court entered an order affirming the Board's decision. In its order, the trial court concluded, among other things, that:

10. The only way for Petitioner's argument to succeed is if this Court accepts the proposition that all accessory structures are accessory uses. For the reasons set forth below, this Court refused to accept this argument and for that reason, among others, finds that the Board of Adjustment acted properly in upholding the decision of the Town's Planning and Parks Director.

. . . .

12. The Zoning Ordinances draw a clear distinction between a "Use" and a "Structure" or "Building." Use is defined as "The specific activity or function for which land, a building, or a structure is designated, arranged, intended, occupied, or maintained." The definitions of accessory structure and accessory building make clear references to actual physical structures of some kind. The Petitioner would have this Court accept the argument that an accessory use is the same as an accessory structure or an accessory building. The Zoning Ordinances of the Town simply do not support this contention. Further, the only use permitted in all districts without the issuance of a conditional use permit is an "accessory use." Accessory structures and accessory buildings

are not mentioned specifically in the Table of Uses found in the Town's Zoning Ordinances and therefore are not permitted as a matter of right in all zoning districts. . . .

. . . .

14. Application of these rules leads to the conclusion that accessory structures and accessory buildings are not the same as accessory uses and further, that accessory structures and accessory buildings are not permitted in any zoning districts as a matter of right under the Town's Zoning Ordinances. . . .

. . . .

27. The clear lesson from *Cannon v. Bd. of Adjustment of Wilmington*, 65 N.C. App. 44, 308 S.E.2d 735 (1983),] and *Stegall v. Bd. of Adjustment of New Hanover*, 87 N.C. App. 359, 361 S.E.2d 309 (1987), *disc. review denied*, 321 N.C. 480, 364 S.E.2d 671 (1988),] is that this Court must look to the zoning ordinances of the Town of Wrightsville Beach in order to determine if the proposed parking deck constitutes an expansion of a permitted nonconforming use. The [decision in *Jirtle v. Board of Adjust. for the Town of Biscoe*, 175 N.C. App. 178, 622 S.E.2d 713 (2005),] is of no help since that decision involves interpretation of an entirely different ordinance. The issue for this Court is whether the construction of the four story parking deck is a change in degree of activity or a change in the kind of activity.

28. The Court concludes that the construction of a four story parking deck utilizing mechanical devices for the location of vehicles within that deck is a significantly different kind of activity from a conventional ground level parking deck. For that reason, the proposed four story parking deck constitutes an impermissible expansion of a permitted non-conforming use.

. . . .

32. As previously noted, the Petitioner has been issued three conditional use permits. . . . In securing these permits, the Petitioner has gone through the process of acquiring an amendment to its conditional use permit. The Petitioner has accepted the benefits given to it under the conditional use permit process and has undertaken construction repairs and alterations of its hotel pursuant to the authority granted by these conditional use permits. Now the Petitioner claims it is not required to secure an amendment to its conditional use permit as a prerequisite to construct-

ing the four story parking deck. The Town contends that the Petitioner is judicially estopped from claiming a right to construct the four story parking deck without going through the conditional use permit [process] on the grounds that the Petitioner has previously acknowledged on three separate occasions that conditional use permits are required for expansion, was granted amendments to conditional use permits and took advantage of the authority given under those permits. Since the Petitioner has previously applied for and been granted conditional use permits, and has taken advantage of the construction permitted by those permits, it is judicially estopped to now challenge the requirement for a conditional use permit.

. . . .

35. As in [*Convent v. Winston-Salem*, 243 N.C. 316, 90 S.E.2d 879 (1956), and *Goforth Properties, Inc. v. Town of Chapel Hill*, 71 N.C. App. 771, 323 S.E.2d 427 (1984),] the Petitioner has accepted the benefits of the conditional use permits previously granted. The Petitioner is now estopped to claim that it can proceed with a new addition to its hotel without seeking a conditional use permit.

36. The landscaping ordinances are found in Sections 155.180 through 155.188 of the Town's Code of Ordinances. Sec. 155.181 provides that the sections dealing with landscaping shall apply "when there is an expansion of the parking facility by a minimum of 10% of the parking with a minimum of 10 total spaces." Clearly this proposed parking deck falls under that requirement.

37. Sec. 155.104 outlines the requirements for landscaping for parking facilities. The architect for the Petitioner . . . testified before the Board of Adjustment that he was " . . . unable to really get the interior landscaping as the ordinance required." [The architect] went on to testify that the ordinance required a landscaping island to be every 15 feet and the plans which he prepared did not include such landscaping islands on the interior of the parking deck. [The] Planning and Parks Director for the Town, testified before the Board of Adjustment that the plans submitted by Petitioner did not comply with the landscape ordinance of the Town of Wrightsville Beach.

38. It is clear from the testimony of [the architect] and [the Planning and Parks Director] that the plans submitted by the

> Petitioner did not comply with the landscaping ordinance of the Town and the Town officials were correct in denying the request to construct the four story parking deck.

On 16 March 2009, Petitioner noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

Judicial review of the decisions of a municipal board of adjustment is authorized by N.C. Gen. Stat. § 160A-388(e2), which provides, in pertinent part, that "[e]very decision of the board shall be subject to review by the superior court by proceedings in the nature of *certiorari*." "Upon review of a decision from a Board of Adjustment, the trial court should:

> '(1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.' "

Wright v. Town of Matthews, 177 N.C. App. 1, 8, 627 S.E.2d 650, 656 (2006) (quoting *Knight v. Town of Knightdale*, 164 N.C. App. 766, 768, 596 S.E.2d 881, 883 (2004)). "If a petitioner contends the Board's decision was based on an error of law, '*de novo*' review is proper. However, if the petitioner contends the Board's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the 'whole record' test." *Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 527-28, *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000) (quoting *JWL Invs., Inc. v Guilford County Bd. of Adjust.*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717, *disc. review denied*, 351 N.C. 357, 540 S.E.2d 349 (1999)). "[W]hen sitting as an appellate court to review a [decision of a quasi-judicial body], [the trial court] must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.' " *Sun Suites*, *id.* (quoting *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 342 (1999)). "On review of the trial court's order, this Court must determine whether the trial court cor-

rectly applied the proper standard of review." *Wright*, 177 N.C. App. at 8, 596 S.E.2d at 883.

B. Specific Challenges to Trial Court's Order

1. Necessity for Amendment to Conditional Use Permit

[1] On appeal, Petitioner argues that the trial court erred by upholding the Town's "administrative determinations which denied the Petitioner the right to construct a multistory parking deck upon its property[.]" As a preliminary matter, we note that the Town did not unequivocally "deny" Petitioner the right to construct a parking deck. Instead, the Town denied Petitioner's request to construct the proposed parking deck without seeking and obtaining an amendment to its existing conditional use permit. As a result, the ultimate issue which we must resolve is the extent, if any, to which Petitioner was entitled under the zoning ordinance to construct the proposed parking deck without undergoing the conditional use permit process.

A proper resolution of Petitioner's challenge to the Board of Adjustment's ruling requires us to interpret various provisions of the Wrightsville Beach zoning ordinance.

> Questions involving interpretation of zoning ordinances are questions of law. Accordingly, the superior court is to apply a *de novo* standard of review to Board decisions involving application and interpretation of zoning ordinances, and the court may freely substitute its judgment for that of the Board. . . . [O]n appeal of the judgment of the superior court, this Court must apply a *de novo* standard of review in determining whether 'the superior court committed error of law in interpreting and applying the municipal ordinance,' and may also freely substitute its judgment for that of the superior court.

Hayes v. Fowler, 123 N.C. App. 400, 404, 473 S.E.2d 442, 444-45 (1996) (citing *Ayers v. Bd. of Adjust. for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994), and quoting *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 137, 431 S.E.2d 183, 187 (1993)). Since Petitioner does not argue that the trial court applied the wrong standard in resolving this issue, we will proceed directly to an examination of the relevant provisions of the zoning ordinance.

"The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." *Cogdell v. Taylor*, 264 N.C. 424, 428, 142 S.E.2d 36, 39 (1965) (citing *In re*

O'Neal, 243 N.C. 714, 92 S.E.2d 189 (1956), and *Perrell v. Service Co.*, 248 N.C. 153, 102 S.E.2d 785 (1958)). "In interpreting a municipal ordinance '[t]he basic rule is to ascertain and effectuate the intent of the legislative body.' " *Capricorn*, 334 N.C. at 138, 431 S.E.2d at 187-88 (quoting *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980)). "We look to the language of the enabling act and the city ordinance to ascertain the intent of the legislative bodies." *Financial Services v. Capitol Funds*, 288 N.C. 122, 134, 217 S.E.2d 551, 559 (1975). "Unless a term is defined specifically within the ordinance in which it is referenced, it should be assigned its plain and ordinary meaning. In addition, we avoid interpretations that create absurd or illogical results." *Ayers*, 113 N.C. App. at 531, 439 S.E.2d at 201 (citing *Rice Associates v. Town of Weaverville Bd. of Adjust.*, 108 N.C. App. 346, 423 S.E.2d 519 (1992), and *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 344 S.E.2d 821, *disc. review denied*, 318 N.C. 417, 349 S.E.2d 598 (1986)). In addition, because "the function of a board of adjustment is to interpret local zoning ordinances[, s]ome deference is given to the board's interpretation of its own city code." *Tucker v. Mecklenburg Cty. Zoning Bd. of Adjust.*, 148 N.C. App. 52, 57, 557 S.E.2d 631, 635 (2001), *aff'd in part*, *disc. review improvidently granted in part*, 356 N.C. 658, 576 S.E.2d 324 (2003) (citing *CG & T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 39, 411 S.E.2d 655, 659 (1992)).

Petitioner argues on appeal, as it did before the Board and the trial court, that it is not required to seek and obtain an amendment to its conditional use permit as a prerequisite to constructing the parking deck because the zoning ordinance permits a landowner to construct an "accessory structure" and use his property for an "accessory use" without obtaining prior authorization. In essence, Petitioner contends that: (1) it is entitled to engage in "accessory uses" of its property without obtaining prior authorization from the zoning administration and enforcement authorities; (2) parking is an "accessory use" under the zoning ordinance; (3) a parking deck is an "accessory structure" under the zoning ordinance since the use of such a structure is subordinate and incidental to the operation of a hotel; (4) one needs "accessory structures" in order to engage in "accessory uses"; and (5) for that reason, the right to engage in an "accessory use" on one's property without obtaining prior approval necessarily includes the right to construct an "accessory structure" in which to conduct the proposed "accessory use" without obtaining prior approval. In other words, Petitioner's argument equates an "acces-

sory use" with an "accessory structure." We do not find this logic persuasive for several reasons.

The validity of Petitioner's argument hinges upon the assumption that "accessory structures" are equivalent to "accessory uses." The term "use" is defined in the zoning ordinance as " '[t]he specific activity or function for which land, a building or a structure is designated, arranged, intended, or maintained." As we have previously noted, an "accessory use" is defined as a "use customarily incidental and subordinate to the principal use or building and located on the same lot with the principal use or building." Thus, the zoning ordinance clearly intends for the term "accessory use" to refer to something that someone does. A "structure," on the other hand, is defined as "[a]nything constructed or erected, the use of which requires more or less permanent location on the ground, or attached to something having more or less permanent location on the ground." The zoning ordinance defines an "accessory structure" as a "detached subordinate structure[s], the use of which is incidental to that of the principal structure and located on the same lot therewith." As a result, the definitional provisions of the zoning ordinance clearly indicate that an "accessory structure" is a physical object. As a result, the relevant provisions of the zoning ordinance simply do not treat "accessory uses," which are activities, and "accessory structures," which are physical objects, as equivalent, so that the fact that "accessory uses" are permitted as a matter of right in the zoning district in which the Blockade Runner is located does not establish that Petitioner is entitled to construct an "accessory structure" on its property as a matter of right.[9]

As further support for its assertion that, "[g]enerally speaking, accessory structures and uses are permitted without more permission," Petitioner cites *Dobo v. Zoning Bd. of Adjust. of the City of Wilmington*, 149 N.C. App. 701, 562 S.E.2d 108 (2002), *reversing per curiam*, 356 N.C. 656, 576 S.E.2d 324 (2003), and *Tucker*, 148 N.C. App. at 52, 557 S.E.2d at 631. However, neither of these decisions holds that accessory structures are "generally" treated like accessory uses or that accessory structures are "generally" allowed without the necessity for the landowner to obtain "more permission." On the contrary, *Dobo* addressed the issue of whether the landowner's operation of a portable sawmill in his yard constituted an "accessory use,"[10]

9. The validity of this point is reinforced by the fact that the Table of Uses contained in the zoning ordinance makes no reference to "accessory structures."

10. *Dobo* addresses a zoning ordinance that defined "accessory use" as "[a] use or structure on the same lot with, and of a nature customarily incidental and subordinate

while *Tucker* addressed the issue of whether a kennel was a permissible accessory use in a multi-family zoning district or was barred under an ordinance provision prohibiting commercial kennels in such areas. Both decisions focused on the use made of the property in question; neither mentioned the subject of accessory structures. In addition, Petitioner cites *Allen v. City of Burlington Bd. of Adjustment*, 100 N.C. App. 615, 397 S.E.2d 657 (1990), for the proposition that accessory structures are allowed as a matter of right under the zoning ordinance. As was the case with *Dobo* and *Tucker*, however, *Allen* deals solely with the use to be made of existing property without mentioning any right to construct an accessory structure. Thus, none of the decisions upon which Petitioner relies provides any support for its position.

Moreover, it is clear that the general import of the zoning ordinance is to require approval from the relevant zoning officials before any major construction project is undertaken. More specifically, § 155.126 of the zoning ordinance provides that "[n]o building or other structure shall be erected, moved, added to, or structurally altered without a permit therefor issued by the Planning and Inspections Department." As a result, we conclude that the zoning ordinance evidences a general intent to supervise construction of any "building or other structure" which intent would be undercut by the adoption of an interpretation of the ordinance that allowed the construction of a large parking deck without any review by zoning administration and enforcement officials.

Finally, the Wrightsville Beach zoning ordinance classifies hotels as conditional uses regardless of the zoning district in which they are located. According to the relevant provisions of the zoning ordinance, a project that is required to obtain a conditional use permit, such as a hotel, must submit a site plan, be the subject of consideration at a public hearing, and obtain a determination by the Board that the "proposed structure [or] improvement . . . meet[s] all requirements of all applicable codes, ordinances, and specifications of the municipality, county, state, or federal governments or other agencies having proper jurisdiction[.]" The Town has consistently "require[d] amendments to the existing conditional use permits for changes or additions to structures requiring a conditional use permit."[11] In light of the consider

---

to, the principal use or structure[.]" *Dobo*, 149 N.C. App. at 703, 562 S.E.2d at 110. The reference to a "use or structure" made the zoning ordinance at issue in that case different from the one at issue here, which does not equate uses and structures.

11. Petitioner has neither disputed the accuracy of this claim nor challenged its lawfulness.

able scrutiny to which conditional uses, such as hotels, are subjected under the zoning ordinance, it would be contrary to the general treatment afforded to hotels for Petitioner to be allowed to construct a four story parking deck without the necessity for obtaining an amendment to its conditional use permit.[12]

As a result, for all of these reasons, we conclude that Petitioner is required to obtain an amendment to its conditional use permit before constructing the proposed parking deck. Neither the zoning ordinance nor the appellate decisions upon with Petitioner relies support Petitioner's argument that accessory structures are permitted as a matter of right, regardless of the nature or size of the structure. Thus, the trial court did not err by upholding the Board of Adjustment's decision that Petitioner could not construct the proposed parking deck without seeking and obtaining an amendment to its conditional use permit.[13]

2. Expansion of Non-Conforming Use

[2] Secondly, Petitioner argues that the trial court erred by upholding the Board's conclusion that the Town properly denied Petitioner's request to build a multi-story parking deck because its proposed deck would constitute an expansion of a non-conforming use. We disagree.

"Where the evidence is not in conflict, the question of whether a particular activity will be deemed a permissible continuation, or an impermissible expansion, of a nonconforming use is a question of law." *Stegall*, 87 N.C. App. at 363, 361 S.E.2d at 312 (citing *In re Tadlock*, 261 N.C. 120, 134 S.E.2d 177 (1964)). Petitioner does not argue that the trial court applied the wrong standard of review, and we conclude that the court properly evaluated the Board's decision using a *de novo* standard of review. As a result, we will proceed to evaluate the issue of whether the construction of Petitioner's pro-

12. The record reflects that the other two large resort hotels located in Wrightsville Beach operate subject to conditional use permits. For that reason, among others, we are unable to agree with Petitioner's suggestion that its rights under the equal protection clause of the United States Constitution and the law of the land clause of the North Carolina Constitution have been violated because both of these resorts have parking decks.

13. Petitioner also argues that its proposed parking deck is a "structure" rather than a "building," that parking is an "accessory use" rather than a "principal use," and that its proposed parking deck is an "accessory structure" rather than a "principal structure." However, since we have concluded that "accessory uses" and "accessory structures" are not equivalent for purposes of the zoning ordinance, we need not address the extent to which Petitioner has correctly classified the proposed parking deck under the zoning ordinance.

posed parking deck would constitute the expansion of a nonconforming use on the merits.

§ 155.009(C)(1) of the zoning ordinance provides, in pertinent part, that, "[e]xcept as specifically provided in this division (C), it shall be unlawful for any person to engage in any activity that causes an increase in the extent of nonconformity of a nonconforming situation. . . ." According to § 155.009(D), "[a] nonconforming use shall not be changed to any but a use listed as permitted in the regulations for the district in which the nonconforming use is located." In addition, § 155.005(B) of the zoning ordinance provides that:

> After May 15, 1972, land or structures, or the uses of land or structures which conform to [zoning] regulations . . . may be continued. However, any structural alteration or change in use shall conform with the regulations specified in this chapter.

Moreover, § 155.009(I) of the zoning ordinance provides, in pertinent part, that "[a]ny non-conforming building or structure, or any building containing a non-conforming use, or any building or structure constituting a non-conforming situation which is voluntarily substantially improved may only be rebuilt or altered so as to bring the structure into complete conformity with this code." As a result, the relevant provisions of the zoning ordinance clearly contemplate that any modifications to a non-conforming use are impermissible unless they bring the non-conformity to an end. *Steagall*, 87 N.C. App. at 364, 361 S.E.2d at 312 (stating that the extent to which "an increase in the intensity of the nonconforming activity is permissible" hinges upon a proper interpretation of the zoning ordinance).

The construction of the proposed parking deck would clearly result in the expansion of an existing nonconformity as that concept is defined in the zoning ordinance. Given that the hotel's parking lot is an existing area of nonconformity, the construction of the proposed deck would result in an expansion of the existing nonconformity for several reasons, including the fact that Petitioner's proposed deck would still not have the required number of parking spaces, in violation of § 155.009(I), discussed above. Petitioner's reliance on *Jirtle*, 175 N.C. App. at 182, 622 S.E.2d at 716 (holding that the construction of a food pantry would not constitute the expansion of an existing nonconforming use under an ordinance providing that "the non-conforming use of land shall not be enlarged or increased, nor shall any non-conforming use be extended to occupy a greater area of land than that occupied by such use at the time of the passage of

the ordinance") is misplaced given the significant difference between the language of the ordinance at issue there and the language of the Wrightsville Beach ordinance. As a result, given the clearly expressed intent of the zoning ordinance to regulate construction and to avoid expansion of nonconforming uses, we conclude that the Board did not err by determining that the construction of the proposed four story parking deck would constitute an "expansion of a permitted non-conforming use."

Petitioner, however, argues that, since the proposed parking deck will "mitigate" the extent of the existing nonconformity by increasing the number of available parking spaces, the construction of the proposed parking deck cannot, as a matter of law, constitute the expansion of a nonconformity. At the hearing held before the trial court, Petitioner argued that:

> If we go and build a six-story building for parking and 200 spaces . . . I've eliminated all the nonconformity. Can I do that? If I want to do it, I can[.] . . . [A]nything that I do with a nonconforming structure that mitigates or reduces the nonconformity is legal[.] . . . [W]e can build a 10-story building or a eight-story building for parking[.] . . . (emphasis added).

"It is well settled that 'in construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results.' " *State v . Jones*, 359 N.C. 832, 837-38, 616 S.E.2d 496, 499 (2005) (quoting *Comm'r of Insurance v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978)). In essence, Petitioner contends that, as long as its proposed building tends to reduce the discrepancy between the required number of parking spaces and the number of parking spaces that is actually available, it has a right to build a "ten story building" for parking without obtaining an amendment to its conditional use permit, and regardless of its effect on the surrounding neighborhood. The adoption of such an argument, aside from its inconsistency with the literal language of the zoning ordinance, would lead to absurd results and justifies its rejection.

In addition, Petitioner argues that, under § 155.009(2) of the zoning ordinance, "where a nonconforming situation exists, change may be permissible if it changes the activity only in degree rather than a change in the kind of activity." The relevant provision actually states, however, that "[w]here a nonconforming situation exists, the equip-

ment or process may be changed, if these or similar changes amount only to changes in degree of activity rather than changes in kind of activity and no other violations of other provisions of this chapter occur." Thus, under the zoning ordinance in effect in Wrightsville Beach, the mere fact that an alteration effects a change in degree rather than a change in kind does not suffice to take the proposed alteration out from under the prohibition against expanding a non-conforming use.

In addition, we conclude that this provision of the zoning ordinance does not justify a finding that the proposed parking deck is not the impermissible expansion of a non-conforming use. Firstly, Petitioner does not assert that construction of the proposed parking deck would constitute a change in "equipment or process" or explain how a provision addressing changes in "equipment or process" applies to the construction of a parking deck. Secondly, in addition to ruling that construction of the proposed parking deck would constitute an improper expansion of a nonconforming use, the Board denied Petitioner's request on several additional grounds, such as the failure of the proposed parking deck to comply with landscaping and sprinkler requirements. As a result, the construction of the proposed parking deck is not permissible under § 155.009(2) of the zoning ordinance since the prerequisites for the application of the subsection simply do not exist. Thus, the trial court did not err by upholding the Board's determination that the construction of the proposed parking deck would constitute an impermissible expansion of an existing non-conforming use.

3. Judicial Estoppel

[3] Finally, Petitioner argues that the Board erred by ruling that Petitioner was judicially estopped from challenging the requirement that it obtain an amendment to its conditional use permit. Given our other holdings, we conclude that we need not address this issue.

"In its broadest and simplest sense, the doctrine of estoppel is a means of preventing a party from asserting a legal claim or defense which is contrary to or inconsistent with his prior actions or conduct." *Godley v. County of Pitt*, 306 N.C. 357, 360, 293 S.E.2d 167, 169 (1982). In this case, neither the Board nor the trial court declined to address Petitioner's challenge to the Town's ruling that it was required to obtain an amendment to its conditional use permit as a prerequisite for constructing its proposed parking deck. Furthermore, this Court has carefully considered and addressed

Petitioner's challenges to the trial court's order on the merits and concluded that the trial court correctly upheld the Board's ruling. Therefore, despite the Board's conclusion that Petitioner should be estopped from challenging the need for an amendment to its conditional use permit and the trial court's decision to affirm that determination, Petitioner has not been prevented from challenging the Town's determination before either the Board, the trial court, or this Court. As a result, we need not address Petitioner's challenge to the trial court's decision that Petitioner was judicially estopped from challenging the Town's determination that it was required to seek and obtain an amendment to its conditional use permit before constructing a proposed parking deck.[14]

III. Conclusion

Therefore, for the reasons discussed above, we conclude that the trial court did not err by upholding the Board's order affirming the decisions of the Town's zoning administrators to deny Petitioner's request to construct a parking deck without seeking and obtaining an amendment to its conditional use permit. Thus, the trial court's order should be, and hereby is, affirmed.

Affirmed.

Chief Judge MARTIN and Judge Robert C. HUNTER concur.

THOMAS MICHAEL KELLEY, PLAINTIFF v. FRANCESCA AGNOLI, DEFENDANT

No. COA09-179

(Filed 6 July 2010)

1. Interlocutory Orders and Appeals— subject matter— appeal—not interlocutory

Davis & Harwell's motion to dismiss plaintiff's appeal from the trial court's order awarding Davis & Harwell expenses for lost earnings and significant expenses under N.C.G.S. § 1A-1, Rule 45 was overruled. The trial court's order was not interlocu-

14. We also note that, because Petitioner did not challenge the trial court's decision to uphold the Board's determination that the Town had correctly concluded that the proposed parking deck did not comply with the landscaping ordinance in its brief, so that Petitioner has abandoned any right it may have had to contest that aspect of the trial court's decision.

tory because at the time the order was entered, the underlying parties had entered into a consent agreement and there was no further action needed to settle and determine the entire controversy.

2. Civil Procedure— compensation for lost earnings and significant expenses—after compliance with subpoena

The trial court had the authority to award monetary compensation to Davis & Harwell for lost earnings and significant expenses pursuant to N.C.G.S. § 1A-1 Rule 45(c) *after* Davis & Harwell had complied with plaintiff's subpoena. At all times, plaintiff was on notice that there was an issue about the breadth of his subpoena and that Davis & Harwell intended to seek reimbursement for its expenses in responding to the subpoena.

3. Civil Procedure— compensation for lost earnings and significant expenses—not a party to the litigation

The trial court did not err in awarding monetary compensation to Davis & Harwell for lost earnings and significant expenses pursuant to N.C.G.S. § 1A-1 Rule 45(c) because Davis & Harwell was not a party to the underlying litigation. Plaintiff cited no authority suggesting that a party's law firm is itself a party to an action.

4. Civil Procedure— compensation for lost earnings and significant expenses—subpoena unduly burdensome

The trial court did not err in awarding monetary compensation to Davis & Harwell for lost earnings and significant expenses pursuant to N.C.G.S. § 1A-1 Rule 45(c) because under Rules 26(g) and 45(c)(1), it was the responsibility of plaintiff and his counsel to assess whether the subpoena served on Davis & Harwell was unduly burdensome.

5. Civil Procedure— compensation for lost earnings and significant expenses—amount of award—findings of fact

The trial court failed to address how it reached the conclusion that $40,000.00 was the appropriate sum for plaintiff to pay Davis & Harwell for lost earnings and significant expenses pursuant to N.C.G.S. § 1A-1 Rule 45(c). The matter was remanded to the trial court for further findings on the issue of the extent of reimbursement.

KELLEY v. AGNOLI

[205 N.C. App. 84 (2010)]

Appeal by plaintiff from order entered 23 October 2008 by Judge Edgar B. Gregory in Forsyth County Superior Court. Heard in the Court of Appeals 2 September 2009.

Robinson & Lawing, LLP, by Michael L. Robinson and Michelle D. Reingold, for plaintiff-appellant.

Davis & Harwell, P.A., by Fred R. Harwell, Jr., Loretta C. Biggs, and Allison C. Wagner, for Davis & Harwell, P.A.

GEER, Judge.

Plaintiff Thomas Michael Kelley appeals from an order requiring him to reimburse appellee Davis & Harwell, PA, a law firm that was representing Mr. Kelley's ex-fiancée in this litigation, for the lost earnings and expenses Davis & Harwell incurred in complying with the trial court's order compelling the firm to submit a privilege log and copies of documents requested in Mr. Kelley's subpoena duces tecum served on the firm. Considering the particular circumstances of this case—including the breadth of the subpoena, the number of times Mr. Kelley was warned that it was overly broad, and Davis & Harwell's status as a nonparty and existing counsel for Mr. Kelley's ex-fiancée—we conclude that the trial court properly determined that an award for lost earnings and significant expense was warranted under Rule 45(c)(1) and (c)(6) of the Rules of Civil Procedure. We must, however, remand for further findings of fact providing (1) the basis for the actual amount ($40,000.00) ordered and (2) the rationale why the court considered certain hours to be compensable under Rule 45.

Facts

Mr. Kelley filed this action against Francesca Agnoli in November 2007. Mr. Kelley's complaint contained the following allegations. On 31 December 2006, Mr. Kelley, a developer and businessman, and Ms. Agnoli, an unemployed Italian citizen, became engaged to be married. During their relationship, Mr. Kelley, approximately 20 years Ms. Agnoli's senior, paid several thousand dollars toward Ms. Agnoli's credit card debt, provided her with a monthly income, and made monthly deposits into a savings account—in her name—to be used by the couple to pay future marital expenses. Mr. Kelley also purchased a half-million dollar home and agreed to transfer legal title to the home to Ms. Agnoli.

In anticipation of the marriage, Mr. Kelley agreed to pay several law firms to negotiate and prepare an agreement between the couple.

Although Mr. Kelley alleged that he understood this document to be a premarital agreement, the final draft was entitled "Engagement Agreement" ("the Agreement"). Under the Agreement's terms, Mr. Kelley was obligated to support Ms. Agnoli for the rest of her life regardless whether they ever married. The couple signed the Agreement on 6 August 2007. Eventually, however, Mr. Kelley came to believe that Ms. Agnoli had never intended to marry him, but instead had merely manipulated him for personal gain. On 21 November 2007, Mr. Kelley filed a complaint asserting claims for fraud, constructive trust, resulting trust, and constructive fraud. He later amended the complaint to add claims for conversion and trespass to chattel.

On 25 and 28 January 2008, Mr. Kelley served subpoenas duces tecum on the lawyers and law firms that had represented Ms. Agnoli in preparing the Agreement. Included were Johnson Peddrick & McDonald, PLLC; Wells Jenkins Lucas & Jenkins, PLLC; John L. Barber of Wells Jenkins Lucas & Jenkins, PLLC; Womble Carlyle Sandridge & Rice, PLLC; Heather J. Bowen of Womble Carlyle; and Davis & Harwell, PA. The subpoenas requested the following from each law firm and lawyer:

> All documents regarding draft or final agreements between [Ms. Agnoli], on the one hand, and any third party individual or entity, on the other hand, including but not limited to all notes, correspondence, memoranda, emails, drafts or final agreements and documents concerning conversations with anyone regarding these matters.
>
> All documents regarding draft or final agreements between [Mr. Kelley] and [Ms. Agnoli] including but not limited to any documents concerning conversations with anyone regarding these matters.

Ms. Bowen and Womble Carlyle filed a general objection to the subpoena on the grounds of attorney-client privilege and/or the work product doctrine. Mr. Barber and Wells Jenkins moved to quash and modify the subpoena on similar grounds, describing it as "overly broad and unreasonable." Johnson Peddrick filed an objection to the subpoena also asserting the attorney-client and work product privileges.

Davis & Harwell's subpoena contained an additional request demanding that it produce

> [a]ll documents regarding draft or final agreements between [Mr. Kelley], on the one hand, and *any third party individual or entity*, on the other hand, including but not limited to all notes, correspondence, memoranda, emails, drafts or final agreements and documents concerning conversations with anyone regarding these matters.

(Emphasis added.) At the time of service of the subpoena, Davis & Harwell was still representing Ms. Agnoli as counsel in this litigation.

On 4 February 2008, Davis & Harwell served an objection to the subpoena on the grounds of relevance, attorney-client privilege, work product, and undue burden and expense. Davis & Harwell specifically noted that the firm had represented Mr. Kelley's ex-wife during their divorce proceedings 15 years earlier and that the subpoena would improperly "encroach" upon those matters. Davis & Harwell contended that the subpoena constituted harassment and reserved the right to seek sanctions pursuant to Rule 45(c)(1) of the Rules of Civil Procedure.

On 19 February 2008, Mr. Kelley's attorneys met with attorneys at Davis & Harwell to discuss the subpoena and the law firm's objection. Davis & Harwell suggested to Mr. Kelley's counsel that the subpoena was extraordinarily broad and sought voluminous documents that were protected from discovery. Mr. Kelley's counsel indicated informally that he would not seek documents from Davis & Harwell regarding Mr. Kelley's ex-wife. Otherwise, Mr. Kelley's counsel did not indicate any willingness to modify or limit the scope of the subpoena.

On 28 March 2008, Mr. Kelley filed a motion to compel production of all the requested documents by most of the subpoenaed firms and lawyers, including Davis & Harwell. In support of the motion, he alleged that the requested documents were "relevant and properly discoverable" and that the "objections raised [were] without proper factual or legal basis."

The trial court held a hearing on Mr. Kelley's motion to compel on 8 April 2008.[1] With respect to Davis & Harwell, Mr. Kelley argued that he was entitled to discovery of all documents described in the subpoena without limitation. Davis & Harwell countered that all the documents were protected from discovery pursuant to Rule 26(b)(1) and

1. At about the time that Mr. Kelley's motion was set for hearing, Ms. Agnoli chose to change counsel for reasons having nothing to do with the facts and circumstances giving rise to the dispute between Mr. Kelley and Davis & Harwell. After Ms. Agnoli retained new counsel, Davis & Harwell was allowed by the trial court to withdraw.

(b)(3) of the Rules of Civil Procedure. Davis & Harwell further argued that compliance with the subpoena would impose an undue burden and expense on the firm because it would require a physical search of every case file opened by the firm since 1980. The firm explained that because of Mr. Kelley's extensive business dealings, his request—included only in the Davis & Harwell subpoena—for documents relating to agreements between Mr. Kelley and any third party (without any time limitation) required a search to determine whether any lawyer in the firm had previously had a representation relating to any transactions involving Mr. Kelley.

On 11 April 2008, the trial court granted Mr. Kelley's motion to compel production by ordering Davis & Harwell to produce, within 30 days, a privilege log numbering and describing each object covered by the subpoena that Davis & Harwell contended was privileged.[2] Davis & Harwell was also required to submit the material described on the privilege log in a sealed container for the court to inspect. The trial court reasoned that the "applicability of the attorney-client privilege had to be determined by the trial court, *not by the attorney*, based on an in camera review of the contested material."

The trial court stated that it would "conduct an in camera review of the documents on the privilege log and as to each document, make conclusions of law about whether the five elements of the attorney-client privilege exist or the protections of the work product doctrine applies [sic]." The court further concluded that "[t]he language in the subpoenas used by counsel for [Mr. Kelley was] overly broad and did include within its purview the possibility that one of the counsel who represented the ex-wife of [Mr. Kelley] would have to disclose matters completely unrelated to the issues involved in the case at bar."

Additionally, the trial court rejected Mr. Kelley's request for sanctions against Davis & Harwell based on the firm's failure to respond to the subpoena. The court explained that "opposition to the motion to compel was substantially justified such as to make an award of expenses unjust except for requiring [Ms. Agnoli] to pay the copying costs of the attorneys who [would] be required to submit a privilege log and related material." Each party was required to pay its own attorneys' fees and costs.

Before the trial court adjourned, Davis & Harwell asked the trial court to limit the order further. Although Mr. Kelley acknowledged to

2. We do not discuss the provisions relating to the other law firms since they are not material to this appeal.

the trial court that he "was not interested in" the materials related to his ex-wife, he never formally withdrew his request for this material. Davis & Harwell repeated its contention, on the record, that undue burden or expense would be imposed "even if [Mr. Kelley's] [s]ubpoena were limited in time to documents originated during or after 2006 because hundreds of case files would still need to be physically searched." The trial court did not, however, modify its order.

Davis & Harwell partially complied with the order on 9 May 2008 by submitting a 44-page privilege log and 2,394 accompanying pages of materials for inspection. Davis & Harwell has explained that in order to "mitigate undue burden and expense," it did not include any materials regarding Mr. Kelley's ex-wife and did not conduct a physical search of all its files.

Before the trial court completed its *in camera* inspection of the documents, Mr. Kelley's counsel mailed a letter directly to the trial judge, with copies to Davis & Harwell, criticizing Davis & Harwell's privilege log. Davis & Harwell responded with its own letter to the trial judge, with copies to opposing counsel, countering Mr. Kelley's arguments, urging the court to evaluate Mr. Kelley's conduct in light of Rule 11 of the Rules of Civil Procedure, and requesting compensation pursuant to Rule 45(c)(1) and (c)(6). Davis & Harwell also filed a written request for findings of fact and conclusions of law in the forthcoming order regarding the discoverability of the items contained in the privilege log.

On 9 July 2008, after the *in camera* inspection, the trial court entered an order that detailed its findings regarding Davis & Harwell's privilege log. The court determined that the documents itemized in the privilege log, with "very few exceptions," were accurately described as protected by either the attorney-client privilege, the work product doctrine, or both. The court did not find Davis & Harwell's privilege log "deficient in any material or significant manner." The court also agreed with Davis & Harwell that "the work product doctrine is a broader concept than that argued by" Mr. Kelley's counsel.

Additionally, in the 9 July 2008 order, the trial court announced that it would hold a later hearing to consider the question of compensation requested by Davis & Harwell. The trial court stated that it would address: (1) whether, under Rule 45(c)(1) and (c)(6), an undue burden or expense had been imposed on Davis & Harwell through having to compile the privilege log and comply with the 11 April 2008

order; (2) whether Mr. Kelley should be ordered to pay compensation, costs, or expenses to Davis & Harwell; and (3) if so, what would be reasonable compensation.

Before the hearing on compensation occurred, Davis & Harwell filed a "Time and Expense Line," in which it itemized its expenses. These included $9,170.00 for work related to the objection to the subpoena, the conference with Mr. Kelley's attorneys, the brief in opposition to the motion to compel production, and attendance at the 8 April 2008 hearing; $25,171.96 for work related to creating the privilege log and compliance letter and responding to Mr. Kelley's letter to the court; $18,732.10 for work related to a request for findings and conclusions; and $630.00 for work related to correspondence about the hearing. In sum, Davis & Harwell calculated that it had incurred an expense of $53,704.06 and had used 232.2 hours of labor.

The trial court held its hearing regarding the request for Rule 45 compensation on 12 September 2008. The court did not, however, enter its written order until 23 October 2008. Meanwhile, on 13 October 2008—10 days before the Rule 45 order was entered—Mr. Kelley and Ms. Agnoli signed and entered a consent judgment that resolved all outstanding issues between them.

In the Rule 45 order, filed 23 October 2008, the trial court concluded that Mr. Kelley owed Davis & Harwell "compensation for lost earnings incurred as a result of the issuance and service of [Mr. Kelley's] Subpoena and to protect Davis & Harwell from significant expense resulting from compliance with that Subpoena and the Order of this Court granting [Mr. Kelley's] MOTION TO COMPEL dated April 11, 2008." The court explained that it was "require[d]," under Rule 45(c)(1), "to enforce the provisions of that Rule which obligate the party or attorney responsible for the issuance and service of a subpoena to take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena." The court also explained that it was "require[d]," under Rule 45(c)(6), "as a matter of law, to protect any person or party from significant expense resulting from complying with [a] subpoena." (Internal quotation marks omitted.)

Basing its decision "solely upon consideration of the record . . . , the evidence and materials presented, and the provisions of G.S. § 1A-1, Rule 26(b)(1), Rule 26(b)(3), Rule 45(c)(1), and Rule 45(c)(6)," the trial court found that Davis & Harwell had met its bur-

den of proof with respect to "lost earnings" under Rule 45(c)(1) and with respect to "significant expense" under Rule 45(c)(6). In reaching its decision to award compensation, the court noted that Mr. Kelley's subpoena "was not limited in time or by scope, source, or subject matter." The court also observed that, at the time the subpoena was served, Mr. Kelley and his counsel "had actual notice and knew in fact that attorneys at Davis & Harwell represented [Ms. Agnoli] in the lawsuit pending between [Mr. Kelley] and [Ms. Agnoli] with respect to which [Mr. Kelley's] Subpoena was issued." Further, despite having "had actual notice of the legal and practical necessity of taking reasonable steps to avoid imposing an undue burden or expense on Davis & Harwell," and despite being "capable" of taking such steps, Mr. Kelley and his counsel "failed to take reasonable steps to avoid imposing an undue burden or expense on Davis & Harwell."

The trial court found that the time Davis & Harwell spent on "compliance tasks" associated with the issuance of the subpoena and the order compelling production was not billable to any client, although that time, if not used for compliance, could have been used on billable matters and, consequently, amounted to lost income. According to the trial court, this "diversion of the time of Davis & Harwell employees from billable work" to "compliance tasks" was a "direct and proximate consequence of the issuance and service of [Mr. Kelley's] Subpoena."

In connection with this matter, Davis & Harwell had kept routine records of the time spent by employees working on the "compliance tasks." The court noted each of those employees' respective positions within the firm, the amount of time spent on the tasks, and the hourly billing rates. Specifically, the trial court found that attorney Fred R. Harwell, Jr. spent no less than 114.4 hours at a rate of $350.00 per hour; attorney Allison C. Wagner spent no less than 73 hours at a rate of $125.00 per hour; office manager Sharon Yount spent no less than 1.5 hours at a rate of $100.00 per hour; paralegal Carol G. Howell spent no less than 7.5 hours at a rate of $100.00 per hour; legal assistant Marion DelFavero spent no less than 18 hours at a rate of $65.00 per hour; and administrative assistant Tiffany B. Allen spent no less than 14.3 hours at a rate of $65.00 per hour.

The trial court determined that Mr. Kelley should not be required to pay the cost of lost earnings associated with preparation of Davis & Harwell's objection to the subpoena and its response to the motion to compel production. Those costs, the court found, amounted to no

more than $10,430.00. The trial court also did not require Mr. Kelley to pay for the copy expenses incurred in preparing the privilege log, as the trial court had already assigned those costs to Ms. Agnoli.

The trial court found that, based on Davis & Harwell's employees' education and experience, as well as the location of the firm, the employees' rates and time spent were "reasonable" and "customary" or "necessary." The court determined that Davis & Harwell had incurred lost earnings and significant expense "in an amount not less than" $40,000.00 as a result of Mr. Kelley's subpoena. The trial court, therefore, ordered Mr. Kelley to pay Davis & Harwell $40,000.00. The court did not explain how it arrived at that sum.

Mr. Kelley appealed from the trial court's 23 October 2008 order. Davis & Harwell moved to dismiss, arguing that this Court lacks subject matter jurisdiction.

Motion to Dismiss Appeal

[1] In contesting this Court's subject matter jurisdiction, Davis & Harwell argues that Mr. Kelley has impermissibly appealed from an interlocutory discovery order that does not affect a substantial right. "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. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). While ordinarily a discovery order is an interlocutory order because the lawsuit typically is still pending during the appeal from the order, the order in this case does not meet the definition of "interlocutory." At the time that the trial court entered the order, there was no further action necessary in order "to settle and determine the entire controversy." *Id.* The lawsuit had already been finally concluded.

We believe that *Long v. Joyner*, 155 N.C. App. 129, 574 S.E.2d 171 (2002), *disc. review denied*, 356 N.C. 673, 577 S.E.2d 624 (2003), controls on the issue whether the Rule 45 order may be appealed. In *Long*, the trial court imposed a sanction on the defendants for their repeated failure to comply with a discovery order. *Id.* at 133, 574 S.E.2d at 174. Afterwards, the parties reached a settlement regarding the underlying suit, and the defendants then appealed the sanction. *Id.* On appeal, this Court held that "[o]rdinarily, defendants' appeal from the sanction order would be dismissed as interlocutory. But here, the underlying legal issues in this case have been resolved by

the parties in a settlement agreement. The trial court's order appealed in this case constitute[d] the only unresolved issue in the case and therefore [was] appealable." *Id.* at 134, 574 S.E.2d at 175.

This case is on all fours with *Long*. Here, as in *Long*, the parties to the underlying case have settled their dispute through a consent judgment, and the trial court's order "constitutes the only unresolved issue in the case." *Id.* We note that the effect of Davis & Harwell's position would be to insulate the trial court's order from review. We can conceive of no justification for such a result. *See also Ariel v. Jones*, 693 F.2d 1058, 1059 (11th Cir. 1982) (holding appellate court had subject matter jurisdiction where appellant had "no other means of effectively obtaining review" where trial court had quashed subpoena of entity that was "not a party to the central action"); *United States v. Columbia Broad. Sys., Inc.*, 666 F.2d 364, 370 (9th Cir. 1982) (applying "collateral order doctrine" and holding order denying reimbursement for discovery expenses was appealable where no other unresolved issue of costs remained for appellant nonparties, order resolved issue collateral to underlying action, and court saw "no way that the [nonparties] could have protected themselves by appeal from the consent judgments eventually entered"), *cert. denied sub nom. CBS, Inc. v. Columbia Pictures Indus., Inc.*, 457 U.S. 1118, 73 L. Ed. 2d 1329, 102 S. Ct. 2929 (1982). We, therefore, deny Davis & Harwell's motion to dismiss.

Order Awarding Compensation Under Rule 45

[2] Mr. Kelley argues on appeal that the trial court abused its discretion by awarding $40,000.00 to Davis & Harwell for lost earnings and significant expense pursuant to Rule 45(c)(1) and (c)(6). Rule 45(c)(1), which is entitled "Protection of Persons Subject to Subpoena," provides:

> (1) Avoid undue burden or expense.—A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.

Rule 45(c)(6) further provides that "[w]hen a court enters an order compelling . . . the production of records, books, papers, documents,

or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena."

We have been unable to find any decision by North Carolina's appellate courts addressing Rule 45(c)(1) and (c)(6). In deciding the proper standard of review, we note that Rule 45(c)(1) provides that the trial court "shall" enforce the Rule and impose "an appropriate sanction" for a violation of the Rule, indicating that sanctions are mandatory if a party has not taken reasonable steps to avoid imposing undue burden or expense on the party subject to the subpoena. *See Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) ("It is well established that the word 'shall' is generally imperative or mandatory." (internal quotation marks omitted)). Likewise, the language in Rule 45(c)(6) providing that the trial court "shall protect" the party producing documents from "significant expense" is mandatory.

On the other hand, reference to an "appropriate sanction" and the subsequent provisions that such a sanction "may" include compensation for lost earnings and for reasonable attorney's fees suggests that the nature of the sanction rests within the discretion of the trial court. *See Baker v. Rosner*, 197 N.C. App. 604, 606, 677 S.E.2d 887, 889 ("Determining which sanctions are appropriate under Rule 37 [of the Rules of Civil Procedure] is within the sound discretion of the trial court."), *disc. review denied*, 363 N.C. 744, 688 S.E.2d 452 (2009).

Rule 26(g) of the Rules of Civil Procedure contains almost identical language. Rule 26(g) provides that a signature on a discovery request, response, or objection certifies, among other things, that the request, response, or objection is "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The rule then states that, upon the finding of a violation of this requirement, the trial court "shall impose . . . an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee." *Id.*

This Court has construed this language as meaning that if the trial court "finds that Rule 26(g) was violated, it must impose an appropriate sanction as directed by the statute." *Williams v. N.C. Dep't of Corr.*, 120 N.C. App. 356, 363, 462 S.E.2d 545, 549 (1995). On the other hand, "[t]he trial court's decision regarding sanctions will only be

overturned on appeal upon showing an abuse of that discretion." *Id.* at 359, 462 S.E.2d at 547.

Based on the language of Rule 45(c) and *Williams*' interpretation of the similar language contained in Rule 26(g), we hold that if a trial court finds a violation of Rule 45(c)(1), it must impose an appropriate sanction. The nature of that sanction, however, rests within the discretion of the trial court and will not be reversed on appeal without a showing of an abuse of discretion. On the other hand, the trial court, in granting a motion to compel under Rule 45(c)(6), is required to protect the party producing documents from "significant expense." *See also In re Exxon Valdez*, 142 F.R.D. 380, 383 (D.D.C. 1992) ("The mandatory language of this Rule [45] represents a clear change from old Rule 45(b), which gave district courts *discretion* to condition the enforcement of subpoenas on the petitioner's paying for the costs of production.").[3]

Mr. Kelley first contends that "Rule 45(c)(1) controls *prior* to seeking a court order and Rule 45(c)(6) is a tool for the court to use to prevent significant expenses and undue burden prior to production of documents. Neither subsection of the rule should be applied *after* a court affirmatively orders production of discovery." This view has, however, been specifically rejected with respect to Rule 45 of the Federal Rules of Civil Procedure.

A leading commentator regarding the Federal Rules has explained the "protection" mandated by Rule 45: "The district court is not obligated to fix the costs in advance of production, although this often will be the most satisfactory accommodation between imposing expense on the subpoenaed party while protecting the party seeking discovery from excessive costs by way of an award under the rule. In some instances, it may be preferable to leave the matter uncertain, determining costs after the materials have been produced, provided that the risk of this uncertainty is disclosed fully to the discovering party." 9A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2463 (3d ed. 2008).

We find persuasive the Ninth Circuit Court of Appeals' decision in *Columbia Broadcasting* addressing this issue. In *Columbia*

3. "Because of the dearth of North Carolina precedent" concerning the payment of compensation pursuant to Rule 45(c)(1) and (c)(6), and the fact that this rule closely resembles Rule 45 of the Federal Rules of Civil Procedure, "we look to federal decisions interpreting this section for guidance." *Keith v. Day*, 60 N.C. App. 559, 560-61, 299 S.E.2d 296, 297 (1983).

Broadcasting, five nonparty television studios were subpoenaed by two television networks "to produce massive quantities of documents"—material that covered a span of more than 20 years. 666 F.2d at 365. The studios filed a motion to quash the subpoenas in which they "expressly 'reserved' the right to seek reimbursement of discovery costs if production was ordered." *Id.* at 366. The district court enforced most of the subpoenas, but did not address the question of the potential cost of reimbursement. *Id.* After the studios turned over all the subpoenaed material, they sought over $2 million in reimbursement for "out-of-pocket costs they allegedly incurred in complying" with the subpoenas. *Id.* The district court denied their requests without explaining why. *Id.* at 366-67.

On appeal, the Ninth Circuit, in response to the networks' argument that the district court lacked authority to award reimbursement of costs after production of the documents, held:

> Given that the studios expressly reserved their right to seek reimbursement and kept the court and networks fully informed of their progress and expenses throughout the lengthy production process, we discern nothing in Rule 45 that precludes post-compliance reimbursement of costs. The networks were on notice throughout the production process that the studios intended to seek reimbursement and they could easily have modified or limited their discovery demands whenever they felt that their exposure to potential reimbursement exceeded the value of requested material. Accordingly, we have little sympathy on the facts of this case for the networks' lament that deferral of a Rule 45(b)(2) determination until after compliance with a subpoena may result in grave injustice by visiting liability for costs on parties, who cannot then escape the consequences.

Id. at 368. In holding that Rule 45 authorized the district court to award reimbursement, the Ninth Circuit recognized that "Rule 45 discloses a 'broad congressional judgment with respect to fairness in subpoena enforcement proceedings.' " *Id.* (quoting *United States v. Friedman*, 532 F.2d 928, 937 (3rd Cir. 1976)). The Court observed that, "[c]onsistent with this purpose, the Rule has been used creatively to require interim reimbursement and reimbursement of costs at the conclusion of discovery." *Id.*

Adopting the reasoning of *Columbia Broadcasting*, we reject Mr. Kelley's contention that the trial court was prohibited from requiring him to compensate Davis & Harwell *after* Davis & Harwell had com-

plied with the trial court's order on the motion to compel. Although Mr. Kelley points to the fact that the trial court granted his motion to compel and did not quash the subpoena, the facts in this case are virtually identical to those in *Columbia Broadcasting* in which the Ninth Circuit concluded that the district court had authority to award reimbursement.

At all times, Mr. Kelley was on notice that there was an issue about the breadth of his subpoena and that Davis & Harwell intended to seek reimbursement for its expenses in responding to the subpoena. Davis & Harwell filed an objection to the subpoena that, among other things, argued the subpoena was unduly burdensome and it reserved the right to seek reimbursement for expenses. When Mr. Kelley's attorneys met with attorneys from Davis & Harwell to attempt to resolve the objection, Davis & Harwell explained the problem with the subpoena's breadth. At the hearing on the motion to compel, Davis & Harwell argued undue burden and asked that Mr. Kelley limit the scope of the subpoena, but Mr. Kelley did not expressly do so even though his counsel acknowledged that they would not need any materials relating to Mr. Kelley's ex-wife.

Although Mr. Kelley repeatedly asserts that the trial court approved the subpoena by granting his motion to compel, the language of the order itself is to the contrary. The trial court did grant the motion to compel to the extent that Davis & Harwell was required to produce a privilege log and those documents claimed to be privileged for an *in camera* review. Nothing in the court's order, however, indicated a wholesale approval of the breadth of Mr. Kelley's subpoena. Instead, the court expressly concluded that "the language in the subpoenas used by counsel for [Mr. Kelley was] overly broad . . . ." Ultimately, in essence, the court told Mr. Kelley that he could have the documents if he wanted them, but he would have to pay for them.

Thus, as was the case in *Columbia Broadcasting*, *id.*, Mr. Kelley was "on notice throughout the production process that [the recipient of the subpoena] intended to seek reimbursement and [he] could easily have modified or limited [his] discovery demands whenever [he] felt that [his] exposure to potential reimbursement exceeded the value of requested material." Yet, Mr. Kelley chose not to do so. Consequently, we hold that the trial court had authority to award compensation for lost earnings and expenses after Davis & Harwell had complied with the subpoena.

[3] Mr. Kelley next contends that Rule 45's protection should not apply to Davis & Harwell because it is intended to protect nonparties and, according to Mr. Kelley, Davis & Harwell did not become a nonparty until it withdrew from representing Ms. Agnoli, two months after service of the subpoena. We agree with Mr. Kelley that "nonparty status is an important factor to be considered in determining whether to allocate discovery costs on the demanding or the producing party." *Columbia Broadcasting*, 666 F.2d at 372. As *Columbia Broadcasting* explains, protection of subpoenaed nonparties is necessary because they are "powerless to control the scope of litigation and discovery, and should not be forced to subsidize an unreasonable share of the costs of a litigation to which they are not a party." *Id.* at 371. *See also Williams v. City of Dallas*, 178 F.R.D. 103, 109 (N.D. Tex. 1998) ("The status of a witness as a nonparty entitles the witness to consideration regarding expense and inconvenience."), *aff'd*, 200 F.3d 814 (5th Cir. 1999).

Davis & Harwell, however, was never a party. Our Supreme Court specifically held in *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000), that the Attorney General, who had represented the State in a class action, was not a party in the case and, therefore, could not individually appeal from the trial court's award of attorney's fees to counsel for the class. Mr. Kelley has cited no authority suggesting that a party's law firm is itself a party, and we know of none. Indeed, we believe that service of a subpoena on the attorneys representing a party in the pending litigation is an extraordinary act that may warrant greater scrutiny and protection from the court and not less.

[4] Mr. Kelley further argues that it is inappropriate to sanction him when he fully complied with the procedures for discovery set out in the Rules of Civil Procedure and, by filing a motion to compel, "sought guidance from the court to determine the appropriateness of the subpoena issued." He asserts: "His one mistake was that he relied on the court to quash the subpoena if it was unreasonable and oppressive and compel discovery if the subpoena was appropriate."

This argument disregards Mr. Kelley's obligations under Rule 26(g) and Rule 45(c)(1). By signing the subpoena, Mr. Kelley's counsel certified, pursuant to Rule 26(g), that the subpoena was "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." Further, Rule 45(c)(1) places an affirmative duty on the attorney serv-

ing the subpoena to "take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena."

The obligations set out in Rule 26(g) and Rule 45(c)(1) existed at the time Mr. Kelley's attorney signed the subpoena. It was the responsibility of Mr. Kelley and his counsel to assess, in the first instance, whether the subpoena was unduly burdensome. They could not delegate their responsibility for making this determination to the trial court. Indeed, given the requirements of Rule 26(g) and Rule 45(c)(1), we do not see how Mr. Kelley has any grounds for complaining about the trial court's granting his motion to compel. The trial court simply granted Mr. Kelley what his counsel certified was (1) needed and (2) not unduly burdensome. It was up to Mr. Kelley to determine whether the documents were important enough to him to warrant having to pay the expenses of gathering them.[4]

Significantly, apart from pointing to the trial court's granting of his motion to compel, Mr. Kelley makes no attempt to justify the breadth of the subpoena served on Davis & Harwell. Our review of that subpoena supports the trial court's ultimate determination in the order on appeal that the subpoena was unduly burdensome.[5] Accordingly, we hold that the trial court properly determined that an award of sanctions/compensation was mandated by Rule 45(c).

We acknowledge that judicial economy might have been better served had the trial court, in its order on the motion to compel, (1)

---

4. Mr. Kelley also asserts that his counsel's meeting with Davis & Harwell, as required, to discuss the objection shows that he complied with Rule 45. Further, he asserts that, "[c]ontrary to the Order, Appellant's counsel repeatedly narrowed the scope of requested documents." The record, however, supports a finding that, despite the mandatory meeting and subsequent acknowledgments that documents relating to the ex-wife were not needed, Mr. Kelley never actually limited the subpoena and never even acknowledged the large number of other irrelevant documents falling within the scope of the subpoena.

5. Mr. Kelley challenges the trial court's conclusions of law that he sought production of materials that were not relevant and that his subpoena was overly broad as a matter of law. While he argues that the conclusions of law were not supported by any findings of fact, the trial court's findings of fact amply reveal the improper breadth of the subpoena, including finding of fact 11: "Plaintiff's subpoena sought production from Davis & Harwell of 'all documents regarding draft of final' (1) agreements between Plaintiff and Defendant, (2) agreements between Defendant and anyone in the world, and (3) agreements between Plaintiff and anyone in the world. Plaintiff's Subpoena was not limited in time or by scope, source, or subject matter. Plaintiff's Subpoena generically detailed the various documents and things sought and contained such descriptive phrases as 'including but not limited to all notes, correspondence, memoranda, emails, drafts or final agreements and documents concerning conversations with anyone regarding these matters.' "

more specifically addressed the scope of the subpoena apart from questions of privilege, (2) denied the motion to the extent it sought documents not relevant to this case, and (3) expressed its intent to protect Davis & Harwell from significant expense. Nonetheless, under the circumstances of this case and considering the reasoning in *Columbia Broadcasting*, which we find persuasive, we hold that the trial court did not err in imposing sanctions and awarding compensation after Davis & Harwell had complied with the order granting the motion to compel.

[5] The question remains, however, whether the trial court abused its discretion with respect to the amount ordered paid: $40,000.00. *See Exxon Valdez*, 142 F.R.D. at 383 ("However, 'protection from significant expense' does not mean that the requesting party necessarily must bear the *entire* cost of compliance . . . ."). As the court in *Exxon Valdez* explained, "a non-party can be required to bear some or all of its expenses where the equities of a particular case demand it." *Id.* Mr. Kelley has not identified any "equities" suggesting that Davis & Harwell should share the burden of the costs of production. *Id.* at 383. Mr. Kelley does, however, argue that the trial court abused its discretion in ordering Mr. Kelley to reimburse Davis & Harwell for certain tasks.

It is well established that "[o]nly if the trial court includes findings of fact regarding *how* it came to choose the particular sanction imposed can this Court determine whether or not the sanction represents an abuse of discretion." *Dunn v. Canoy*, 180 N.C. App. 30, 50, 636 S.E.2d 243, 256 (2006) (emphasis added), *appeal dismissed and disc. review denied*, 361 N.C. 351, 645 S.E.2d 766 (2007). Here, despite acknowledging Davis & Harwell's employees' billing rates and time spent and despite categorizing reimbursable and non-reimbursable costs, the court failed to address how it reached the conclusion that $40,000.00 was the appropriate sum for Mr. Kelley to pay Davis & Harwell. The court simply found, without further explanation, that Davis & Harwell incurred "lost earnings" and " 'significant expense resulting from complying with' " the subpoena in an amount "not less than Forty-Thousand Dollars ($40,000)."

After reviewing the record, we simply cannot tell where the $40,000.00 came from. Davis & Harwell's "Time and Expense Line" does not include any categories of tasks that, when totaled, would equal $40,000.00. Although the trial court stated that it was not requiring Mr. Kelley to pay the cost of lost earnings associated with the preparation of Davis & Harwell's objection to the subpoena and re-

sponse to the motion to compel production, we do not know exactly what was included as compensable compliance tasks.

Mr. Kelley argues that the time spent on Davis & Harwell's 85-page request for findings of fact and conclusions of law, filed on its own initiative, should not be included as lost earnings. It appears from the trial court's findings that the trial court may have included this time in its award because it viewed the request as being responsive to Mr. Kelley's counsel's 14 May 2008 letter to the trial court. Given, however, the findings of fact related to this document, we cannot tell for sure whether the trial court ordered reimbursement of this time because it viewed the task as one of the burdens associated with compliance with the subpoena or whether the trial court was, in actuality, sanctioning other behavior it viewed as improper. *See Dunn*, 180 N.C. App. at 46-47, 636 S.E.2d at 253-54. We, therefore, cannot determine whether the trial court properly required Mr. Kelley to pay for this time under Rule 45.

Accordingly, although we affirm the trial court's decision that Davis & Harwell was entitled to reimbursement for lost earnings and significant expense, we must remand for further findings on the issue of the extent of reimbursement. On remand, the trial court must explain how it calculated the compensation owed to Davis & Harwell, including what tasks were included as resulting from compliance with the subpoena and why. On remand, the trial court is not required to order the same amount of sanctions or compensation. If the trial court determines a different amount is proper, based upon findings made in accordance with this opinion, it should enter the new order for that amount.

Affirmed in part; remanded in part.

Judges STROUD and ERVIN concur.

RICE v. COHOLAN

[205 N.C. App. 103 (2010)]

J. FREDERICK RICE AND WIFE, DONNA RICE; AND DOUGLAS K. BRADLEY, PLAINTIFFS-APPELLEES V. DONALD COHOLAN AND WIFE, TERESA COHOLAN; MADISON DEVELOPMENT OF CHARLOTTE, LLC; JOHN SADRI CUSTOM HOMES, INC.; TEMPLE ISRAEL, INC.; MADISON GEER; BRYANT P. MARKS; NACHUM ESHET AND WIFE, MARY ESHET; GAYLE L. SMITH; ERNIE CASTELLANO AND WIFE, DEBBIE CASTELLANO; AND GEORGE S. CROUCH, JR., AND WIFE, MARY ANN C. CROUCH, DEFENDANTS-APPELLANTS

No. COA09-326

(Filed 6 July 2010)

1. Appeal and Error— notice of appeal—certificate of service—not filed—time for filing notice tolled

The Court of Appeals had jurisdiction to hear an appeal, even though the notice of appeal was not filed in the proper county within thirty days of the judgment, because no certificate of service was filed with the appealed order. The time for filing the notice of appeal was therefore tolled and the notice that was filed properly was timely.

2. Appeal and Error— cross-assignments of error—not an alternative basis for supporting order

Plaintiff's cross-assignments of error did not relate to an alternative basis in law for supporting the order appealed from and were overruled.

3. Deeds— restrictive covenants—enforceability and termination

A trial court order concluding that plaintiffs could enforce deed restrictions was reversed where fourteen of the eighteen lots in the subdivision contained the same or similar restrictions, there was a common grantor and a general plan of development, and the owners of lots encumbered by the restrictive covenants could enforce those covenants against owners of similarly restricted lots. A reference to a specific anniversary date did not limit termination of the restrictions to that date, and, applying the "one vote per lot" rationale, a majority of owners validly terminated the restrictions in the deeds by agreement.

Appeal by Defendants Donald Coholan and wife, Teresa Coholan, from order entered 14 August 2008 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Court of Appeals 30 September 2009.

James, McElroy & Diehl, P.A., by John R. Buric and Jon P. Carroll, for Plaintiffs-Appellees.

Johnston, Allison & Hord, P.A., by Patrick E. Kelly and Daniel A. Merlin, for Defendants-Appellants.

McGEE, Judge.

Plaintiffs filed this action on 16 November 2006 seeking to enforce deed restrictions on eighteen lots known as Jefferson Park and located on Jefferson Drive in Charlotte. Plaintiffs sought, *inter alia*, to enjoin development and subdivision of certain lots located within Jefferson Park. To support their claim, Plaintiffs relied on the restrictive covenants in the original deeds to Jefferson Park.

On 17 October 1945, Ralph Petree and wife, Margaret Petree (the Petrees), sold a plot of land along Jefferson Drive to Mercer J. Blankenship and wife, Marjorie W. Blankenship, and Malcolm B. Blankenship and wife, Bessie G. Blankenship (collectively the Blankenships). The Blankenships subdivided the real property into two blocks of nine lots each. The lots were platted on a map titled, "A Subdivision Plan Of A Part Of Jefferson Park Charlotte, N.C[.]" The map was dated 31 July 1946 and was filed with the Mecklenburg County Register of Deeds at Map Book 1166, Page 131.

The Deeds and The Restrictions Therein

Between 1946 and 1951, the Blankenships conveyed the lots in Jefferson Park as follows:

(1) Lots 1 and 3, Block 1, to the Mecklenburg Baptist Association (MBA). The deed conveying the property contained the following restrictions:

> The aforesaid lot 1, Block 1, of Jefferson Park shall be used solely and exclusively for the erection of a Church Plant by the [MBA], provided that should [the MBA] dispose of same it shall be subject to the same restrictions and easements as shall be and are set out herein with reference to Lot 3, Block 1, of Jefferson Park, which are as follows: That said lot is to be used for residential purposes only, and no structure shall be erected . . . on said lot other than one detached single family building not to exceed 2 1/2 stories in height and a private garage for not more than three cars and such other outbuildings as are incident to the residence use of said lot. This lot shall not be subdivided, nor changed in any manner but shall remain as shown on said map. No building shall

be erected on said lot nearer than 100 feet to the Center Line of the Street on which it fronts, and no building shall be located nearer than 25 feet from any side lot line.

(2) Lot 9, Block 2, to T.B. Meadows and wife to be used as a lake site, and should the property not be so used, alternate restrictions would apply. Those alternate restrictions provided, in part, that the property was not to be subdivided nor used for non-residential purposes; only one house, not to exceed two and one-half stories in height, could be built on the lot; and the house could not be built within 100 feet of the center line of Jefferson Drive, nor within 25 feet of a side line.

(3) Lots 6 and 8, Block 2, to Russell Kistler. The deed stated that "[t]he said lot or parcel of land is hereby conveyed subject to the following restrictions and easements[,]" including that the lots could not be subdivided. The lots were to be used for only residential purposes and only one house, not to exceed two and one-half stories in height, could be built on the lots; and the house could not be built within 100 feet of the center line of Jefferson Drive, nor within 25 feet of a side line.

(4) Nine of the remaining lots were conveyed to other grantees. The deeds to each of these lots, including Lot 8, Block 1, contained restrictive covenants, including that: (a) the lots could not be subdivided; (b) the lots could be used for only residential purposes; (3) no structure other than one detached single family dwelling, not to exceed two and one half stories in height, could be constructed; and (4) each house built must be set back 100 feet from the center line of Jefferson Drive and 25 feet from any side line.

(5) Malcolm and Bessie Blankenship conveyed their one-half interest in Lot 2, Block 1, to Mercer J. and Marjorie Blankenship on 26 August 1948. Mercer J. and Marjorie Blankenship conveyed their interest in Lot 5, Block 2, to Malcolm and Bessie Blankenship on 26 October 1949; they also conveyed their interest in Lot 9, Block 1, to Malcolm and Bessie Blankenship on 4 August 1950. Finally, the Blankenships together transferred all of their collective interest in Lot 4, Block 2, to Ben and Katrina Blankenship on 26 October 1949. None of these four intra-family deeds contained any restrictions.

Termination of Restrictions

Each of the above-described deeds that did contain restrictive covenants also contained a clause concerning the termination of

restrictions. Each deed provided that the covenants were to run with the land and would be binding until 1 January 1975. After that date, the covenants would "automatically extend for successive periods of ten years" unless the covenants were terminated.

The deeds provided that the owners of lots so encumbered could vote to remove the restrictions, but the language in the deeds differed. The deeds to eight lots contained language permitting termination of restrictions upon a vote of the "majority of the then owners of said lots as shown on said map[.]" One deed allowed termination upon a vote of the "majority of the owners of Jefferson Park[.]" The deeds to three lots permitted termination upon a vote of the "majority of the then owners of said lots in Jefferson Park[.]" One deed permitted termination upon a vote of the "majority of the then owners of lots in Jefferson Park[.]" Another deed permitted termination upon a vote of the "majority of the then owners of this and other lots in Jefferson Park."

In 2006, Donald Coholan and wife, Teresa Coholan (the Coholans), purchased Lots 8 and 9, Block 1, along Jefferson Drive. Prior to the Coholans' purchase of these lots, K & P Development, LLC, owned the property and had subdivided the two lots into six lots. The attorney representing the Coholans at the real estate closing researched the issue of restrictive covenants and concluded that there were no effective restrictions which would prevent the Coholans from subdividing the real property. However, "out of an abundance of caution," the Coholans' attorney prepared a Termination of Restrictions Agreement (the Agreement), which was designed to terminate any restrictive covenants that might restrict the development of the lots in Jefferson Park. The Agreement was signed by the owners of ten of the eighteen lots in Jefferson Park on 5 September 2006 and was recorded 6 September 2006.

Procedural History

Plaintiffs, as owners of lots in Jefferson Park, filed this action to prevent the Coholans from developing Lots 8 and 9, Block 1. The trial court entered a temporary restraining order on 16 November 2006, enjoining the Coholans from developing Lots 8 and 9, Block 1. The trial court later entered an order on 12 January 2007 that determined Plaintiffs' motion for preliminary injunction. In its order, the trial court made, *inter alia*, the following conclusions of law:

> 2. The Plaintiffs have made a significant showing that there is a uniform scheme of development with respect to Jefferson Park.

The fact that not all of the lots are restricted or the deeds do not contain identical language or restrictions is not dispositive, so long as the nature of the restrictions is the same.

. . .

4. The Deed Restrictions touch and concern eighteen (18) lots in Jefferson Park to which they attach, and both horizontal and vertical privity exists. As a result, any lot owner in Jefferson Park may enforce the Deed Restrictions against any other lot owner in Jefferson Park whose lot is encumbered by the Deed Restrictions.

. . .

7. Lot 8 is encumbered by the Deed Restrictions.

8. Lot 9 is not encumbered by the Deed Restrictions.

9. The Deed Restrictions have not been extinguished by the North Carolina Marketable Title Act, N.C.G.S. § 47B-1, *et seq.*, based upon the [c]ourt's finding that the residential exception of the Act (N.C.G.S. § 47B-3(13)) applies.

. . .

13. The purported Termination Agreement lacks execution by a majority of owners in Jefferson Park and is therefore ineffective.

. . .

15. The Deed Restrictions Prohibit Defendants from subdividing any portion of Lot 8.

16. The Deed Restrictions prohibit Defendants from constructing more than one (1) residential structure onto Lot 8.

17. The Deed Restrictions prohibit Defendants from constructing any building on Lot 8 that is closer than one hundred (100) feet to the centerline of Jefferson Drive or twenty-five (25) feet to the side lot line.

18. The Deed Restrictions are not enforceable with respect to Lot 9.

The trial court then dissolved the temporary restraining order and denied Plaintiffs' motion for preliminary injunction with respect to Lot 9. The trial court further granted Plaintiffs' motion for preliminary injunction as to Lot 8, enjoining the Coholans from subdividing or developing Lot 8.

Plaintiffs amended their complaint on 22 January 2007, naming their original co-plaintiffs, George and Mary Ann Crouch, as defendants. Plaintiffs sought to (1) enforce deed restrictions against all lots, including Lot 9, Block 1; and (2) invalidate the Agreement. A consent order and judgment was entered on 8 June 2007, dismissing Plaintiffs' claims as to Lot 9, Block 1.

Plaintiffs and the Coholans filed cross-motions for summary judgment. In an order entered 14 August 2008, the trial court denied the Coholans' motion in pertinent part and granted Plaintiffs' motion, thereby invalidating the Agreement and declaring the restrictions on Lot 8, Block 1 to be "in full force and effect." The trial court found that there were no genuine issues of material fact and made the following conclusions of law:

> 3. There was a common scheme of development for each of the lots referenced on the Map for which a set of Restrictive Covenants is found in the chain of title. The owners of the lots having the Restrictive Covenants in the chain of title can enforce the covenants against owners of similarly restricted lots. The owners of lots which do not have the Restrictive Covenants in the chain of title are not subject to the restrictions and therefore cannot be forced to comply with the restrictions.
>
> 4. For purposes of determining a "majority of owners," each owner of a lot located on the Map gets one (1) vote. In the event one individual or entity owns more than one lot, that individual or entity has only one (1) vote. The Restrictive Covenants do not contemplate a cumulation of votes.
>
> 5. In the plain language of the Marketable Title Act, the legislature pluralized the word "restrictions." As such, Section 13 of the Marketable Title Act is applicable, and the Marketable Title Act does not act to extinguish the Restrictive Covenants.
>
> 6. In the event a majority of owners subject to the Restrictive Covenants attempts to terminate the restrictions, the majority termination is only effective on the anniversary date of the restrictions. Absent unanimous agreement of the owners of the restricted lots, the Restrictions can not [sic] be terminated between anniversary dates.

The Coholans (hereinafter referred to as Defendants) appeal.

Jurisdiction

[1] As a preliminary matter, we address whether this appeal is properly before our Court. The order from which Defendants are appealing was entered 14 August 2008 in Mecklenburg County. Defendants mailed notice of appeal on 12 September 2008 to the clerk of superior court in Gaston County, who received and filed the notice of appeal on 15 September 2008. Defendants realized they had mistakenly filed their notice of appeal in the wrong county when they received a file-stamped copy of the notice of appeal from Gaston County. Defendants immediately filed their notice of appeal in Mecklenburg County on 17 September 2008.

Plaintiffs moved to dismiss Defendants' appeal on 7 January 2009 on the ground that Defendants did not file their notice of appeal in the proper place within thirty days of the entry of judgment. Plaintiffs' motion was denied on 18 February 2009. From the denial of their motion, Plaintiffs filed a separate appeal, No. COA09-1034. However, we address the timeliness of Defendants' appeal in the present case because it deals with potentially jurisdictional violations of the N.C. Rules of Appellate Procedure.

N.C.R. App. P. 3(a) provides that an appeal may be taken "by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule." Rule 3(c) provides:

> In civil actions and special proceedings, a party must file and serve a notice of appeal:
>
> (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or
>
> (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period[.]

N.C.R. App. P. 3(c). Rule 58 of the Rules of Civil Procedure provides in pertinent part:

> The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5.

N.C. Gen. Stat. § 1A-1, Rule 58 (2009). Finally, Rule 5 of the Rules of Civil Procedure provides in pertinent part:

> A certificate of service shall accompany every pleading and every paper required to be served on any party or nonparty to the litigation, except with respect to pleadings and papers whose service is governed by Rule 4. The certificate shall show the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon whom the paper has been served.

N.C. Gen. Stat. § 1A-1, Rule 5(b) (2009).

The order in the present case was entered on 14 August 2008. The order was prepared by the trial court by modifying an electronic draft order provided by Plaintiffs. According to findings of fact made at the hearing on Plaintiffs' motion to dismiss the appeal, the trial court filed the order and "had copies of the order sent to each [party's] counsel." The record on appeal does not include a certificate of service.

This Court previously addressed the timeliness of an appeal pursuant to N.C.R. App. P. 3 in *Davis v. Kelly*, 147 N.C. App. 102, 554 S.E.2d 402 (2001). In *Davis*, a judgment was entered against the defendant on 24 August 2000 and served on the defendant on 1 September 2000. *Id.* at 105, 554 S.E.2d at 404. The plaintiff filed a certificate of service on 26 October 2000. *Id.* The defendant filed notice of appeal, first with this Court, but then on 10 October 2000, filed properly with the clerk of superior court in Mecklenburg County. *Id.* The plaintiff argued that, because the notice of appeal was filed more than thirty days after judgment was entered, the appeal should have been dismissed. *Id.* Our Court held:

> We note that plaintiff did not fully comply with the service requirements of Rule 58 of the Rules of Civil Procedure until 26 October 2000 since that is the date he filed a certificate of service with the court. The running of the time for filing and serving a notice of appeal was tolled pursuant to N.C.R. App. P. 3 until plaintiff's compliance, and defendant's notice of appeal is, therefore, timely. Plaintiff's motion to dismiss the appeal is denied.

Id.

In the present case, the record on appeal shows that Plaintiffs did not file a certificate of service of the order of 14 August 2008. Because

there was no certificate of service filed, the time for filing the notice of appeal was tolled. Thus, Defendants' notice of appeal filed in Mecklenburg County on 17 September 2008 was timely. Our Court, therefore, has jurisdiction to hear this appeal. *But see Huebner v. Triangle Research Collaborative*, 193 N.C. App. 420, 667 S.E.2d 309 (2008), *disc. review denied*, 363 N.C. 126, 673 S.E.2d 132 (2009).

Plaintiffs' Cross-Assignments of Error

[2] Plaintiffs have made thirteen cross-assignments of error regarding the order denying their motion to dismiss Defendants' appeal, entered 18 February 2009. The N.C. Rules of Appellate Procedure were amended, effective 1 October 2009. Because this appeal was filed prior to 1 October 2009, we do not apply the newer version of Appellate Rule 10. Cross-assignments of error are permitted when the actions of the trial court "deprived the appellee of an alternative basis in law for supporting the *judgment, order or other determination from which appeal had been taken.*" N.C.R. App. P. 10(d) (2009) (emphasis added). Plaintiffs' cross-assignments of error concern the order denying Plaintiffs' motion to dismiss Defendants' appeal entered 18 February 2009. However, the matter before us concerns Defendants' appeal from the trial court's order granting summary judgment in favor of Plaintiffs, entered 14 August 2008. Because Plaintiffs' cross-assignments of error do not relate to an "alternative basis in law for supporting" the 14 August 2008 order, they are overruled. *See Birmingham v. H & H Home Consultants*, 189 N.C. App. 435, 444, 658 S.E.2d 513, 519 (2008).

Standard of Review

Defendants appeal from an order granting Plaintiffs' motion for summary judgment. This Court reviews *de novo* an appeal from a trial court's order for summary judgment. *Robins v. Town of Hillsboro*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007) (internal citations omitted). We must "determine whether there is a 'genuine issue of material fact' and whether either party is 'entitled to judgment as a matter of law.' " *Id.* (citations omitted). In the case before us, because the facts are undisputed, we limit our review to the trial court's interpretation and application of the law.

Defendants' First Assignment of Error

[3] Defendants contend the trial court erred by concluding that Plaintiffs could enforce the deed restrictions because there was no common development scheme. Defendants argue there was no com-

mon development scheme because (1) there was no common grantor of the lots at issue; (2) many lots contained no restrictive covenants; (3) some deeds specifically allowed for non-conforming structures; and (4) there was no master plan for setting forth restrictions. We disagree.

Our Supreme Court addressed restrictions on the use of real-property in conjunction with a general plan of development in *Sedberry v. Parsons*, 232 N.C. 707, 62 S.E.2d 88 (1950):

> These principles are well settled in this jurisdiction:
>
> 1. "Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created."
>
> 2. The right to enforce the restrictions in such case is not confined to immediate purchasers from the original grantor. It may be exercised by subsequent owners who acquire lots in the subdivision covered by the general plan through *mesne* conveyances from such immediate purchasers.
>
> 3. The restrictions limiting the use of land in the subdivision embraced by the general plan can be enforced against a subsequent purchaser who takes title to the land with notice of the restrictions.
>
> 4. A purchaser of land in a subdivision is chargeable in law with notice of restrictions limiting the use of the land adopted as a part of a general plan for the development or improvement of the subdivision if such restrictions are contained in any recorded deed or other instrument in his line of title, even though they do not appear in his immediate deed.

Sedberry, 232 N.C. at 710-11, 62 S.E.2d at 90-91 (citations omitted).

To determine whether the restrictive covenants in the Jefferson Park deeds are enforceable by Plaintiffs against Defendants, a court must determine "whether substantially common restrictions apply to all lots of like character or similarly situated." *Id.* at 711, 62 S.E.2d at 91. In *Sedberry*, our Supreme Court held that, when a landowner divided real property into twenty-one lots and sold only eleven of

those lots with restrictions, there were not "substantially common restrictions" sufficient to imply a general plan of development. *Id.* at 712, 62 S.E.2d at 91.

In this case, a review of the early deeds in the Jefferson Park subdivision shows the following facts. The Blankenships purchased land from the Petrees, divided the land into eighteen lots, and sold all but four of the lots. Eleven of the lots were sold to private individuals for residential purposes. Two of the lots were sold to the MBA, for the purpose of building a church plant. Another lot was sold with a contingency allowing for use as a lake site. The deeds for the MBA lots and the lake site lot contained language subjecting those lots to the below-discussed restrictions in the event they were not used for their original purpose. Each of the deeds to the fourteen lots sold to parties outside the Blankenship family contained (1) restrictions against subdividing the property; (2) prohibitions against using the property for other than residential purposes; and (3) restrictions concerning the location, number, and architecture of buildings on the property.

The Blankenship family retained four lots. For three of those lots, two of the owners deeded their one-half interest to the other owners. Malcolm B. and Bessie Blankenship deeded their one-half interest in Lot 2, Block 1, to Mercer J. and Marjorie Blankenship. Likewise, Mercer J. and Marjorie Blankenship deeded their one-half interest in Lot 5, Block 2, and their one-half interest in Lot 9, Block 1, to Malcolm B. and Bessie Blankenship. The Blankenships deeded Lot 4, Block 2, to Ben M. and Katrina Blankenship. None of these intra-family deeds contained any restrictions. Thus, the deeds to fourteen of the eighteen lots in Jefferson Park contained the same or similar restrictions, while the deeds to four lots were not similarly restricted.

Common Grantor

We first address Defendants' argument that there was no common grantor to the Jefferson Park properties. The entire acreage, which would become Jefferson Park, was conveyed by the Petrees to the Blankenships in 1945. The Blankenships sold fourteen lots to purchasers outside the Blankenship family and retained four lots within the Blankenship family. Defendants direct our attention to only the three deeds that the Blankenships conveyed amongst each other.

Defendants argue that these intra-family deeds are evidence that the early deeds to the Jefferson Park lots did not share a common grantor. Defendants cite no authority for interpreting the deeds in this manner. The undisputed facts indicate that the Petrees conveyed

the Jefferson Park acreage to the Blankenships. The Blankenships then conveyed, as grantors, all but three of the lots. The remaining three lots were then disposed of in the following manner: each Blankenship couple conveyed their one-half interest in the lot in question to the other Blankenship couple. On these facts, we cannot agree with Defendant that the three intra-family deeds indicate the lack of a common grantor to the Jefferson Park lots.

General Plan of Development

We next address the issue of whether there was a general plan of development as to the Jefferson Park lots. In *Sedberry*, our Supreme Court found no general plan of development when eleven of twenty-one lots were restricted. *Sedberry*, 232 N.C. at 712, 62 S.E.2d at 91. By contrast, the development in the case before us involves fourteen of eighteen lots in Jefferson Park being restricted, *inter alia*, to use for residential purposes. These fourteen lots were also subject to a prohibition against subdivision, combined with restrictions governing the location, number, and architecture of any buildings constructed on the lots. In light of these facts, we find that there are substantially common restrictions applicable to all lots of like character. Further, the properties were sold in accordance with a map dated 31 July 1946 and titled: "A Subdivision Plan Of A Part Of Jefferson Park Charlotte, N.C[.]" We therefore hold that the trial court correctly concluded that there was a general plan of development for the lots in Jefferson Park and that the owners of lots encumbered by the restrictive covenants could enforce those covenants against owners of similarly restricted lots. We therefore overrule Defendants' first argument.

Termination of Restrictions Agreement

Defendants further argue that the trial court erred in determining that (1) they had not assembled the majority ownership required to terminate the restrictions by agreement and (2) that such a termination could only occur at the anniversary dates set out by the deeds.

This case arises from restrictions contained in the deeds for lots located in Jefferson Park, which precluded the owners from subdividing their property and constructing more than one residential home on each lot. The provisions in the deeds, which allow the restrictions to be terminated, differ slightly in their wording, but substantially follow this language:

> These covenants are to run with the land and shall be binding on all of said parties and all parties claiming under them until

> January 1st, 1975, at which time said covenants shall be automatically extended for successive periods of ten years unless by a vote of the majority of the then owners of said lots as shown on said map and it is agreed thereby to change said covenant in whole or in part.

On 5 September 2006, the owners of ten of the eighteen lots in Jefferson Park signed an agreement that "terminate[d] in their entirety any and all restrictions as may encumber the lots shown on the Recorded Map and contained in the various deeds in the chain of title and the Deeds and declare them to be of no further force and effect."

An issue before the trial court was whether the termination agreement was effective. This required a two-part inquiry: (1) whether the majority of owners could terminate the restrictive covenants in between anniversary dates; and (2) if so, what constituted a "majority of the owners" of Jefferson Park.

The trial court concluded that: (1) the majority termination is only effective on the anniversary date of the restrictions and (2) "[f]or purposes of determining a 'majority of owners,' each owner of a lot located on the Map gets one (1) vote. In the event one individual or entity owns more than one lot, that individual or entity has only one (1) vote." The trial court set aside the Agreement and ordered that the restrictive covenants pertaining to the lots in Jefferson Park remained "in full force and effect."

When Termination Is Permitted

Plaintiffs contend that the reference to a specific anniversary date of 1 January 1975, and automatic ten-year extension periods, require that any termination of the restrictions can be effective only on the anniversary dates.

North Carolina appellate courts have not addressed this question. Therefore, we look to cases from other states for persuasive authority. *See Skinner v. Preferred Credit*, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005), *aff'd*, 361 N.C. 114, 638 S.E.2d 203 (2006).

In *Hill v. Rice*, 505 So.2d 382 (Ala. 1987), the Alabama Supreme Court addressed this issue, construing the following provision:

> "(1) The restrictions herein set out shall run with the land and shall be binding upon all parties and persons claiming under them until Jan. 1, 1980, at which time said covenants and restrictions

> shall automatically be extended for successive periods of ten (10) years, unless by vote of majority of the then owners of the lots it is agreed to discontinue or to change said covenants in whole or in part."

Id. at 383. In *Hill*, the plaintiff argued that because there was no election by a majority of the owners on or before 1 January 1980, the covenants were effective for an additional ten years, and that an agreement signed on 14 May 1985 was ineffective to remove the restrictions. *Id.* at 384. The Alabama Supreme Court held:

> It is . . . well settled that restrictions on the use of land are not favored in the law, and such restrictions are strictly construed in favor of the free use of such property. . . . "Where the language of the restriction is clear and unambiguous, it will be given its manifest meaning, but its construction will not be extended by implication or include anything not plainly prohibited and all doubts and ambiguities must be resolved against the party seeking enforcement."

Id. (internal citation and emphasis omitted). The Alabama Supreme Court further held that the language of the covenant was not so clear and unambiguous that a majority of the lot owners could not remove the covenants prior to 1990. *Id.* "While it is clear that the restrictions were binding upon all parties and persons claiming under them until January 1, 1980, it is not clear that the intent of the covenants was that a majority of the owners could not agree to remove the restrictions after that date." *Id.* (emphasis omitted). The Court held that a different interpretation "would be inconsistent with th[e] Court's policy that restrictions on the use of land are not favored and are strictly construed in favor of the free use of property." *Id.* at 385; *contra Scholten v. Blackhawk Partners*, 909 P.2d 393, 397 (Ariz. Ct. App. 1995) (finding the analysis in *Hill* to be unpersuasive and holding that such a construction rendered the provision for ten-year extension periods meaningless).

The Courts of North Carolina have recognized the legal principles, which underpin the *Hill* decision:

> " 'Covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction to affect lands not specifically described, or to grant rights to persons in whose favor it is not

> clearly shown such restrictions are to apply. Doubt will be resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.
>
> " 'Such construction in favor of the unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction.' "

Long v. Branham, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967) (citation omitted).

In the case before us, there is no language in the deeds that prohibits the majority of the owners from removing the restrictions prior to one of the anniversary dates. We find the reasoning set forth in *Hill* to be persuasive and applicable to this case. The majority of the owners of Jefferson Park were not limited to terminating the restrictions on the anniversary dates and the Agreement of 5 September 2006 was effective to terminate the restrictions.

Majority of The Owners

The next question to be determined is whether a "majority of the owners" of Jefferson Park executed the Agreement. Again, there are no North Carolina cases dealing with this issue. There is a split of authority among other states' courts as to the meaning of such language contained in a restrictive covenant.

In *Sky View Financial, Inc. v. Bellinger*, 554 N.W.2d 694 (Iowa 1996), the Court summarized the two lines of cases addressing this issue:

> [T]he Association relies on a line of "one vote per owner" cases which holds that phrases like "a majority of the then owners of the lots affected thereby" or "the majority of the owners of the property" refer to voting strength measured by number of owners, not by area owned. *Cieri v. Gorton*, 179 Mont. 167, 587 P.2d 14, 17 (1978); *Beck v. Council of the City of St. Paul*, 235 Minn. 56, 50 N.W.2d 81, 82 (1951). In *Cieri*, the court rejected on equitable grounds the efforts of two nonresident owners of sixty-nine undeveloped lots to remove *all* restrictive covenants from a 110-lot subdivision over the objection of forty-one resident owners.

Cieri, 587 P.2d at 17. Citing *Beck*, the court framed the issue as "whether the numerical strength of those who are owners in fact is to be determined on a per capita basis or according to the amount or the number of parcels of land which they own." *Id.* (quoting *Beck*, 50 N.W.2d at 83). In both cases, the covenants revealed an emphasis on individual ownership irrespective of acreage owned, thus yielding a "one vote per owner" interpretation. *Cieri*, 587 P.2d at 17; *Beck*, 50 N.W.2d at 83.

A contrary line of cases adopts the "one vote per lot" position. In the leading "lot" case, *Diamond Bar Development Corp. v. Superior Court*, 60 Cal. App. 3d 330, 131 Cal. Rptr. 458 (1976), the owners of a majority of lots (including the developer) voted to amend protective covenants controlling perimeter fencing. Capturing the essence of the controversy, the court described the question as "whether the draftsman feared a majority tyranny based upon sheer numbers of property owners or a majority tyranny based upon extent of ownership." *Id.*, 131 Cal. Rptr. at 460. The court looked to the covenant document as a whole, finding evidence of a voting system that favored number of lots owned over mere ownership status. This scheme, the court believed, was consistent with an evident drafting intent that influence over amendments would be "commensurate with the extent of [the owners'] investment." *Id.*, 131 Cal. Rptr. at 461. Similarly, in *Cecala v. Thorley*, 764 P.2d 643, 644 (Utah App. 1988), the court found the phrase "majority of owners of lots" susceptible to two reasonable interpretations and, thus, looked to the entire agreement to discern the drafter's intent. Noting that the covenant language manifested an intent that land area ownership control the subdivision development, it rejected the *Beck* and *Cieri* analysis in favor of the "one vote per lot" interpretation in *Diamond Bar*. *Id.* at 645-46.

Id. at 697-98.

The rationale behind the "one vote per owner" line of cases was that "the word 'majority' refer[ed] to a quantity measured by numbers and not by area, and that the absurd result of one individual constituting a majority because he owned many tracts would occur if the latter construction were adopted." *Cieri v. Gorton*, 587 P.2d 14, 17 (Mont. 1978) (citation omitted). Conversely, the rationale behind the "one vote per lot" line of cases is that if the Court were to give one vote to each person or entity that has *some* ownership interest in a single lot, a total number of voters would be potentially

limitless and not readily ascertainable. *Cecala v. Thorley*, 764 P.2d 643, 645 (Utah App. 1988); *see also Sky View Financial, Inc.*, 554 N.W.2d at 698 (holding that the phrase "majority of the owners" meant each lot got one vote based on the reasoning that " 'it doesn't seem remotely logical or probable that the developer intended to abdicate its powers to the individual property owners once two lots, a majority of two out of three, had been sold' " because, "[c]onsistent with the covenants, the balance of control will eventually shift as more lots are sold and the developer no longer enjoys majority status") (alterations omitted)).

We hold that the "one vote per lot" cases are better reasoned and are applicable to the facts of the case before us. This is especially true in light of the fact that all of the lots of Jefferson were conveyed many years ago. In *Cecala*, the court looked at the entire document and held that the repeated use of the phrase "said lot" supported a construction of the voting rights provision that allotted one vote per lot, regardless of the number of owners of that lot. *Cecala*, 764 P.2d at 644-45. Similarly, in *Sky View Financial, Inc.*, the Court examined the amendment provision language, i.e., "[t]his Declaration may be amended by the affirmative vote of a majority of the Owners of all Lots in the Development," and held that the reference to "all Lots" would be meaningless unless all lots were considered for voting purposes. *Sky View Financial, Inc.*, 554 N.W.2d at 697-98.

In this case, the language in the deeds to the fourteen lots that allowed the restrictions to be terminated was as follows: (1) the deeds to eight lots state "by a vote of the majority of the then owners of *said lots* as shown on said map[;]" (2) the deeds to three lots state "by a vote of the majority of the then owners of *said lots* in Jefferson Park[;]" (3) the deed to one lot states "by a vote of the majority of the owners of Jefferson Park[;]" (4) the deed to one lot states "by a vote of the majority of the then owners of *lots* in Jefferson Park[;]" and (5) the last deed states "by a vote of the majority of the then owners of *this and other lots* in Jefferson Park[.]" (Emphasis added). Following the reasoning of *Cecala* and *Sky View Financial, Inc.*, we hold that the repeated use of the phrase "lots" in the provisions allowing the restrictions to be terminated, supports a construction that allocates one vote per lot owned. Because the owners of ten of the eighteen lots signed the Agreement, it was effective and the restrictions were declared "to be of no further force and effect." A majority of the owners of Jefferson Park validly terminated the restrictions in the deeds by agreement on 5 September 2006. We hold that the trial court's con-

clusions were erroneous as a matter of law. We need not address Defendants' remaining arguments.

Conclusion

The real properties constituting Jefferson Park, as originally conveyed, were burdened by certain restrictive covenants. We hold that, because fourteen of the eighteen original lots sold were similarly burdened, there was a common development plan for the subdivision. Therefore, any owner could enforce properly preserved restrictions against any other owner similarly restricted. However, because a majority of owners agreed to terminate the restrictions, Defendants are entitled to a judgment as a matter of law. Because Defendants are entitled to a judgment as a matter of law with respect to the claims set out in the Plaintiffs' complaint, the order of the trial court is hereby reversed.

Reversed.

Judges STEELMAN and JACKSON concur.

IN THE MATTER OF: Y.Y.E.T., MINOR CHILD

No. COA10-14

(Filed 6 July 2010)

1. Termination of Parental Rights— grounds—abused and neglected

The trial court did not err in a termination of parental rights case by concluding by clear, cogent, and convincing evidence that grounds existed to terminate respondents' parental rights under N.C.G.S. § 7B-1111(a)(1) based on the fact that the minor child was abused and neglected. Respondents were held jointly and individually responsible for their child's injury even though neither parent accepted responsibility.

2. Termination of Parental Rights— best interests of child—abuse of discretion standard

The trial court did not abuse its discretion by concluding that it was in the best interest of the minor child that respondent father's parental rights be terminated. Respondent failed to acknowledge why his child was placed in the custody of the

Department of Social Services and also failed to exhibit changed behavior. Further, compliance with the case plan was not one of the factors the trial court was required to consider in making the best interest determination under N.C.G.S. § 7B-1110(a).

Appeal by Respondents from order entered 17 September 2009 by Judge Hugh B. Lewis in District Court, Mecklenburg County. Heard in the Court of Appeals 28 April 2010.

Kathleen Arundell Widelski, Senior Associate Attorney, for Petitioner-Appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Pamela Newell Williams, for Guardian ad Litem.

Robert W. Ewing, for Respondent-Appellant Mother.

David A. Perez, for Respondent-Appellant Father.

STEPHENS, Judge.

Respondents appeal from the trial court's order terminating their parental rights to the minor child, Y.Y.E.T.[1] For the reasons stated herein, we affirm the order of the trial court.

I. Factual Background and Procedural History

Y.Y.E.T. was born to Respondents on 15 April 2007. Mecklenburg County Department of Social Services ("DSS") first became involved in this matter on 28 August 2007 after Y.Y.E.T. was admitted to Carolinas Medical Center with a swollen leg on 23 August 2007. Y.Y.E.T. was diagnosed with a bucket handle fracture of the right femur which went through the growth plate. Additionally, Dr. Carmen Talarico, an expert in pediatric radiology, discerned a separation of the periostium from a significant portion of the bone mass, and radiological studies indicated other abnormalities, including a possible shoulder fracture. On 28 August 2007, DSS filed a petition alleging Y.Y.E.T. was abused and neglected as defined by N.C. Gen. Stat. § 7B-101(1) and (15). That same day, DSS was granted nonsecure custody of Y.Y.E.T. and the child was placed in foster care. In its petition, DSS alleged that Respondent-mother initially stated the child's leg was caught between the bars of the crib and that she removed the child from the crib. Respondent-mother later stated that Respondent-father removed the child from the crib. Re-

1. Initials have been used throughout to protect the identity of the juvenile.

spondents' explanation as to how Y.Y.E.T.'s leg was injured was inconsistent with the injuries incurred.

An adjudication hearing was held on 16 November 2007, following which the trial court entered an order on 14 December 2007 adjudicating Y.Y.E.T. to be abused and neglected. The trial court found that Respondents indicated that the child's injury was caused by the child's leg getting stuck in the bars of the crib. Respondent-mother also believed the injury could have been caused by an immunization the child received. The trial court made the following additional findings of fact in its adjudication order:

> 6. Dr. [Steven] Frick and Dr. [Carmen] Talarico diagnosed a bucket handle fracture of the right femur. The fracture went through the growth plate. Additionally, Dr. Talarico discerned a separation of the periostium from a significant portion of the bone mass. The periostium is normally tightly attached to the bone, especially at the ends of the bone. The separation extended a long way up the bone, which indicated that a large amount of force was used. Extreme pressure by grabbing or squeezing or shaking was required to cause the injury. It would be like trying to remove a stuck lid from a jar or twisting an onion causing separation of the layers. This type of injury is non-accidental because to occur it required torque exerted on the limb from the external force of twisting.
>
> 7. The child is too young to cause this type of injury. A four to five month old child's leg would slide easily in and out from between the crib slats and the child's father told a [DSS] investigator that he removed the child gently from the crib. The parents' explanation of the reason for the injury does not match the injury.
>
> 8. The injury is highly specific of child abuse in an infant of four months of age and could not have occurred from the child's leg being stuck between the rails of the child's crib. This type of trauma has been defined as being caused exclusively by non-accidental trauma. There was no abnormality of bone structure that would provide a medical explanation for these injuries such as by bone disease.
>
> 9. There was a two day delay in the parents' getting the child to the hospital.

10. Radiological studies indicated other abnormalities, including one to the shoulder. These could be other fractures, though not acute. Subsequent studies revealed a prior injury to the child's shoulder. The other injuries were not studied further as they were not in need of treatment. The other injuries might could be explained away, but not the injury to the shoulder.

11. The parents were the sole care providers for the child.

Based on the above findings of fact, the trial court concluded that Y.Y.E.T. was an abused and neglected child as defined by N.C. Gen. Stat. [§] 7B-101. The trial court continued legal custody of Y.Y.E.T. with DSS with placement of the child in foster care. At that time, the trial court also ordered that DSS "should make reasonable efforts to eliminate the need for placement of the [child] and make it possible for the child to safely return to his/her own home and the parent[s'] care." Respondents did not appeal from the trial court's adjudication and disposition order, and thus, this order and the findings and conclusions contained therein are binding on the parties. *In re Wheeler*, 87 N.C. App. 189, 194, 360 S.E.2d 458, 461 (1987) ("Because no appeal was taken or other relief sought from the [adjudication and dispositional] order, it remained a valid final order which was binding in the later proceeding on the facts regarding abuse and neglect which were found to exist at the time it was entered.").

A review hearing was held on 22 May 2008, at which the trial court found that DSS had requested parenting capacity evaluations in order to seek direction in recommending services for the parents, but the information given by the parents in the evaluation was considered invalid. Thus, the evaluator could not make any recommendations. The trial court had hoped that the parenting capacity evaluations would identify who caused the child's injuries and why. The trial court's goal was to establish a level of culpability for the parents, so the trial court could determine whether reunification with a non-offending parent could occur or if issues with an offending parent could be rectified so that the child could be returned to her home. At the time of the May 2008 review hearing, the trial court had exhausted the available resources for determining who had caused Y.Y.E.T.'s injuries other than the possibility of a forensic interrogation, which could possibly result in criminal charges against one or both parents. Thus, the trial court found that reasonable efforts toward reunification would be futile and would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reason-

able period of time. The trial court also found that Respondents had subjected the child to aggravated circumstances as defined in N.C. Gen. Stat. § 7B-101 as an additional basis for ceasing reasonable efforts. The trial court changed the permanent plan for the child to adoption.

On 12 August 2008, DSS filed a motion to terminate Respondents' parental rights ("TPR"), and on 28 August 2008, DSS filed an amended motion to terminate. On 6 May, 7 May, and 29 July 2009, the trial court held hearings on the TPR motion. On 17 September 2009, the trial court entered an order terminating Respondents' parental rights. The trial court made findings similar to those made in the adjudication order. The trial court also found that the child had remained in DSS custody since 28 August 2007 and that Respondents had completed parenting classes as required by their case plan. In addition, the trial court made the following pertinent findings:

> 29) The parents, as the only caretakers for the child, are responsible for the child's injuries. The Court cannot determine if a parent does not know what happened, knows what happened and will not tell on the other parent, or is the parent who inflicted the injuries. The Court currently cannot separate the parents as to culpability and has no way to address the issues as long as each parent maintains his/her current position that he or she did not injure the child and does not know how the child was injured.
>
> . . . .
>
> 43) When questioned by [Max] Nunez,[2] respondent-father provided different accounts of how he removed the juvenile from the crib back in August 2007. It sounded to the evaluator like the respondent-father was fitting the description of his motion to the twisting way that doctors indicated as the likely cause of the break to the femur.
>
> 44) Mr. Nunez did not recommend one way or another, if the juvenile should or should not return to the respondent-mother and/or respondent-father's custody. His recommendations included that if the Court were to return the juvenile to the parents, there should be ongoing monitoring of the child's wellbeing for as long as the Court can arrange.
>
> . . . .

2. Max Nunez is an expert in the field of parenting capacity evaluations. Mr. Nunez conducted the second parenting capacity evaluation of Respondents.

52) Respondent-father did not believe the juvenile was injured when she was ordered into DSS custody.

53) During this termination of parental rights hearing, respondent-mother's explanation for the injury was that maybe there was an accident.

54) On the dates of this termination of parental rights hearing, the perpetrator of the juvenile's abuse still has not been identified. Respondent-mother and respondent-father were sole caretakers for the juvenile; however, neither respondent-mother nor respondent-father has accepted responsibility for the child's injuries.

Based on the foregoing findings of fact, the trial court made the following pertinent conclusions of law:

4) The Court hoped that the parenting capacity evaluations would identify who caused the injuries and why. The Court's hope was based on a level of culpability being established which would allow determination of whether reunification could occur with a non-offending parent or issues could be rectified with an offending parent so that the child could be returned to her home.

5) The Court has exhausted the available resources except for the possibility of a forensic interrogation, which could possibly lead to criminal charges against one, or both, of the parents.

6) Respondent-mother and respondent-father, as the only caretakers for the child, are responsible for the child's injuries. The Court cannot determine if a parent does not know what happened, knows what happened and will not tell on the other parent, or is the parent who inflicted the injuries. The Court currently cannot separate the parents as to culpability and has no way to address the issues as long as each parent maintains his/her current position that he or she did not injure the child and does not know how the child was injured.

. . . .

9) [Each parent] has abused and neglected the juvenile within the meaning of N.C. Gen. Stat. [§] 7B-101. The juvenile is less than 18 years of age and the parent inflicted or allowed to be inflicted upon the juvenile a serious physical injury by other than accidental means; created or allowed to be created a sub-

> stantial risk of serious physical injury to the juvenile by other than accidental means. The juvenile did not receive proper care, supervision, or discipline from the parent and/or lived in an environment injurious to her welfare. Repetition of abuse or neglect is probable.
>
> . . . .
>
> 14) The juvenile would be at risk if placed back in the home with the respondent-mother and/or the respondent-father because the perpetrator of the juvenile's injuries has never been identified.

Based on the foregoing findings of fact and conclusions of law, the trial court ordered that Respondents' parental rights to Y.Y.E.T. be terminated. From this order, Respondents appeal.

II. Discussion

Proceedings to terminate parental rights occur in two phases: (1) the adjudication phase, and (2) the disposition phase. *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003). In the adjudication phase, the burden of proof is on the petitioner, findings made by the trial court must be supported by clear, cogent, and convincing evidence, and the findings must support a conclusion that at least one statutory ground for the termination of parental rights exists. *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406 (2003). A trial court's determination that at least one ground for termination exists will be overturned only upon a showing by the respondent that there is a lack of clear, cogent, and convincing competent evidence to support the findings. *In re Allen*, 58 N.C. App. 322, 325, 293 S.E.2d 607, 609 (1982). The trial court's "findings of fact are conclusive on appeal if they are supported by 'ample, competent evidence,' even if there is evidence to the contrary." *In re J.M.W.*, 179 N.C. App. 788, 792, 635 S.E.2d 916, 919 (2006) (quoting *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988)). "Once [the petitioner] has met its burden of proof in showing the existence of one of the grounds for termination, . . . the decision of whether to terminate parental rights is within the trial court's discretion." *In re Allred*, 122 N.C. App. 561, 569, 471 S.E.2d 84, 88 (1996). "The decision to terminate parental rights is vested within the sound discretion of the trial judge and will not be overturned on appeal absent a showing that the [trial court's] actions were manifestly unsupported by reason." *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005).

A. Grounds to Terminate Respondents' Parental Rights

[1] Each Respondent argues[3] that the trial court erred in concluding that grounds existed to terminate their parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). Pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), the trial court "may terminate the parental rights upon a finding [that the] parent has abused or neglected the juvenile." Specifically, Respondents argue that the trial court's findings of fact are not supported by clear, cogent, and convincing evidence, and thus, that the findings do not support the trial court's conclusions of law. Of the 58 findings of fact made by the trial court, Respondent-mother challenges only finding of fact 29,[4] and Respondent-father does not challenge any of the trial court's findings. Findings of fact which are not contested are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Here, the trial court made a number of findings in addition to finding of fact 29, addressing the nature of the injury which led to Y.Y.E.T.'s removal from Respondents' care. Specifically, the trial court found (1) that the child's injury was not accidental, (2) that the child was too young to cause this type of injury to herself, (3) that her leg "was mishandled with extreme force[,]" (4) that the injury was highly specific of child abuse in an infant of four months of age, and (5) that Respondents brought Y.Y.E.T. to the hospital two days after the injury occurred. The trial court also found that Respondents were the sole care providers for the child when the injury occurred. As neither Respondent has argued on appeal that any of these findings are not supported by clear, cogent, and convincing competent evidence, they are presumed to be properly supported and are binding on this Court. *In re H.L.A.D.*, 184 N.C. App. 381, 397, 646 S.E.2d 425, 436 (2007) ("Findings of fact not argued on appeal are deemed to be supported

3. Respondent-mother and Respondent-father appeal from the trial court's order separately. However, because each parent argues that the trial court could not terminate his or her parental rights without specifying which parent was the perpetrator of the abuse, we address this issue as it applies to each parent together.

4. As stated above, the trial court's finding of fact 29 provides that "[t]he parents, as the only caretakers for the child, are responsible for the child's injuries. The Court cannot determine if a parent does not know what happened, knows what happened and will not tell on the other parent, or is the parent who inflicted the injuries. The Court currently cannot separate the parents as to culpability and has no way to address the issues as long as each parent maintains his/her current position that he or she did not injure the child and does not know how the child was injured."

by sufficient evidence, and are binding on appeal."), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008); N.C. R. App. P. 28(b)(6).

Additionally, in the adjudication and disposition order, which was received into evidence and considered by the trial court at the TPR hearing, the trial court found that Y.Y.E.T. had incurred other injuries prior to the August 2007 injury to the child's leg. Radiological studies revealed a prior injury to the child's shoulder and other abnormalities. The trial court found that the other injuries might be reasonably explained, but the injury to the child's shoulder could not be "explained away[.]" Although Respondents maintain that they do not know who caused Y.Y.E.T.'s leg injury, as they did not appeal from the adjudication and disposition order, Respondents are bound by the findings that Y.Y.E.T. had incurred other injuries prior to the August 2007 hospital visit, at least one of which was inexplicable. Thus, the findings in the adjudication and disposition order further support the trial court's finding in its TPR order that Y.Y.E.T. was abused and neglected pursuant to N.C. Gen. Stat. § 7B-1111(a)(1).

From the outset of DSS's involvement in this matter, DSS and the trial court have tried to determine which parent was the perpetrator of Y.Y.E.T.'s injury. DSS requested a temporary disposition by asking the trial court to order Respondents to participate in a parenting capacity evaluation, in the hope that this evaluation would aid DSS in determining the course of action that was in the best interest of Y.Y.E.T. Respondents completed the parenting capacity evaluation. However, at the 14 May 2008 review hearing, the trial court found that the information given by the parents in the evaluation was considered invalid and the evaluator could not make the requested recommendations. The trial court hoped that the parenting capacity evaluations would identify who caused the child's injury and why. If the evaluations had established a level of culpability as to each parent, the court could determine whether reunification could occur with a non-offending parent or if issues could be rectified with an offending parent so that the child could be returned to her home. At the time of the 14 May 2008 review hearing, the court had exhausted the available resources except for the possibility of a forensic interrogation, which could possibly lead to criminal charges against one or both of the parents.

The trial court pursued extensive efforts to determine which parent inflicted the injury on Y.Y.E.T. in August 2007. Despite the trial court's inability to conclusively determine who was the perpetrator of

the injury, the trial court's finding that both parents were responsible is nevertheless supported by clear, cogent, and convincing evidence. Y.Y.E.T.'s injury was not accidental and was found to be "highly specific of child abuse in an infant of four months of age[.]" As the child's sole care providers, it necessarily follows that Respondents were jointly and individually responsible for the child's injury. Whether each Respondent directly caused the injury by inflicting the abuse or indirectly caused the injury by failing to prevent it, each Respondent is responsible.

Furthermore, Respondents' refusal to accept responsibility for the child's injury indicates that the conditions which led to the child's initial removal from Respondents' home have not been corrected. It is apparent that one or both of Y.Y.E.T.'s parents inflicted an injury on the child and that the parents have protected each other throughout the course of these proceedings by refusing to identify the perpetrator. Respondents' conduct further indicates that Respondents continue to put their own self-interests first, and are not prepared to act in the best interest of their child. Respondents' willingness to return Y.Y.E.T. to the home and circumstances in which her injury occurred clearly demonstrates that Respondents are not devoted to the welfare of their child. Thus, the trial court properly determined that the repetition of abuse or neglect is probable.

Respondents argue, however, that the trial court erred in concluding that they each abused and neglected Y.Y.E.T. pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) without specifically finding that either Respondent was the perpetrator of the child's injury. Respondents' argument is flawed as we have held above that the trial court properly found Respondents were jointly and individually responsible for their child's injury. Furthermore, Respondents' argument is contrary to public policy and would establish a dangerous precedent should we be persuaded by their contention. Such a holding would encourage individuals to deny responsibility for and knowledge of harm inflicted upon a child and would thwart the ability of the courts to serve the best interest of the child.

Accordingly, we conclude that the trial court's findings are supported by clear, cogent, and convincing evidence.[5] These find-

5. Respondent-mother contends that the trial court's finding of fact 29 constitutes an abuse of discretion. We note, however, that the correct standard for reviewing the trial court's findings of fact is whether they are supported by clear, cogent, and convincing evidence. As we have held that finding of fact 29 was supported by such evidence, we need not address Respondent-mother's additional argument on this finding.

ings support the trial court's conclusion that grounds existed to terminate Respondents' parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). Respondents' arguments are overruled. Having concluded that one ground for termination of parental rights exists, we need not address the additional ground found by the trial court. *In re Brim*, 139 N.C. App. 733, 743, 535 S.E.2d 367, 373 (2000).

B. Best Interest of the Child

[2] Respondent-father also argues that the trial court abused its discretion by concluding that it was in the best interest of Y.Y.E.T. that Respondent-father's parental rights be terminated. Specifically, Respondent-father contends that the trial court "unnecessar[ily] sever[ed]" "the parental rights of a father who had [possibly] done nothing wrong[.]" We disagree.

"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." N.C. Gen. Stat. § 7B-1110(a) (2009). The decision of whether termination is in the best interest of the child is reviewed for an abuse of discretion. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001).

N.C. Gen. Stat. § 7B-1110(a) enumerates six factors that trial courts must consider when making a determination as to a child's best interest:

> (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).[6]

Respondent-father argues that he complied with the components of his case plan, and that he "did virtually all he could have done to

6. Respondent-father does not argue that the trial court failed to consider the proper statutory factors in reaching its best interest determination.

have been reunited with his daughter." Respondent-father maintained housing and employment throughout the evaluation period. Additionally, Respondent-father completed parenting classes which consisted of eleven sessions. At the beginning of the parenting classes, Respondent-father scored 63% out of 100% on an initial evaluation test, but he scored 93% out of 100% on the evaluation test at the conclusion of the parenting classes. Respondent-father also completed the court-ordered parenting capacity evaluation. However, as stated previously, the information given by both parents in the evaluation was considered invalid.

Although Respondent-father substantially complied with the case plan, the trial court found that "[t]he case plan is not just a check list. The parents must demonstrate acknowledgment and understanding of why the juvenile entered DSS custody as well as changed behaviors." Respondent-father has not done this. Respondent-father refuses to acknowledge exactly how Y.Y.E.T. was injured and who perpetrated her injury. Thus, he has clearly failed to acknowledge why his child entered DSS custody, and he has also failed to exhibit changed behaviors. Furthermore, compliance with the case plan is not one of the factors the trial court is to consider in making the best interest determination. *See* N.C. Gen. Stat. § 7B-1110(a).

In applying the statutory factors that do weigh on the best interest determination, the trial court properly concluded that it would be in Y.Y.E.T.'s best interest to terminate Respondent-father's parental rights. Y.Y.E.T. was four months old when she incurred the leg fracture and was placed in DSS custody. Mecca Harvey ("Harvey"), the permanency planning social worker who was assigned to this matter in November 2007, testified at the 6 May 2009 hearing that there were no barriers to the child's adoption, which was her permanent plan. Harvey also testified that the child was "observably attached to the foster parent[,]" and was "always very happy and very playful" with the foster parent. In the parenting capacity evaluation, Max Nunez noted that the child interacted appropriately with Respondents and that the child "was calm and responsive to them and seemed comfortable in their presence[.]" Additionally, the trial court made the following pertinent findings:

> 55) There are no barriers to the current foster parents adopting the child except for termination of the respondent-mother and respondent-father's parental rights.

> 56) The juvenile has been in the same foster home since initial removal from the respondent-parents in August 2007. *The juvenile appears comfortable with and attached to the foster parent.* The juvenile has not sustained any other significant injuries since removal from the respondent-mother and respondent-father.

(Emphasis added).

Based on the foregoing, the trial court made the following conclusions of law:

> 14) The juvenile would be at risk if placed back in the home with the respondent-mother and/or the respondent-father because the perpetrator of the juvenile's injuries has never been identified.
>
> 15) The goal for the juvenile is adoption, and the Court concludes that adoption is in the juvenile's best interest for the sake of permanence, safety, and protection.
>
> 16) Pursuant to N.C. Gen. Stat. § 7B-1110, it is in the juvenile's best interest that the parental rights of respondent-mother and respondent-father be terminated in order for the juvenile to be cleared for adoption. It is contrary to the best interest of the juvenile to return to the respondent-mother and/or the respondent-father.

In considering the factors delineated in N.C. Gen. Stat. § 7B-1110(a) as they apply to the present matter, we hold that the trial court did not abuse its discretion in concluding that it would be in Y.Y.E.T.'s best interest to terminate the parental rights of Respondent-father.

Accordingly, the order of the trial court is

AFFIRMED.

Judges HUNTER, ROBERT C. and GEER concur.

TONY D. GUPTON, PLAINTIFF v. SON-LAN DEVELOPMENT CO., INC., LANNY K. CLIFTON, JAMES W. JOHNSON, III, ROBERT P. WELLONS, AND FRED L. STANCIL, DEFENDANTS

No. COA09-934

(Filed 6 July 2010)

1. Appeal and Error— review of summary judgment—evidence not considered by trial court

On appellate review of summary judgment, the appellate court cannot review evidence which was not considered by the trial court in its analysis. In this case, the trial court limited its consideration of a settlement agreement to the specific facts contained in its order and discussion of the settlement agreement in the defendant's brief that went beyond the scope of the limited purpose for which the evidence was considered by the trial court was stricken.

2. Malicious Prosecution— prior lawsuit—probable cause

The trial court did not err by granting defendants' motion for summary judgment on a claim for malicious prosecution in a dispute arising from a failed real estate transaction. A reasonable person would be induced to believe that plaintiff had repudiated his obligations by his actions; defendant's prior lawsuit was initiated upon sufficient probable cause.

3. Contracts— tortious interference—underlying lawsuit—probable cause

The trial court did not err by granting defendants' motion for summary judgment with respect to a claim for tortious interference with contract in a dispute arising from a failed real estate transaction. Defendants had probable cause to file the underlying lawsuit and were merely enforcing their rights under their contract.

4. Wrongful Interference— interference with prospective advantages—underlying lawsuit—probable cause

The trial court did not err by granting defendants' motion for summary judgment on plaintiff's claim for unlawful interference with prospective economic relationships and advantages. Defendants had probable cause to initiate the underlying lawsuit.

5. Unfair and Deceptive Trade Practices— failed real estate transaction—lawsuit and lis pendens

The trial court did not err by granting summary judgment for defendants on an unfair and deceptive practices action arising from a failed real estate action. Defendants had probable cause to bring the underlying lawsuit and were justified in issuing the notice of *lis pendens*, so that their actions were not unfair, and defendants' actions were not likely to mislead any future purchasers of the property as to proper ownership, so that defendants were not deceptive.

Appeal by plaintiff from order entered 5 March 2008 by Judge Robert H. Hobgood in Harnett County Superior Court. Heard in the Court of Appeals 22 February 2010.

Akins/Hunt, P.C., by Donald G. Hunt, Jr. and Kristen G. Atkins, for plaintiff-appellant.

Bain, Buzzard & McRae, LLP, by Edgar R. Bain, Robert A. (Tony) Buzzard, and L. Stacy Weaver, III, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiff Tony D. Gupton ("Gupton") appeals from an order granting defendants' motion for summary judgment dismissing his claims for compensatory, special, and punitive damages. For the reasons which follow, we affirm the judgment of the trial court.

This action arises out of a series of contracts for the purchase and sale of a tract of land and business operated thereon, Hidden Valley Country Club, Inc. ("Hidden Valley"), located in southern Wake County. The facts shown by the record before the trial court, summarized only to the extent required for discussion of the issues before us, show that on 11 February 2004, Gupton entered into a contract ("11 February 2004 agreement") with John Bailey Wells ("Wells") to purchase "all land, equipment on hand as of December 31, 2003, inventory and property associated with Hidden Valley Country Club for the agreed price of $2,164,000." By a separate contract, Wells agreed to provide $252,000 in owner financing for the purchase, and Gupton agreed to pay Wells a bonus of $25,200 in the event "said property and business are sold in the future." At the time of these contracts, Gupton's intentions were to operate Hidden Valley as a golf course.

Gupton was unable to secure sufficient financing to complete the purchase. Through a business partner, Keith Johnson, Gupton approached defendant Lanny Clifton ("Clifton"), the owner of Son-Lan Development, Inc. ("Son-Lan"), about buying the property for development purposes. On 7 May 2004, Gupton entered into a contract with Son-Lan ("7 May 2004 agreement") in which Gupton agreed to sell Hidden Valley to Son-Lan for the sum of $2,350,000. The contract was conditioned upon Gupton's purchase of Hidden Valley from Wells pursuant to the 11 February 2004 agreement, and the closing was to "occur on or before June 7, 2004." Gupton further agreed to convey the land, inventory, and equipment to Son-Lan through a general warranty deed, free from encumbrances. Son-Lan agreed separately with James W. Johnson, III ("Johnson"), Fred L. Stancil ("Stancil"), and Robert P. Wellons ("Wellons") (collectively "defendants") for their participation in the purchase of the property from Gupton.

Gupton's closing of the purchase from Wells was set for 26 May 2004. Prior to that date, Wells indicated to Gupton that he would tender only a quitclaim deed, bill of sale, and title to the vehicles. Wells also sought assurances that Gupton would continue to operate Hidden Valley as a golf course and that his son and Lisa W. Earp would be employed there.

On 26 May 2004, defendants provided Gupton with the funds for the purchase price of Hidden Valley from Wells. Upon Wells' tender of a quitclaim deed, which Gupton refused to accept, the closing did not occur. Thereafter, in August 2004, Gupton and Wells sought, through mediation, to resolve the situation. Gupton notified Clifton in advance of the scheduled mediation session, but neither Clifton nor the other defendants were available to attend. During the mediation, Gupton contacted Johnson and informed him that he intended to agree to pay Wells an increased amount to purchase Hidden Valley; Johnson told Gupton that defendants would not purchase the property at a higher price than that to which Gupton had agreed in the 7 May 2004 agreement with Son-Lan. Notwithstanding, on 9 August 2004, Gupton entered into a written Settlement and Release Agreement ("9 August 2004 agreement") with Wells in which he agreed to purchase Hidden Valley for $2,725,000 on or before 9 February 2005, in return for a general warranty deed, free from any encumbrances. Gupton and Wells further agreed to a mutual release of any past or future claims, including any potential claim arising from the 11 February 2004 agreement.

On 30 September 2004, Son-Lan filed a complaint and Notice of *Lis Pendens* ("Son-Lan lawsuit") in the Superior Court of Harnett County against Gupton, Wells, and Hidden Valley seeking specific performance of the 7 May 2004 agreement, as well as claims for civil conspiracy, tortious interference with a contract, unfair and deceptive practices, and fraud. By an amended complaint, Son-Lan also asserted a claim for constructive fraud. Gupton, Wells, and Hidden Valley moved for a change of venue to Wake County, which was denied. *Son-Lan Dev. Co. v. Wells*, 174 N.C. App. 840, 622 S.E.2d 523 (2005) (unpublished). They appealed the denial of the motion and, on 6 December 2005, this Court reversed and ordered a change of venue to Wake County. *Id.*

During the course of the Son-Lan lawsuit, Gupton received offers from third parties to purchase Hidden Valley for prices in excess of that which he had agreed to pay Wells. According to Gupton, due to the pendency of the Son-Lan lawsuit, he was unable to close on his contract with Wells prior to the 9 February 2005 deadline, and therefore, he could not accept the offers.

The record contains a copy of a Settlement and Release Agreement ("January 2005 settlement agreement") which was apparently signed by all of the parties to the current litigation in January 2005, which purports to settle the Son-Lan lawsuit upon payment by Gupton and Wells of an amount totaling $150,000. On 28 August 2006, Hidden Valley issued its check to Son-Lan and its attorney in the amount of $135,000, and on the same day, Son-Lan voluntarily dismissed the Son-Lan lawsuit with prejudice.

On 15 June 2007, Gupton filed his complaint in this action alleging claims for malicious prosecution, wrongful and tortious interference with contract, unlawful interference with prospective economic relationships and advantages, unfair and deceptive trade practices, and civil conspiracy. Gupton sought monetary damages as well as a declaratory judgment that "defendants acted as business partners as that term is defined by North Carolina Uniform Partnership Act and that defendants' liability to plaintiff is, therefore, joint and several." In support of his claims, Gupton alleged that defendants took "affirmative acts to commence a frivolous and unwarranted civil action against plaintiff." Defendants filed an answer denying the material allegations of the complaint and asserting a counterclaim which was subsequently voluntarily dismissed.

Defendants moved for summary judgment, and Gupton filed a motion seeking partial summary judgment with respect to his claim

for a declaratory judgment. A number of motions were filed by the parties relating to discovery issues, and Gupton filed two motions *in limine* seeking to exclude opinions rendered by defendants' expert witnesses and "any evidence related to compromises, settlements, offers to any compromise and offers to settle that may have been made" in the Son-Lan lawsuit.

By order entered 5 March 2008, the trial court granted Gupton's motion for partial summary judgment with respect to the declaratory judgment, holding there was no genuine issue with respect to the fact that defendants "acted as business partners in matters pertaining to" Gupton. The trial court denied Gupton's first motion to compel discovery and motion for sanctions. The trial court allowed Gupton's first motion *in limine* "to Exclude Probable Cause Experts . . . but only as to [the experts'] testimony about 'probable cause.' " The trial court ruled the remainder of the expert "testimony [wa]s admissible for purposes of the [d]efendants' Summary Judgment Motion." Evidence of the January 2005 settlement agreement was excluded, "except that for the limited purpose of the [d]efendant's Summary Judgment Motion evidence [wa]s admissible that Hidden Valley Country Club, Inc. on 28 August 2006 issued its check number 12720 in the amount of $135,000 payable to the order of Son-Lan Development Co. Inc. and Edgar Bain, and that on the same date, 28 August 2006, Edgar Bain, attorney for Son-Lan Development Co., Inc. signed and filed a Notice of Voluntary Dismissal with Prejudice in" the Son-Lan lawsuit. The additional motions of the parties for Rule 37 sanctions were denied. Finally, the trial court granted defendants' motion for summary judgment with respect to each of Gupton's substantive claims. Gupton appeals.

---

[1] Our standard of review of an order granting summary judgment is *de novo*. *Dillingham v. Dillingham*, —— N.C. App. ——, ——, 688 S.E.2d 499, 503 (2010). "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." *Id.* at ——, 688 S.E.2d at 503-04 (internal quotation marks omitted).

> [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). Moreover, in reviewing a grant of summary judgment, "the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). The appellate court, however, cannot review evidence which was not considered by the trial court in its analysis. *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) ("This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal."). In this case, for reasons which are unclear in the record, the trial court limited its consideration of the January 2005 settlement agreement to the specific facts contained in its order, and defendants have not cross-assigned error to its ruling in that respect. Accordingly, we decline to consider the agreement for any other purpose, and any discussion of that evidence in defendants' brief which goes beyond the scope of the limited purpose for which it was considered by the trial court is stricken. *See* N.C.R. App. P. 34(a)(3).

[2] Gupton first argues that the trial court erred in granting defendants' motion for summary judgment with respect to his claim of malicious prosecution. In order to prove a claim for malicious prosecution, a plaintiff must show "(1) defendant initiated the earlier proceeding; (2) malice on the part of defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; *and* (4) termination of the earlier proceeding in favor of the plaintiff." *Best v. Duke Univ.*, 337 N.C. 742, 749, 448 S.E.2d 506, 510, *reh'g denied*, 338 N.C. 525, 452 S.E.2d 807 (1994) (emphasis added). "Additionally, in malicious prosecution cases based on underlying civil actions, the plaintiff must prove special damages." *Raymond U v. Duke Univ.*, 91 N.C. App. 171, 177, 371 S.E.2d 701, 706, *disc. review denied*, 323 N.C. 629, 374 S.E.2d 590 (1988). Probable cause, as it applies to claims of malicious prosecution, "has been properly defined as the existence of such facts and circumstances, known to [the defendant] at the time, as would induce a reasonable man to commence a prosecution." *Best*, 337 N.C. at 750, 448 S.E.2d at 510 (internal quotation marks omitted) (alteration in original). It is not essential that the person bringing the action "knows the facts necessary to insure a conviction, but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offense." *Petrou v. Hale*, 43 N.C. App. 655, 657, 260 S.E.2d 130, 133 (1979) (internal quotation marks omitted), *disc. review denied*, 299 N.C. 332, 265 S.E.2d 397 (1980). Moreover, "[w]hether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, the

existence of probable cause is a question of law for the court." *Best*, 337 N.C. at 750, 448 S.E.2d at 510.

We find the circumstances in the present case "would induce a reasonable man" to conclude that Gupton had, by his actions, repudiated his obligations under the 7 May 2004 agreement and justify defendants' bringing the prior action for its breach.[1] *Id.* (internal quotation marks omitted). A valid contract existed between Gupton and Son-Lan for Son-Lan to purchase Hidden Valley, conditioned on Gupton's purchase of Hidden Valley under the original 11 February 2004 agreement with Wells. Though the agreement between Gupton and Son-Lan set a closing date for 7 June 2004, it did not indicate that time was of the essence. Thus, the parties had a reasonable time from the specified closing date in which to perform under the contract. *Phoenix Ltd. P'ship of Raleigh v. Simpson*, ––– N.C. App. –––, –––, 688 S.E.2d 717, 719 (2009) ("Generally, in the absence of a 'time is of the essence' provision, the parties must perform within a reasonable amount of time of the date set for closing."). Accordingly, when Gupton entered into the 9 August 2004 agreement with Wells, the 7 May 2004 agreement between Gupton and Son-Lan was still valid. *Wolfe v. Villines*, 169 N.C. App. 483, 489, 610 S.E.2d 754, 759 (2005) (finding a delay of only a few weeks from the set closing date was not unreasonable and did not invalidate the contract to purchase the property). Therefore, any actions by Gupton on 9 August 2004 and beyond that demonstrated his intention not to perform his duties under the 7 May 2004 agreement could be considered an anticipatory repudiation. *Allen v. Weyerhaeuser, Inc.*, 95 N.C. App. 205, 209, 381 S.E.2d 824, 827 (1989).

It is well settled that "[w]hen the promisor to an executory agreement for the performance of an act in the future renounces its duty under the agreement and declares its intention not to perform it, the promisee may treat the renunciation as a breach and sue at once for damages." *Id.* (internal quotation marks omitted). "In order to main-

1. Defendants did not specifically plead anticipatory repudiation in their complaint in the Son-Lan lawsuit, but instead claimed that Gupton breached his contract. This, however, is not fatal to defendants' previous claim nor their position in the present appeal, especially where the complaint alleged facts sufficient to support a claim for anticipatory repudiation. *See Strickland v. Town of Aberdeen*, 124 N.C. App. 430, 433, 477 S.E.2d 218, 220 (noting that "allegations of a mislabeled claim must still reveal that plaintiff has properly stated a claim under some legal theory"); *see also Taylor v. Taylor Prods. Inc.*, 105 N.C. App. 620, 626, 414 S.E.2d 568, 573 (1992) (stating that "an anticipatory repudiation will give rise to an action for total breach of the contract"), *overruled on other grounds by Brooks v. Giesey*, 334 N.C. 303, 318, 432 S.E.2d 339, 347 (1993).

tain [such] a claim for anticipatory [repudiation], the words or conduct evidencing the renunciation or breach must be a positive, distinct, unequivocal, and absolute refusal to perform the contract when the time fixed for it in the contract arrives." *Id.* (internal quotation marks omitted). If this occurs, there "is a breach of the contract . . . even though it takes place long before the time prescribed for the promised performance and *before conditions specified in the promise have ever occurred*." 9 Arthur L. Corbin, *Corbin on Contracts* § 959 (1951, interim ed. renewed 1979) (emphasis added). Moreover, when a party, whose obligation it is to fulfill a condition precedent contained in a contract, clearly repudiates his obligation to act in good faith and ensure that reasonable efforts are taken to fulfill the condition, the other party acquires rights under the contract and may sue to enforce those rights. *Accord Carson v. Grassmann*, 182 N.C. App. 521, 525, 642 S.E.2d 537, 540 (finding that "[b]ecause plaintiffs have not acted in bad faith in failing to meet the condition precedent, defendants have no rights under the contract"), *disc. review denied*, 361 N.C. 426, 648 S.E.2d 207 (2007); s*ee Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 40 N.C. App. 743, 746, 253 S.E.2d 625, 628 (1979) (stating that when a "buyer's obligation [is] condition[ed] upon obtaining financing," the buyer "implied[ly] promise[s] that [he] . . . will act in good faith and make reasonable efforts to secure the financing.").

In the present case, the 7 May 2004 agreement between Gupton and Son-Lan was clearly conditioned on Gupton's purchase of Hidden Valley from Wells pursuant to their 11 February 2004 agreement. *See Carson*, 182 N.C. App. at 524, 642 S.E.2d at 539 ("A condition precedent is an event which must occur before a contractual right arises, such as the right to immediate performance." (internal quotation marks omitted)). However, while the contract between Gupton and Son-Lan was still valid, Gupton entered into a new contract with Wells where he agreed to purchase Hidden Valley for $2,725,000, $375,000 more than the purchase price stated in the 7 May 2004 agreement. After this new contract was formed, Gupton began actively searching for new purchasers for Hidden Valley. Based on these actions, a reasonable person would believe that Gupton did not intend to meet his obligation to act in good faith and make reasonable efforts to ensure that the 11 February 2004 agreement with Wells was enforced. Even though Gupton did attempt to close on his original contract with Wells on 26 May 2004, a reasonable person could conclude that Gupton's actions subsequent to the failed closing indicated his repudiation of his obligations under the 7 May 2004 agreement

with Son-Lan. *See Weyerhaeuser Co.*, 40 N.C. App. at 747, 253 S.E.2d at 628 (finding that even though there was some evidence that the defendant made a good faith effort in meeting the condition to assist the plaintiffs in obtaining financing, a jury could conclude that defendants in fact did not assist plaintiffs based on the other evidence presented). Moreover, Gupton's actions clearly indicate his intention to repudiate his obligation to sell Hidden Valley to defendants for the agreed $2,350,000, even if he was able to purchase Hidden Valley from Wells. Thus, based on this evidence a reasonable person could view these actions as an effort by Gupton to prevent defendants from "receiv[ing] the benefits of the agreement," and, thus, an anticipatory repudiation. *Sunset Beach Dev. v. AMEC, Inc.*, ––– N.C. App. ––, ––, 675 S.E.2d 46, 57 (2009). Accordingly, before initiating the Son-Lan lawsuit, defendants had sufficient facts before them to indicate that Gupton was repudiating his obligations under the 7 May 2004 agreement by not only engaging in conduct which clearly indicated his intent not to honor the original purchase price but by also failing to make reasonable efforts to enforce his original contract with Wells. Under these circumstances, we find that "a reasonable man [would be induced] to commence a prosecution" for anticipatory repudiation and breach of contract. *Best*, 337 N.C. at 750, 448 S.E.2d at 510.

In addition, we hold defendants had probable cause to file their claim for specific performance and to file the Notice of *Lis Pendens*. *See Rainbow Props. v. Wilkinson*, 147 N.C. App. 520, 523, 556 S.E.2d 11, 14 (2001) ("[S]pecific performance is a proper remedy for enforcement of an option to purchase real estate."); *see also George v. Admin. Office of the Courts*, 142 N.C. App. 479, 482, 542 S.E.2d 699, 702 (2001) (noting that "[a]ctions affecting title to real property" are proper actions for which to file a notice of *lis pendens* (internal quotation marks omitted)). Defendants' prior lawsuit was, therefore, initiated upon sufficient probable cause and, as such, Gupton's claim for malicious prosecution cannot survive. *Koury v. John Meyer of Norwich*, 44 N.C. App. 392, 398, 400, 261 S.E.2d 217, 221-23 (finding defendants were not liable for malicious prosecution when the undisputed facts revealed that they had probable cause to seek the plaintiff's arrest), *disc. review denied*, 299 N.C. 736, 267 S.E.2d 662 (1980).

In the context of his argument surrounding defendants' probable cause to initiate the Son-Lan lawsuit, Gupton also suggests that the trial court erred in admitting the testimony of three of defendants' expert witnesses as well as admitting evidence of Hidden Valley's pay-

ment to defendants and their voluntary dismissal of the Son-Lan lawsuit. A discussion of these evidentiary rulings is not necessary because, as we have already explained, defendants were entitled to summary judgment with respect to Gupton's malicious prosecution claim even without considering the challenged evidence. We have also considered Gupton's various other arguments surrounding his claim for malicious prosecution and have concluded that they are without merit and may be disposed of without discussion. The trial court did not err in granting defendants' motion for summary judgment on this claim.

[3] Gupton next argues that the trial court erred in granting defendants' summary judgment motion on his claim of wrongful and tortious interference with contract.

> To establish a claim for tortious interference with contract, a plaintiff must show: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

Sellers v. Morton, 191 N.C. App. 75, 81, 661 S.E.2d 915, 921 (2008) (internal quotation marks omitted). "[I]nterference with contract is justified if it is motivated by a legitimate business purpose." *Id.* at 82, 661 S.E.2d at 921 (internal quotation marks omitted). In the present case, Gupton argues that defendants interfered with his contract with Wells by filing the Son-Lan lawsuit and accompanying Notice of *Lis Pendens*. However, as we have already established, defendants had probable cause to file the Son-Lan lawsuit based on the actions by Gupton in repudiating his obligations under the 7 May 2004 agreement. Thus, defendants were merely enforcing their rights under their contract with Gupton, making their actions "motivated by a legitimate business purposes." *Id.* (internal quotation marks omitted). The trial court did not err in granting defendants summary judgment on this claim.

[4] Gupton also contends that the trial court erred in granting summary judgment on his claim of unlawful interference with prospective economic relationships and advantages in defendants' favor. "[T]o state a claim for wrongful interference with prospective advantage, the plaintiffs must allege facts to show that the defendants acted without justification in inducing a third party to refrain from entering

into a contract with them which contract would have ensued but for the interference." *Walker v. Sloan*, 137 N.C. App. 387, 393, 529 S.E.2d 236, 242 (2000) (internal quotation marks omitted). Further,

> the general rule prevails that unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of the defendant's own rights, but with design to injure the plaintiff, or gaining some advantage at his expense.

Coleman v. Whisnant, 225 N.C. 494, 506, 35 S.E.2d 647, 656 (1945). Thus, Gupton's claim for unlawful interference with prospective advantage fails for the same reason that his claim for wrongful and tortious interference with contract fails. Defendants had probable cause to initiate the Son-Lan lawsuit and, thus, were only exercising their rights under the 7 May 2004 agreement. The trial court, therefore, did not err in granting defendants' motion for summary judgment with respect to this claim.

[5] Gupton finally argues that the trial court erred in granting defendants' summary judgment motion dismissing his claim for unfair and deceptive trade practices. "To prevail on a claim of unfair and deceptive trade practices, a plaintiff must show: (1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby." *Carcano v. JBSS, LLC*, ___ N.C. App. ___, ___, 684 S.E.2d 41, 49 (2009) (internal quotation marks omitted). "Whether an act or practice is unfair or deceptive under this section is a question of law for the court." *Id.* at ___, 684 S.E.2d at 50. Additionally, "it is not necessary that an act or practice be *both* unfair *and* deceptive in order to be violative of the statute." *Rucker v. Huffman*, 99 N.C. App. 137, 142, 392 S.E.2d 419, 421 (1990).

"A practice is unfair when it offends public policy and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Walker v. Branch Banking & Tr. Co.*, 133 N.C. App. 580, 583, 515 S.E.2d 727, 729 (1999) (internal quotation marks omitted). "Stated another way, a party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position." *Carcano*, ___ N.C. App. at ___, 684 S.E.2d at 50. "[A] practice is deceptive if it has the capacity or tendency to deceive." *Huff v. Autos Unlimited, Inc.*, 124 N.C. App. 410, 413, 477 S.E.2d 86, 88 (1996) (internal quotation marks omitted) (alteration in original), *writ of supersedeas, motion for*

temp. stay, and cert. denied, 346 N.C. 279, 487 S.E.2d 546 (1997). As defendants had probable cause to bring the Son-Lan lawsuit and were justified in issuing the Notice of *Lis Pendens*, their actions were not unfair. Additionally, defendants' actions were not likely to mislead any future purchasers of Hidden Valley as to the proper ownership and, thus, were not deceptive. As defendants' actions were neither unfair or deceptive, Gupton's claim for unfair and deceptive trade practices also fails, and we find the trial court did not err.

Gupton's remaining assignments of error relating to the trial court's ruling on various motions relating to discovery have not been brought forward in his brief and are, therefore, deemed to have been abandoned. N.C.R. App. P. 28(b)(6). The order of the trial court is affirmed.

Affirmed.

Judges WYNN and STEPHENS concur.

IN THE MATTER OF: A.J.M.P.

No. COA09-1609

(Filed 6 July 2010)

1. Termination of Parental Rights— grounds—neglect

The trial court did not err by concluding that grounds existed based on neglect under N.C.G.S. § 7B-1111(a)(1) to terminate respondent father's parental rights. Respondent's other grounds assigned as error did not need to be addressed based on the upholding of the trial court's findings and conclusion regarding neglect.

2. Termination of Parental Rights— best interest of child—statutory factors

The trial court did not abuse its discretion by concluding that it would be in the child's best interest to terminate respondent father's parental rights based on the trial court's consideration of the factors required by N.C.G.S. § 7B-1110(a). Respondent father admitted that he had not written letters or sent gifts to the minor child throughout the term of his imprisonment, nor had he

financially supported the child since the child's parents divorced in 2004.

Appeal by respondent-father from orders entered 28 September 2009 by Judge Albert A. Corbett, Jr., in Harnett County District Court. Heard in the Court of Appeals 28 April 2010.

Charlene Edwards for petitioner-mother appellee.

Richard Croutharmel for respondent-father appellant.

HUNTER, JR., Robert N., Judge.

Respondent-father appeals from an order terminating his parental rights to A.J.M.P. ("Abraham").[1] On appeal, respondent-father challenges the trial court's conclusion that grounds existed to terminate his parental rights based on the following contentions: (1) Abraham does not meet the definition of a "dependent" child under N.C. Gen. Stat. § 7B-101(a)(9) (2009); (2) respondent-father has tried to maintain contact with his child despite respondent-father's incarceration and petitioner-mother's refusal to allow him to communicate with Abraham; (3) respondent-father has not failed to provide child support pursuant to N.C. Gen. Stat. § 7B-1111(a)(4) (2009) because petitioner-mother did not prove that there was an existing child support order by clear, cogent, and convincing evidence; (4) petitioner-mother failed to prove that respondent-father neglected Abraham. In addition, respondent-father asserts that the trial court abused its discretion by continuing to the disposition stage and determining that termination of his parental rights was in the best interest of Abraham.

For the reasons stated herein, we conclude that the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and that the findings of fact support the trial court's conclusion that respondent-father neglected Abraham. We further conclude that the trial court did not abuse its discretion in concluding that termination of respondent-father's parental rights would be in the best interest of Abraham. Accordingly, we affirm the decision of the trial court.

I. FACTUAL BACKGROUND

Abraham was born to petitioner-mother and respondent-father on 14 March 2001. Petitioner and respondent married on 28 March 2002;

1. The juvenile's name has been changed to protect his identity.

however, the couple separated on 4 April 2003, and were later divorced on 2 August 2004. On 15 April 2004, petitioner-mother initiated a child custody action pursuant to Chapter 50 of the North Carolina General Statutes. The district court awarded custody of Abraham to petitioner-mother, and respondent-father was awarded visitation.

In 2005, respondent-father was deployed to Afghanistan while working as a civilian contractor with the C.I.A. There, he was arrested by federal authorities on charges involving abuse of a prisoner of war which resulted in the death of the prisoner. Respondent-father was incarcerated in the Wake County Jail as a federal pre-trial detainee from June 2005 until approximately March 2006 when he was granted pre-trial release. Respondent-father did not see Abraham and had limited telephone contact with the child while he was incarcerated.

After respondent-father was granted pre-trial release, petitioner-mother secured an *ex parte* order suspending respondent-father's visitation until the matter could be heard by the trial court. On 27 March 2006, the trial court modified the parties' previous visitation arrangement, limiting respondent-father's visitation with Abraham to two-hour increments. Respondent-father visited with Abraham under the terms of the agreement once on 4 April 2006. Further visitation by respondent-father was eliminated because he was arrested and placed in the Harnett County Jail for assaulting his girlfriend at the time. At the time of his arrest, approximately $8,000 was found in respondent-father's vehicle. As a result of this arrest, respondent-father's pre-trial release was revoked, and on 22 May 2006, the trial court entered an order ceasing respondent-father's visitation with Abraham. Respondent-father was subsequently convicted and received an active sentence for the federal charge involving the death of the prisoner in Afghanistan. His projected release date is July 2012. Abraham was five years old at the time of respondent-father's incarceration and he will be eleven years old upon respondent-father's release.

While respondent-father has been in prison, petitioner-mother and her husband, M.L., have been caring for Abraham. Petitioner-mother and M.L. are both actively involved with Abraham's school and his extracurricular activities, including: baseball, Boy Scouts, and the Boy Scout Derby. Abraham also attends Calvary Baptist Church with petitioner-mother, M.L., and M.L.'s fourteen-year-old daughter. M.L. has stated that he desires to adopt Abraham. Respondent-father has not seen Abraham since his last visit on 4 April 2006.

On December 2006, petitioner-mother filed a termination of parental rights petition alleging four grounds for termination, including: (1) N.C. Gen. Stat. § 7B-1111(a)(1) (neglect); (2) N.C. Gen. Stat. § 7B-1111(a)(3) (failure to pay support); (3) N.C. Gen. Stat. § 7B-1111(a)(6) (dependency); and (4) N.C. Gen. Stat. § 7B-1111(a)(7) (abandonment). In assessing petitioner-mother's termination of parental rights, the trial court appointed a guardian ad litem ("GAL") for Abraham.

The GAL visited Abraham on 9 May 2007 and 25 January 2008. During the visits the GAL spoke with, among others, petitioner-mother, M.L.'s daughter, and Roberta Keithley ("Keithley")—respondent-father's friend. The GAL recommended that respondent-father's parental rights be terminated so that M.L. could adopt Abraham. The GAL asserts the following facts as the basis for the GAL's recommendation: (1) the respondent-father has not seen the child for five years and has not provided any meaningful support, financial or otherwise; (2) respondent-father is incarcerated for a crime of violence that he chose to commit; and (3) adoption by M.L. would give Abraham the stability he needs. The GAL submitted a report on the best interests of Abraham at the termination of parental rights hearing on 25 August 2009. In addition to the GAL's findings, the report included a letter from Keithley to the GAL and a letter from respondent-father dated 27 October 2008.

Petitioner-mother filed her proper termination of parental rights petition in February 2008. Respondent-father filed a *pro se* answer on 21 July 2008 denying petitioner-mother's material allegations. In November 2008, respondent-father wrote a letter to the clerk of court and attached four motions: (1) motion for appointment of counsel; (2) motion for extension of time; (3) motion to participate in the termination of parental rights hearing via telephone; and (4) motion that the petitioner-mother be held in contempt for denying him access to Abraham. On 26 November 2008, the trial court appointed counsel to represent respondent-father at the termination of parental rights hearing. The termination hearing was held in special session on 25 August 2009.

At the beginning of the hearing, respondent-father made four motions to dismiss on various grounds. All four motions were denied. Petitioner-mother presented all of her evidence, which detailed the facts presented above and included testimony from respondent-father. At the close of petitioner-mother's evidence, respondent-father

made a motion to dismiss for insufficiency of the evidence. The court denied that motion.

To refute petitioner-mother's evidence, respondent-father also testified in his own defense; however, his testimony was solely limited to rebuttal of the petitioner-mother's testimony. At the close of all evidence, respondent-father made another motion to dismiss which was denied by the trial court.

On 28 September 2009, the trial court issued an order that it was in the best interests of Abraham that respondent-father's parental rights be terminated. Respondent-father filed notice of appeal on 25 August 2009.

On appeal, respondent-father challenges the trial court's conclusion that grounds exist to terminate his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a) (2009). Respondent-father also contends, largely based on his first argument, that the trial court abused its discretion by continuing to the disposition stage and determining pursuant to N.C. Gen. Stat. § 7B-1110(a) (2009) that termination of his parental rights was in the best interest of Abraham.

II. INSUFFICIENT GROUNDS FOR TERMINATING PARENTAL RIGHTS

[1] Respondent-father asserts that the trial court erred by concluding that grounds existed to terminate his parental rights. Based on the record before us, we disagree with respondent-father and affirm the trial court.

N.C. Gen. Stat. § 7B-1111(a) sets out the statutory grounds for terminating parental rights. A finding of any one of the separately enumerated grounds is sufficient to support a termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000)).

The trial court concluded that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (neglect), (4) (willful failure to pay for care and support), (6) (failure to provide proper care and supervision), and (7) (willful abandonment) to terminate respondent-father's parental rights. We first address the court's conclusion that respondent-father neglected Abraham.

According to N.C. Gen. Stat. § 7B-1111(a)(1), a court may terminate one's parental rights where:

> The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

"Neglect" is statutorily defined, in pertinent part, as follows:

> Neglected juvenile.—A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C.G.S. § 7B-101(15) (2009). In determining whether neglect has occurred, "the trial judge may consider . . . a parent's complete failure to provide the personal contact, love, and affection that [exists] in the parental relationship." *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982). "Incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re Yocum*, 158 N.C. App. 198, 207-08, 580 S.E.2d 399, 405 (2003).

In the present case, the trial court made the following findings of fact in support of its conclusion that respondent-father neglected Abraham:

> 31. Respondent was incarcerated in the Wake County Jail as a Federal Pre-Trial detainee from June 2005 until approximately March 2006.
>
> 32. During this time of his incarceration, the Respondent had not seen the minor child and he had engaged in limited telephone contact with the minor child.
>
> 33. Upon the Respondent's pre-trial release from federal custody in March 2006 the Petitioner secured an ex parte order suspending the respondent's visitation until the matter was heard by the court.
>
> . . . .
>
> 36. Respondent exercised [his] first visit and, before he could exercise the second visitation[,] . . . the respondent was

arrested for assault on a female concerning his at the time li[v]e-in-girlfriend and was placed in the Harnett County Jail.

. . . .

39. On May 22, 2006, The Honorable Jacqueline L. Lee, District Court Judge presiding over Harnett County Domestic Relations Court entered an order ceasing the Respondent's visitation with the minor child until further orders of the Court.

40. Nothing was filed by the Respondent . . . [regarding the court ordered cease of visitation] from May 22, 2006 until July 2008 after the termination of parental rights action was filed . . . .

. . . .

47. Respondent has had funds available to him and has had and continues to have an ability to pay support for the minor child and has failed to do so.

48. Respondent has never paid any child support to the petitioner for the use and benefit of the minor child; neither while he was employed, nor when he was initially incarcerated, nor while he has been in the federal prison system earning income. . . .

. . . .

49. During all of the time that the Respondent has been incarcerated he has not written any letters to the minor child, nor has he sent any cards.

. . . .

52. Respondent has not sent any gifts or packages or items to the minor child. He did in 2007 register the minor child to receive a gift from an Angel Tree program for children with incarcerated fathers.

55. Respondent only made one telephone call to the minor child between June 2005 and February 2006.

56. Respondent has not been a part of the minor child's school or extracurricular activities nor has he written the minor child to inquire about such subjects or any other matter.

57. Respondent has not provided the juvenile with proper care supervision or discipline.

58. Respondent has abandoned the juvenile by virtue of his criminal acts that led to his post and pre[-]trial incarcerations.

59. The Respondent's actions, as set forth herein above constitutes neglect of the minor child.

Respondent-father specifically disputes finding of fact number 55 in his brief and contends that he called Abraham at least four times between June 2005 and February 2006. He asserts that petitioner-mother's diary supports his contention, as it shows that petitioner-mother made entries providing that respondent-father called on the following dates: 8 July 2005, 6 August 2005, 5 September 2005, and 7 February 2006. In addition, respondent-father contends that he attempted to maintain contact with Abraham through Keithley by requesting that she call petitioner-mother on his behalf.

With regard to respondent-father's contentions, we note that respondent-father has been in prison for over half of Abraham's life. Respondent-father has had minimal contact with Abraham since his imprisonment, and has not actually seen the minor child since 4 April 2006. In 2007, respondent-father registered Abraham to receive a gift from the Angel Tree program for children with incarcerated fathers; however, aside from this program, respondent-father has not sent any gifts or packages to the minor child. Further, although there is evidence that respondent-father has attempted to contact Abraham by telephone and through intermediaries, he admittedly has not written any letters or sent cards to Abraham since his incarceration.

In addition, respondent-father admits that he has not provided financial support for Abraham since he and petitioner-mother divorced in 2004. In fact, the evidence showed, and the trial court found, that respondent-father has been assigned to work duty in the federal prison system since 2007 and that he has received funds from friends and family while in prison. Therefore, despite his ability to contribute to Abraham's well-being, respondent-father has not given any monetary support to the minor child. We hold that grounds for termination of respondent's parental rights under section 7B-1111(a)(1) were established by clear, cogent, and convincing evidence. As such, respondent-father's assignment of error is overruled.

Respondent-father also contends that the trial court erred by determining that grounds existed to terminate his parental rights pur-

suant to N.C. Gen. Stat. § 7B-1111(a)(4) (willful failure to pay for care and support), (6) (failure to provide proper care and supervision), and (7) (willful abandonment).

With regard to respondent-father's remaining arguments, we note that petitioner-mother concedes that Abraham is not a "dependant" child pursuant to N.C. Gen. Stat. § 7B-101(a)(9), and further concedes that there was no judicial decree ordering respondent-father to pay child support to petitioner-mother as required by N.C. Gen. Stat. § 7B-1111(a)(4). Petitioner's concessions are not fatal on appeal, given that a trial court's finding of one ground for termination of parental rights is sufficient. *See In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). Moreover, because we have upheld the trial court's findings and conclusion regarding neglect, we need not address respondent-father's assignments of error contesting any other ground for termination.

III. BEST INTEREST OF THE CHILD

[2] We next consider whether the trial court erred in concluding that it was in the best interests of the juvenile to terminate respondent-father's parental rights. Respondent-father bases his final argument on his contention that there are no grounds pursuant to N.C. Gen. Stat. § 7B-1111(a) to terminate his parental rights and on an argument that petitioner-mother intentionally thwarted his attempts to maintain a relationship with Abraham. Based on our holding above, and after further review of the record, including the trial court's order and briefs and contentions of the parties, we affirm the trial court.

"The trial court has discretion, if it finds that at least one of the statutory grounds exists, to terminate parental rights upon a finding that it would be in the [juvenile's] best interests." *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001). Factors to consider in determining the juvenile's best interests include: (1) the age of the juvenile; (2) the likelihood of adoption; (3) the impact on the accomplishment of the permanent plan; (4) the bond between the juvenile and the parent; (5) the relationship between the juvenile and a proposed adoptive parent or other permanent placement; and (6) any other relevant consideration. N.C. Gen. Stat. § 7B-1110(a) (2009). The court is to take action "which is in the best interests of the juvenile" when "the interests of the juvenile and those of the juvenile's parents or other persons are in conflict." N.C. Gen. Stat. § 7B-1100(3) (2005). As a discretionary decision, the trial court's disposition order will not be disturbed unless it could not have been the product of reasoning.

In re J.B., 172 N.C. App. 747, 751, 616 S.E.2d 385, 387, *aff'd*, 360 N.C. 165, 622 S.E.2d 495 (2005).

Here, the trial court's 28 September 2009 order reveals that the trial court considered the factors required by N.C. Gen. Stat. § 7B-1110(a). In pertinent part, the trial court found:

> 63. The minor child resides with the Petitioner, her current husband [M.L.] and his daughter [] who is 13 years old.
>
> 64. Petitioner is a Veterinary Technician for ATS contracted at Ft. Bragg and has been so for ten years. Her yearly income is approximately $22,000 to 24,000.00 per year.
>
> 65. [M.L.] is a Pharmacy Technician at Ft. Bragg and has been for six years. His yearly income is approximately $72,000.00.
>
> 66. Petitioner and [M.L.] have resided together with the minor child [] at their current residence since October 2005.
>
> . . . .
>
> 69. Petitioner and [M.L.] are both actively involved with the minor child's school. Additionally, they are both actively involved with the minor child's extracurricular activities such as baseball, Boy Scouts and the Boy Scout Derby, and they attend Calvary Baptist Church as a family.
>
> 70. The minor child gets along well with and has a close relationship with [M.L.'s] daughter [].
>
> 71. Petitioner and [M.L.] have been the sole source of parental care, support and guidance for the minor child. The Petitioner since the Respondent's first incarceration of June 2005 and [M.L] assisting the Petitioner since October 2005.
>
> 72. Petitioner is heavily involved with the minor child's school at Benhaven Elementary. She is on the School Improvement Team, has served as a proctor, attends awards ceremonies and back to school nights with the minor child.
>
> 73. [M.L.] is also active with the minor child's school.
>
> 74. Both Petitioner and [M.L.] are active with the minor child in cub scouts and boy scouts and the Pinewood derby and his recreational sports teams such as his baseball team.

75. The Respondent has not been a part of the minor child's school or extracurricular activities nor has he written the minor child to inquire about these subjects.

76. The minor child [] is a well-adjusted, happy child.

77. The minor child [] calls [M.L.] dad.

78. [M.L.] is the adult male who is filling the role of father in the life of this minor child.

. . . .

80. [M.L.] wishes and desires to adopt [Abraham] who he already sees as his son.

81. The Guardian Ad Litem's recommendation was that the Respondent's rights be terminated so that [M.L.] could adopt the minor child because of the following facts:

    a. That the Respondent has not been a presence in the minor child's life for approximately five years. The minor child was five years old when he last saw the Respondent and is now nine;

    b. The Respondent is incarcerated for a crime of violence that he chose to commit;

    c. That the Respondent has not provided any meaningful support—financial or otherwise—to the minor child;

    d. Termination[] and adoption would give [the minor child] the stability he needs.

82. Petitioner has proven by clear, cogent and convincing evidence that it is in the best interests of the juvenile [] that the parental rights of the respondent[-father] be terminated.

Despite the trial court's lengthy findings of fact, respondent-father argues that the trial court's conclusion does not take into consideration petitioner-mother's attempts to thwart his bond with Abraham. Respondent-father's contention is based solely on his sparse attempts to contact Abraham through Keithley or by telephone. With regard to this argument, we also note that, although respondent-father has not seen Abraham since 4 April 2006, the cessation of visitation was ordered by the district court in the custody case. Respondent-father has not challenged the district court's order, and the petitioner-mother was acting in accordance with that order.

Moreover, to date, respondent-father admittedly has not written letters or sent gifts to the minor child throughout the term of his imprisonment. In addition, respondent-father admits that he has not financially supported Abraham since he and petitioner-mother divorced in 2004. We conclude that respondent-father's own actions thwarted the bond between himself and the minor child, and as such, his argument on this issue is without merit.

Based on the trial court's findings of fact and the record, we hold that the trial court did not abuse its discretion in terminating respondent-father's parental rights. *See In re Humphrey*, 156 N.C. App. 533, 577 S.E.2d 421 (2003) (upholding termination order where evidence showed the mother failed to contact her child for a significant period and had withheld her love, care, and affection from the child).

We affirm the trial court's order terminating respondent-father's parental rights to his child.

Affirmed.

Judges McGEE and STROUD concur.

IN THE MATTER OF: L.I.

No. COA09-1306

(Filed 6 July 2010)

1. Confessions and Incriminating Statements— juvenile proceeding—Miranda warning—custodial interrogation—motion to suppress—improperly denied

The trial court in a juvenile proceeding erred in denying the juvenile's motion to suppress a statement made to a police officer during a traffic stop. The juvenile was in custody when she made the statement, the statement was in response to the officer's interrogation, and the juvenile had not been advised of her rights under *Miranda* and N.C.G.S. § 7B-2101(a). Furthermore, the State failed to argue that the error was harmless beyond a reasonable doubt.

2. Search and Seizure— exclusionary rule—Miranda violation—no coercion—motion to suppress—properly denied

The trial court in a juvenile proceeding did not err in denying the juvenile's motion to suppress contraband seized during a traffic stop. The exclusionary rule did not preclude the admission of the physical evidence obtained as a result of a *Miranda* violation where the juvenile made no argument that she was subjected to actual coercion.

Appeal by juvenile from orders entered 24 March 2009 by Judge Brian C. Wilks in Durham County District Court. Heard in the Court of Appeals 24 March 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

James N. Freeman, Jr. for juvenile-appellant.

HUNTER, Robert C., Judge.

Juvenile L.I. appeals from the trial court's orders adjudicating her delinquent and ordering a Level 2 disposition. Juvenile's main argument on appeal is that the trial court erred in denying her motion to suppress her statement to the police officer during a traffic stop as well as the contraband seized during the stop. We conclude that juvenile's statement was obtained in violation of her constitutional and statutory rights, and thus the trial court should have suppressed the statement. With respect to the contraband, however, juvenile has made no argument that she was subjected to actual coercion and thus the trial court properly admitted this evidence. Accordingly, we reverse and remand the matter for a new adjudication hearing.

Facts

The State's evidence tended to show the following facts: On 19 December 2008, Corporal Raheem Abdul Aleem, with the Durham County's Sheriff's Department, was patrolling the area of a recent robbery when he saw a Toyota 4Runner drive by and the male driver was not wearing his seatbelt. Corporal Aleem activated his blue lights and pursued the vehicle. Corporal Aleem stopped the car, exited his patrol car, and approached the driver's side window. For safety purposes, Corporal Aleem asked the driver to exit the vehicle and walk back toward his patrol car. Corporal Aleem then frisked the driver for weapons and placed him in "investigative detention" while he contin-

ued his investigation. Corporal Aleem next asked the front passenger to get out of the 4Runner and frisked him as well.

Juvenile, one of four other passengers in the backseat of the 4Runner, was then asked to get out of the car. Based on his conversation with the front passenger, as juvenile was getting out of the vehicle, Corporal Aleem asked juvenile for the marijuana that he "knew she had." When juvenile responded, "what marijuana?," Corporal Aleem stated: "the marijuana I know you have." Juvenile then turned away and appeared to reach in her pants. When Corporal Aleem tried to see what juvenile was "reaching for," she responded: "[Y]o, you can't look in my pants." At this point, Corporal Aleem placed juvenile in investigative detention, handcuffed her, and placed her in the backseat of the patrol car.

While waiting for a female officer to arrive to search juvenile, Corporal Aleem told juvenile that "if you take drugs into the jail[,] it's an additional charge." Corporal Aleem then called juvenile's school to verify her age. After calling the school, Corporal Aleem "went over to her window" because "she wanted to tell [him] something[.]" Juvenile then told him that the drugs were not in her pants but were in her right coat pocket. Juvenile leaned out of the patrol car, showing Corporal Aleem where the drugs were located. Corporal Aleem got juvenile out of the patrol car, reached inside her pocket, and pulled out a plastic bag containing nine individual bags of "green leafed material and two plastic bags of a powdered substance." Juvenile's mother arrived at the scene and Corporal Aleem explained to her that he was going to "do[] a petition on [juvenile]" and left juvenile in her mother's custody.

A juvenile petition was filed alleging that juvenile was delinquent for possessing marijuana with the intent to sell or deliver. Prior to the adjudication and disposition hearing, juvenile filed a motion to suppress her statements as well as the contraband. During the adjudication phase of the proceedings, defense counsel requested a *voir dire* to determine the admissibility of the statements and contraband. At the conclusion of the *voir dire*, the trial court entered an order from the bench denying juvenile's motion to suppress. The trial court subsequently adjudicated juvenile a delinquent juvenile and ordered a Level 2 disposition. Juvenile timely appealed to this Court.

I

[1] Juvenile first contends that the trial court erred in denying her motion to suppress her statement that she had marijuana in her coat

pocket. She contends that the statement was obtained as a result of a custodial interrogation conducted in violation of N.C. Gen. Stat. § 7B-2101 (2009) and without her having been advised of her rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

"A trial court's findings of fact following a hearing on the admissibility of a [juvenile]'s statements are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995). The trial court's conclusions of law must be supported by its findings and 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).

At a suppression hearing, "conflicts in the evidence are to be resolved by the trial court" and the court "must make findings of fact resolving any material conflict in the evidence." *State v. McArn*, 159 N.C. App. 209, 212, 582 S.E.2d 371, 374 (2003). Where, however, there is no material conflict in the evidence presented at the suppression hearing, specific findings of fact are not required. *State v. Parks*, 77 N.C. App. 778, 781, 336 S.E.2d 424, 426 (1985), *appeal dismissed and disc. review denied*, 316 N.C. 384, 342 S.E.2d 904-05 (1986). "In that event, the necessary findings are implied from the admission of the challenged evidence." *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980).

The Fifth Amendment of the United States Constitution guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Miranda*, the United States Supreme Court held that the Fifth Amendment requires that, prior to custodial interrogation, a person must be advised

> that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. at 479, 16 L. Ed. 2d at 726.

In addition to the warnings mandated by *Miranda*, the General Assembly has established statutory protections for juveniles. *See* N.C. Gen. Stat. § 7B-2101. Prior to questioning a juvenile in custody, the juvenile must be advised that: (1) "the juvenile has a right to re-

main silent"; (2) "any statement the juvenile does make can be and may be used against the juvenile"; (3) "the juvenile has a right to have a parent, guardian, or custodian present during questioning"; and (4) "the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation." N.C. Gen. Stat. § 7B-2101(a)(1)-(4). However, "*Miranda* warnings and the protections of N.C.G.S. § 7B-2101 apply only to custodial interrogations." *In re W.R.*, 363 N.C. 244, 247, 675 S.E.2d 342, 344 (2009).

On appeal, both juvenile and the State predominately focus their arguments on whether juvenile was in custody when she made her statement to Corporal Aleem that the drugs were in her coat pocket. The record indicates, however, that the State, in arguing for the admission of juvenile's statement at the conclusion of the *voir dire*, did not contend that juvenile was not in custody at the time of her statement or that its evidence was sufficient to support a finding to that effect. Instead, the State argued that Corporal Aleem's "testimony shows that [juvenile] made statements to the officer at this point voluntarily. She decided that she did not want to be charged with taking drugs in a detention facility." Similarly, the trial court determined that, irrespective of whether juvenile was in custody at the time she made the statement, she made the statement voluntarily:

> THE COURT: As far as—as it concerns the statement, the court will find that the juvenile initiated contact with the officer by asking him to come back over that the juvenile wanted to talk to him and therefore was not custodial interrogation, but rather a voluntary statement given by the juvenile at that time.

Although the trial court did not make a finding regarding whether juvenile was in custody at the time of her statement, our Supreme Court has held that "[t]he absence of such a finding . . . does not prevent [an appellate court] from examining the record and determining whether [the] defendant was in custody." *State v. Torres*, 330 N.C. 517, 525, 412 S.E.2d 20, 24 (1992); *accord State v. Hall*, 131 N.C. App. 427, 431, 508 S.E.2d 8, 12 (1998) (reviewing whether defendant was in custody for *Miranda* purposes despite absence of finding on issue), *aff'd per curiam*, 350 N.C. 303, 513 S.E.2d 561 (1999).

In determining whether a person is in custody for purposes of *Miranda* and N.C. Gen. Stat. § 7B-2101, the "ultimate inquiry" is whether, based on the totality of the circumstances, there was a formal arrest or restraint on freedom of movement of the degree associ-

ated with a formal arrest. *State v. Buchanan*, 353 N.C. 332, 338, 543 S.E.2d 823, 827 (2001); *W.R.*, 363 N.C. at 248, 675 S.E.2d at 344. This "ultimate inquiry" is "an objective test, based upon a reasonable person standard, and is 'to be applied on a case-by-case basis considering all the facts and circumstances.' " *Hall*, 131 N.C. App. at 432, 508 S.E.2d at 12 (quoting *State v. Medlin*, 333 N.C. 280, 291, 426 S.E.2d 402, 407 (1993)).

Corporal Aleem's uncontradicted testimony indicates that, at the time of juvenile's statements, he had "placed her in investigative detention," had handcuffed her, and had placed her in the backseat of his patrol car. Considering the totality of the circumstances, juvenile was in custody at the time of her statement. *See State v. Johnston*, 154 N.C. App. 500, 503, 572 S.E.2d 438, 441 (2002) (concluding defendant was in custody where defendant was ordered out of vehicle, handcuffed, placed in backseat of patrol car, and told that he was in "secure custody"), *appeal dismissed*, 356 N.C. 687, 578 S.E.2d 320 (2003).

With respect to whether juvenile's statement was the product of custodial interrogation, the trial court determined that it was a "voluntary," spontaneous statement, unsolicited by Corporal Aleem. The "determination of whether an interrogation is conducted while a person is in custody" is a question of law, "fully reviewable on appeal." *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826.

Under *Miranda*, "interrogation" includes both "express questioning" by police and its "functional equivalent"—"any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980). However, "because 'the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.' " *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000) (quoting *Innis*, 446 U.S. at 301-02, 64 L. Ed. 2d at 308), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Relevant factors for determining whether police "should have known" that their conduct was likely to elicit an incriminating response include: "(1) 'the intent of the police'; (2) whether the 'practice is designed to elicit an incriminating response from the accused';

and (3) '[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion . . . .' " *State v. Fisher*, 158 N.C. App. 133, 142-43, 580 S.E.2d 405, 413 (2003) (quoting *Innis*, 446 U.S. at 302 nn. 7-8, 64 L. Ed. 2d at 308 nn. 7-8), *aff'd per curiam*, 358 N.C. 215, 593 S.E.2d 583-84 (2004).

On appeal, juvenile contends that Officer Aleem's statements to her, while she was alone and handcuffed in the backseat of the patrol car, that he was "taking her downtown" and that it was an "additional charge" to take drugs into a detention facility "were clearly made to 'elicit an incriminating response' from the juvenile." We agree.

In *State v. Phelps*, 156 N.C. App. 119, 121, 575 S.E.2d 818, 820 (2003), *rev'd per curiam for reasons stated in the dissent*, 358 N.C. 142, 592 S.E.2d 687-88 (2004),[1] the police officer explained to the defendant, while transporting him to jail and without providing any *Miranda* warnings, that "he needed to let me know right now before we went past the jail doors if he had any kind of illegal substances or weapons on him, that it was an automatic felony no matter what it was, so he better let me know right now." The defendant told the police officer that he had crack cocaine in his coat pocket and the officer retrieved the drugs. *Id.* On appeal from the denial of his motion to suppress the cocaine, the defendant argued, as juvenile contends here, that "his statement regarding the location of the crack cocaine was inadmissible because he was not read his *Miranda* warnings prior to the statement being made and the statement was obtained during custodial interrogation." *Id.* at 122, 575 S.E.2d at 821. In holding that the trial court should have granted the defendant's motion to suppress, this Court explained:

> [The officer] knew or should have known that his statement was reasonably likely to evoke an incriminating response. [The officer]'s objective purpose was to obtain defendant's admission or denial of the possession of contraband. Therefore, we conclude the trial court erred in admitting defendant's incriminating

1. Although Judge R.C. Hunter concurred that a *Miranda* violation occurred in *Phelps*, he dissented on the grounds that the majority was incorrect in concluding that the trial court's erroneous admission of the defendant's incriminating statement was harmless beyond a reasonable doubt and that the evidence was also admissible under the inevitable discovery doctrine. *Phelps*, 156 N.C. App. at 127-28, 575 S.E.2d at 823-25 (Hunter, R.C., J., dissenting). On review, the Supreme Court reversed per curiam the majority's decision "[f]or the reasons stated in the dissenting opinion[.]" *Phelps*, 358 N.C. at 142, 592 S.E.2d at 687-88. *Phelps* is thus controlling with respect to the holdings reached by the entire panel as well as those conclusions in Judge Hunter's dissent.

> statement because the officer failed to advise defendant of his *Miranda* warnings prior to the custodial interrogation.

Id. at 123, 575 S.E.2d at 821.

This case is factually indistinguishable from *Phelps*. When Corporal Aleem first ordered juvenile to get out of the SUV, he asked her directly: "[Where is] the marijuana I know you have[?]" After handcuffing and placing juvenile in the back of the patrol car, Corporal Aleem told her that he was going to "take her downtown" and that "if [she] t[ook] drugs into the jail it[] [would be] an additional charge." In "response" to Corporal Aleem's statements, juvenile told him that she had marijuana and that it was in her coat pocket.

Based on *Phelps*, we conclude that Corporal Aleem "knew or should have known that his statement was reasonably likely to evoke an incriminating response." *Id.* Corporal Aleem's testimony indicates that it was his "objective purpose" to obtain juvenile's admission that she possessed the marijuana that Corporal Aleem "knew she had." *Id.* The trial court, therefore, erred in denying juvenile's motion to suppress her statement made during a custodial interrogation without being advised of her rights under *Miranda* and N.C. Gen. Stat. § 7B-2101(a).

Although we conclude that the trial court erred in denying juvenile's motion to suppress her statement, "not all errors involving incriminating statements obtained in violation of *Miranda* require new trials." *State v. Washington*, 102 N.C. App. 535, 540, 402 S.E.2d 851, 854 (Greene, J., dissenting), *rev'd per curiam for reasons stated in the dissent*, 330 N.C. 188, 410 S.E.2d 55 (1991). Pursuant to N.C. Gen. Stat. § 15A-1443(b) (2009), "[a] violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." Under N.C. Gen. Stat. § 15A-1443(b), the State bears the burden of demonstrating that the error was harmless beyond a reasonable doubt. *State v. Turner*, 330 N.C. 249, 266, 410 S.E.2d 847, 857 (1991). Here, however, the State fails to make any argument on appeal that the erroneous admission of juvenile's statement was harmless beyond a reasonable doubt. Consequently, the State has failed to meet its burden of proof under N.C. Gen. Stat. § 15A-1443(b). *See State v. Pinchback*, 140 N.C. App. 512, 520-21, 521 n.4, 537 S.E.2d 222, 227, 227 n.4 (2000) (holding that State did not meet its burden of demonstrating that constitutional violation was harmless beyond a reasonable doubt where State did not address issue in its brief).

II

[2] Juvenile also contends that "[t]he contraband was discovered as a direct result of the illegal and unconstitutional interrogation." Thus, juvenile argues, the marijuana "was 'fruit of the poisonous tree,' " and should have been suppressed along with her statement. We note that, in violation of Rule 28(b)(6) of the Rules of Appellate Procedure, juvenile does not cite any authority in support of this contention.

We nonetheless conclude that the trial court did not err in admitting the evidence of the marijuana. With respect to *Miranda* violations, our Supreme Court has held, based on *Michigan v. Tucker*, 417 U.S. 433, 41 L. Ed. 2d 182 (1974), and *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222 (1985), that although a "statement which is obtained by the violation of the *Miranda* rule must be excluded," evidence "obtained as a result of the violation does not have to be excluded." *State v. May*, 334 N.C. 609, 612, 434 S.E.2d 180, 182 (1993), *cert. denied*, 510 U.S. 1198, 127 L. Ed. 2d 661 (1994). The exclusionary rule does not preclude the admission of physical evidence obtained as a result of a *Miranda* violation where "the record shows there was no actual coercion but only a violation of the *Miranda* warning requirement . . . ." *Id.*; *accord State v. Hardy*, 339 N.C. 207, 224, 451 S.E.2d 600, 610 (1994) ("Physical evidence obtained as a result of a failure to give required Miranda warnings . . . need not be excluded."); *State v. Harris*, 157 N.C. App. 647, 653, 580 S.E.2d 63, 67 (2003) ("[P]hysical evidence obtained in violation of *Miranda* is admissible unless obtained as a result of actual coercion.").

Although the trial court did not address actual coercion in its order, an appellate court "make[s] an independent determination of the ultimate issue of voluntariness based upon [its] examination and consideration of the entire record on appeal." *State v. Davis*, 305 N.C. 400, 419-20, 290 S.E.2d 574, 586 (1982); *accord State v. White*, 291 N.C. 118, 122, 229 S.E.2d 152, 155 (1976) (explaining that determination of whether statement is coerced must be based on "consideration of the entire record"). In determining whether a statement is voluntary, an appellate court "reviews the totality of the surrounding circumstances in which the statement was made." *State v. Brewington*, 352 N.C. 489, 499, 532 S.E.2d 496, 502 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001). "A statement is involuntary or coerced if it is the result of government tactics so oppressive that the will of the interrogated party 'has been overborne and his capacity for self-determination critically impaired . . . .' " *Phelps*,

156 N.C. App. at 125, 575 S.E.2d at 823 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 36 L. Ed. 2d 854, 862 (1973)); *accord Elstad*, 470 U.S. at 309, 84 L. Ed. 2d at 232 (equating "actual coercion" with "circumstances calculated to undermine the suspect's ability to exercise his free will"). Our Supreme Court has set out several factors to be considered in assessing whether a statement is coerced:

> whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Hardy, 339 N.C. at 222, 451 S.E.2d at 608. "The presence or absence of any one of these factors is not determinative." *State v. Kemmerlin*, 356 N.C. 446, 458, 573 S.E.2d 870, 881 (2002).

Here, "the record shows," *May*, 334 N.C. at 612, 434 S.E.2d at 182, that juvenile was not subjected to actual coercion. While we have concluded that juvenile was in custody at the time of her statement and that her *Miranda* rights were violated, there is no evidence suggesting that juvenile was deceived, that she was held incommunicado, that she was threatened or intimidated, that she was promised anything, or that she was interrogated for an unreasonable period of time. Nor is there any evidence that juvenile was under the influence of drugs or alcohol or that her mental condition was such that she was vulnerable to manipulation. *See State v. Nguyen*, 178 N.C. App. 447, 453, 632 S.E.2d 197, 202 (finding no coercion where "[n]o evidence appear[ed] in the record that tends to show that defendant was deceived; that defendant was held incommunicado; that defendant was interrogated for an unreasonable length of time; or that any promises, physical threats, or shows of violence were made"), *appeal dismissed and disc. review denied*, 360 N.C. 653, 637 S.E.2d 189 (2006), *cert. denied*, 549 U.S. 1291, 167 L. Ed. 2d 339 (2007); *State v. Campbell*, 133 N.C. App. 531, 538, 515 S.E.2d 732, 737 (concluding confession was voluntary where defendant was not deceived, held incommunicado, or threatened, and "[t]here was no indication that defendant was under the influence of impairing substances or that his mental capacity was debilitated"), *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999). Considering the totality of the circumstances, we conclude that juvenile's statement is not the product of actual

coercion and that the trial court properly admitted the evidence of the marijuana.[2]

In sum, we conclude that the trial court erred in denying juvenile's motion to suppress her statement. As for the contraband, we hold that the trial court properly admitted the evidence. Accordingly, we reverse the trial court's order denying juvenile's motion to suppress with respect to her statement, vacate the trial court's order adjudicating juvenile delinquent, and remand the case for further proceedings consistent with this opinion. Due to our disposition on appeal, we do not address juvenile's other arguments.

Reversed and remanded.

Judge CALABRIA concurs.

Judge HUNTER, Robert N., Jr. concurs in result only.

IN THE MATTER OF: J.H.K. AND J.D.K.

No. COA10-12

(Filed 6 July 2010)

Termination of Parental Rights— minors' guardian ad litem required to be at hearing

The trial court erred by conducting a termination of parental rights hearing when the minor children's guardian *ad litem* (GAL) was not physically present as required by N.C.G.S. § 7B-1108. The case was reversed and remanded for a new hearing with the GAL in attendance.

Appeal by respondent-father from order entered 18 September 2009 by Judge Polly D. Sizemore in Guilford County District Court. Heard in the Court of Appeals 28 April 2010.

Janet K. Ledbetter for respondent-father appellant.

Mercedes O. Chut for Guilford County Department of Social Services petitioner appellee.

2. Juvenile makes no argument that N.C. Gen. Stat. § 7B-2101 requires the exclusion of the evidence as a consequence of Corporal Aleem's failure to advise her of her statutory rights as a juvenile. We, therefore, do not address the issue.

Smith, James, Rowlett, and Cohen, by Margaret F. Rowlett for Guardian ad litem appellee.

HUNTER, JR., Robert N., Judge.

On 18 September 2008, the trial court terminated respondent-father's ("Mike's") parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (6) (2007). Mike appeals the trial court's order to this Court and contends, *inter alia*, that the trial court erred in conducting the termination of parental rights hearing when the minor children's guardian *ad litem* ("GAL") was not physically present. After careful review, we hold that the minor children's appointed GAL should have attended the termination of parental rights hearing. We accordingly reverse and remand for a new termination of parental rights hearing.

BACKGROUND

On 22 January 2007, police were called to the minor children's home. Upon arrival, the police observed needles and syringes used for drugs, marijuana, and several knives on a table accessible to the minor children. Officers noted that the washing machine and master bathtub were filled with dirty water, and that there was no food in the home except for a few apples. At this time, the minor children were three and four years old, living with their biological mother ("Eva").

The next day, employees from the Guilford County Department of Social Services ("DSS") visited the home. The DSS workers observed the kitchen in disarray, trash on the floor, debris in the hallways and bedrooms, and no food in the house except for the apples. Eva was in the house when DSS arrived. The minor children were running about unsupervised, and Eva appeared to be under the influence of drugs. When the DSS workers asked Eva to submit to a drug screen, Eva stated that the test would come back positive for cocaine and marijuana. The DSS workers observed needle track marks on Eva's arms. Mike was not living with Eva at this time.

DSS placed the minor children with a family friend, and contacted Mike, who was living in a hotel. After meeting with Mike in the lobby of the hotel, DSS told Mike that one of the minor children was ill, and that the child needed to be taken to the doctor.

On 25 January 2007, DSS met with Mike. At the meeting, Mike stated that he had not taken the child to the doctor. DSS workers pressed Mike on the reasons why he did not take the child in for med-

ical attention, and Mike became "belligerent" and cursed at several DSS workers.

On 26 January 2007, DSS filed a petition to have the minor children declared neglected and dependent, and Terry Helms was appointed as the minor children's GAL on 31 January 2007. A hearing was held on 16 March 2007, and based on the events between 22 and 25 January 2007, the trial court adjudicated the minor children neglected and dependent as defined under N.C. Gen. Stat. § 7B-101 (2007). The minor children were placed in foster care following the hearing. The record shows that Ms. Helms was not present at the hearing, but she did file a report containing her recommendations to the trial court. On 19 March 2007, Mike entered into a case plan for reunification with his children that contained the following requirements: (1) participate in a substance abuse assessment and follow the recommendations, (2) secure appropriate housing, (3) complete a parenting assessment and follow recommendations, (4) participate in parenting classes, (5) participate in Family Preservation Services, (6) submit to random drug screens, and (7) comply with visitation.

A follow-up hearing was held on 8 June 2007 concerning the minor children. At the hearing, the trial court made the following findings of fact pertaining to Mike's progress on his case plan.

> 2. A petition was filed January 25, 2007, and Adjudication and Disposition was held on March 16, 2007, adjudicating the children neglected and dependent.
>
> . . . .
>
> 4. The underlying issue was the ongoing substance abuse by the parents in the presence of the children.
>
> . . . .
>
> 7. It is reported that on March 21, 2007, [Eva] suffered from 3rd degree burns as a result of [Mike] pouring rubbing alcohol on her body and setting her on fire. She was burned on 35% of her body. She was burned down the right side of her body, both legs, on a portion of her back and her hair. Her feet were very swollen as a result of the burn. She required various skin [grafts] as a result of this injury. She also reported that she remembers [Mike] trying to strangle her. [Eva] remained at [the hospital] from March 21, 2007, until March 31, 2007.
>
> . . . .

9. [Mike] is currently incarcerated in the High Point Jail. A letter was received from him on May 22, 2007. He is currently participating in ADS through the PRIDE program. He is receiving substance abuse.

The trial court further found that Mike had participated in both substance abuse and parenting assessment as required under the case plan, but he had failed to meet any other goals in the plan. Ms. Helms did not attend the hearing, but she filed a report with the trial court recommending the minor children's further placement with their foster parents.

A Permanency Plan Review Hearing was held on 7 September 2007. Following the hearing, the trial court entered an order stating that the permanent placement plan for the minor children would be adoption with a concurrent effort made toward reunification. Ms. Helms did not attend the hearing, but she filed a report with the trial court recommending a permanent placement of adoption rather than reunification. In November 2007, Mike was released from jail, and he entered into a new case plan with DSS.

Further review hearings concerning the minor children were held on 30 November 2007, 7 March 2008, and 30 May 2008. Ms. Helms filed reports for these hearings but she did not attend. On 16 December 2008, the trial court entered orders appointing Karen Moorefield as the minor children's new GAL. At a review hearing held 17 December 2008, GAL filed no report and Karen Moorefield did not attend the hearing. On 13 March 2009, a review hearing was held; Karen Moorefield did not attend the hearing nor did she file a report with the trial court.

The initial petition to terminate Mike's parental rights was filed on 15 November 2007, and a second petition was filed in July 2008. In the petition, DSS alleged that grounds existed under subsections (1), (3), and (6) of N.C.G.S. § 7B-1111(a) to terminate Mike's parental rights.

Proceedings to terminate Mike's parental rights were continued several times in 2009. On 14 and 15 July 2009 the hearing began, and after hearing the evidence, the trial court entered an order terminating Mike's parental rights making the following findings:

22. While incarcerated in the Guilford County jail, [Mike] completed the PRIDE program; participated in NA/AA classes; did

not get any infractions; and was cooperative with the Guilford County Jail until he was discharged on November 2, 2007.

23. [Mike] cooperated with [DSS] by voluntarily sharing information with the social worker that he used marijuana while incarcerated. Upon release from the Guilford County jail, the father contacted [DSS] and advised that he had been released. He further advised that he would be entering the Prodigal Son Drug Treatment Program on November 5, 2007 at 10:00 a.m.

. . . .

25. Following his release from jail and placement on supervised probation, [Mike] began receiving services for his substance abuse issues in a residential drug treatment facility on November 2, 2008, at the Christian Counseling and Wellness Group. This is a possible two year program but can be completed in 12 months.

26. [Mike's] case plan was updated to include the condition that he would participate in the Christian Counseling Wellness Group.

27. During the time [Mike] was in the Christian Counseling Wellness Group, he was in substantial compliance with the case plan as he [was] residing at this facility, he was submitting to drug screens, which were negative, and he obtained a substance abuse assessment through the facility. In addition, he was visiting with the children. He did not participate in a parenting psychological assessment. He began parenting classes but did not complete the program.

28. In March of 2008, [Mike] left the [Christian] Counseling Wellness Group without successfully completing the program.

29. After leaving this program, [Mike] did not maintain any contact with [DSS], he did not submit to any drug screens and did not remain in compliance with his case plan.

30. [Mike] has not visited with the minor children since leaving the residential drug treatment facility on March 25, 2008.

31. In June, 2008, [Mike] was arrested for violating his probation. He did not contact DSS and let them know of his incarcera-

tion. [Mike] admitted to a willful violation of his probation and took an active sentence in September, 2008.

. . . .

36. Since the minor children came into custody, [Mike] does well and addresses his substance abuse issues only while incarcerated or in residential treatment.

37. During the 2 1/2 years or 30 months the children have been in foster care, both parents have had periods of recovery and then relapse and have not had a period of recovery of any significant length in which any substantial progress was made such that the children could be returned to them on even a trial basis.

38. During the 2 1/2 years the children have been in foster care, both parents have committed criminal charges and the father has willfully violated probation. Each parent has had periods of incarceration in which they are unable to care [for] or even see their children.

. . . .

40. Both parents knew of the petitions to terminate their parental rights. Due to the petitions being put on hold, both parents had [a] substantial amount of time to work on their substance abuse, work on their case plan and show they were able to provide a home and proper supervision for their children, but both parents failed to do so within the 30 months the children have been in foster care.

. . . .

42. There is a probability of a repetition of neglect if the minor children are returned to [Mike] as he remains incarcerated on charges which occurred after the children were placed in foster care, he relapsed within four months of his release from jail in 2008 and he has not successfully addressed his substance abuse issues except during incarceration or a residential drug treatment program and that was for a period of only four months.

Based on these findings, the trial court found that grounds existed to terminate Mike's parental rights under subsections (1) and (6) of N.C.G.S. § 7B-1111(a). The trial court further found that it was in the

best interests of the minor children to terminate Mike's parental rights. Karen Moorefield filed a two-page report with the trial court in support of terminating Mike's parental rights, but she was not present at any of the termination of parental rights proceedings. Mike filed a timely notice of appeal.

ANALYSIS

Citing *In re R.A.H.*, 171 N.C. App. 427, 614 S.E.2d 382 (2005), Mike argues that N.C. Gen. Stat. §§ 7B-601, -1108 (2007) mandate a GAL's attendance at a termination of parental rights hearing, and that in this case the trial court erred by conducting the hearing without the minor children's GAL being present. We agree.

Section 7B-601 of our General Statutes states:

> When in a petition a juvenile is alleged to be abused or neglected, the court shall appoint a guardian ad litem to **represent** the juvenile. . . . The juvenile is a party in all actions under this Subchapter. . . . The duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

N.C.G.S. § 7B-601(a) (emphasis added). Section 7B-1108(b) provides that if a parent's response to a petition to terminate parental rights "denies any material allegation of the petition[,] . . . the court shall appoint a guardian ad litem for the juvenile to **represent** the best interests of the juvenile, unless . . . a guardian ad litem has already been appointed pursuant to G.S. 7B-601." N.C.G.S. § 7B-1108(b) (emphasis added). If a GAL has already been appointed pursuant to section 7B-601 and appointment of a GAL is also appropriate under section 7B-1108, section 7B-1108(d) further requires:

> the guardian ad litem appointed under G.S. 7B-601, and any attorney appointed to assist that guardian, **shall** also **represent the juvenile in all proceedings** under this Article and shall have the duties and payment of a guardian ad litem appointed under

> this section, unless the court determines that the best interests of the juvenile require otherwise.

N.C.G.S. § 7B-1108(d) (emphasis added).

This Court examined these statutes in *R.A.H.*, and held that the failure of the trial court to appoint a GAL prior to the termination of parental rights hearing was prejudicial error. *R.A.H.*, 171 N.C. App. at 432, 614 S.E.2d at 385. In that case, no GAL was appointed pursuant to section 7B-601 upon the filing of a petition of neglect. *Id.* at 430, 614 S.E.2d at 384. Over five months later, when the termination of parental rights hearing began, the minor child still had no GAL representation, and a GAL was not appointed until three and a half days into the termination of parental rights hearing. *Id.* In reversing and remanding the case for a new hearing, we observed:

> In the instant case, the trial court made a valiant effort to correct the error and proceed with the termination hearing by appointing a guardian *ad litem* immediately once the error was brought to its attention, and offering the newly appointed guardian *ad litem* the option of recalling witnesses and postponing further hearings in the matter. However, because our polar star in these proceedings is the best interests of the child, we must presume prejudice where, as here, a child was not **represented** by a guardian *ad litem* at a critical stage of the termination proceedings. This is particularly so in light of the fact that the minor child is not capable of understanding and protecting its own rights and interests.

Id. at 431-32, 614 S.E.2d at 385 (citation omitted) (emphasis added).

In this case, the minor children were first appointed a GAL following the petition alleging neglect under section 7B-601. From the time of this first appointment through the termination of Mike's parental rights, Terry Helms, or a properly substituted GAL, was responsible for being the minor children's *representative*. *See* N.C.G.S. §§ 7B-601, -1108. The minor children were parties in all the hearings taking place in this case prior to the petition to terminate Mike's parental rights. N.C.G.S. § 7B-601(a). After the petition was filed to terminate Mike's parental rights and Mike filed a response, section 7B-1108 mandated that a GAL "represent the [minor children] in *all proceedings*[.]" N.C.G.S. § 7B-1108(d) (emphasis added).

As we noted in *R.A.H.*, minor children are not capable of protecting their own rights and interests, and an attorney advocate is not a sufficient substitute to fill the particular role performed by a

GAL. *R.A.H.*, 171 N.C. App. at 431, 614 S.E.2d at 385 ("The functions of the guardian *ad litem* and the attorney advocate are not sufficiently similar to allow one to 'pinch hit' for the other when the best interest of a juvenile is at stake."). Thus, we do not believe that the General Assembly intended the term "represent" to merely require a GAL to prepare a report for the trial court to be submitted at the termination of parental rights hearing in lieu of actually appearing in the courtroom.

"Represent" means "[t]o serve as the official and authorized delegate or agent for" or "[t]o act as a spokesman for," *The American Heritage Dictionary* 1049 (2d ed. 1985); and the word is characterized as "[t]he act or an instance of standing for or acting on behalf of another[.]" *Black's Law Dictionary* 1328 (8th ed. 2004). Applying these definitions to sections 7B-601 and 7B-1108, it is apparent that these statutes require a GAL to "act" and be a "spokesman" for: (1) the minor child's health, safety, and welfare outside the courtroom; and (2) the minor child's best interests in the courtroom. *See* N.C.G.S. §§ 7B-601, -1108. Inside the courtroom, the GAL has a duty "to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses **at** adjudication; to explore options with the court **at** the dispositional hearing; [and] . . . to report to the court when the needs of the juvenile are not being met[.]" N.C.G.S. § 7B-601(a) (emphasis added). When a petition to terminate parental rights is filed and disputed by the parent, GALs are required to "represent the juvenile in all proceedings[.]" N.C.G.S. § 7B-1108(d).

Looking at these statutory duties, it is patently clear that a GAL's representation goes far beyond a written report addressed to the trial court at a termination of parental rights hearing. The GAL is obligated to be an active "agent" inside the courtroom and to vigorously promote a minor child's best interests. Given that a minor child is a party in all proceedings under section 7B-601, a GAL needs to be intimately familiar with a minor child's case, and be present to offer evidence, examine witnesses, explore options, and report to the trial court when a minor child's case comes on for a hearing. N.C.G.S. § 7B-601(a). When a petition to terminate parental rights is filed against a minor child's parent, the GAL is required to be an "agent" and a "spokesman" for a minor child's best interests in "all proceedings." N.C.G.S. § 7B-1108(d). We can imagine no set of circumstances in which a GAL can be an agent satisfactorily performing these duties without being present in the courtroom when a minor child's fate is being determined in the trial court.

The fundamental premise underlying our holding in *R.A.H.* was that a minor child needs GAL representation at every "critical stage of the termination proceedings." *R.A.H.*, 171 N.C. App. at 431, 614 S.E.2d at 385. Here, we can conceive of no weightier "critical stage" than the severance of a minor child's bond with his or her biological parent. It is at these most tender moments that a minor child needs the person charged with actively promoting their best interests—their representative. The plain meaning of "represent" includes an element of physical presence under sections 7B-601 and 7B-1108, and we conclude that these statutes mandate a GAL's physical presence at a termination of parental rights hearing. Since the minor children's GAL in this case did not attend the termination of parental rights hearing pursuant to section 7B-1008, we must presume prejudice as this Court did in *R.A.H.*[1] *R.A.H.*, 171 N.C. App. at 431, 614 S.E.2d at 385 ("[W]e must presume prejudice where, as here, a child was not represented by a guardian *ad litem* at a critical stage of the termination proceedings."). Accordingly, we reverse, and remand this case for a new hearing to be conducted with the minor children's GAL in attendance.

Reversed and remanded.

Judges McGEE and STROUD concur.

1. Appellee Guardian *ad litem* argues that Mike waived this argument, and therefore review here is not proper under Rule 10 of the North Carolina Rules of Appellate Procedure. This Court, however, has held that section 7B-1108 is "intended to protect the best interests of the child," and that a parent's failure to object under this statute will not preclude appellate review. *In re J.L.S.*, 168 N.C. App. 721, 723, 608 S.E.2d 823, 825 (2005); *see In re Fuller*, 144 N.C. App. 620, 622, 548 S.E.2d 569, 570-71 (2001). Though these cases deal with the consequences of failure to appoint a GAL instead of the GAL's failure to attend a hearing, we find the reasoning of these cases to be applicable to the case *sub judice*. Appellee's argument is therefore overruled.

STATE OF NORTH CAROLINA v. WADDELL JOHNSON HOPPER, JR., DEFENDANT

No. COA09-1211

(Filed 6 July 2010)

Search and Seizure— investigatory stop—reasonable suspicion of traffic violation—motion to suppress—properly denied

The trial court in a possession of controlled substances case did not err in denying defendant's motion to suppress evidence seized from his vehicle during a traffic stop. The police officer that stopped defendant had reasonable suspicion to believe that defendant committed a traffic violation by failing to have his taillights on while driving on a public street with his windshield wipers operating, thus supporting the traffic stop.

Appeal by defendant from judgment entered 7 May 2009 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 24 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General J. Joy Strickland, for the State.

S. Hannah Demeritt for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Waddell Johnson Hopper, Jr. appeals from the trial court's order denying his motion to suppress evidence seized during a traffic stop. Defendant contends that the police officer that stopped him lacked reasonable suspicion to conduct the stop, and thus the evidence seized was the product of an unconstitutional search and should have been suppressed. We conclude, however, that the officer had reasonable suspicion to believe that defendant committed a traffic violation supporting the traffic stop. We, therefore, affirm.

Facts

On 28 April 2008, Officer T.S. Mabe of the Winston-Salem Police Department was on routine patrol in Piedmont Circle, an apartment complex in Winston-Salem, North Carolina. Piedmont Circle, also the name of a street in the complex, "goes around some inner apartments, and then there's some outer apartments on the other side of the circle[.]" Corporal Mabe was contacted by investigators in the police

department's narcotics unit and was told that defendant, who was driving in front of him in a white Chevrolet SUV, was driving with a revoked license.

At the time of the call from the narcotics officers, it was "raining excessively heavy" and Corporal Mabe needed his windshield wipers on their highest setting to see out of his front windshield. Corporal Mabe saw defendant's white SUV in front of him and noticed that defendant did not have his taillights on despite the heavy rain. Corporal Mabe activated his blue lights and siren and stopped defendant's car. The narcotics officers arrived at the scene and defendant was cited for failing to have his vehicle's taillights in proper working order. During the traffic stop, defendant's vehicle was searched and the police found approximately 10 grams of marijuana, drug paraphernalia, and a 9mm handgun. Defendant was arrested and charged with possession of marijuana with the intent to sell or deliver, possession of drug paraphernalia, carrying a concealed weapon, and possession of a firearm by a felon.

Defendant filed a pre-trial motion to suppress the evidence seized pursuant to the traffic stop on the ground that Corporal Mabe did not have reasonable suspicion to stop defendant's vehicle. After conducting a hearing on 4 May 2009, the trial court entered an order on 7 May 2009, in which it concluded that Corporal Mabe had reasonable suspicion to conduct the traffic stop based on defendant's failure to have his taillights on while driving with his windshield wipers operating. Consequently, the trial court denied defendant's motion to suppress and defendant pled guilty to all charges, expressly reserving his right to appeal from the denial of his motion to suppress. The court consolidated the offenses into one judgment and sentenced defendant to a presumptive-range term of 16 to 20 months imprisonment. Defendant timely appealed to this Court.

Discussion

Defendant's only argument on appeal is that the trial court erred in denying his motion to suppress. In reviewing the denial of a motion to suppress, the appellate court determines whether the trial court's findings of fact are supported by competent evidence and whether those findings, in turn, support the court's conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). The court's findings of fact are binding on appeal if they are 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). The trial

court's conclusions of law, however, "are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S. Const. amend. IV. Traffic stops are permitted under the Fourth Amendment if the officer has " 'reasonable suspicion' to believe that a traffic law has been broken." *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008) (quoting *United States v. Delfin-Colina*, 464 F.3d 392, 396 (3d Cir. 2006)). Reasonable suspicion requires that "[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by [the officer's] experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)).

Reasonable suspicion is a less demanding standard than probable cause, *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645, *cert. denied*, —— U.S. ——, 172 L. Ed. 2d 198 (2008), and only requires a "minimal level of objective justification, something more than an 'unparticularized suspicion or hunch[,]' " *State v. Steen*, 352 N.C. 227, 239, 536 S.E.2d 1, 8 (2000) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). "A court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion" exists. *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)).

With respect to whether Corporal Mabe had reasonable suspicion to conduct a traffic stop of defendant's SUV on 28 April 2008, the trial court found:

> 4) It was raining hard and Corporal Mabe had to put his windshield wipers on the highest setting so that he could see out the front windshield of his patrol car.
>
> 5) When Corporal Mabe pulled behind the defendant's white SUV on the road known as Piedmont Circle, he observed that the defendant's vehicle did not have its taillights on as required by G.S. 20-129 at a time when Officer Mabe believed that the defendant's windshield wipers were operating.
>
> 6) Corporal Mabe believed Piedmont Circle was a public road.

> 7) Corporal Mabe issued the defendant a citation for failing to have taillights in proper working order pursuant to G.S. 20-129.

Based on its findings, the trial court concluded that "Piedmont Circle is a public road or highway within the meaning of G.S. 20-129"; that "Corporal Mabe reasonably believed that the defendant was required to have his taillights operating under the given weather conditions"; and that "Corporal Mabe had reasonable articulable suspicion to stop the defendant's vehicle for failing to have taillights in proper working order." Consequently, the court determined that the evidence seized pursuant to the traffic stop was "lawfully obtained" and denied defendant's motion.

N.C. Gen. Stat. § 20-129 (2009) provides in pertinent part that "[e]very vehicle upon a highway within this State" is required to have its headlights and taillights on

> [a]t any . . . time when windshield wipers are in use as a result of smoke, fog, rain, sleet, or snow, or when inclement weather or environmental factors severely reduce the ability to clearly discern persons and vehicles on the street and highway at a distance of 500 feet ahead, provided, however, the provisions of this subdivision shall not apply to instances when windshield wipers are used intermittently in misting rain, sleet, or snow.

N.C. Gen. Stat. § 20-129(a)(4). In turn, N.C. Gen. Stat. § 20-4.01(13) (2009), provides that "[t]he terms 'highway' and 'street' and their cognates are synonymous[,]" and include "[t]he entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic."

Defendant argues that "[t]he trial court's conclusion that Piedmont Circle is a public road is not supported by the findings of fact or the evidence of record and is incorrect as a matter of law." We note, as an initial matter, that the issue regarding whether a street is public or private is a question of fact. *See State v. Mark*, 154 N.C. App. 341, 345-46, 571 S.E.2d 867, 870 (2002) (addressing whether evidence was sufficient to support "reasonable inference" that road on which defendant was driving was public or private road), *aff'd per curiam*, 357 N.C. 242, 580 S.E.2d 693 (2003); *State v. Bowen*, 67 N.C. App. 512, 514-15, 313 S.E.2d 196, 197-98 (holding trial court could not determine as a "matter of law" that driveway into condominium complex was public vehicular area where evidence was conflicting but concluding

that evidence was "sufficient to take the case to the jury"), *appeal dismissed*, 312 N.C. 79, 320 S.E.2d 405 (1984); *see also State v. Mikolinski*, 56 Conn. App. 252, 261, 742 A.2d 1264, 1270 (1999) ("The question of whether a roadway is a public highway is a question of fact."), *aff'd*, 256 Conn. 543, 775 A.2d 274 (2001); *State v. Guillet*, 3 Conn. Cir. Ct. 380, 382, 215 A.2d 685, 687 (1965) ("Whether the defendant was operating a motor vehicle on a public highway, as the [DWI] statute requires, is a question of fact . . . ."); *State v. Scott*, 61 Or. App. 205, 208, 655 P.2d 1094, 1095 (1982) (holding that issue of whether streets in privately-owned condominium complex were open to the public was a question of fact). The trial court's determination, labeled as a conclusion of law, that Piedmont Circle is a "public road or highway," is thus more properly considered a finding of fact rather than a conclusion of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (defining conclusions of law as "any determination requiring the exercise of judgment or the application of legal principles" and findings of fact as "[a]ny determination reached through logical reasoning from the evidentiary facts" (internal citations and quotation marks omitted)). A trial court's "mislabeling" a determination, however, is "inconsequential" as the appellate court may simply re-classify the determination and apply the appropriate standard of review. *In re R.A.H.*, 182 N.C. App. 52, 60, 641 S.E.2d 404, 409 (2007). Accordingly, we review the trial court's finding that Piedmont Circle is a public street to determine whether it is supported by competent evidence. *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826.

Corporal Mabe testified that the Piedmont Circle apartment complex is property of the City of Winston-Salem and that the street Piedmont Circle, which runs through the apartment complex, is a "public road[.]" Corporal Mabe stated that he is assigned to patrol the Piedmont Circle complex and patrols the area every day. He also indicated that parking spots are provided for the apartment complex and that he saw cars parked along Piedmont Circle on 28 April 2008. This evidence is sufficient to support the trial court's finding that Piedmont Circle is a public street. *See State v. Cornett*, 177 N.C. App. 452, 454-55, 629 S.E.2d 857, 858 (holding that evidence was sufficient to support inference that road on which defendant was driving was "open[] to vehicular traffic" within meaning of DWI statute where both police officer and defendant testified that they drove on road and "there were no gates or signs indicating that it was a private road"), *appeal dismissed and disc. review denied*, 361 N.C. 172, 640 S.E.2d 56 (2006); *Bowen*, 67 N.C. App. at 515, 313 S.E.2d at 197-98

(concluding that evidence was sufficient to permit jury to reasonably conclude driveway into condominium complex was a "public vehicular area" where evidence showed that driveway was accessible from public highway, "appeared to serve a normal apartment complex," "For Sale" signs indicated public was permitted in complex, and parking was provided).

Defendant counters, however, that Piedmont Circle is not a public street, pointing to photographs he presented at the suppression hearing showing "No [T]respassing" signs posted somewhere in the Piedmont Circle apartment complex. Corporal Mabe, however, testified that he was not familiar with the signs and defendant did not present any evidence indicating that the signs were posted at the time of the stop. Nor did defendant present any evidence indicating to what specific property the no trespassing signs referred. We also note that although defendant presented photographs of street signs of other streets in the Piedmont Circle complex with green backgrounds and white lettering, indicating that they are public streets, defendant did not present a photograph of the street sign for Piedmont Circle itself. In short, the evidence presented at the suppression hearing is conflicting.

Where, as here, " 'there is a conflict between the [S]tate's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal.' " *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997) (quoting *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982)); *accord State v. Johnson*, 322 N.C. 288, 293, 367 S.E.2d 660, 663 (1988) ("[M]erely because there is evidence from which a different conclusion could have been reached does not warrant a reversal of the trial court's finding of fact. It is the trial court's duty to resolve any conflicts and contradictions that may exist in the evidence." (internal citations omitted)). As the trial court was entitled—and, in deed, required—to resolve the conflict between the State's evidence and defendant's evidence regarding whether Piedmont Circle is a public road, its determination, supported by competent evidence, will not be disturbed on appeal.

Defendant argues on appeal, as he did at the suppression hearing, that even if Piedmont Circle is a public street, N.C. Gen. Stat. § 20-129 does not apply to Piedmont Circle. In support of his argument, defendant relies on *Coleman v. Burris*, 265 N.C. 404, 409, 144 S.E.2d 241, 244-45 (1965), where the Supreme Court held that the provisions of N.C. Gen. Stat. § 20-129 "are not applicable" to roads within the

municipal street system, but, rather, apply only to those highways or streets that form part of the State highway system. *Compare* N.C. Gen. Stat. § 136-66.1(1) (2009) ("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 and to major business, industrial, governmental and institutional destinations located inside the municipalities.") *with* N.C. Gen. Stat. § 136-66.1(2) ("In each municipality the municipal street system shall consist of those streets and highways accepted by the municipality which are not a part of the State highway system.").

Coleman, however, was decided eight years before the enactment of N.C. Gen. Stat. § 20-4.01, the statute defining the term "highway" used in N.C. Gen. Stat. § 20-129. The language in N.C. Gen. Stat. § 20-4.01(13) is broader than the Court's holding in *Coleman*: the statute defines the term "highway"—and its synonym "street"—as "[t]he entire width between property or right-of-way lines of every way or place of whatever nature, *when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic*." (Emphasis added.) We interpret N.C. Gen. Stat. § 20-129 and N.C. Gen. Stat. § 20-4.01 according to the plain meaning of their terms. *See Smith v. Powell*, 293 N.C. 342, 346, 238 S.E.2d 137, 140 (1977) (holding that "[t]he definition of 'highway' in G.S. 20-4.01(13)" should be given its "plain and ordinary meaning" and "given the same connotation" to all provisions in Chapter 20 of the General Statutes "unless the context requires otherwise"). The broad definition of a highway or street in N.C. Gen. Stat. § 20-4.01(13) does not include a requirement that the highway or street be a part of the State highway system—only that it be "open to the use of the public as a matter of right for the purposes of vehicular traffic." Because defendant was "upon a [street] within this State" that is "open to the use of the public as a matter of right for the purposes of vehicular traffic," defendant was required to comply with N.C. Gen. Stat. § 20-129(a)(4).

Our holding that N.C. Gen. Stat. § 20-129 applies to all highways or streets as defined by N.C. Gen. Stat. § 20-4.01, including Piedmont Circle, is buttressed by examining other motor vehicle laws in Chapter 20 of the General Statutes using similar language. *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."). N.C. Gen. Stat. § 20-28(a) (2009), for example, makes it a misdemeanor for "any person whose drivers license has been revoked" to "drive[] any motor vehicle *upon the highways of the State* . . . ." (Emphasis added.) Applying defendant's rationale to N.C. Gen. Stat. § 20-28(a) would mean that individuals whose licenses have been revoked could drive on public highways and streets without violating the statute so long as they do not drive on highways and streets within the State highway system. We do not believe that the General Assembly intended to expose the general public to such an unreasonable danger. *See Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978) ("In construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results."). Likewise, N.C. Gen. Stat. § 20-10 (2009) prohibits any "person 14 years of age or under" to "operate any road machine, farm tractor or motor driven implement of husbandry *on any highway within this State*." (Emphasis added.) According to defendant, however, any person under the age of 14 could legally drive a farm tractor on any public highway or street in North Carolina so long as the road was not part of the State highway system. Again, we seriously doubt that the Legislature intended such an untoward result.

On appeal, defendant does not contend that his taillights were on while his windshield wipers were operating on 28 April 2008. Nor does he argue that if, as we have concluded, Piedmont Circle is a public street to which N.C. Gen. Stat. § 20-129 applies, Corporal Mabe did not have reasonable suspicion to stop him for violating the motor vehicle statute. Since we have held that Piedmont Circle is a public street under N.C. Gen. Stat. § 20-4.01(13) and that N.C. Gen. Stat. § 20-129(a)(4) applies to all public streets, the trial court properly concluded that Corporal Mabe had a reasonable suspicion to believe that defendant was committing a traffic violation when he observed defendant driving on Piedmont Circle using his windshield wipers in the inclement weather but not having his taillights on.

Our conclusion that Corporal Mabe correctly believed that Piedmont Circle is a public street, thus supporting a finding of reasonable suspicion that defendant had committed a traffic violation, distinguishes this case from the line of decisions holding that a law enforcement officer's mistaken belief that a defendant had committed a traffic violation is constitutionally insufficient to support a

traffic stop. *See*, *e.g.*, *State v. Ivey*, 360 N.C. 562, 565, 633 S.E.2d 459, 461-62 (2006) (holding that where defendant's failure to use turn signal did not constitute a traffic violation, police officer's stop was unreasonable), *overruled in part on other grounds by State v. Styles*, 362 N.C. 412, 665 S.E.2d 438 (2008); *State v. McLamb*, 186 N.C. App. 124, 127, 649 S.E.2d 902, 904 (2007) (concluding that where deputy stopped defendant based on mistaken belief that defendant was speeding, "the legal justification for th[e] traffic stop was not objectively reasonable" and "the stop violated defendant's Fourth Amendment rights"), *disc. review denied*, 362 N.C. 368, 663 S.E.2d 433 (2008). As the trial court's conclusion that Corporal Mabe had reasonable suspicion to believe that defendant had committed a traffic violation is supported by its findings and the evidence, we affirm the trial court's order denying defendant's motion to suppress.

Affirmed.

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

TAMERA FRANK & PETER FRANKLIN, PLAINTIFFS v. WALTER SAVAGE, JERRI STORIE & JOHNNY RIDDLE IN THEIR CAPACITY AS YANCEY COUNTY COMMISSIONERS; THE YANCEY COUNTY BOARD OF COMMISSIONERS; NATHAN BENNETT, IN HIS CAPACITY AS YANCEY COUNTY MANAGER; JASON ROBINSON, JERRI STORIE, CATHY KING, ELAINE BOONE, & JUDY BUCHANAN, IN THEIR CAPACITY AS MEMBERS OF THE YANCEY COUNTY DEPARTMENT OF SOCIAL SERVICES BOARD OF DIRECTORS; & THE YANCEY COUNTY DEPARTMENT OF SOCIAL SERVICES BOARD OF DIRECTORS, DEFENDANTS

No. COA09-1413

(Filed 6 July 2010)

1. Appeal and Error— notice of appeal—timely

Defendants' motion to dismiss plaintiffs' appeal for failure to file timely notice of appeal was denied. Defendants' failure to comply with the service requirements of Rule 58 of the rules of Civil Procedure required the application of Rule 3(c)(2) and under this Rule, plaintiffs' appeal was timely.

2. Open Meetings— Board of Commissioners—unannounced meeting

The trial court erred in granting defendants' motion to dismiss plaintiff's complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) alleging that the Board of Commissioners and its members violated the Open Meetings Law. Treating the allegations in plaintiffs' complaint as true, plaintiffs stated a cognizable claim that the Board of Commissioners violated N.C.G.S. §§ 143-318.12(b) and 153A-40.

3. Counties— authority of Board of Commissioners—composition of administrative board

The trial court erred in granting defendants' motion to dismiss plaintiff's complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) because, treating plaintiffs' allegations as true, plaintiffs stated a cognizable claim that the Board of Commissioners exceeded its authority and violated N.C.G.S. §§ 108A-4 and 153A-76 by revoking plaintiffs' appointments to the Department of Social Services Board of Directors.

4. Constitutional Law— due process—no adequate state remedy—not alleged

The trial court did not err by dismissing plaintiffs' due process claims where they did not allege the lack of adequate state remedy.

Appeal by plaintiffs from order entered 13 July 2009 by Judge Bradley Letts in Superior Court, Yancey County. Heard in the Court of Appeals 25 May 2010.

Parker Poe Adams & Bernstein LLP, by Robert A. Leandro and Elizabeth A. Magee, for plaintiffs-appellants.

Donny J. Laws, for defendants-appellees.

WYNN, Judge.

"In ruling upon a Rule 12(b)(6) motion, the trial court . . . should not dismiss the action unless it appears to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim."[1] In the present case, the trial court

1. *Arroyo v. Scottie's Professional Window Cleaning*, 120 N.C. App. 154, 158, 461 S.E.2d 13, 16 (1995), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996).

granted Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiffs Tamera Frank and Peter Franklin's complaint. Treating Plaintiffs allegations as true, we hold that the complaint was sufficient to state claims upon which relief may be granted against Defendant Yancey County Board of Commissioners. We therefore reverse, in part, the trial court's dismissal of Plaintiff's complaint.

In their complaint filed 23 January 2009, Plaintiffs alleged that during the regularly scheduled monthly meeting of the Yancey County Board of Commissioners on 11 November 2008, the Commissioners nominated and appointed Plaintiffs to serve on the Yancey County Department of Social Services ("DSS") Board of Directors. Plaintiffs were sworn into office by the Clerk to the Board of Commissioners immediately following the meeting.

Defendants Walter Savage, Jerri Storie, and Johnny Riddle were sworn into office on the new Board of Yancey County Commissioners on 1 December 2008. At a special meeting held that day, the new Board declared Plaintiffs' appointments invalid and, to the extent the appointments were valid, voted to revoke the appointments. Thereafter, the Board authorized the appointments of Defendants Elaine Boone and Judy Buchanan to serve as DSS Directors in place of Plaintiffs. Following the special meeting, Defendant Nathan Bennett, Yancey County Manager, sent a letter to Plaintiffs stating that the Board found Plaintiffs' appointments were not properly executed and therefore invalid.

On 9 December 2008, the Board held its regularly scheduled meeting and adopted the minutes of the 1 December 2008 meeting. Plaintiffs attended the 9 December 2008 meeting and requested reconsideration of the revocation and invalidation of their appointments. This request was denied. After the 9 December 2008 meeting, Defendant Nathan Bennett sent a letter to each of the Plaintiffs stating that the Board would not address the issue further and informing Plaintiffs that their recourse was to the courts.

In their complaint, Plaintiffs alleged numerous violations of their rights under the constitution and laws of North Carolina. Plaintiffs requested, among other things, injunctions restraining Defendants from further violations of Plaintiffs' rights; a declaratory judgment declaring the rights of the parties and declaring the actions of the new Board null and void; and that the costs of this action be taxed against Defendants. On 26 March 2009, Defendants filed an answer and a motion to dismiss Plaintiff's complaint pursuant to Rule

12(b)(6). By order filed 13 July 2009, the trial court granted Defendants' motion to dismiss.

On appeal, Plaintiffs contend that the trial court erred in granting Defendants' motion to dismiss because Plaintiffs' complaint stated claims based on valid legal theories: (I) alleged violations of N.C. Gen. Stat. § 143-318.9 & 318.12(b)(2) and N.C. Gen. Stat. § 153A-40(b); (II) alleged violations of N.C. Gen. Stat. § 108A-4; and (III) alleged violations of Plaintiff's Due Process Rights.

[1] Preliminarily, we address Defendants' Motion to Dismiss Plaintiffs' appeal filed with this Court on 31 March 2010. In their Motion to Dismiss, Defendants contend that Plaintiffs failed to file timely notices of appeal under Rule 3 of our Rules of Appellate Procedure, which provides that an appellant must file and serve a notice of appeal:

> (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or
>
> (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period;

N.C. R. App. P. 3(c)(1) & (2) (2010).

The trial court's order from which this appeal was taken was filed on 13 July 2009. According to Defendants' certificates of service, they deposited copies of the trial court's order in the mail on the same day. According to Plaintiffs, their attorney received the order on 17 July 2009. Plaintiffs filed respective notices of appeal on 13 August 2009. Plaintiffs thus filed their respective notices of appeal 31 days after entry of the order and 27 days from the date of receipt.

Defendants argue that Plaintiffs' failure to file timely notices of appeal under Rule 3(c)(1) warrants dismissal of their appeal. Plaintiffs reply that this Court should deny Defendants' motion to dismiss, as Defendants did not themselves comply with the Rules of Appellate Procedure.

Rule 3(c)(1) of the Rules of Appellate Procedure provides that a party must file and serve notice of appeal within thirty days after entry of judgment *if the party has been served a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure*. N.C. R. App. P 3(c) (emphasis added). Rule 58 provides that "[s]ervice and proof of service shall be in accordance

with Rule 5." N.C. Gen. Stat. § 1A-1, Rule 58 (2009). Rule 5(b) provides: "[a] certificate of service shall accompany every pleading and every paper required to be served . . . [and] shall show the date and method of service or the date of acceptance of service *and shall show the name and service address of each person upon whom the paper has been served*." N.C. Gen. Stat. § 1A-1, Rule 5 (2009) (emphasis added).

Defendants' certificate of service does not show the name or service address of any person upon whom the order was served. Plaintiffs argue that Defendants therefore did not properly serve them by mail and that this Court should determine the applicable deadline for appeal by using Rule 3(c)(2). Plaintiffs point out that they actually received the order on 17 July 2009, more than three days after entry of the order. By Plaintiffs' calculation, their 13 August 2009 filing was timely.

We faced a similar situation in *Davis v. Kelly*, 147 N.C. App. 102, 554 S.E.2d 402 (2001). Appellee in *Davis* argued that appellant "filed the notice of appeal more than 30 days after the judgment was entered and that her appeal should therefore be dismissed." *Id.* at 105, 554 S.E.2d at 404. The Court noted however that appellee "did not fully comply with the service requirements of Rule 58 of the Rules of Civil Procedure." *Id.* Under the applicable provisions of Rule 3, appellant had thirty days from the date she was properly served with the judgment.[2] *Id.* The Court therefore denied appellee's Motion to Dismiss the appeal.

We believe that Defendants' failure to comply with the service requirements of Rule 58 of the Rules of Civil Procedure in the present case requires us to apply Rule 3(c)(2) and not Rule 3(c)(1). We therefore hold that Plaintiffs' appeal is timely. Defendants' Motion to Dismiss Plaintiffs' appeal is denied.[3]

Turning to the merits of Plaintiffs appeal, we note that:

---

2. We recognize that the language of Rule 3 when *Davis* was decided differs from that of the current Rule 3. *See* N.C. R. App. P. 3(c) (2001) ("The running of the time for filing and serving a notice of appeal . . . is tolled as to all parties for the duration of any period of noncompliance with the service requirements of Rule 58 of the Rules of Civil Procedure . . . ."). We believe application of the current Rule 3 yields the same result.

3. To the extent that Plaintiff's appeal was not timely filed, we grant Plaintiffs' petition for a writ of certiorari. *See Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) ("Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner.")

> On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted. 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 County, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). "In ruling upon a Rule 12(b)(6) motion, the trial court should liberally construe the complaint and should not dismiss the action unless it appears to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim." *Arroyo v. Scottie's Professional Window Cleaning*, 120 N.C. App. 154, 158, 461 S.E.2d 13, 16 (1995), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

I

[2] Plaintiffs first argue that the trial court erred in dismissing the complaint because the Board of Commissioners and its members violated our Open Meetings Law, N.C. Gen. Stat. § 143-318.9 & 318.10 and § 143-318.12(b)(2), as well as § 153A-40, by holding a special meeting on 1 December 2008 without giving proper notice to the public.

N.C. Gen. Stat. § 143-318.10 provides that "[e]xcept as provided . . . each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting." N.C. Gen. Stat. § 143-318.10(a) (2009). N.C. Gen. Stat. § 143-318.12(b) provides "[i]f a public body holds an official meeting at any time or place other than a time or place [of its regularly scheduled meeting], it shall give public notice of the time and place of that meeting as provided in this subsection." N.C. Gen. Stat. § 143-318.12(b) (2009).

N.C. Gen. Stat. § 143-318.16 grants courts "jurisdiction to enter mandatory or prohibitory injunctions to enjoin" violations of this Article. N.C. Gen. Stat. § 143-318.16 (2009). N.C. Gen. Stat. § 143-318.16A states:

> Any person may institute a suit in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article. Upon such a finding, the court may declare any such action null and void.

N.C. Gen. Stat. § 143-318.16A(a) (2009).

Plaintiffs also cite N.C. Gen. Stat. § 153A-40, which pertains specifically to County Boards of Commissioners. That statute requires notice of a special meeting "to be posted on the courthouse bulletin board at least 48 hours before the meeting." N.C. Gen. Stat. 153A-40 (2009). Although there is no specific enforcement mechanism provided, Plaintiffs contend that they are entitled to enforcement of this statute under the Declaratory Judgment Act. *See* N.C. Gen. Stat. § 1-253 (2009). "[J]urisdiction under the Act may be invoked 'only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise.' " *A. Perin Dev. Co., LLC v. Ty-Par Realty, Inc.*, 193 N.C. App. 450, 451, 667 S.E.2d 324, 326 (2008) (quoting *Nationwide Mut. Insurance Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E.2d 654, 656-57 (1964)), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 230 (2009).

According to Plaintiff's complaint, notice of the 1 December 2008 special meeting of the Yancey County Board of Commissioners was not properly given. Treating the allegations in Plaintiffs' complaint as true, as we must, we conclude that Plaintiffs have stated a cognizable claim that the special meeting of the Board was held without complying with the notice requirements of N.C. Gen. Stat. § 143-318.12(b) and N.C. Gen. Stat. § 153A-40. *See Knight v. Higgs*, 189 N.C. App. 696, 704, 659 S.E.2d 742, 748 (2008) (holding that County Board of Elections violated the Open Meetings Law); *H.B.S. Contractors v. Cumberland County Bd. of Education*, 122 N.C. App. 49, 54, 468 S.E.2d 517, 521 (affirming trial court's declaration that County Board of Education violated Open Meetings Law), *disc. review improvidently allowed*, 345 N.C. 178, 477 S.E.2d 926 (1996). Plaintiffs are therefore entitled to a judicial determination of whether the actions taken by the Board at the unannounced meeting are null and void.

II

[3] Plaintiffs next argue that the trial court erred in dismissing their complaint because relief may be granted for Defendants' viola-

tion of N.C. Gen. Stat. § 108A-4. N.C. Gen. Stat. § 108A-1 provides that "[e]very county shall have a board of social services[.]" N.C. Gen. Stat. § 108A-1 (2009). "Each member of a county board of social services shall serve for a term of three years." N.C. Gen. Stat. § 108A-4 (2009).

Plaintiffs rely on *Bd. of Adjmt. of the Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 432 S.E.2d 310, *reh'g denied*, 335 N.C. 182, 436 S.E.2d 369 (1993). In that case, plaintiffs were members of a town Board of Adjustment. *Id.* at 423, 432 S.E.2d at 311. The town Board of Commissioners abolished the Board of Adjustment on which plaintiffs sat, and created a new Board of Adjustment with different members. *Id.* at 424-25, 432 S.E.2d at 312. The *Swansboro* plaintiffs sued, alleging a violation of N.C. Gen. Stat. § 160A-388(a), which mandated that all Board of Adjustment members serve for three years. *Id.* at 425, 432 S.E.2d at 312. Noting that the relevant statute did not require the city council to appoint a Board of Adjustment at all, our Supreme Court affirmed the trial court's award of summary judgment to Defendants. *Id.* at 426-27, 432 S.E.2d at 313-14.

The Court in *Swansboro* recognized that N.C. Gen. Stat. § 160A-146 empowered the city council "to create and abolish boards that are not established and required by law." *Swansboro*, 334 N.C. at 426, 432 S.E.2d at 313. N.C. Gen. Stat. § 153A-76 contains analogous language regarding County Government. *Compare* N.C. Gen. Stat. § 153A-76 (2009), *with* N.C. Gen. Stat. § 160A-146 (2009). N.C. Gen. Stat. § 153A-76 states, moreover, that "[t]he board [of commissioners] may not change the composition or manner of selection of a local board of education, the board of health, the board of social services, the board of elections, or the board of alcoholic beverage control." N.C. Gen. Stat. § 153A-76 (4) (2009).

Although *Swansboro* dealt with the authority of a town—rather than a county—Board of Commissioners, we believe the internal logic of that case is applicable to the circumstances before us. The result in *Swansboro* depended on the Board of Commissioner's power to dissolve an administrative board, the establishment of which was not required by law. *Id.* at 427, 432 S.E.2d at 313-14. The corollary to that principle is that when the establishment of the administrative board is required by law, the Board of Commissioners lacks the authority to abolish said board, in whole or in part. Moreover, N.C. Gen. Stat. § 153A-76 specifically pro-

hibits changing the composition or the manner of selecting the board of social services.

Plaintiffs' complaint alleges that Plaintiffs were appointed and sworn into office as Directors of Yancey County DSS. It alleges further that the new Board of Commissioners entertained a motion to revoke their appointments and appoint other persons in their places. Treating the allegations in Plaintiffs' complaint as true, we hold that Plaintiffs have stated a cognizable claim that the Board of Commissioners violated N.C. Gen. Stat. § 108A-4 (establishing three year term for member of county board of social services) and § 153A-76 (prohibiting abolishment of that board) when it revoked Plaintiff's appointments to the Yancey County DSS. Plaintiffs are entitled to a judicial determination of whether the Yancey County Board of Commissioners acted beyond its statutory authority when it invalidated their appointments. *See James v. Hunt*, 43 N.C. App. 109, 116, 258 S.E.2d 481, 486 (1979) (case was appropriate for declaratory judgment when member of Cemetery Commission challenged Governor's statutory basis for his removal), *disc. review denied*, 299 N.C. 121, 262 S.E.2d 6 (1980).

III

[4] Plaintiffs next argue that the trial court erred in dismissing their complaint because relief may be granted for a violation of their right to due process.

"To assert a direct constitutional claim . . . for violation of his procedural due process rights, a plaintiff must allege that no adequate state remedy exists to provide relief for the injury." *Copper v. Denlinger*, 363 N.C. 784, 788, 688 S.E.2d 426, 428 (2010). This principle holds for both state and federal due process claims. *See id.* (state constitution); *Gilbert v. North Carolina State Bar*, 363 N.C. 70, 85, 678 S.E.2d 602, 611 (2009) (federal constitution); *Snuggs v. Stanly County Dept. of Public Health*, 310 N.C. 739, 740-41, 314 S.E.2d 528, 529 (1984) (federal constitution).

Plaintiffs do not specify in their complaint or in their brief whether they mean to invoke the state or the federal constitution. Either way, Plaintiffs' complaint failed to allege that no adequate state remedy exists. Indeed, the complaint concurrently alleged cognizable claims under state law, as recognized above. Accordingly, we hold that the trial court did not err in dismissing Plaintiffs' due process claims.

We conclude by noting that Plaintiffs' argument in their brief concerns only their complaint as against the Yancey County Board of Commissioners and its members in their official capacities. Insofar as there is no error claimed in the trial court's dismissal of Plaintiffs' complaint with regard to the other named Defendants, we do not disturb the trial court's order regarding them.

Affirmed in part, Reversed in part.

Judges STROUD and HUNTER, JR. concur.

ERNEST TODD WOODLIFF, EMPLOYEE, PLAINTIFF v. THOMAS FITZPATRICK D/B/A CUSTOM WOODWORK UNLIMITED, EMPLOYER (NONINSURED), AND THOMAS FITZPATRICK, INDIVIDUALLY DEFENDANTS

No. COA09-1447

(Filed 6 July 2010)

Workers' Compensation— jurisdiction—independent findings—three or more workers—burden of proof not carried

The Industrial Commission correctly decided that it lacked jurisdiction over a workers' compensation claim where plaintiff-carpenter did not sustain his burden of showing that defendant regularly employed three or more employees.

Appeal by Plaintiff from Opinion and Award of the Full Commission of the North Carolina Industrial Commission filed 27 July 2009. Heard in the Court of Appeals 12 April 2010.

Jay Gervasi, P.A., by Jay A. Gervasi, Jr., for Plaintiff-Appellant.

Prather Law Firm, by J.D. Prather, for Defendant-Appellees.

BEASLEY, Judge.

Ernest Todd Woodliff (Plaintiff) appeals from an Opinion and Award of the North Carolina Industrial Commission (Commission) denying Plaintiff benefits under the Workers' Compensation Act (Act). Specifically, Plaintiff challenges the Commission's jurisdictional finding of insufficient evidence that Thomas Fitzpatrick d/b/a/

Custom Woodwork Unlimited and Thomas Fitzpatrick individually (collectively Defendant) regularly employed three or more employees and conclusion that "Defendant is not an employer subject to the provisions of the North Carolina Workers' Compensation Act" such that the "Commission does not have jurisdiction over this claim." Because Plaintiff has failed to sustain his burden of proof that Defendant regularly employs three or more employees, we affirm.

Plaintiff worked as a framing carpenter for Defendant, a general contractor, from 17 November 2006 through 7 December 2007, when he was injured while performing carpentry work for Defendant. Plaintiff filed a Form 18 Notice of Accident to Employer and Claim of Employee on 14 February 2008, and Defendant denied the claim on the basis that the Commission lacked jurisdiction because Defendant has never had three or more employees and was not the employer of Plaintiff on the date of the injury. Deputy Commissioner Adrian A. Phillips heard Plaintiff's claim on 24 September 2008 and found that Plaintiff, as well as at least five other individuals, were employed by Defendant before concluding that the Commission had jurisdiction over Defendant as an employer under the Act and awarding compensation for Plaintiff's injury. Defendant appealed to the Full Commission, which reversed the opinion of the deputy commissioner as to the finding of jurisdiction. Because the parties contested whether an employer-employee relationship existed between them at all relevant times and asked the Commission to determine whether Defendant was an employer subject to the Act, the Commission limited the initial testimony to that issue in order to make a primary ruling on jurisdiction. While the Full Commission agreed that Plaintiff was an employee under the Act, it found that "there is insufficient evidence to establish that the other individuals working with Plaintiff on projects for Defendant were employees of Defendant rather than subcontractors." Therefore, the Full Commission reversed the award of benefits on the ground of "insufficient evidence that Defendant regularly employed three or more employees in the same business with some constancy." From this decision, Plaintiff appeals.

The sole issue Plaintiff challenges is the Commission's decision that Defendant did not have the three employees required to come under the provisions of the Act. Defendant cross-assigns as error the Commission's: (1) conclusion that Plaintiff was an employee rather than a subcontractor of Defendant and (2) failure to rule on and grant Defendant's request to take additional evidence in connection with its appeal to the Full Commission.

"[T]he Commission has no jurisdiction to apply the Act to a party who is not subject to its provisions," *Williams v. ARL, Inc.*, 133 N.C. App. 625, 628, 516 S.E.2d 187, 190 (1999), therefore we first address the jurisdictional issue raised by Plaintiff regarding whether Defendant employer had the required number of employees to be subject to the Workers' Compensation Act. *See Chadwick v. Department of Conservation and Development*, 219 N.C. 766, 767, 14 S.E.2d 842, 843 (1941) (holding that whether the employer had requisite number of employees is one of jurisdictional fact).

While this Court generally reviews Commission opinions for any competent evidence in the record to support its conclusions of law, jurisdictional findings of fact are not binding and we must consider all the evidence in the record to make our own findings of fact. *Weston v. Sears Roebuck & Co.*, 65 N.C. App. 309, 314, 309 S.E.2d 273, 276 (1983); *see also Cain v. Guyton*, 79 N.C. App. 696, 698, 340 S.E.2d 501, 503 ("The Commission's findings of jurisdictional facts are not conclusive on appeal even if they are supported by competent evidence."), *aff'd*, 318 N.C. 410, 348 S.E.2d 595 (1986) . "Thus, it is incumbent on this Court to . . . make an independent finding." *Durham v. McLamb*, 59 N.C. App. 165, 168, 296 S.E.2d 3, 5 (1982); *see also Grouse v. DRB Baseball Management*, 121 N.C. App. 376, 378, 465 S.E.2d 568, 570 (1996) ("Whether an employer had the required number of employees to be subject to the Workers' Compensation Act is a question of jurisdiction and this Court is required to review the evidence and make an independent determination.").

Pursuant to the current law under N.C. Gen. Stat. § 97-2(1), the version which was also in effect at the time of Plaintiff's accident on 7 December 2007, an employer is subject to the provisions of the Act if it regularly employs three or more employees. *See* N.C. Gen. Stat. § 97-2(1) (2007) (defining the parameters of "employment" under the Act to include "all private employments in which three or more employees are regularly employed in the same business or establishment"). Plaintiff has the burden of proof, and if he cannot show that Defendant did " 'regularly employ' [three] or more employees, he is not subject to and bound by the Act." *Patterson v. Parker & Co.*, 2 N.C. App. 43, 48, 162 S.E.2d 571, 574 (1968); *see also Cain*, 79 N.C. App. at 698, 340 S.E.2d at 503 (holding the plaintiff has the burden of proving that the employer regularly employed five—now three—or more employees). Moreover, "evidence showing a defendant had in his employ [three] or more employees 'must affirma-

tively appear' in the record to sustain the jurisdiction of the Industrial Commission over the claim." *Durham*, 59 N.C. App. at 170, 296 S.E.2d at 6 (quoting *Chadwick*, 219 N.C. at 767, 14 S.E.2d at 843). Although the Act leaves undefined the term "regularly employed," this Court has examined its meaning and stated in *Patterson*:

> We believe that the term 'regularly employed' connotes employment of the same number of persons throughout the period with some constancy. It would not seem that the purpose of the Act would be accomplished by making it applicable to an employer who may have had, in the total number of persons entering and leaving his service during the period, more than the minimum number required by the Act.

Patterson, 2 N.C. App. at 48-49, 162 S.E.2d at 575. Still, "[i]n considering whether [D]efendant[] had [three] or more regularly employed workers, 'the fact that [the employer] fell below the minimum requirement on the actual date of injury would not preclude coverage.' " *Grouse*, 121 N.C. App. at 379, 465 S.E.2d at 570 (quoting *Patterson*, 2 N.C. App. at 48, 162 S.E.2d at 574).

In this case, there is evidence that several individuals performed work on projects for Defendant with Plaintiff at various times throughout Plaintiff's employ, including Stuart Thomas, Dexter Trivett, Tony Martin, Chad Cooper, Hiawatha Withers, Michael Bowens, and Gregory Penfield. However, when describing the work and types of projects he had done for Defendant throughout the course of his nearly one-year employment, Plaintiff testified that people were assigned to work with him depending on the job and varied from site to site. Asked whether these people worked simultaneously with him, Plaintiff responded: "Yeah, on some of them. Then—we went through so many people there." The Commission also inquired of Plaintiff whether the named individuals worked with him and, if so, for how long. Plaintiff testified that "Dexter probably only lasted about a month or so. Stuart lasted about three weeks, but Chad and Tony—they lasted a couple months or better." The evidence also shows that Defendant's relationship with Mr. Withers was terminated at some point during Plaintiff's employment. Defendant Fitzpatrick also contradicted Plaintiff's suggestion that the individuals were working for him at the same time. He testified, rather, that they were subcontractors who contracted with Defendant for various projects throughout 2007 but who also engaged in other work, including Mr. Martin whose primary trade was in telecommunications tower assem-

bly. Defendant Fitzpatrick explained the difficulty of keeping skilled help for long periods of time and thus opted to engage various subcontractors with whom he had developed a relationship for different projects when they were available.

While acknowledging that the dates when these named workers came and went were not clear from the testimony, Plaintiff nonetheless attempts to piece together a time frame during which at least three regular employees worked for Defendant. The evidence reflects some dates: Mr. Bowens worked for Defendant from the summer of 2006 through the end of that year but then spent five to six months in Florida before returning in late spring of 2007; a man named Eric Chafa worked for about three to four weeks in the summer of 2006; and Don Croft worked for the month of October in 2006 (the latter two individuals being gone before Plaintiff was hired). While there is testimony that Mr. Penfield worked for most of 2006, the Commission found that the greater weight of the evidence showed him to have been a subcontractor and not an employee of Defendant, and Plaintiff does not challenge such finding in his brief. Accordingly, Mr. Penfield cannot be counted as an employee of Defendant in determining whether there were regularly three or more. Still, Plaintiff proposes that unless all of the named individuals aside from Mr. Penfield worked only before Mr. Bowens returned in late Spring of 2007, then there were times after that when at least three people worked for Defendant. He theorizes in his brief:

> The most likely scenario, taking into account the seasonal fluctuations about which Mr. Fitzpatrick testified, was that there were more than three people working for the defendant during the warmer months of 2007, with the force reduced to just the three mainstays[1] by the time Mr. Woodliff was injured as the approaching winter reduced the need for workers.

While there indeed may have been some overlap among the times that the named individuals worked with Defendant, Plaintiff's conjecture does not constitute convincing or even competent evidence that Defendant employed at least three persons with some constancy

1. The "three mainstays" to which Plaintiff refers are the three individuals who were performing work on the same project with Plaintiff at the time of his accident: Plaintiff, Defendant Fitzpatrick, and Mr. Bowens. Despite the fact that Plaintiff can show that three individuals were working at the same time for Defendant employer on at least this one occasion, this is insufficient to prove "employment" under the Act. First, it is contested whether Defendant Fitzpatrick was an employee. While the trial court concluded that Defendant Fitzpatrick was not an employee pursuant to N.C. Gen.

throughout the period. Moreover, there is evidence that some of these individuals performed work for F & W Properties, a distinct entity and separate business co-owned by Defendant Fitpatrick, and the imprecise testimony renders it indecipherable who actually worked for Defendant employer and when they did so. Pursuant to the mandates of *Patterson*, the purpose of the Act would not be accomplished by making it applicable to Defendant employer just because he "may have had, in the total number of persons entering and leaving his service during the period, more than the minimum number required by the Act."

Even assuming *arguendo* that three or more individuals worked for Defendant with some constancy, Plaintiff presented insufficient evidence that any of the other individuals working with him on projects for Defendant were employees rather than subcontractors. Plaintiff contends that because the Commission found that *he* was an employee rather than a subcontractor (to which Defendant cross-assigns as error), it is "plainly illogical" to conclude that the other individuals were not employees. While Plaintiff argues that "the evidence is uncontroverted that all of the people who worked on projects for the defendant were treated exactly the same way," when asked at the hearing whether he had "any witnesses here that would include people who worked with you who would be in a similar situation to you," Plaintiff replied in the negative. We acknowledge that the other workers signed the same "Subcontractor's Agreement" but also submitted weekly time sheets as did Plaintiff. Plaintiff, however, presented far more evidence on his own status as an employee that is lacking with regard to the other individuals. While the testimony reveals that Plaintiff was paid an hourly wage based upon the hours recorded on his time sheet at a rate of $13.00 with copies of his weekly checks from Defendant submitted as exhibits; Defendant provided tools and equipment for Plaintiff to use during the duration of his employment; Defendant Fitzpatrick supervised Plaintiff on an almost daily basis and controlled how Plaintiff performed his job and how he was paid; Plaintiff did not work for anyone else during his

---

Stat. § 97-2(2), presumably referring to the provision allowing sole proprietors to *elect* coverage by the Act, Defendant Fitzpatrick's own answer to Plaintiff's interrogatories contradicts that conclusion. Defendant Fitzpatrick wrote: "The Sole proprietorship "Custom Woodworks Unlimited" has had no employees *other than sole proprietor Thomas S. Fitzpatrick*." However, we need not address the question of whether Defendant Fitzpatrick was an employee of Defendant employer because, as discussed *infra*, there is insufficient evidence that Mr. Bowens was an employee rather than a subcontractor. Therefore, even if Defendant Fitzpatrick could be counted as an employee, Plaintiff would still only be able to show two regular employees.

time under Defendant's employ or have an independent business as a carpenter nor did he hire any assistants to help him with his work for Defendant; and Plaintiff displayed a magnetic sign reading "Custom Woodwork Unlimited" on the side of his personal truck, the record is devoid of similar evidence pertaining to the remaining workers. *See Hayes v. Elon College*, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944) (setting forth the factors to be considered when deciding the degree of control exercised by an employer to determine whether a person is an employee or independent contractor); *see also Durham*, 59 N.C. App. at 168-69, 296 S.E.2d at 6 (holding under similar facts that an employer-employee relationship existed within the provisions of the Act).

It is true that the document labeled "Subcontractor's Agreement" does not automatically designate the relationship between the parties to be one of general and subcontractor and that, rather, the actual relationship between the parties is determinative. *See Williams*, 133 N.C. App. at 629, 516 S.E.2d at 191 ("Notwithstanding, however, how the parties may have designated their relationship, the actual relationship created by the agreement is a legal question."). Plaintiff, however, failed to present even the minimal amount of evidence that would allow us to engage in an analysis pursuant to *Hayes* and determine whether Defendant likewise had the authority to exercise sufficient control over the other workers such that they were also employees.

Although Plaintiff acknowledges that he, as the claimant, had the burden of proving that an employment relationship existed at the time the accident occurred, *see Hughart v. Dasco Transp., Inc.*, 167 N.C. App. 685, 689, 606 S.E.2d 379, 382 (2005), he incorrectly claims that because he met that burden, N.C. Gen. Stat. § 97-3 requires this Court to presume Defendant regularly employed three or more employees. *See* N.C. Gen. Stat. § 97-3 (2007) ("[E]very employer and employee, *as hereinbefore defined* and except as herein stated, shall be presumed to have accepted the provisions of this Article . . . and shall be bound thereby." (emphasis added)). Plaintiff argues that once he proves that he is an employee, Defendant "can escape liability in this case only by proving that he did not have three or more employees," essentially attempting to shift the burden of proof Defendant. Plaintiff's contention, however, is directly contrary to the above-stated controlling precedent, which bestows upon the claimant the burden of proving "employment" under the Act, and Plaintiff is mistaken in reasoning that § 97-3 creates any presumption thereof

so as to confer jurisdiction over the claim to the Commission. Additionally, Plaintiff attempts to invoke the rule laid down in *Johnson v. Hosiery Company*, 199 N.C. 38, 40, 153 S.E. 591, 593 (1930), that the Act is to be liberally construed with a view toward providing compensation. However, it is well established that "the rule of liberal construction cannot be extended beyond the clearly expressed language of the [A]ct," *Gilmore v. Board of Education*, 222 N.C. 358, 366, 23 S.E.2d 292, 297 (1942), nor can it "be carried to the point of applying an act to employments not within its stated scope, or not within its intent or purpose, *Wilson v. Mooresville*, 222 N.C. 283, 290, 22 S.E.2d 907, 913 (1942). Our Supreme Court has rebuked Plaintiff's specific argument:

> But plaintiffs insist that the rule of liberal construction applies in cases arising under the Workmen's Compensation Act and that this rule should be invoked to resolve any doubt in favor of plaintiffs. In answer to this argument we need only to point out that this rule is an interstitial one, benefiting [sic] the injured party only in those cases where the Act applies. It cannot be invoked to determine when the Act does apply.
>
> The doctrine of liberal construction arises out of the Act itself, and relates to cases falling within the purview of the Act. Until it is adjudicated affirmatively that the employer-employee relationship existed at the time of the accident no construction or interpretation of the Act—liberal or otherwise—comes within the scope of judicial inquiry.

Hayes, 224 N.C. at 19, 29 S.E.2d at 142. Accordingly, we reject Plaintiff's contentions that we should act under a presumption of jurisdiction when weighing the evidence and that we should resolve any doubt in his favor. Where the burden of proving "employment" under the Act unquestionably fell upon Plaintiff, we conclude that he failed to meet his burden of presenting sufficient evidence to show Defendant regularly employed three or more employees with some constancy throughout the period. Plaintiff also presented insufficient evidence that the named individuals were similarly situated to him, or that they worked pursuant to Defendant's control based on other facts, in order to demonstrate that they even qualified as employees under the Act before we can be asked to count them. Therefore, we hold Defendant was not subject to the Act at the time of Plaintiff's injury by accident and affirm the Full Commission's opinion denying Plaintiff's claim on the basis of a lack of jurisdiction.

In view of our decision, we need not address Defendant's cross-assignments of error.

Affirmed.

Chief Judge MARTIN and Judge JACKSON concur.

DENISE MATHIS AND ALAN MATHIS, PLAINTIFFS v. CONSTANCE DALY, ET AL., DEFENDANTS

No. COA09-1696

(Filed 6 July 2010)

Appeal and Error— interlocutory orders and appeals—denial of summary judgment motion—defamation—failure to establish substantial right

Defendant's appeal from the trial court's interlocutory order denying her motion for summary judgment in an action seeking compensation for alleged defamatory statements following plaintiff's termination of employment was dismissed. There was no N.C.G.S. § 1A-1, Rule 54(b) certification, and defendant failed to establish she was a limited purpose public figure in order to establish a substantial right implicating her First Amendment rights.

Judge WYNN concurring in result in separate opinion.

Appeal by defendant from order entered 1 October 2009 by Judge Nathaniel J. Poovey in Haywood County Superior Court. Heard in the Court of Appeals 25 May 2010.

McLean Law Firm, P.A., by Russell L. McLean, III, and Lisa A. Kosir, PLLC, by Lisa A. Kosir, for plaintiff-appellee.

Everett Gaskins Hancock & Stevens, LLP, by C. Amanda Martin, for defendant-appellant Constance Daly.

CALABRIA, Judge.

Constance Daly ("defendant") appeals the trial court's order denying her motion for summary judgment. We dismiss the appeal as interlocutory.

I. Background

Defendant was president of the Board of Directors ("the Board") of the Haywood County Council on Aging ("the HCCA"). Denise Mathis ("plaintiff") was first employed by the HCCA in 1999. On 3 February 2004, the Board changed plaintiff's job title to CEO/Executive Director of the HCCA.

In September 2004, Haywood County experienced severe flooding as a result of Hurricanes Frances and Ivan. As a result, Governor Michael Easley designated disaster relief funds to Haywood County. In order to receive these funds, Haywood County was required to form an "Unmet Needs Committee" to distribute the relief funds through the Haywood County Finance Office.

In October 2004, the HCCA submitted requests to several agencies for flood relief funds. The HCCA received funds from several sources, including a grant of $65,000 from the United Way of Haywood County. While plaintiff was administering these flood relief funds, the HCCA experienced severe financial difficulties. After questions arose as to whether plaintiff mismanaged or otherwise misappropriated funds, the Board terminated plaintiff from employment. Plaintiff sought unemployment compensation from the Employment Securities Commission ("the ESC").

Following plaintiff's dismissal, the Haywood County District Attorney investigated plaintiff's financial management of the HCCA. As a result, on 7 August 2006, plaintiff was indicted on fourteen counts of embezzlement. The State later dismissed these charges. However, while the investigation and charges were still pending, members of the Board spoke to several local newspapers regarding plaintiff's financial management of the HCCA.

On 12 February 2007, plaintiff and her husband, Alan Mathis, instituted an action in Haywood County Superior Court against defendant and others (collectively "the trial defendants") seeking compensation for, *inter alia*, defamatory statements made about plaintiff following plaintiff's termination of employment. The trial defendants filed an answer on 13 April 2007, which asserted fourteen affirmative defenses, including a defense, based upon the U.S. Constitution, that plaintiff was "either a public official, a public figure, or a limited purpose public figure when the allegedly defamatory statements were made."

On 5 August 2009, defendant separately filed a motion for summary judgment. After a hearing on the motion, the trial court entered an order denying defendant's motion on 1 October 2009. Defendant appeals.

II. Interlocutory Appeal

As an initial matter, we note that defendant appeals from an interlocutory order. "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995).

> An appeal from an interlocutory order is permissible only if (1) the trial court certified the order under Rule 54(b) of the Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review. The burden rests on the appellant to establish the basis for an interlocutory appeal.

Dailey v. Popma, 191 N.C. App. 64, 67-68, 662 S.E.2d 12, 15 (2008) (internal quotations and citations omitted). There is no Rule 54(b) certification in the instant case, and therefore immediate appeal of the trial court's order is only permitted if the order affects a substantial right.

Defendant argues that the trial court's order denying her motion for summary judgment affects defendant's rights under the First Amendment to the United States Constitution. Defendant is correct that this Court has previously held that "[a]n order implicating a party's First Amendment rights affects a substantial right." *Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 719, 504 S.E.2d 802, 807 (1998). However, defendant has failed to establish that her First Amendment rights were implicated in the instant case.

Our Courts have made clear that there are limited circumstances when an action based upon alleged defamatory speech is "elevated from a state's common law to having at least some guarantees of protection under the First Amendment of the Constitution." *Neill Grading & Constr. Co. v. Lingafelt*, 168 N.C. App. 36, 42, 606 S.E.2d 734, 738 (2005). "Generally, this degree of First Amendment protection is governed by two factors: first, the individual capacity of the plaintiff; and, second, the content of the speech." *Id.*

"[T]he First Amendment sets limits on a public figure's ability to recover for defamation." *Wells v. Liddy*, 186 F.3d 505, 532 (4th Cir.

1999). "[A] defamation plaintiff who is a public official or public figure 'may recover injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth[.]' " *Gaunt v. Pittaway*, 139 N.C. App. 778, 785, 534 S.E.2d 660, 665 (2000) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 41 L. Ed. 2d 789, 807, 94 S. Ct. 2997, 3008 (1974)). However, "where the plaintiff is a private figure, and the speech at issue is of private concern, a state court is free to apply its governing common law without implicating First Amendment concerns." *Neill*, 168 N.C. App. at 43, 606 S.E.2d at 739.

A. Limited Purpose Public Figure

Defendant argues that, for purposes of defendant's alleged defamatory statements, plaintiff is a limited purpose public figure, and therefore, this case implicates the First Amendment. We disagree.

> [A] limited purpose public figure is one who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues . . . [T]he Supreme Court developed a two-part inquiry for determining whether a defamation plaintiff is a limited purpose public figure: (1) was there a particular "public controversy" that gave rise to the alleged defamation and (2) was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify "public figure" status?

Gaunt, 139 N.C. App. at 785, 534 S.E.2d at 665 (internal quotations and citations omitted). "Under North Carolina law, an individual may become a limited purpose public figure by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 34, 568 S.E.2d 893, 900-01 (2002) (internal quotations and citations omitted).

In support of treating plaintiff as a limited purpose public figure, defendant states that plaintiff "repeatedly testified about the community impact from the floods, the central role played by the Council on Aging in dealing with the floods, and her role as the leader of that effort." Defendant then quotes plaintiff's testimony before the ESC:

> I, back in 2004 I was the one who initially got this unmet needs, I, along with one other person, got this unmet needs committee

> together. I was the one initially that went out and, and helped with the flood relief. I went to the governor's office on two occasions to appeal that Western North Carolina receive funds. So I, I'm probably more aware than anybody about these things. . . . [By early 2006] We had already at the time of February the 9th already administered either through the county or the Council on Aging over $700,000 to flood victims. . . . We were the leaders from flood, of flood relief.

Assuming, *arguendo*, that the flood relief effort was an important public controversy, defendant has failed to establish that plaintiff's involvement in the flood relief effort "gave rise to the alleged defamation." *Gaunt*, 139 N.C. App. at 785, 534 S.E.2d at 665. The defamatory statements alleged in plaintiff's complaint related to plaintiff's financial management of the HCCA, plaintiff's interactions with the Board regarding the financial matters of the HCCA, plaintiff's dismissal by the Board as a result of her financial management of the HCCA, and plaintiff's testimony before the ESC as a result of her dismissal. The alleged defamatory statements did not pertain to plaintiff's role in securing and providing flood relief to Haywood County. Any alleged defamatory statements pertaining to the flood relief funds were limited to plaintiff's alleged inability to manage these funds within the HCCA once they were received. Since the alleged defamatory statements applied only to plaintiff's private management of the finances of the HCCA, defendant has failed, for purposes of this appeal, to demonstrate that plaintiff was a limited purpose public figure.

B. Issue of Public Concern

If a plaintiff in a defamation action is not a public figure, "[t]he question then becomes whether the First Amendment is implicated by [defendant's] statements . . . because the content of those statements are a matter [sic] 'public concern' where the First Amendment requires some degree of fault." *Neill*, 168 N.C. App. at 44, 606 S.E.2d at 740. The *Neill* Court held that "[whether] . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." *Id.* at 45, 606 S.E.2d at 740 (internal quotations and citations omitted).

Neill is the only case in our Courts that has analyzed what constitutes a matter of public concern in defamation actions. In *Neill*, the defendant was alleged to have made defamatory statements attributing the appearance of sinkholes in the parking lot of a local restaurant in Hickory, North Carolina to the construction work of the plain-

tiff. *Id.* at 39, 606 S.E.2d at 736-37. This Court determined that the defamatory statements at issue addressed a matter of public concern based upon a number of factors, including, *inter alia*: (1) that the sinkholes were discussed throughout the community, nationally on CNN and Fox News and internationally; (2) that the sinkholes were a matter of public study, as they were discussed at the Western Piedmont Council of Government, at North Carolina State University and the University of North Carolina at Charlotte; and (3) that the Hickory Visitors Bureau received calls from as far away as Michigan asking how to find the sinkholes. *Id.* at 45-46, 606 S.E.2d at 740-41.

In the instant case, defendant has failed to present evidence of anything resembling the extensive amount of public interest that was present in *Neill*. In fact, defendant has failed to specifically address the issue of whether the alleged defamatory statements addressed matters of public concern. The phrase "public concern" does not appear in defendant's brief; the closest approximation is defendant's statement, which does not cite to any portion of the record on appeal, that "the speech relates to issues that still are actively before the public eye, in the public dialogue and in the public courts." This bare statement is insufficient to establish that the alleged defamatory statements, which, as previously noted, applied only to plaintiff's private management of the finances of the HCCA, addressed matters of public concern. As a result, defendant has failed to establish that the trial court's order denying summary judgment implicated defendant's First Amendment rights and this interlocutory appeal is therefore not properly before this Court.

Moreover, even assuming, *arguendo*, that the alleged defamatory statements involved matters of public concern, this interlocutory appeal would still be improper. The *Neill* Court made clear that "North Carolina's standard of fault for speech regarding a matter of public concern, where the plaintiff is a private individual, is negligence." *Id.* at 47, 606 S.E.2d at 741. The Court then analyzed whether the potential misapplication of this negligence standard would affect a substantial right:

> [W]here the content is a matter of public concern, we do not believe the dissemination of information regarding a private individual is of a kind benefitted by the uninhibited, robust, and wide-open speech we see promoted by the actual malice standard of fault for public officials or public figures. Thus, we are not concerned that a trial court's application of the negligence standard of fault, beyond the stage of summary judgment, would have a

> chilling effect on free speech where the substance of the defamatory statement makes substantial danger to reputation apparent. The negligence standard of fault does, and we believe should, provide its own cooling and deliberative effect on the kind of speech at issue in this case.

Id. at 48, 606 S.E.2d at 742 (internal quotations and citations omitted). Consequently, the Court dismissed the appeal as interlocutory, because "finding a substantial right where it would not further any First Amendment protection would unnecessarily weigh against North Carolina's constitutional mandate that its courts of justice protect the otherwise good names of its private citizens." *Id.* Therefore, once defendant in the instant case failed to establish that plaintiff is a limited purpose public figure, she could not establish a substantial right that entitled her to an immediate appeal, regardless of whether the speech addressed a matter of public concern. Pursuant to the holding in *Neill*, defendant's appeal necessarily must be dismissed.

III. Conclusion

Defendant has failed to meet her burden to establish the basis for an interlocutory appeal, and so this appeal must be dismissed.

Dismissed.

Judge HUNTER, Robert C. concurs.

Judge WYNN concurs in the result by separate opinion.

WYNN, Judge, concurring in the result.

I agree with the majority that Defendant has failed to demonstrate that the order here affects a substantial right that would be lost without immediate review. I write separately because I believe it is not necessary for this Court to determine whether Defendant's prior statements are entitled to First Amendment protection. *See Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) ("[T]he courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.").

"[W]hen First Amendment rights are threatened or impaired by an interlocutory order, immediate appeal is appropriate." *Harris v. Matthews*, 361 N.C. 265, 270, 643 S.E.2d 566, 569-70 (2007). Cases that have allowed immediate appeal of an interlocutory order on the basis

of alleged violations of the First Amendment generally involve ongoing prejudice to that right. *See Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 719, 504 S.E.2d 802, 807 (1998) (preliminary gag order); *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 15, 431 S.E.2d 828, 834 (preliminary injunction against protest), *appeal dismissed*, *disc. review denied*, 335 N.C. 175, 436 S.E.2d 379 (1993), *and cert. denied*, 512 U.S. 1253, 129 L. Ed. 2d 894 (1994).

An exception exists where a party distinctly contends that the trial court misapplied a constitutional standard. *Priest v. Sobeck*, 153 N.C. App. 662, 670, 571 S.E.2d 75, 81 (2002) (Greene, J., dissenting) (misapplication of the proper standard would have a chilling effect on First Amendment rights), *rev'd for reasons stated in dissent*, 357 N.C. 159, 579 S.E.2d 250 (2003); *see also Boyce & Isley, PLLC v. Cooper*, 169 N.C. App. 572, 577, 611 S.E.2d 175, 178 (2005) (noting that *Priest* dissent did not consider whether substantial right would be lost absent immediate appeal). The case relied upon by the majority is in this line. *See Neill Grading & Const. Co. v. Lingafelt*, 168 N.C. App. 36, 47, 606 S.E.2d 734, 741 ("[W]e examine whether misapplication of the 'negligence' standard of fault for a defendant's speech . . . would have a chilling effect on defendant's rights . . . ."), *disc. review improvidently allowed*, 360 N.C. 172, 622 S.E.2d 490 (2005).

Neither of these circumstances appears in this case. Defendant does not allege that the trial court misapplied a constitutional standard. Rather, Defendant argues that "[t]he pendency of this libel suit has the very chilling effect recognized by the U.S. Supreme Court and will operate in a similar fashion to a gag order or prior restraint." Be that as it may, the trial court issued no injunction or any other order that could operate like a prior restraint. Indeed, the alleged defamatory statements were published in 2006 and 2007, and nothing prevents Defendant from continuing to exercise to the fullest her First Amendment rights. Consequently, "there is nothing here to suggest an immediate loss of these rights." *Boyce*, 169 N.C. App. at 577, 611 S.E.2d at 178. I therefore concur in the dismissal of this appeal.

ALLAN RICHARD LOWD, PLAINTIFF v. EDMUND LLOYD REYNOLDS, INDIVIDUALLY AND AS AGENT FOR S.T.S. OF FLORIDA, LLC A/K/A S.T.S., LLC, AND JAMES ROLEN WHEATLEY, JR., DEFENDANTS

No. COA09-505

(Filed 6 July 2010)

1. Discovery— motion to compel medical records—physician-patient privilege impliedly waived

The trial court in a negligence action arising out of an automobile accident did not err in granting defendant Wheatley's motion to compel the production of medical records for which plaintiff had asserted the physician-patient privilege. Pursuant to the holding in *Midkiff v. Compton*, 204 N.C. App. 21, plaintiff impliedly waived his physician-patient privilege by bringing a personal injury action against defendant which placed his medical condition at issue.

2. Discovery— motion to compel medical records—in camera review

The trial court in a negligence action arising out of an automobile accident did not abuse its discretion in refusing to review *in camera* medical records plaintiff argued were privileged before granting defendant Wheatley's motion to compel production of the records. Plaintiff had waived his physician-patient privilege with regard to the records and the records were relevant in determining whether the accident was the proximate cause of plaintiff's injuries.

3. Discovery— order to produce medical records—no abuse of discretion

The trial court in a negligence action arising out of an automobile accident did not abuse its discretion by ordering plaintiff to produce medical records and information which were not in his possession, custody, or control because plaintiff had a legal right to obtain the documents requested.

Appeal by plaintiff from order entered 30 October 2008 by Judge Phyllis M. Gorham in Carteret County Superior Court. Heard in the Court of Appeals 26 October 2009.

Christopher L. Beacham and Stevenson L. Weeks, for plaintiff-appellant.

Harris, Creech, Ward and Blackerby, P.A., by W. Gregory Merritt and Jay C. Salsman, for defendant-appellee.

JACKSON, Judge.

Allen Richard Lowd ("plaintiff") appeals from the trial court's order (1) granting James Rolen Wheatley, Jr.'s ("Wheatley") motion to compel the production of medical records for which plaintiff had asserted the physician-patient privilege pursuant to section 8-53 of our General Statutes and (2) granting, in part, plaintiff's motion for a protective order limiting the use of the medical records solely for purposes of this litigation. For the reasons set forth below, we affirm.

On 9 April 2008, plaintiff filed a complaint, and on 3 June 2008, plaintiff filed an amended complaint in which he alleged that he sustained personal injuries during a multiple automobile collision resulting from the negligence of Edmund Lloyd Reynolds, individually and as an agent for S.T.S. of Florida, LLC a.k.a. S.T.S., LLC; and Wheatley (collectively, "defendants").

On 30 June 2008, Wheatley served plaintiff with interrogatories and requests for production of documents (the "discovery request"). In relevant part, discovery request number 17 sought production of

> all medical records, hospital charts, physician charts, patient charts, letters, memoranda, correspondence, x-rays, CT scans, MRIs, bills, insurance billing information or any other viewable, audible, or tangible things that relate to medical care or treatment that the Plaintiff has received from January 1, 1995, through the present date.

On 21 August 2008, plaintiff served his responses to Wheatley's discovery request in which he objected to discovery request 17 because it sought "information privileged pursuant to N.C.G.S. § 8-53" and because the "interrogatory is overly broad and unduly burdensome."

Pursuant to Wheatley's discovery request and plaintiff's response, but without waiving his objection, plaintiff produced limited medical records. These records evidenced treatment plaintiff had received for injuries he alleges he sustained as a result of the subject accident, beginning with an emergency room record dated 9 June 2005. However, plaintiff failed to produce any record of medical treatment prior to the date of the accident.

On 10 October 2008, Wheatley filed a motion to compel discovery. Wheatley sought to discover the amount of monetary relief plaintiff sought and plaintiff's medical records beginning on 1 January 1995. With respect to plaintiff's medical records, Wheatley argued that the issues are relevant to the lawsuit because plaintiff "placed his medical condition at issue by alleging damages due to injuries."

On 14 October 2008, plaintiff filed a motion for a protective order. Plaintiff asked the trial court to either recognize these documents as privileged and limit the exchange of his medical records or, in the alternative, that the court review the documents *in camera* to determine "whether the privilege should be removed in the interest of justice." Plaintiff argued that the physician-patient privilege protected the information that Wheatley sought to discover pursuant to North Carolina General Statutes, section 8-53 and, further, that the interrogatory was overly broad and unduly burdensome because the records were over ten years old and "may no longer exist."

On 27 October 2008, the trial court conducted a hearing regarding Wheatley's motion to compel discovery and plaintiff's motion for a protective order. The trial court granted Wheatley's motion and granted plaintiff's motion for a protective order to the extent that "any and all medical records produced in discovery not be used for any purpose outside the scope of this litigation." From the trial court's order, plaintiff appeals.

On appeal, plaintiff presents two central arguments in support of his contention that the trial court abused its discretion in granting Wheatley's motion to compel the production of plaintiff's medical records. First, plaintiff argues that the trial court abused its discretion because (1) plaintiff did not waive the physician-patient privilege set forth in North Carolina General Statutes, section 8-53; (2) the trial court did not review the records *in camera* prior to granting Wheatley's motion; and (3) the trial court failed to make sufficient findings that the disclosure of plaintiff's records was necessary for the proper administration of justice as contemplated by North Carolina General Statutes, section 8-53. Second, plaintiff argues that the trial court abused its discretion by compelling the production of documents that were not in plaintiff's care, custody, or control. We disagree.

[1] Preliminarily, with respect to plaintiff's first argument on appeal, we note that our recent decision in *Midkiff v. Compton*, 204 N.C. App. 21, 693 S.E.2d 172, (2010) controls much of our decision in the

case *sub judice*. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

Next, we address the timeliness of this appeal. In *Midkiff* we noted that

> [o]rdinarily, discovery orders are interlocutory and are not subject to immediate appeal. Orders that are interlocutory are subject to immediate appeal when they affect a substantial right of a party. [W]hen, as here, 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[.] Because the trial court in the present case ordered [p]laintiff to disclose matters she had asserted were protected by the physician-patient privilege, the trial court's order is immediately appealable and is properly before us.

204 N.C. App. 24, 693 S.E.2d at 174, (internal citations and quotation marks omitted). Therefore, this appeal, like *Midkiff*, properly is before us notwithstanding its interlocutory nature.

In *Midkiff*, we further explained that

> [w]hen reviewing a trial court's ruling on a discovery issue, our Court reviews the order of the trial court for an abuse of discretion. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

Id. at 24, 693 S.E.2d at 175 (internal citations and quotation marks omitted).

As noted *supra*, our holding in *Midkiff* applies to the present case. In *Midkiff*, the plaintiff filed a complaint sounding in negligence seeking to recover damages for personal injuries after being struck by the defendant's automobile while jogging. *Id.* at 22, 693 S.E.2d at 173. The defendant served the plaintiff with interrogatories and requests for production of documents, including, *inter alia*, the plaintiff's medical records for the previous ten years. *Id.* at 22, 693 S.E.2d at 173-74. The plaintiff objected on the grounds that the request was "unduly broad, overly burdensome, and not reasonably calculated to lead to the dis-

covery of admissible evidence in that [the defendant sought] medical records pertaining to parts of [the plaintiff's] body not injured in the subject collision." *Id.* The plaintiff also asserted that the information was protected by the physician-patient privilege pursuant to North Carolina General Statutes, section 8-53. *Id.* The defendant filed a motion to compel discovery, and the plaintiff filed a motion for a protective order seeking to prevent discovery or have the trial court review the records *in camera* to determine which records were relevant. *Id.* at 23, 693 S.E.2d at 174. The trial court did not review the plaintiff's records *in camera* and allowed the defendant's motion to compel discovery for a period of five years preceding the filing of the action. *Id.* The plaintiff appealed, and, in affirming the trial court's decision, we held that the trial court did not abuse its discretion. *Id.* at 23, 36, 693 S.E.2d at 174, 182.

Plaintiff here first contends that the trial court abused its discretion in granting Wheatley's motion to compel production of plaintiff's medical records because the records purportedly were privileged pursuant to North Carolina General Statutes, section 8-53. In relevant part, section 8-53 provides that

> [n]o person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon . . . . Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, . . . may . . . compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.

N.C. Gen. Stat. § 8-53 (2009). The physician-patient privilege, which belongs to the patient, may be waived either expressly or impliedly and is qualified rather than absolute. *Midkiff*, 204 N.C. App. at 25, 693 S.E.2d at 175, (citing *Sims v. Insurance Co.*, 257 N.C. 32, 38, 125 S.E.2d 326, 331 (1962); *Capps v. Lynch*, 253 N.C. 18, 22-23, 116 S.E.2d 137, 141 (1960)). In *Midkiff*, we thoroughly examined the history of the physician-patient privilege and explained that " 'case law has also recognized an implied waiver where a patient by bringing an action, counterclaim, or defense directly placed her medical condition at

issue." *Id.* at 30, 693 S.E.2d at 178 (quoting *Mims v. Wright*, 157 N.C. App. 339, 342-43, 578 S.E.2d 606, 609 (2003)). We held that, by bringing a personal injury action, the "[p]laintiff impliedly waived her physician-patient privilege as to medical records causally or historically related to her 'great pain of body and mind.' " *Id.* at 35, 693 S.E.2d at 181.

Here, as in *Midkiff*, plaintiff brought a personal injury action against defendants alleging that he "has suffered and will continue to suffer pain of body and mind." Therefore, pursuant to our holding in *Midkiff*, plaintiff in the case *sub judice* impliedly has waived his physician-patient privilege. *See id.*

Furthermore, the trial court heard Wheatley's and plaintiff's arguments regarding production of documents, and no evidence suggests that the court's decision was "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 35, 693 S.E.2d at 176 (citing *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). Accordingly, we hold that plaintiff impliedly waived his physician-patient privilege, and the trial court did not abuse its discretion.

Additionally, when the privilege has been waived, there is no need to determine whether disclosure is necessary for the proper administration of justice. Therefore, "[b]ecause we have held that [p]laintiff impliedly waived [his] privilege with respect to these records, we need not address this issue." *Id.* at 36, 693 S.E.2d at 182, (citing *Sims v. Insurance Co.*, 257 N.C. 32, 38, 123 S.E.2d 326, 331 (1962)).

[2] Next, plaintiff argues that the trial court abused its discretion in refusing to review the medical records he argues were privileged *in camera* before granting Wheatley's motion to compel production of the records. We disagree.

"The decision to conduct *in camera* review rests 'in the sound discretion of the trial court.' " *Id.* at 35, 693 S.E.2d at 181 (quoting *Spangler v. Olchowski*, 187 N.C. App. 684, 693, 654 S.E.2d 507, 514 (2007)). Pursuant to North Carolina General Statutes, section 1A-1, Rule 26, "[p]arties may obtain discovery regarding *any* matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2009). We already have established that plaintiff waived his privilege, and, therefore, we must determine whether the information was relevant.

The test of relevance for discovery purposes only requires that information be "reasonably calculated to lead to the discovery of admissible evidence[.]" N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2009). We believe that the discovery of plaintiff's past medical history is relevant. The information sought may assist in determining, *inter alia*, whether the accident in question was a proximate cause of plaintiff's injury or whether plaintiff's injuries are the result of a preexisting condition.

In *Midkiff*, we discussed the trial court's refusal to review the requested discovery *in camera* prior to its production to the defendant. *Midkiff*, 204 N.C. App. at 35-36, 693 S.E.2d at 181-82. We held that the trial court did not abuse its discretion by refusing to review the documents *in camera* for two reasons. *Id.* at 36, 693, S.E.2d at 182. First, the trial court would not know what sort of evidence may be developed later or what kind of issues might come up within either party's case. *Id.* at 35, 693 S.E.2d at 181. Second, irrelevant information may be excluded at trial pursuant to our Rules of Evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 401, *et seq.* (2009). Because this information is not privileged and is relevant to the subject matter, and because the trial court's decision is bolstered by bases already held to be legitimate, we hold that the trial court did not abuse its discretion by refusing to review plaintiff's records *in camera*.

[3] With respect to plaintiff's second main argument on appeal, plaintiff contends that the trial court abused its discretion by ordering him to produce medical records and information that were not in his possession, custody, or control. We disagree.

Rule 34 of the North Carolina Rules of Civil Procedure permits a party to request that any other party produce documents "within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served." N.C. Gen. Stat. § 1A-1, Rule 34(a) (2009). " '[D]ocuments are deemed to be within the possession, custody or control of a party for purposes of Rule 34 if the party has actual possession, custody or control of the materials *or has the legal right to obtain the documents on demand*.' " *Pugh v. Pugh*, 113 N.C. App. 375, 380-81, 438 S.E.2d 214, 218 (1994) (quoting *Resolution Trust Corp. v. Deloitte & Touche*, 145 F.R.D. 108, 110 (D. Colo. 1992)) (emphasis added).

In this case, plaintiff has the legal right to obtain his medical records. Plaintiff contends that accessing records may be difficult from medical providers that are neither a party to this action or not

located within the state. Although this may be true, plaintiff has the right to obtain his medical records upon request pursuant to the Health Insurance Portability and Accountability Act ("HIPAA"). *See* 45 C.F.R. §§ 164.502(a)(2)(I), 164.524(a)(1) (2009). Furthermore, Wheatley's offer to obtain the medical records on plaintiff's behalf and at Wheatley's expense eliminates any legitimacy to plaintiff's perceived difficulty. Because plaintiff has a legal right to his medical records, they are considered to be within his "possession, custody or control" pursuant to our prior interpretation of Rule 34 of the North Carolina Rules of Civil Procedure, and the trial court did not abuse its discretion by compelling the production of such records. *See Pugh*, 113 N.C. App. at 380-81, 438 S.E.2d at 218.

For the foregoing reasons, we affirm the trial court's order compelling discovery of plaintiff's medical records.

Affirmed.

Chief Judge MARTIN and Judge ERVIN concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER ALLAN DALLAS, DEFENDANT

No. COA09-644

(Filed 6 July 2010)

1. Evidence— hearsay—exception—automobile valuation testimony—Kelley Blue Book—NADA pricing guide

The trial court did not commit plain error in a multiple felony larceny of a motor vehicle and misdemeanor larceny case by admitting the automobile valuation testimony of three witnesses. The Kelley Blue Book and the NADA pricing guide fall within the N.C.G.S. § 8C-1, Rule 803(17) hearsay exception.

2. Evidence— testimony—automobile valuation if junked and sold for parts—relevancy—larceny

Although defendant contended that the trial court erred in a multiple felony larceny of a motor vehicle and misdemeanor larceny case by sustaining the State's objection to testimony by defendant's expert witness, a used car salesman, about the value of a Honda Accord if it had been junked and sold for parts, defendant failed to make an offer of proof at trial. Further, defendant failed to show how he was prejudiced when this value would not be relevant under the larceny statute in N.C.G.S. § 14-72.

3. Damages and Remedies— restitution—improperly based on unverified worksheet

The trial court's award of restitution in a larceny case was vacated. An unsworn statement of a prosecutor was insufficient to support the amount of restitution ordered, and the award was improperly based on the unverified restitution worksheet submitted by the State.

Appeal by defendant from judgments entered 23 July 2008 by Judge Thomas D. Haigwood in Perquimans County Superior Court. Heard in the Court of Appeals 30 November 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General B. LeAnn Martin, for the State.

Russell J. Hollers III for defendant-appellant.

GEER, Judge.

Defendant Christopher Allan Dallas appeals from his convictions of three counts of felony larceny of a motor vehicle, one count of misdemeanor larceny of a motor vehicle, and of being a habitual felon. Defendant primarily contends the trial court erred in admitting hearsay evidence as to the values of the stolen vehicles. We hold, however, that the challenged evidence either fell under the hearsay exception set out in Rule 803(17) of the Rules of Evidence or its admission was not prejudicial to defendant. Defendant also argues, and we agree, that the trial court's award of restitution—based solely on the unverified restitution worksheet submitted by the State—is not supported by competent evidence in the record. Accordingly, we vacate the award of restitution.

Facts

At trial, the State's evidence tended to show the following facts. Dianne Welter, who lives at 100 Soundside Drive in Hertford, North Carolina, had parked on her property a 1987 white GMC van and a 1986 white Chevrolet C20 custom conversion van. She left her residence for a period of time beginning in August 2007. While she was away, she was contacted by defendant, who was interested in purchasing the vans. Ms. Welter told defendant repeatedly that she did not want to sell them.

When Ms. Welter returned to her residence in November 2007, the vans were missing from the property. A month earlier, in October 2007, Harry Clubb, a friend of defendant's who hauls cars and junk for a living, saw defendant broken down on the side of the road. Defendant was attempting to tow a white 1985 or 1986 Chevrolet van with his truck. Mr. Clubb pulled over, loaded the van onto his trailer, and hauled it to the metal crusher for defendant. The next morning, Mr. Clubb went with defendant to Ms. Welter's property where they used Mr. Clubb's trailer to pick up another white van. No one was home at the time, but defendant told Mr. Clubb that he had permission from Ms. Welter to take the van.

Roy Lewis, who lived in Ms. Welter's neighborhood, was riding his bike that morning when he came across two men working on a van parked on Ms. Welter's property. Mr. Lewis stopped to investigate, and the men told him they had talked to Ms. Welter and had been given permission to clean up and haul away the junk in her yard. At trial, Mr. Lewis testified that defendant looked familiar, but he could

not be absolutely sure defendant was one of the men he talked to that day.

On 8 November 2007, Mark MacLenan came home from work to discover his 1993 Honda Accord missing from his driveway. At around 8:00 a.m. that morning, Mr. Clubb had accompanied defendant to pick up a Honda Accord and take it to a metal crushing facility. Defendant told Mr. Clubb he had bought the Honda for $50.00. While driving through town that day, William Bostwick, Mr. MacLenan's neighbor, saw Mr. MacLenan's Accord being loaded onto a flatbed truck in front of defendant's house. Mr. Bostwick had noticed that the Accord was not parked in its usual spot on Mr. MacLenan's property earlier that day.

On 16 November 2007, Shirley Proctor discovered that her 1988 Ford Taurus was missing from her backyard. Sometime in August or September 2007, defendant had come to Ms. Proctor's house to ask if she would be interested in selling the Taurus. Ms. Proctor refused to sell the car to defendant. A few months later, on 15 November 2007, defendant came back and again asked to purchase the car. That time, Ms. Proctor told defendant she would sell it to him, but they never discussed a price, and she told him she would need to clean the car out beforehand. Defendant told Ms. Proctor he would be back to pick it up the next day. James Rushing, who was working with defendant on 15 November 2007, accompanied defendant to Ms. Proctor's home. Mr. Rushing sat in the car while defendant talked to Ms. Proctor on her front porch. He heard Ms. Proctor say twice that she did not want her car crushed. Defendant came back to the van and said he was going to buy the car.

The next morning, Ms. Proctor called defendant and left him a message saying she had decided not to sell the car. She then left her house to go shopping. Later that day, Mr. Rushing and defendant went over to Ms. Proctor's house to pick up the car. When Mr. Rushing asked defendant how he got the keys to the car, defendant told him that Ms. Proctor had given them to him. They loaded the car onto the truck and drove it to the metal crusher. When Ms. Proctor returned from her shopping trip and discovered her car missing, she called defendant who denied taking the car.

Defendant was subsequently charged with four counts of felony larceny of a motor vehicle and with being a habitual felon. At trial, Ms. Welter testified that the 1987 GMC van, which had over 150,000 miles on it, was worth $1,200.00 and the Chevrolet C20 van was worth

between $1,200.00 to $1,400.00. In addition, Ms. Welter had paid $1,300.00 to put new tires on both vans. When asked how she arrived at the value of the new tires, Ms. Welter said she had contacted Wal-Mart, where she had purchased the tires, and had been given that number. Ms. Proctor testified that her Taurus had around 150,000 miles on it, but did not remember what she had told the investigating detectives about the value of the car. Mr. MacLenan testified that the Accord had approximately 130,000 miles on it and needed a couple hundred dollars' worth of work in order for it to be driven. Mr. MacLenan testified that he looked up the car's value in the Kelley Blue Book and that it was worth $1,500.00.

Chris Cooper, a used car salesman, testified that, in his opinion, the 1993 Honda Accord had a value of between $2,000.00 to $4,000.00; the 1987 GMC van had a value of between $1,200.00 to $3,000.00, depending on the add-ons to the vehicle; and the 1986 Chevrolet van had a value of $1,200.00 to $3,000.00, depending on the upgrades made to the vehicle. He based this testimony on the NADA pricing guide.

Defendant testified on his own behalf and admitted speaking to Ms. Welter about purchasing her vans, but denied stealing them. Defendant admitted taking Ms. Proctor's Taurus, but contended that she had given it to him and authorized him to take it off her lot. Defendant denied any involvement with the theft of Mr. MacLenan's Honda Accord. He testified that on 8 November 2007, Mr. Clubb had parked his trailer in defendant's yard and left for a few minutes, returning with a black car. Mr. Clubb stripped the car and loaded it onto his trailer and left. Defendant indicated that the black car he saw could have been Mr. MacLenan's Accord.

The trial court ultimately dismissed the felony larceny charge with respect to Ms. Proctor's Taurus and instead instructed the jury on the charge of misdemeanor larceny of the Taurus. The jury found defendant guilty of misdemeanor larceny of the Taurus and felony larceny of the Accord and the two vans. Defendant pled guilty to being a habitual felon. The trial court sentenced defendant to a presumptive-range term of 107 to 138 months imprisonment for one count of felony larceny of a motor vehicle, a consecutive presumptive-range term of 107 to 138 months imprisonment for the second count of felony larceny of a motor vehicle, and a concurrent presumptive-range term of 107 to 138 months imprisonment for the third count of felony larceny of a motor vehicle. The court sentenced defendant to a term of 120 days for the misdemeanor larceny charge with that sen-

tence to run consecutive to the second felony count sentence. The trial court also ordered restitution to Mr. MacLenan in the amount of $1,500.00 and to Ms. Welter in the amount of $8,277.00. Defendant timely appealed to this Court.

I

[1] Defendant challenges three valuation opinions given by the State's witnesses: (1) Mr. MacLenan's testimony that, according to the Kelley Blue Book, his Accord was worth $1,500.00; (2) Mr. Cooper's testimony that the Accord was worth $2,000.00 to $4,000.00, the 1987 GMC van was worth $1,200.00 to $3,000.00, and the 1986 Chevrolet van was worth $1,200.00 to $3,000.00; and (3) Ms. Welter's testimony that she paid $1,300.00 for new tires on the vans. He claims that the testimony violated the hearsay rule and that Mr. MacLenan's and Ms. Welter's testimony also improperly invaded the province of the jury.

As defendant did not object to Mr. MacLenan's or Mr. Cooper's testimony, this Court reviews the admissibility of that testimony only for plain error. *See State v. Locklear*, 172 N.C. App. 249, 259, 616 S.E.2d 334, 341 (2005) (" 'Where, as here, a criminal defendant fails to object to the admission of certain evidence, the plain error analysis . . . is the applicable standard of review.' " (quoting *State v. Ridgeway*, 137 N.C. App. 144, 147, 526 S.E.2d 682, 685 (2000))). "If 'we are not persuaded that the jury probably would have reached a different result had the alleged error not occurred, we will not award defendant a new trial.' " *Id.* (quoting *Ridgeway*, 137 N.C. App. at 147, 526 S.E.2d at 685).

With respect to Mr. MacLenan and Mr. Cooper, the issue is whether their reliance on the values set out in the Kelley Blue Book and the NADA pricing guide amounted to inadmissible hearsay. Rule 803(17) of the Rules of Evidence provides that "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations" are not excluded by the hearsay rule. We hold that both the Kelley Blue Book and the NADA pricing guide fall within the Rule 803(17) hearsay exception.

In *In re McLean Trucking Co.*, 281 N.C. 375, 388, 189 S.E.2d 194, 203 (1972), *appeal dismissed and cert. denied*, 409 U.S. 1099, 34 L. Ed. 2d 681, 93 S. Ct. 909 (1973), the Supreme Court specifically held that the use of the Kelley Blue Book for determining the value of trucks comes within Rule 803(17). Thus, Mr. MacLenan's testimony

that he arrived at the value of $1,500.00 by looking at the Kelley Blue Book was admissible. *See also State v. Shaw*, 120 Wash. App. 847, 852, 86 P.3d 823, 826 (2004) (holding trial court did not err in admitting detective's testimony about stolen car's value obtained from Kelley Blue Book website because Blue Book values are admissible under Rule 803(17)).

Although North Carolina courts have not specifically addressed the admissibility of the NADA pricing guide, we believe it falls within the scope of Rule 803(17). Mr. Cooper testified that the NADA is "a national pricing guide" that he and others in the used car sales profession commonly use to price cars. *See Commander v. Smith*, 192 N.C. 159, 160, 134 S.E. 412, 413 (1926) ("[A]s a rule standard price lists and market reports which are shown to be in general circulation and relied on by the commercial world and by those engaged in the trade may be received as evidence of the market value.").

Other jurisdictions have held that NADA evidence is admissible under Rule 803(17). *See*, *e.g.*, *Hess v. Riedel-Hess*, 153 Ohio App. 3d 337, 345, 794 N.E.2d 96, 103 (2003) (holding that because "[t]he NADA handbook is a standard tool for determining the value of a vehicle[,]" trial court did not err in admitting into evidence NADA appraisal guide from NADAguides.com in order to establish value of vehicle under Rule 803(17)); *State v. Batiste*, 764 So. 2d 1038, 1040 (La. App. 2000) ("In our view, the NADA Blue Book, containing the relative commercial values of used vehicles, constitutes the exact type of publication contemplated by La. Code Evid. art. 803(17)."), *cert. denied*, 794 So. 2d 778 (2001). In line with those jurisdictions, we also hold that NADA evidence was admissible in this case.

Ms. Welter's testimony regarding the value of her new tires—based on her phone call to Wal-Mart—presents a different issue. Even assuming, however, without deciding, that it was hearsay, defendant has failed to show prejudice. *See State v. Chavis*, 141 N.C. App. 553, 566, 540 S.E.2d 404, 414 (2000) ("The erroneous admission of evidence requires a new trial only when the error is prejudicial. To show prejudicial error, a defendant has the burden of showing that there was a reasonable possibility that a different result would have been reached at trial if such error had not occurred." (internal citations and quotation marks omitted)).

The testimony regarding the value of the tires on the two vans was offered to establish that the value of the stolen property was more than $1,000.00. *See* N.C. Gen. Stat. § 14-72(a) (2009) (providing

that "[l]arceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony"). Both Mr. Cooper and Ms. Welter testified that the vans were each worth more than $1,000.00. In light of this evidence, even if the testimony regarding the tires had been excluded, we do not believe there is a reasonable possibility that the jury would have reached a different verdict regarding whether the larceny of the vans was a felony or a misdemeanor.

Finally, defendant argues alternatively that Mr. MacLenan's and Ms. Welter's testimony regarding the value of their vehicles improperly "invaded the jury's province as the fact-finder." Our Supreme Court has held, however, that "the owner of property is competent to testify as to the value of his own property even though his knowledge on the subject would not qualify him as a witness were he not the owner." *Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville*, 308 N.C. 255, 270, 302 S.E.2d 204, 213 (1983). *See also White v. Reilly*, 15 N.C. App. 331, 335-36, 190 S.E.2d 303, 306 (1972) (holding that owner of car could testify as to value of his car and weight to be given testimony was for jury to decide). We, therefore, hold that the trial court did not err in admitting the testimony of Mr. MacLenan, Ms. Welter, and Mr. Cooper.

II

[2] Defendant also contends that the trial court erred in sustaining the State's objection to testimony by defendant's expert witness, Kos Jackson, a used car salesman, about the value of the Accord if it had been junked and sold for parts. After testifying that fair market value and what a person would pay for a car were different issues, Mr. Jackson testified that a 1993 Honda Accord with normal mileage would have a retail value of $2,000.00, but would be worth only $200.00 to $300.00 if not running or $1,000.00 to $1,200.00 if "operable in rough condition." He was then asked what the value would be if "junked and sold for parts." The trial court sustained the State's objection to the question. The court also sustained the State's objection to the next question asking Mr. Jackson for his opinion of the value of the 1993 Honda Accord if, as Mr. MacLenan had described it, it was not running, a headlight was out, and it had bad tires.

Defendant did not make an offer of proof at trial so we do not know what Mr. Jackson would have testified if he had answered. "In order to preserve the exclusion of evidence for appellate review, '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. Barton*, 335 N.C. 741, 749, 441 S.E.2d 306, 310 (1994) (quoting *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)). The Supreme Court has explained:

> The reason for such a rule is that the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred. In the absence of an adequate offer of proof, [w]e can only speculate as to what the witness' answer would have been.

Id., 441 S.E.2d at 310-11 (internal citations and quotation marks omitted). Defendant, therefore, failed to properly preserve this issue for appellate review.

In any event, the first question did not seek relevant evidence. The term "value" as used in N.C. Gen. Stat. § 14-72, the larceny statute, "means fair market value." *State v. Cotten*, 2 N.C. App. 305, 311, 163 S.E.2d 100, 104 (1968). *See also State v. Morris*, 79 N.C. App. 659, 661, 339 S.E.2d 834, 835 ("The proper measure of value is the price the stolen goods would bring in the open market in the condition they were in at the time they were stolen . . . ."), *rev'd in part on other grounds*, 318 N.C. 643, 350 S.E.2d 91 (1986). The value of the Accord if it were junked and sold for parts would not be relevant under the larceny statute.

As for the second question, defendant cannot demonstrate prejudice. Mr. Jackson had already testified that a 1993 Honda Accord that did not run and was in poor condition would be worth only $200.00 to $300.00. Defendant does not explain why, in light of that testimony, he was prejudiced by not being able to ask the value of Mr. MacLenan's 1993 Honda Accord if it was not running, had a headlight out, and had bad tires. Any error in sustaining the objection was, therefore, harmless.

III

[3] Finally, defendant argues—and the State concedes—that the trial court's award of restitution to Ms. Welter is not supported by competent evidence. In *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (quoting *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)), this Court stressed that " '[t]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing.' " The Court held that "[t]he

unsworn statement of the prosecutor is insufficient to support the amount of restitution ordered." *Id.*

In the judgment for larceny of Ms. Welter's vans, the trial court ordered defendant to pay restitution in the amount of $8,277.00. The trial court based this amount on the unverified Restitution Worksheet submitted by the State. The evidence at trial was, however, that the two vans were worth $1,200.00 to $1,400.00. Therefore, this Court vacates the order of restitution.

No error as to trial; vacated as to restitution.

Chief Judge MARTIN and Judge ELMORE concur.

SCOTT DEWAYNE LITTLETON, PLAINTIFF v. JONATHAN WILLIS, ADMINISTRATOR CTA OF THE ESTATE OF ELLA DEE WILLIS, DECEASED, DEFENDANT

No. COA09-732

(Filed 6 July 2010)

Negligence— instructions—permanent injury

The trial court erred by instructing the jury on permanent injury in a negligence action arising from an automobile accident where the medical testimony established only that plaintiff's injury had not healed after one year. Plaintiff did not present any medical expert testimony that plaintiff, with reasonable certainty, may be expected to experience future pain and suffering.

Appeal by Defendant from Judgment entered 19 August 2008 and Order entered 22 December 2008 by Judge Phyllis M. Gorham in Superior Court, Carteret County. Heard in the Court of Appeals 5 November 2009.

Bailey & Way, by John E. Way, Jr., for Defendant-Appellant.

Wheatly, Wheatly, Weeks & Lupton, P.A., by Stevenson L. Weeks and Christopher L. Beacham, for Plaintiff-Appellee.

STEPHENS, Judge.

I. Factual Background and Procedural History

On 24 February 2006, Scott Dewayne Littleton ("Plaintiff") filed a complaint against Jonathan Willis, in his capacity as the administrator of the estate of Ella Dee Willis ("Defendant"), alleging personal injuries as a result of an automobile accident that occurred on 21 December 2004. This matter came on for trial during the 28 July 2008 Civil Session of Superior Court, Carteret County. The evidence presented at trial tended to show the following:

On 21 December 2004, Plaintiff was involved in a car accident, in which a vehicle traveling in the opposite direction, driven by Ella Dee Willis, collided head on with Plaintiff's vehicle.[1] Plaintiff was driving his vehicle, and his wife, three children, and a friend were passengers in the vehicle. Upon impact, the friend who was riding in the front passenger seat was thrown through the windshield; Plaintiff's wife and son were thrown from the passenger side of the back seat into the front passenger seat; and Plaintiff's daughters were thrown from the driver's side of the back seat into the back of the driver's seat, in which Plaintiff was sitting. Plaintiff was trapped in the driver's seat because the impact had caused the vehicle's motor to enter the passenger compartment and crush Plaintiff's left foot under the brake pedal. The passengers riding in Plaintiff's vehicle were able to exit the vehicle on their own, but Plaintiff had to be pulled from the vehicle by emergency medical personnel.

Immediately following the accident, Plaintiff was transported by emergency medical personnel to Carteret General Hospital. At Carteret General Hospital, Plaintiff complained of "left collar bone pain, chest wall discomfort, left lower extremity pain and minimal abdominal pain." Laboratory tests revealed an elevated creatinine level which is a muscle enzyme that is released into the blood when a muscle is damaged. The emergency room physician at Carteret General Hospital requested a consultation from Dr. Brady Way ("Dr. Way"), a general surgeon. Dr. Way's impression was that Plaintiff suffered from blunt chest and abdominal trauma with probable mediastinum vascular injury.

Later that day, Plaintiff was flown to Pitt Memorial Hospital for review. At Pitt Memorial Hospital, Plaintiff was examined and it was

1. Ella Dee Willis is now deceased.

determined that there was no major mediastinum injury. On 22 December 2004, Plaintiff was released from Pitt Memorial Hospital.

Plaintiff first sought medical treatment from Dr. James Crosswell ("Dr. Crosswell") on 10 January 2005. At the first visit, Dr. Crosswell observed that Plaintiff's foot was swollen and thought there could be a "hidden" fracture. Due to Plaintiff's continued complaints of left foot pain, continued swelling, and inability to ambulate, Dr. Crosswell ordered an MRI which revealed a fracture of the medial cuneiform and probable fracture of the lateral cuneiform bones in the left ankle/upper foot area. Throughout this time, Plaintiff continued to complain of shoulder, ankle, and foot pain. Dr. Crosswell also testified that Plaintiff was unable to work as a roofer during the time he was under his care.

Dr. Crosswell referred Plaintiff to Dr. Jeffrey Moore ("Dr. Moore"), an expert in orthopedic surgery. During visits to Dr. Moore from 20 January 2005 to 30 June 2005, Plaintiff complained of pain in his left foot and ankle. Dr. Moore opined that Plaintiff could not engage in his occupation as a roofer during the period Plaintiff was under his care.

Plaintiff testified that in the nearly four years since the accident, he had experienced significant swelling and pain in his left foot. Plaintiff testified that he has taken pain medication ever since the accident. Plaintiff's current medications included a fentanyl patch, at a cost of $280.84 for ten patches, and either percocet or oxycodone, costing $21.50 for sixty tablets.

Plaintiff's wife, Daria Littleton ("Daria"), testified that her family had no source of income after the accident, and that they stayed with friends and family. Daria testified that she puts pillows under Plaintiff's foot at night to prevent swelling and relieve the pain so Plaintiff can sleep. Because Plaintiff has been unable to work since the accident, Daria found work cleaning houses in order to pay for the family's bills and Plaintiff's prescriptions. Daria testified that money is so tight for her family, she has to choose between paying the electric bill and paying the pharmacy bills for Plaintiff's pain medications, which cost between $200.00 and $400.00 per month.

At the close of Plaintiff's evidence, Defendant made a motion for a directed verdict which was denied. At the close of all evidence, Defendant renewed his motion for a directed verdict and Plaintiff made a motion for a directed verdict on the issue of negligence. The trial court denied Defendant's motion and granted Plaintiff's motion.

During the charge conference, Defendant objected to an instruction on permanent injury. The trial court overruled Defendant's objection and instructed the jury on permanent injury. The jury returned a verdict awarding damages in the amount of $1,428,238.60. Judgment was entered upon the jury's verdict on 19 August 2008.

On 8 August 2008, Defendant filed motions for judgment notwithstanding the verdict and new trial. In an order entered 22 December 2008, the trial court denied Defendant's motions. From the trial court's judgment and order, Defendant appeals.

II. Instruction on Permanent Injury

In his first argument, Defendant contends that there was insufficient evidence to support a charge of permanent injury, and that the trial court erred in giving an instruction on such. Plaintiff, however, contends that Defendant did not object to the jury charge on permanent injury, and thus, has failed to preserve this issue for our review. Plaintiff's argument is without merit.

Pursuant to N.C. R. App. P. 10(a)(2),

> [a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

Contrary to Plaintiff's contention, Defendant did object to the jury instruction on permanent injury at trial. During the charge conference, defense counsel entered an objection to a charge on permanent injury, arguing that there was no evidence supporting that instruction. The trial court overruled that objection and allowed the instruction. Later on, the trial court asked for any additions, corrections, or objections to the instructions and the following exchange occurred:

> [DEFENSE COUNSEL]: Your Honor, as you know, I object to any reference to loss—of loss of part of the body and permanent injury. As you know, I objected to the finding of negligence.
>
> THE COURT: Objection is noted.

> I am going to, if there is no objection, allow the jury to have this copy of the instruction.
>
> . . . .
>
> THE COURT: Any objection, [defense counsel]?
>
> [DEFENSE COUNSEL]: No, your Honor.

Defense counsel's response of, "No, your Honor[,]" when asked if there was any objection at the end of the charge conference did not constitute a waiver of this issue on appeal. Defense counsel entered an objection to an instruction on permanent injury at the beginning of the charge conference and again immediately prior to the trial court's final inquiry. Moreover, it is obvious that defense counsel's response related solely to the trial court's intention to give a copy of its instructions to the jury. Defendant has preserved this issue for our review, and thus, we address the merits of Defendant's argument.

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).

> "To warrant an instruction permitting an award for permanent injuries, the evidence must show the permanency of the injury and that it proximately resulted from the wrongful act with reasonable certainty. While absolute certainty of the permanency of the injury and that it proximately resulted from the wrongful act need not be shown to support an instruction thereon, no such instruction should be given where the evidence respecting permanency and that it proximately resulted from the wrongful act is purely speculative or conjectural." *Short v. Chapman*, 261 N.C. 674, 682, 136 S.E.2d 40, 46 [(1964)]. The opinion in *Short v. Chapman*, [*s*]*upra*, quotes with approval from *Diemel v. Weirich*, 264 Wis. 265, 58 N.W.2d 651 [(1953)], as follows:
>
> " 'It is a rare personal injury case indeed in which the injured party at time of trial does not claim to have some residual pain

> from the accident. Not being a medical expert, such witness is incompetent to express an opinion as to how long such pain is going to continue in the future. The members of juries also being laymen should not be permitted to speculate how long, in their opinion, they think such pain will continue in the future, and fix damages therefor accordingly.' "

Callicutt v. Hawkins, 11 N.C. App. 546, 547-48, 181 S.E.2d 725, 726 (1971).

> There can be no recovery for a permanent injury unless there is some evidence tending to establish one with reasonable certainty. Upon proof of an *objective* injury from which it is apparent that the injured person must of necessity continue to undergo pain and suffering in the future, the jury may award damages for it without the necessity of expert testimony. Where, however, the injury is *subjective* and of such a nature that laymen cannot, with reasonable certainty, know whether there will be future pain and suffering, it is necessary, in order to warrant an instruction which will authorize the jury to award damages for permanent injury, that there be offered evidence by expert witnesses, learned in human anatomy, who can testify, either from a personal examination or knowledge of the history of the case, or from a hypothetical question based on the facts, that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering, as a result of the injury proven.

Gillikin v. Burbage, 263 N.C. 317, 326, 139 S.E.2d 753, 760-61 (1965) (internal citations and quotation marks omitted); *see also Mitchem v. Sims*, 55 N.C. App. 459, 462, 285 S.E.2d 839, 841 (1982) (Where injury complained of is subjective and of such nature that a layman cannot with reasonable certainty know whether injury is permanent, it is necessary to have medical expert testimony.); *Callicutt*, 11 N.C. App. at 548, 181 S.E.2d at 726 (Where injury complained of is subjective and of such nature that layman cannot, with reasonable certainty, know whether the injury is permanent or whether there will be future pain and suffering, jury may be authorized to award damages for permanent injury or future pain and suffering only if there is offered evidence by expert witnesses who can testify that there is reasonable certainty of permanency or of future pain and suffering.).

In *Callicutt*, our Court held that the trial court did not err "in instructing the jury that there was no evidence that plaintiff sustained a permanent injury or would suffer future pain or incur future med-

ical expenses as a result of [a] collision." *Callicutt*, 11 N.C. App. at 546, 181 S.E.2d at 726. In that case, the only evidence of the permanency of the plaintiff's injury was the plaintiff's testimony that his back continued to hurt every day, four years after the accident which caused his injury. *Id.* at 547, 181 S.E.2d at 726. The doctor who treated the plaintiff ten days after the collision testified that plaintiff's condition appeared to be normal except for a small herniated disc in the lower back, and the doctor did not testify that this injury would be permanent. *Id.* The only other medical expert testimony came from a doctor who examined the plaintiff shortly before trial, and that doctor testified that the plaintiff did not have a herniated disc at that time. *Id.* Thus, the only evidence of permanent injury was the plaintiff's own testimony. *Id.*

In *Gillikin*, the plaintiff presented medical expert testimony that the plaintiff's ruptured disc was the type of condition that usually improves but that could reoccur. *Gillikin*, 263 N.C. at 326, 139 S.E.2d at 761. Our Supreme Court held that this testimony fell short of establishing a permanent injury and noted that the plaintiff's counsel made no further attempt to show one. *Id.* Thus, it was error to charge the jury on permanent injury where so much would have been left to the jury's speculation. Further, the Court found that it was error to admit the mortuary table into evidence in the absence of sufficient evidence of permanent injury. *Id.* at 327, 139 S.E.2d at 761.

> In actions for personal injuries resulting in permanent disability, the mortuary table (G.S. § 8-46) is competent evidence bearing upon the life expectancy and the future earning capacity of the injured person. It is not admissible unless there is evidence of permanent injury. Without such evidence, the admission of the mortuary table to show the probable expectancy of life would be misleading and prejudicial. The expectancy of life is only material when the injury is shown to be one which will continue through life. When permanence is not shown to be probable, the admission of evidence as to the probable duration of the plaintiff's life is improper, and can only mislead the jury as to the real import of the testimony upon the question of damages.

Id. (internal citations and quotation marks omitted).

We conclude that the evidence in this case is no more sufficient on permanent injury than that which was presented in *Callicutt* and *Gillikin*, and thus, the trial court erred in instructing the jury on permanent injury. The medical expert testimony presented at trial

tended to show the following with regard to the alleged permanent nature of Plaintiff's injury:

During visits to Dr. Jeffrey Moore from 20 January 2005 to 15 July 2005, Plaintiff complained of a great deal of pain in his left foot and ankle. On or about 10 March 2005, Dr. Moore reviewed an MRI that Dr. James Crosswell had ordered. That MRI revealed a fracture of the first cuneiform bone in Plaintiff's foot. The cuneiform is in the middle part of the foot and is one of several bones that acts as an intermediary between the ankle and the fore part of the foot where the metatarsals and toes are. Dr. Moore also reviewed the report from Plaintiff's 6 July 2005 MRI which revealed the presence of edema. Dr. Moore explained that

> edema is one of those signs of inflammation, and those are the types of findings that one sees with any long-term problem with a bone or joint. Any post-traumatic episode where you repeat an M.R.I. at a really long time frame after the initial injury, and you see such things as edema in the surrounding joints and bones.

Dr. Moore opined that Plaintiff could not engage in his occupation as a roofer during the period Plaintiff was under his care. There is no evidence, however, that Dr. Moore saw Plaintiff after 15 July 2005, some seven months after the automobile accident, nor is there any evidence that an MRI of Plaintiff's foot was performed after 6 July 2005.

Dr. Crosswell treated Plaintiff from 18 January 2005 until 23 December 2005, and then reexamined him almost two years later in November 2007. Throughout this time, Plaintiff continued to complain of shoulder, ankle, and foot pain. Dr. Crosswell testified that when he saw Plaintiff on 23 December 2005, one year after the accident, Plaintiff's foot fracture still had not healed. Dr. Crosswell next saw Plaintiff in November 2007, at which time Plaintiff continued to complain of shoulder and ankle pain. Dr. Crosswell was uncertain if the fracture in Plaintiff's foot had healed at that time. Dr. Crosswell opined that Plaintiff was unable to work as a roofer during the time he was under his care. When asked if he considered Plaintiff's injury to be permanent, Dr. Crosswell testified that "[n]ot having seen him for a couple of years, three years, I really don't have—I don't feel like I could give an accurate assessment to what has happened in the last three years."

As in *Callicutt* and *Gillikin*, Plaintiff did not present any medical expert testimony that Plaintiff, "with reasonable certainty, may be

expected to experience future pain and suffering, as a result of the injury proven." *Gillikin*, 263 N.C. at 326, 139 S.E.2d at 761. The medical testimony in this case establishes only that Plaintiff's injury had not healed after one year. Thereafter, Dr. Crosswell could not opine as to whether Plaintiff's fracture had healed in the following years. Thus, the medical testimony in this case was insufficient to warrant an instruction on permanent injury as this would have required the jury "to speculate how long, in their opinion, they think [Plaintiff's] pain will continue in the future, and fix damages therefor accordingly." *Callicutt*, 11 N.C. App. at 547-48, 181 S.E.2d at 726. We thus conclude that the trial court erred in instructing the jury on permanent injury. Accordingly, we award a new trial. In light of this holding, we need not address Defendant's remaining arguments on appeal.

NEW TRIAL.

Judges STROUD and BEASLEY concur.

JIMMY LITTLETON LYONS-HART, PETITIONER v. BENJAMIN PERRY HART, RESPONDENT

No. COA09-1461

(Filed 6 July 2010)

Partition— favored over sale—no finding of value—findings did not support sale

An order denying a petition for partition by sale was reversed and remanded where the trial court did not make findings concerning fair market value despite testimony about the value of the property. Moreover, the findings made by the court did not support a determination that division in-kind would result in a substantial injury to some or all interested parties.

Appeal by respondent from order entered 7 October 2008 by Judge William C. Griffin, Jr. in Hyde County Superior Court. Heard in the Court of Appeals 14 April 2010.

Windy H. Rose for petitioner-appellee.

Katherine S. Parker-Lowe for respondent-appellant.

HUNTER, Robert C., Judge.

Benjamin Perry Hart ("respondent") appeals from the trial court's 30 September 2008 order in which it ordered the sale of a parcel of land owned by respondent and his brother, Jimmy Littleton Lyons-Hart ("petitioner"), as tenants in common. After careful review, we reverse the trial court's order and remand with instructions for the trial court to enter an order denying petitioner's Petition for Partition by sale.

Background

On 6 April 1996, Jimmy L. Hart died testate, leaving a parcel of land located on Ocrakoke Island, North Carolina to petitioner and respondent as tenants in common. Accordingly, petitioner and respondent each own a one-half interest in the property. The property consists of .30 acres, or 13,132 square feet of land. The land is zoned as a residential lot and there currently exists on the property one water meter hook up, one septic system, and one double-wide mobile home. Additionally, there are two right-of-ways on the property, one known as Lighthouse Road, which runs to the northwest of the property, and the other known as Loop Road, which runs to the southwest of the property. The right-of-ways take up approximately 2,707.8 square feet of the property. The Loop Road right-of-way has encroached upon the property forming a curve that serves as a radius for turning from Loop Road onto Lighthouse Road. This encroachment is not part of the official right-of-way.

Since 1996, the brothers jointly paid the taxes and insurance on the property and jointly used the property, though respondent spent more time there than petitioner. In 2006, respondent permanently moved into the mobile home. In October 2006, petitioner informed his brother that he wished to end the tenancy in common and suggested three options: (1) respondent could purchase petitioner's interest in the property; (2) they could mutually agree to sell the property and split the proceeds; or (3) petitioner could demand a partition by sale. According to petitioner, respondent originally agreed to sell the property through a real estate agent, but subsequently changed his mind. Respondent offered to divide the property and move the mobile home, but petitioner would not agree to that arrangement.

Petitioner filed a Petition to Partition the property on 12 July 2007. Petitioner alleged: "[P]etitioner desires to hold his interest in said lands in severalty; but that the nature and size of said land is such that an actual partition thereof cannot be made without injury to

the persons interested therein." Respondent filed a response on 30 July 2007, and claimed that "[t]he nature and size of said land is such that an actual division thereof can be made between the co-tenants without injury to any of the parties interested."

On 27 May 2008, a hearing was held before the Hyde County Clerk of Superior Court. Upon hearing evidence and arguments of counsel, the Clerk denied petitioner's petition in open court. On 3 July 2008, the Clerk issued a written order, finding that an actual partition was possible and concluding that "petitioner ha[d] failed to meet his burden of proof in support of partition by sale[.]" Petitioner filed a notice of appeal to superior court on 7 July 2008.

On 9 September 2008, the superior court conducted a *de novo* hearing on petitioner's Petition for Partition. At that time, three surveys were entered into evidence regarding possible divisions of the property. At the time of the hearing, the Ocracoke Development Ordinance required a residential lot to have at least 5,000 total square feet of space. The ordinance allowed the total measurement of a lot to include any square footage taken up by a right-of-way.[1] Accordingly, even though a right-of-way existed on the parties' property and took up 2,707.8 square feet of land, all 13,132 square feet of land could be taken into account in a survey in order to determine if a divided lot would still meet the 5,000 square feet requirement.

The first survey, taken by Legget Land Surveying, P.A. ("Legget"), at the request of petitioner, was based on "geometric measurements" and divided the lot into lots 1A and 1B. Lot 1A contained 5,479 square feet of total land and 3,357 square feet of minimum building space. Lot 1B contained 4,915 square feet of total land and 2,917 square feet of minimum building space. The minimum building space measurements took into account the city ordinance that requires an 8 foot "minimum setback" from the right-of-way. This survey assumed that the mobile home would be moved entirely onto lot 1A. However, this survey did not include the square feet of the right-of-way.

The second survey, also taken by Legget at the request of petitioner, would not require the mobile home to be moved. Based on this survey, lot 1A contained 7,369 square feet of total land and 3,953 square feet of minimum building space. Lot 1B contained 5,763 square feet of total land and 2,334 square feet of minimum building space. This survey took into account the right-of-way.

1. The ordinance was amended in December 2007 to include this provision.

The third survey of the land was performed on behalf of respondent by Edward Foley ("Foley"). This survey assumed that the mobile home would be moved entirely onto lot 1A. Foley divided the property evenly so that lots 1A and 1B would each contain 6,521.6 square feet of total land. Foley took into account the square feet taken up by the right-of-way; however, Foley did not provide any measurements of minimum building space. Nevertheless, there is no evidence to suggest that Foley's survey would result in a violation of any provisions of the city ordinance.

At the hearing, Martha K. Garrish ("Garrish"), a real estate agent, testified that the fair market value of the lot would be $330,000 undivided. Garrish also testified that if each lot were divided into 6,521.6 square feet, as shown in the Foley survey, lot 1A would have a fair market value of $265,000 and lot 1B would have a fair market value of $259,000. Garrish gave no value to the mobile home. Garrish claimed that part of her assessment was based on the fact that lot 1B would have an unobstructed view of the Pamlico Sound, while lot 1A would have only a partial view obstructed by another residence.

On 7 October 2008, the trial court entered a written order containing findings of fact and the following conclusion of law: "Based upon the foregoing findings of fact, the Court concludes as a matter of law that actual partition of the land cannot be made without substantial injury to some or all interested parties." Consequently, the trial court ordered that the land be sold.

On 16 October 2008, respondent timely filed a motion for amended findings of fact, a motion for additional findings of fact, a motion to alter or amend the judgment, a motion for a new trial, and a motion for relief from judgment. A hearing was held on 9 March 2009, and the trial court issued an order denying the motions on 15 June 2009. Respondent timely appealed the trial court's order to this Court.

Standard of Review

> It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Shear v. Stevens Building Co., 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (internal citations omitted). "[T]he determination as to whether a partition order and sale should [be] issue[d] is within the sole province and discretion of the trial judge and such determination will not be disturbed absent some error of law." *Whatley v. Whatley*, 126 N.C. App. 193, 194, 484 S.E.2d 420, 421 (1997).

Discussion

Respondent's primary argument on appeal is that the trial court erred in concluding as a matter of law that an actual partition of the land would cause "substantial injury to some or all interested parties." While respondent does not dispute any of the findings of fact made by the trial court, respondent nevertheless claims that the findings of fact do not support the conclusion of law. We agree.

It has been established in this State that "a partition in kind, if it can be fairly accomplished, is always favored over a sale, since this does not compel a person to sell his property against his will." *Butler v. Weisler*, 23 N.C. App. 233, 238, 208 S.E.2d 905, 909 (1974) (citing *Brown v. Boger*, 263 N.C. 248, 256, 139 S.E.2d 577, 583 (1965)). "The physical difficulty of division is only a circumstance for the consideration of the court." *Id.*

The applicable statute governing the trial court's determination on a petition to partition states:

> (a) The court *shall* order a sale of the property described in the petition, or of any part, *only if it finds*, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties.
>
> (b) 'Substantial injury' means the fair market value of each share in an in-kind partition would be materially less than the share of each cotenant in the money equivalent that would be obtained from the sale of the whole, and if an in-kind division would result in material impairment of the cotenant's rights.
>
> (c) The court shall specifically find the facts supporting an order of sale of the property.
>
> (d) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section.

N.C. Gen. Stat. § 46-22 (2007) (emphasis added).[2]

2. N.C. Gen. Stat. § 46-22 was amended in 2009 after the hearing in this matter.

This Court has previously interpreted N.C. Gen. Stat. § 46-22, as amended in 1985 to include the definition of "substantial injury," and held:

> A tenant in common is entitled, as a matter of right, to an actual partition of the land. If an actual partition, also known as a partition in kind, cannot be made without substantial injury to any of the other tenants in common, the tenant in common seeking partition is equally entitled to a partition by sale. Our law, however, favors actual partition over partition by sale. A tenant in common is entitled to partition by sale only if he or she can show by a preponderance of the evidence that actual partition would result in substantial injury to one of the other tenants in common.

Partin v. Dalton Property Assoc., 112 N.C. App. 807, 810, 436 S.E.2d 903, 905 (1993) (internal citations omitted).

> Under the current version of N.C. Gen. Stat. § 46-22, before a trial court may order a partition by sale, it must first determine that an actual partition would result in substantial injury, that is, that were an actual partition ordered, one of the cotenants would receive a share with a fair market value materially less than the value of the share the cotenant would receive were the property partitioned by sale and a cotenant's rights would be materially impaired. N.C.G.S. § 46-22(b).

Id. at 811, 436 S.E.2d at 906. While factually dissimilar, this Court faced a similar question of law in *Partin* as in the case at bar. There, "the trial court concluded as a matter of law that 'an actual partition of the subject property cannot be made without substantial injury to the co-tenants.' " *Id.* at 812, 436 S.E.2d at 906. This Court held:

> To be sustained, [the trial court's] conclusion must be supported by a finding of fact that an actual partition would result in one of the cotenants receiving a share of the property with a value materially less than the value the cotenant would receive were the property partitioned by sale and that an actual partition would materially impair a cotenant's rights. *These findings of fact must be supported by evidence of the value of the property in its unpartitioned state and evidence of what the value of each share of the property would be were an actual partition to take place.*
>
> In this case, the trial court failed to make the required findings of fact that actual partition would result in one of the

> cotenants receiving a share with a value materially less than the value of the share he would receive were the property partitioned by sale and that actual partition would materially impair a cotenant's rights, and there is no evidence in this record which would support such findings of fact.

Id. (emphasis added). In *Partin*, "[n]either party presented any evidence as to the current value of the land at the time of trial, nor as to what the value of the land would be were it to be actually partitioned." *Id.* at 809, 436 S.E.2d at 905. The trial court's findings of fact did establish that the property would be difficult to partition in-kind because, among other things, the property was "very irregular," "the boundary of the subject property [was] not well established," and there was only one entrance to the property and "no other known means of access[.]" *Id.* at 808, 436 S.E.2d at 904. Despite evidence that the partition in-kind would be difficult, this Court required a showing of fair market value. According to the holding of *Partin*, and as dictated by N.C. Gen. Stat. § 46-22(b), the trial court must consider evidence of fair market value in determining whether a substantial injury would result from a partition in-kind.

In the present case, the trial court made no findings regarding the value of the property in its unpartitioned state and the value of the land should it be divided despite Garrish's testimony concerning the value of the property. Garrish claimed that the fair market value of the land was $330,000 undivided. She further stated that if each lot were divided into 6,521.6 square feet, as shown in the Foley survey, lot 1A would have a fair market value of $265,000 and lot 1B would have a fair market value of $259,000. No other testimony was provided concerning the value of the land. Consequently, the trial court erred in failing to consider fair market value as required by our case law and statute. Without a finding regarding fair market value, the trial court's conclusion of law regarding substantial injury cannot be sustained. *See Partin*, 112 N.C. App. at 812, 436 S.E.2d at 906. Assuming, *arguendo*, that the trial court had made findings concerning Garrish's testimony, such findings would not have supported the trial court's conclusion of law since the uncontroverted evidence indicates that the property is worth more divided in-kind.

N.C. Gen. Stat. § 46-22(b) requires the trial court to consider other factors beyond the fair market value of the land when assessing whether a substantial injury would occur should the land be parti-

tioned in-kind. Here, the trial court recited the findings of the two Legget surveys, but failed to even mention the Foley survey. The trial court did not make a finding that the land could not be divided in-kind based on the evidence provided, nor did the trial court state that any division would materially impair a cotenant's rights. While the Legget surveys show that lot 1B would have smaller minimum building space than lot 1A, that fact is not determinative, particularly where there is evidence that the lots are still valued more individually than as a whole. The valuation was based, in part, on the fact that lot 1B would have an unobstructed view of the Pamlico sound, while lot 1A would have only a partial view. While the trial court found that the mobile home would have to be moved to satisfy the city ordinance requiring an 8 foot setback from the right-of-way, and that no water meter hook-ups would be available until fall 2009 for lot 1B, the trial court did not relate these findings to any substantial injury. Our Supreme Court has stated that "[s]ince partition in kind is favored, such partition will be ordered, even though there may be some slight disadvantages in pursuing such method." *Brown*, 263 N.C. at 256, 139 S.E.2d at 583; *see also Partin*, 112 N.C. App. at 810, 436 S.E.2d at 905 ("A partition by sale will not be ordered merely for the convenience of one of the cotenants."). The trial court's findings at best establish "slight disadvantages" to dividing the property.

In reviewing the trial court's conclusion of law *de novo*, we hold that the trial court's findings of fact do not support the determination that an actual partition of the land would cause substantial injury to "some or all interested parties." Not only did the trial court fail to make findings concerning fair market value, the findings made by the trial court do not support a determination that division in-kind would result in a substantial injury to one of the parties.

In *Partin*, where there was no evidence of fair market value presented, this Court remanded the case to the trial court for a new trial. *Partin*, 112 N.C. App. at 812, 436 S.E.2d at 906. We see no need to do so here where there was evidence of value. Upon review of the evidence, petitioner in this case simply failed to meet his burden of proving a substantial injury would occur if the property were divided in-kind. Accordingly, we reverse and remand this case to the trial court for entry of an order denying petitioner's Petition for Partition by sale. We further order the trial court to remand this case to the Superior Court Clerk with instructions to enter an order for the partition of the parties' property in-kind.[3]

3. The Clerk's original order contained the appropriate disposition.

Conclusion

Based on the foregoing, we reverse the trial court's order due to an error of law and remand with instructions for the trial court to enter an order denying petitioner's Petition for Partition by sale. We need not address respondent's remaining assignments of error.

Reversed and Remanded.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA v. BRADLEY PAUL BLYMYER

No. COA09-1722

(Filed 6 July 2010)

1. Sentencing— erroneous consolidated sentence—first-degree murder—robbery with dangerous weapon

The trial court erred by consolidating for judgment defendant's convictions for first-degree murder and robbery with a dangerous weapon where the jury did not specify whether it found defendant guilty of first-degree murder based on premeditation and deliberation or on felony murder. Thus, the conviction for robbery with a dangerous weapon was arrested.

2. Evidence— gruesome photographs—victim's body

The trial court did not commit plain error in a first-degree murder and robbery with a dangerous weapon case by admitting multiple gruesome photographs of the victim's body. Defendant's constitutional arguments that he raised for the first time on appeal were dismissed. Further, the photos of the victim's body had probative value and, in conjunction with the testimony of two witnesses, were not substantially outweighed by their prejudicial effect.

3. Evidence— prior crimes or bad acts—broke into and stole from two houses near time of victim's death—motive

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by admitting into evidence testimony that defendant broke into and stole from two houses near the time of the victim's death. The admission of testimony

regarding defendant's acts of theft to support his addiction was relevant to illustrate defendant's motive for stealing from the victim, and thus, permissible under N.C.G.S. § 8C-1, Rule 404(b).

Appeal by defendant from judgment entered 12 August 2009 by Judge John L. Holshouser, Jr., in Rowan County Superior Court. Heard in the Court of Appeals 24 May 2010.

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

Haral E. Carlin for defendant-appellant.

BRYANT, Judge.

Defendant Bradley Blymyer appeals from a judgment and commitment entered in Rowan County Superior Court consistent with a jury verdict finding him guilty of first-degree murder and robbery with a dangerous weapon. For the reasons stated herein, we find no error at trial and arrest judgment as to the conviction for robbery with a dangerous weapon.

On 16 November 2006, Kathy McBride stopped to visit with sixty-two year old Jimmy Musselwhite, the victim, at 125 Verlen Drive in Rowan County, and discovered his body. McBride noted that the victim's hands were behind his back, bound with duct tape and that a baseball bat was lying on the floor beside him. A medical examiner later determined that the victim died from multiple blunt and sharp force trauma injuries to his head and neck and had been dead between three to seven days. Sergeant Chad Moose, a deputy with the Rowan County Sheriff's Department, investigated the homicide, and on 26 February 2007, the Rowan County Superior Court Clerk issued an arrest warrant charging defendant Bradley Paul Blymyer with first-degree murder.

Joshua Shaffer, a witness for the prosecution, testified that he and defendant had been friends since the fifth grade and both began abusing prescription medication when Shaffer was seventeen years old. On 10 November 2006, Shaffer and defendant planned to acquire prescription pills from the victim, who was prescribed pain medication for a medical condition affecting his legs. Shaffer testified that he and defendant went to the victim's residence, knocked on the door, and were admitted. Shaffer and defendant carried gloves; Shaffer carried a .25 caliber pistol; and defendant carried a knife and duct tape. Shaffer asked the victim if he was willing to sell some of his pills.

When the victim refused, Shaffer displayed the pistol and stated "that we was [sic] going to have to take them then." Shaffer ordered the victim onto the floor, and defendant taped the victim's hands. Shaffer collected the loose change on the counter, approximately $80.00 from the victim's wallet, and two pill bottles of prescription medication. When, the victim stated that he was going to call the police, Shaffer picked up a baseball bat and struck the victim in the head twice. Once the victim lost consciousness, Shaffer began searching the residence. While searching a back room, Shaffer testified that he heard what sounded like someone being hit with a baseball bat approximately three times. Shaffer returned to find the victim lying on the floor "making a gurgling sound." Shaffer and defendant left. They split the stolen pills and used the money to purchase more pills.

In addition to this testimony, Shaffer and six other witnesses testified to defendant's acts of breaking and entering and stealing to support his addiction.

After the close of the evidence, a jury convicted defendant of first-degree murder and robbery with a dangerous weapon. The trial court consolidated the two convictions and entered judgment sentencing defendant to life imprisonment. Defendant appeals.

On appeal, defendant raises the following eight issues: Did the trial court err by (I) consolidating for judgment the convictions for first-degree murder and robbery with a dangerous weapon; (II) admitting photographs of the victim's body; and (III, IV, V, VI, VII, VIII) admitting testimony regarding prior break-ins.

I

[1] Defendant argues that the trial court committed error by consolidating for judgment the convictions for first-degree murder and robbery with a dangerous weapon where the jury did not specify whether it found defendant guilty of first-degree murder based on premeditation and deliberation or on felony murder. We agree.

> The crime is first-degree murder. Premeditation and deliberation and felony murder are theories which the State may use, pursuant to N.C.G.S. § 14-17, to convict a defendant of first-degree murder. However, a defendant is convicted of the crime, not of the theory. When a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction. Consequently, if a defendant

> is convicted only of first-degree felony murder, the underlying felony cannot be used as an aggravating circumstance at the sentencing proceeding, nor if convicted of the underlying felony can a defendant be sentenced separately for that felony.

State v. Millsap, 356 N.C. 556, 560, 572 S.E.2d 767, 770 (2002) (internal citations omitted).

> But when a jury is properly instructed upon both theories of premeditation and deliberation and felony murder, and returns a first[-]degree murder verdict without specifying whether it relied on either or both theories, the case is treated as if the jury relied upon the felony murder theory for purposes of applying the merger rule.

State v. Silhan, 302 N.C. 223, 262, 275 S.E.2d 450, 477 (1981), *overruled on other grounds by State v. Sanderson*, 346 N.C. 669, 448 S.E.2d 133 (1997).

Here, the jury found defendant guilty of first-degree murder and robbery with a dangerous weapon but did not specify upon which theory the murder conviction was premised. Therefore, we hold that the crime of robbery with a dangerous weapon merged with that of the murder. *See id.* Accordingly, we arrest judgment as to defendant's conviction for robbery with a dangerous weapon.

II

[2] Next, defendant argues that the trial court committed plain error by admitting gruesome photographs of the victim's body. Defendant argues that the admission amounted to a violation of defendant's rights under the constitutions of the United States and North Carolina and a violation of Rules 401 and 403 of our Rules of Evidence. Defendant argues that several of the photographs had little probative value and were grotesque, redundant, and solely intended to inflame the passions of the jury. We disagree.

Defendant raises these issues for the first time on appeal. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citation omitted). Therefore, we dismiss defendant's arguments pertaining to potential constitutional violations.

When the issues not preserved for appeal involve errors in the trial court's instructions to the jury or rulings on the admissibility of

evidence, we review them for plain error. *State v. Cummings*, 346 N.C. 291, 313-14, 488 S.E.2d 550, 563 (1997); *see also*, N.C. R. App. P. 10(b)(4) (2008). We limit our review to defendant's argument that the admission of photographs of the victim's body violated Rules of Evidence 401 and 403 and amounted to plain error.

> The plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to the appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings . . . .

State v. Cummings, 346 N.C. 291, 314, 488 S.E.2d 550, 563-64 (1997) (citation omitted).

"Photographs are usually competent to explain or illustrate anything that is competent for a witness to describe in words, and properly authenticated photographs of a homicide victim may be introduced into evidence under the trial court's instructions that their use is to be limited to illustrating the witness's testimony." *State v. Hennis*, 323 N.C. 279, 283-84, 372 S.E.2d 523, 526 (1988) (internal citations omitted). "Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Goode*, 350 N.C. 247, 258, 512 S.E.2d 414, 421 (1999) (citation omitted). "Photographs depicting the condition of the victim's body, the nature of the wounds, and evidence that the murder was done in a brutal fashion provide the circumstances from which premeditation and deliberation can be inferred. The large number of photographs, in itself, is not determinative." *State v. Hyde*, 352 N.C. 37, 54, 530 S.E.2d 281, 293 (2000) (internal citations and brackets omitted).

Here, the trial court admitted twenty-eight photographs and diagrams of the inside of the mobile home in which the victim was found. Of the twenty-eight photograph or diagrams, twelve depicted the victim's body. The trial court also admitted an additional eleven photographs taken during the autopsy. Testifying for the State,

Sergeant Chad Moose used photos from inside the victim's mobile home to illustrate the position and general condition of the victim's body in the room where he was found, as well as the injuries the victim sustained. Dr. Thomas Owen, a forensic pathologist and medical examiner with the Mecklenburg County Medical Examiner's Office, testified as an expert in forensic pathology to his observations while performing an autopsy. The State introduced photos which Dr. Owen used to illustrate the condition of the body as it was received and during the course of his examination. We hold that the photos of the victim's body had probative value. Furthermore, the probative value of the photos in conjunction with the testimony of Sergeant Moose and Dr. Owen was not substantially outweighed by their prejudicial effect. Therefore, we hold the trial court's admission of the photographs did not amount to error, much less "something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . ." *Cummings*, 346 N.C. at 314, 488 S.E.2d at 563-64 (citation omitted). Accordingly, we overrule defendant's argument.

III, *IV*, *V*, *VI*, *VII*, and *VIII*

[3] Defendant argues that the trial court erred by admitting into evidence testimony that defendant broke into and stole from two houses near the time of the victim's death. Defendant contends that the evidence was admitted in violation of Rule 404(b). We disagree.

Under Rule 404, "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. R. Evid. 404(a) (2009). However, "[e]vidence of other crimes, wrongs, or acts . . . [may] be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. R. Evid. 404(b) (2009). Still, "relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. R. Evid. 403 (2009).

Seven witnesses testified to defendant's bad acts. We review a trial court's determination to admit evidence over objection under Rules 404(b) and 403 for abuse of discretion. *See State v. Lofton*, 193 N.C. App. 364, 373, 667 S.E.2d 317, 323 (2008) (reviewing evidence admitted under Rule 403); *State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635 (2000) (reviewing evidence admitted under Rule

404(b)). However, where the record does not indicate an issue regarding an evidentiary admission was preserved for appellate review, we review the admission only for plain error. *See Cummings*, 346 N.C. at 313-14, 488 S.E.2d at 563; *see also*, N.C. R. App. P. 10(b)(4).

On appeal, defendant challenges the testimony of Joshua Shaffer, Terry Holshouser, State Bureau of Investigation (SBI) Agent Steven Holmes, Melissa Freeze, Starla Holshouser Taylor, and Lieutenant Register Bost of the Rowan County Sheriff's Department. However, defendant failed to object before the trial court to the testimony he now challenges. Therefore, we review the admission of the testimony for plain error. *See Cummings*, 346 N.C. at 313-14, 488 S.E.2d at 563; *see also*, N.C. R. App. P. 10(b)(4).

First, we consider the testimony of Joshua Shaffer. In substance, Shaffer testified that he and defendant broke into the homes of David Wright—Shaffer's stepfather—and Terry and Teresa Holshouser—the parents of Shaffer's girlfriend, Starla Holshouser Taylor—to support their addiction to prescription pain killers. Shaffer also testified that on 31 October 2006, he and defendant attempted to steal prescription pain medication from the victim. Defendant went to the victim's residence wearing gloves, a bandanna over his mouth, and carrying a knife, but the two could not gain access to the victim's home.

The testimony of Terry Holshouser, Agent Steven Holmes of the State Bureau of Investigation, Melissa Freeze—defendant's girlfriend, Starla Holshouser Taylor, and Lieutenant Register Bost of the Rowan County Sheriff's Department tended to corroborate Shaffer's testimony that defendant, like Shaffer, was motivated by his addiction to prescription medication. Therefore, we hold that the admission of testimony regarding defendant's acts of theft to support his addiction was relevant to illustrate defendant's motive for stealing from the victim and thus permissible under Rule 404(b). Accordingly, defendant's argument is overruled.

No error at trial, judgment arrested as to the conviction for robbery with a dangerous weapon.

MARTIN, Chief Judge and ELMORE, Judge concur.

STATE OF NORTH CAROLINA v. ERICA LASHELL McLEAN

No. COA09-1602

(Filed 6 July 2010)

1. Identification of Defendants— photos in lineup—compiled by routine procedure

There was no plain error in the admission of testimony identifying defendant as the person in the photo selected by an undercover officer after a drug buy. The photos the undercover officer examined were taken and compiled as a routine procedure following arrests and were not indicative of anything more than that the person photographed had been arrested. They were nontestimonial in nature.

2. Criminal Law— instructions—expert witness testimony—giving instruction not prejudicial

The trial court did not err in a cocaine prosecution by giving the jury an instruction on how it should consider expert witness testimony as to an SBI Agent. Although defendant argued that the witness did not give an expert opinion on whether the substance tested was cocaine, the witness in fact offered her opinion to explain the standard operating procedures followed by the SBI lab. Even assuming that the agent did not offer expert opinions, defendant was not prejudiced because the jury was entitled and instructed to give whatever weight they deemed appropriate to the testimony. The results of the lab report were admitted independently of this agent's testimony.

Appeal by defendant from judgments entered 26 May 2009 by Judge Richard T. Brown in Lee County Superior Court. Heard in the Court of Appeals 26 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General James M. Stanley, Jr., for the State.

Michele Goldman for defendant-appellant.

STEELMAN, Judge.

The trial court's admission of testimony into evidence that linked defendant's name to a photograph in the Sanford Police Department photo database did not constitute error, much less plain error. It was

not error for the trial court to instruct the jury on how to consider expert testimony based upon the testimony of Special Agent West.

I. Factual and Procedural Background

On 9 May 2006, Deputy Frank McDaniel (McDaniel) was working undercover with the City-County Drug Unit of the Lee County Sheriff's Office. On that day, McDaniel made a street-level drug buy at 106 Pearl Street in Lee County. After completing the buy, McDaniel returned to a predetermined location and was debriefed by Officer Ray Bullard (Bullard), a narcotics investigator with the Sanford Police Department. During this debriefing session, McDaniel described the individual from whom he purchased crack cocaine. Bullard loaded a series of lineup photos from the Sanford Police Department's database on his laptop that matched the description given by McDaniel, and McDaniel selected the photograph of Erica Lashell McLean from a lineup. Bullard cross-referenced the photograph in the database and determined that the person identified by McDaniel was defendant.

The substance obtained by McDaniel was tested by Todd Huml (Huml) at the State Bureau of Investigation (SBI) laboratory and determined to be cocaine. Huml did not testify at trial. Special Agent Jennifer West (Agent West) was qualified as an expert in the field of forensic drug chemistry and testified at trial.

Defendant was indicted for felony maintaining a dwelling for keeping and selling of a controlled substance, possession of drug paraphernalia, possession with intent to manufacture, sell, and deliver a controlled substance (PWISD), and sale and delivery of a controlled substance.

On 26 May 2009, a jury found defendant guilty of possession with intent to sell and deliver cocaine, sale and delivery of cocaine, and possession of drug paraphernalia. The felony maintaining charge was voluntarily dismissed by the State prior to trial. Defendant was sentenced to 12-15 months imprisonment on the sale and delivery count and a consecutive sentence of 8-10 months on the remaining two charges. These sentences were suspended, and defendant was placed on probation for 36 months upon regular and special conditions of probation.

Defendant appeals.

II. Whether the Trial Court's Admission of Purported Hearsay Evidence Constituted Plain Error

[1] In her first argument, defendant contends that the trial court's admission of purported hearsay evidence linking her to the photograph identified by McDaniel constituted plain error. We disagree.

A. Standard of Review

The admissibility of evidence at trial is a question of law and is reviewed *de novo*. *State v. Wilkerson*, 363 N.C. 382, 434, 683 S.E.2d 174, 205 (2009). When a defendant fails to object at trial to the improper admission of evidence, the reviewing court determines if the erroneously admitted evidence constitutes plain error. *State v. Locklear*, 172 N.C. App. 249, 259, 616 S.E.2d 334, 341 (2005). Plain error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002, *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)) (emphasis in original). In determining whether the error rises to plain error, the appellate court examines the entire record and decides whether the "error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 379.

B. Hearsay & Plain Error

Defendant contends that the following testimony from Bullard and McDaniel was inadmissible hearsay:

Bullard:

Q. Okay. And if you would, can you tell me what occurred as you were working with Deputy Frank McDaniel on Tuesday, May the 9th, 2006?

A. [Description of the events prior to the identification] Officer McDaniel viewed the photographs. He identified the subject that he had just purchased crack cocaine from as photograph No. 2308. At that time I crossed-referenced that over and it was a photograph of Erica Lashell McLean.

McDaniel:

Q. Did Agent Bullard tell you who—the picture you identified on that day?

A. Yeah, it was known that it was Erica McLean.

The State contends that the foregoing testimony is admissible hearsay under either exception (6) (business records) or exception (8) (public records) set forth in N.C. Gen. Stat. §8C-1, Rule 803 (2009). Under Exception (8), the following are admissible:

> Public Records and Reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate a lack of trustworthiness.

N.C. Gen. Stat. §8C-1, Rule 803(8) (2009).

When North Carolina rules of evidence parallel their federal counterparts, our appellate courts have frequently looked to federal decisions for additional guidance. *State v. Thompson*, 332 N.C. 204, 219, 420 S.E.2d 395, 403 (1992). As North Carolina Rule of Evidence 803(8) differs from the federal rule only in using "State" in place of "government," federal decisions provide us with meaningful guidance.

In excluding matters observed by police officers and other law enforcement personnel from exception (8), Congress "intended to [exclude] observations made by law enforcement officials at the scene of a crime or the apprehension of the accused and not 'records of routine, non-adversarial matters' made in a non-adversarial setting." *United States v. Pena-Gutierrez*, 222 F.3d 1080, 1087 (9th Cir. 2000) (citing *United States v. Wilmer*, 799 F.2d 495, 501 (9th Cir. 1986), *cert. denied*, 481 U.S. 1004, 95 L. Ed. 2d 200 (1987)), *cert. denied*, 531 U.S. 1057, 148 L. Ed. 2d 570 (2000).

Our Supreme Court has agreed with the majority of other courts that the intended purpose of Rule 803(8) was not to change the common law rule allowing admission of public records of purely "ministerial observations," but instead to prevent prosecutors from attempting to prove their cases in chief by simply putting into evidence police officers' reports of their contemporaneous observations of crime. *State v. Smith*, 312 N.C. 361, 380-81, 323 S.E.2d 316, 327-28 (1984)

(citing *State v. Smith*, 66 Ore. App. 703, 706, 675 P.2d 510, 512 (1984); *United States v. Grady*, 544 F.2d 598, 604 (2d Cir. 1976)).

The underlying theory behind excluding hearsay observations of police officers at the scene of the crime is that they may not be as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases. *State v. Harper*, 96 N.C. App. 36, 40, 384 S.E.2d 297, 299 (1989) (citation omitted). For example, the notes of a non-testifying, undercover officer summarizing alleged drug transactions with a defendant were held to be inadmissible pursuant to Rule 803(8)(B). *Id.* Similarly, a defendant's exculpatory statements contained in a police report were held inadmissible under Rule 803(8) as a matter "observed by police officers." *State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988).

However, fingerprinting and photographing a suspect, and cataloguing a judgment and sentence, are the types of routine and unambiguous matters which the public records hearsay exception in Rule 803(8) is designed to allow, and were not meant to be prohibited by the exclusion in subsection (B). *United States v. Weiland*, 420 F.3d 1062, 1075 (9th Cir. 2005), *cert. denied*, 547 U.S. 1114, 164 L. Ed. 2d 667 (2006); *see also*, *State v. Windley*, 173 N.C. App. 187, 193-94, 617 S.E.2d 682, 686 (2005) (holding that law enforcement record cards allegedly bearing defendant's fingerprints were non-testimonial in nature), *cert. denied and disc. review denied*, 360 N.C. 295, 629 S.E.2d 288 (2006); *United States v. Dowdell*, 595 F.3d 50, 72 (1st Cir. 2010) (holding that a booking sheet does not recount the work that led to an arrest so much as the mere fact that an arrest occurred, and thus constituted a non-adversarial, ministerial observation that was not excluded by Rule 803(8)(B)).

In the instant case, the photos in the Sanford Police Department's photo database were taken and compiled as a routine procedure following an arrest. As in *Dowdell*, these photos are not indicative of anything more than that the person photographed has been arrested, and are thus non-testimonial in nature. As noted in *Weiland*, photographing an arrested suspect is a routine and unambiguous record that Rule 803(8) was designed to cover. Absent evidence to the contrary, there is no reason to suspect the reliability of these records, as they are not subject to the same potential subjectivity that may imbue the observations of a police officer in the course of an investigation. Accordingly, these photos fall under the permissible scope of Rule

803(8), and the admission of the testimony identifying defendant as the person in the photo selected by McDaniel was not error.

This argument is without merit.

III. Whether the Jury Instruction Prejudiced Defendant

[2] In her second argument, defendant contends that the trial court erred in giving the jury an instruction on how it should consider expert witness testimony as to the testimony of Agent West because she did not give an expert opinion that the substance tested by Huml was cocaine. We disagree.

A. Standard of Review

Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). A defendant is prejudiced when there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial. N.C. Gen. Stat. §15A-1443(a) (2009). The burden of showing such prejudice is on defendant. *Id.* When reviewing jury instructions,

> [they] will be construed contextually, and isolated portions will not be held prejudicial when the charge as [a] whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

State v. Rich, 351 N.C. 386, 394, 527 S.E.2d 299, 303 (2000) (quoting *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970)).

B. Jury Instruction

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. §8C-1, Rule 702(a) (2009). It is well-settled in North Carolina case law that an expert may testify to his or her own conclusions based on the testing of others in the field. *State v. Delaney*, 171 N.C. App. 141, 144, 613 S.E.2d 699, 701 (2005).

Prior to trial, the State gave notice to defendant of its intention to introduce the SBI lab report at trial pursuant to N.C. Gen. Stat. § 90-95(g)(1). Defendant failed to notify the State that she objected to

the introduction of the report pursuant to N.C. Gen. Stat. § 90-95(g)(2). The report was therefore admitted at trial without further authentication as evidence of the "identity, nature, and quantity of the matter analyzed." N.C. Gen. Stat. § 90-95(g) (2009); *State v. Steele*, 201 N.C. App. 689, 696, 689 S.E.2d 155, 161 (2010). The report stated that the material submitted to the SBI lab from the 9 May 2006 transaction contained a cocaine base with a weight of 0.2 grams.

Agent West was found to be an expert in the field of forensic drug chemistry. She testified to the typical procedures followed in performing a chemical analysis of a substance submitted to the SBI and in creating a lab report for the results of those analyses. In her testimony, she interpreted the report and offered opinions. These included that it was not unusual for evidence submitted to be held in the evidence vault at the SBI lab for five months before testing, due to the high case load and a backlog of evidence. She also testified the she did not have any reason to believe that Huml had deviated from standard operating procedures in performing the testing recorded in the report. As an expert in the field of forensic drug chemistry, she offered her opinion to explain the standard operating procedures followed in testing substances at the SBI lab. The trial court's expert witness testimony instruction to the jury was proper.

Even assuming *arguendo* that Agent West did not offer any expert opinions in her testimony, defendant was not prejudiced by the trial court giving the expert witness testimony instruction to the jury. N.C.P.I.—Crim., 104.94. The trial judge instructed the jury that "[y]ou should consider the opinion of an expert witness if one is given, but you are not bound by it. In other words, you are not required to accept an expert witness' opinion to the exclusion of the facts and circumstances disclosed by other testimony." The jury was entitled and instructed to give whatever weight they deemed appropriate to the testimony of Agent West. Defendant has not pointed to any evidence in the record that demonstrates that the jury would probably have reached a different verdict but for the instruction. The results of the laboratory report were admitted independently of Agent West's testimony.

This argument is without merit.

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

NO ERROR.

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

STATE OF NORTH CAROLINA v. DARRICE JAMAR COVINGTON

No. COA09-1291

(Filed 6 July 2010)

Constitutional Law— effective assistance of counsel—denial of request for substitute counsel—no error

The trial court in a possession with intent to sell or deliver cocaine case did not err by denying defendant's request for appointment of substitute counsel. Communication and trial strategy did not violate defendant's constitutional rights, and the trial court did not abuse its discretion in denying defendant's request.

STROUD, Judge concurring.

Appeal by defendant from judgment entered 16 June 2009 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 11 March 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Phillip T. Reynolds, for the State.

Michael J. Reece, for defendant-appellant.

JACKSON, Judge.

Darrice Jamar Covington ("defendant") appeals from his 16 June 2009 conviction of possession with intent to sell or deliver cocaine.[1] For the following reasons, we hold no error.

---

1. At trial, the trial court noted that the charge should read "possession with the intent to sell *and* deliver cocaine" and instructed the jury in this manner. (Emphasis added). However, the jury's verdict reads "Guilty of Possession With Intent to Sell *or* Deliver cocaine." (Emphasis added). Although the charge brought against defendant reads "possession with intent to manufacture, sell, *and* deliver[,]" the statutory language of the charge reads "possess with intent to manufacture, sell *or* deliver[.]" N.C. Gen. Stat. § 90-95(a)(1) (2007) (emphasis added). Neither party's brief discusses this issue, and therefore, we do not address it.

On 23 December 2008, defendant was arrested for possession with the intent to sell or distribute cocaine. After a brief pursuit, defendant was apprehended and taken to the Raleigh Police Department where several attempts to search defendant proved unsuccessful due to defendant's clothing, as well as physical and verbal resistance. With the aid of four or five officers, handcuffs, and leg irons, officers were able to search defendant. Their search uncovered a bag of cocaine from the waistband of defendant's boxer shorts, a bag of marijuana, and $234.00 in cash.

On 29 December 2008, defendant waived his right to counsel and subsequently retained an attorney ("trial counsel"). On 15 June 2009, a jury was impaneled for defendant's trial. The following day, trial counsel stated that defendant wished to address the court. Defendant stated that he desired substitute counsel. The trial court asked defendant to explain the basis for his request, and defendant stated that trial counsel had not communicated frequently enough; consequently, they had not discussed the case fully. Defendant also claimed that he was unaware that the trial was going to take place that day. Additionally, defendant explained that he was concerned with trial counsel's trial strategy, particularly that defendant was advised not to testify. The trial court explained to defendant that trial counsel may have a reason for advising defendant not to testify and pointed out defendant's criminal record containing a conviction for the same crime with which he was charged in the instant case. The trial court explained to defendant that he had the right to testify notwithstanding his counsel's advice.

The trial court refused defendant's request to substitute counsel. Instead, the trial court presented defendant with the option to proceed with representation by trial counsel or to proceed representing himself with trial counsel as standby, noting that this course of action was not advised. Defendant chose to proceed with representation by trial counsel. He was convicted as charged by a jury, and at sentencing, defendant told the trial court, "I didn't even know that I—the trial would be set up this quick. I didn't even know that—that the trial [would] be set up so quick. I never knew none of this." On 16 June 2009, the trial court entered judgment and commitment. Defendant appeals.

Defendant's sole argument is that he is entitled to a new trial because the trial court's denial of his request for appointment of substitute counsel constituted a violation of his right to effective assistance of counsel pursuant to Article I, Section 23 of the North

Carolina Constitution and the Sixth Amendment of the United States Constitution.[2] We disagree.

Our Supreme Court has held that

> [t]he right to the assistance of counsel and the right to face one's accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the Federal Constitution which is made applicable to the States by the Fourteenth Amendment, and by Article I, Sections 19 and 23 of the Constitution of North Carolina. The right to the assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused and to prepare his defense.

State v. Cradle, 281 N.C. 198, 207, 188 S.E.2d 296, 302 (1972) (citations omitted). Errors arising pursuant to the United States Constitution are presumed prejudicial unless the appellate court finds that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2007). "The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." *Id.* Our Supreme Court applies this principle to errors arising pursuant to the North Carolina Constitution. *State v. Bunch*, 363 N.C. 841, 844, 689 S.E.2d 866, 868 (2010) (quoting *State v. Huff*, 325 N.C. 1, 33, 381 S.E.2d 635, 654 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990)).

However, "[a]bsent a showing of a sixth amendment violation, the decision of whether appointed counsel shall be replaced is a matter committed to the sound discretion of the trial court." *State v. Hutchins*, 303 N.C. 321, 336, 279 S.E.2d 788, 798 (1981) (citing *State v. Sweezy*, 291 N.C. 366, 230 S.E.2d 524 (1976)). "Because of the potential these challenges have for disrupting the efficient dispensing of justice, appellate courts ought to be reluctant to overturn the action of the trial judge." *Id.* at 337, 279 S.E.2d at 798.

To obtain substitute counsel, a defendant must show " 'good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict.' " *State v. Sweezy*, 291 N.C. 366, 372, 230 S.E.2d 524, 529 (1976) (quoting *United States v. Calabro*, 467 F.2d 973, 986 (2d

2. We note that in the case *sub judice*, trial counsel was retained. However, most of the case law presented by both defendant and the State involves appointed counsel. Neither party argues that this distinction affects the instant case, and our research has disclosed no case that finds the difference significant. Therefore, we will apply case law addressing appointed counsel to the case before us.

Cir. 1972)). " 'In the absence of any substantial reason for replacement of court-appointed counsel, an indigent defendant must accept counsel appointed by the court, unless he desires to present his own defense.' " *State v. Robinson*, 290 N.C. 56, 65, 224 S.E.2d 174, 179 (1976) (quoting *State v. McNeil*, 263 N.C. 260, 270, 139 S.E.2d 667, 674 (1965)).

Denying a defendant's request for substitute counsel based upon his current counsel's communication and trial strategy does not automatically amount to a violation of the defendant's constitutional rights. *See State v. Thacker*, 301 N.C. 348, 271 S.E.2d 252 (1980). In *Thacker*, a defendant requested substitute counsel because of poor "communication between [the defendant] and the [c]ourt-appointed counsel." *Id.* at 351, 271 S.E.2d at 254. The defendant stated that his counsel did not understand the questions that the defendant wanted to present to the court. *Id.* The defendant was allowed to dismiss his counsel and represent himself; his appointed counsel remained available for assistance throughout trial. However, the defendant was not permitted to obtain substitute counsel. Both this Court and our Supreme Court affirmed this decision, holding that "the trial court must satisfy itself only that present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective. The United States Constitution requires no more." *Id.* at 353, 271 S.E.2d at 256.

In the case *sub judice*, defendant's first concern is the level of communication in the attorney-client relationship. Defendant explained that he and his attorney never sat down to talk about the case and that he did not know he was going to be tried until he arrived in court the day of the trial. This argument is unpersuasive.

The trial transcript indicates that defendant and his counsel were in contact prior to the trial. Defendant stated that he had discussed with his counsel the possibility of a plea agreement, potential witnesses in the case, and his desire to avoid incarceration. Although defendant claimed that he never saw a lab report detailing the amount of cocaine he possessed, trial counsel explained to defendant the results of the lab report and the pertinent law regarding why he was charged with a particular weight of cocaine even if the entire substance was not pure. Defendant argues that he was unaware that his trial was going to take place when he appeared in court. However, his presence and trial counsel's presentation of defendant's case demonstrate that whatever defendant's level of awareness may have been, his case was not prejudiced. Trial counsel was prepared for

trial, as evidenced by his examination of witnesses, objections throughout the trial, and closing argument. Although defendant *personally* may not have been ready for trial, his case was ready to be tried and his right to counsel was not violated.

Second, defendant expressed concern regarding trial counsel's trial tactics. Defendant explained that he wanted to take the stand to testify but was advised not to do so. Defendant's concern does not render the assistance of his counsel ineffective, especially considering that "the type of defense to present and the number of witnesses to call is a matter of trial tactics, and the responsibility for these decisions rests ultimately with defense counsel." *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 211 (1991) (citations omitted). The trial court explained to defendant that the decision to testify ultimately was his, but noted that not testifying could be in defendant's best interest given his criminal record. Defendant's concern in this regard demonstrates not only that defendant's counsel attempted to represent defendant effectively, but also that defendant and his counsel previously had communicated regarding whether defendant should testify.

As in *Thacker*, defendant in the instant case voiced concern at trial with his counsel's communication and trial strategy. In both instances, the trial court heard the defendants' concerns and denied their requests for substitute counsel. As in *Thacker*, the trial court here required that defendant either proceed with his present counsel or represent himself, a decision which does not violate a defendant's constitutional right to counsel. *Thacker*, 301 N.C. at 351, 271 S.E.2d at 254. Because defendant's constitutional rights were not violated, the trial court's decision whether to allow substitute counsel was discretionary, and as explained *supra*, it did not abuse its discretion by denying defendant's request.

No error.

Judge ELMORE concurs.

Judge STROUD concurs in a separate opinion.

STROUD, Judge concurring.

Although I concur in the result reached by the majority opinion, I write this separate opinion because I do not believe that defendant

demonstrated that he ever requested court-appointed counsel, nor does the record reflect that he is an indigent defendant who would qualify for court-appointed counsel. However, I concur in the result, as I do not believe that defendant demonstrated a violation of his right to effective assistance of counsel, whether he was requesting the opportunity to retain new counsel and a continuance of his trial or he was requesting court-appointed counsel.

The difficulty arises because it is not clear whether defendant was asking for court-appointed counsel or if he was asking for a continuance to retain new counsel on his own. Defendant's specific statement to the trial court was "I don't want to try the case myself. I want to get another lawyer." Unfortunately, the briefs do not clear up the confusion regarding defendant's request. Defendant's brief implies that defendant's trial counsel was court-appointed and that he wanted new court-appointed counsel. The State's brief repeatedly refers to defendant's counsel as court-appointed. However, the record clearly demonstrates that defendant's trial counsel was privately retained. In addition, the record does not contain an affidavit of indigency or any request by defendant for court-appointed counsel, nor is there any indication that defendant would have qualified for court-appointed counsel. Even if the trial court had permitted defendant's retained counsel to withdraw from the case, defendant would not have been entitled to court-appointed counsel if he did not qualify as indigent pursuant to N.C. Gen. Stat. § 7A-450. *See* N.C. Gen. Stat. § 7A-450 (2007); *State v. Turner*, 283 N.C. 53, 55, 194 S.E.2d 831, 832 (1973) ("The requirement that the State furnish counsel to each defendant charged with a criminal offense beyond the class of petty misdemeanor is conditioned upon a showing of indigency and inability to procure counsel for that reason." (citations omitted)).

For the above reasons, I concur with the result reached by the majority opinion.

STATE OF NORTH CAROLINA v. MAURICE OWENS, DEFENDANT

No. COA09-1441

(Filed 6 July 2010)

1. Evidence— officer testimony—housebreaking tools

The trial court did not commit prejudicial error in a possession of implements of housebreaking, breaking and entering, larceny, and trespassing case by overruling defendant's objection to a detective's testimony that officers found tools in defendant's possession considered to be housebreaking tools in light of the strong evidence of defendant's guilt.

2. Burglary and Unlawful Breaking or Entering— instruction—housebreaking tools

The trial court did not commit plain error in a possession of implements of housebreaking, breaking and entering, larceny, and trespassing case by giving what was tantamount to a peremptory instruction that the tools found in defendant's possession were implements of housebreaking in light of the substantial evidence of defendant's guilt.

3. Burglary and Unlawful Breaking or Entering— possession of implements of housebreaking—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession of implements of housebreaking at the close of all evidence. There was plenary circumstantial evidence permitting the jury to infer that defendant was in actual or constructive possession of tools that were reasonably capable of use for the purpose of breaking into a building and that defendant did in fact possess them for that purpose at the time and place of his arrest.

4. Burglary and Unlawful Breaking or Entering— breaking and entering—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss the charge of breaking and entering under N.C.G.S. § 14-54(a) and felonious larceny pursuant to a breaking or entering. There was substantial evidence that defendant was the person who entered a pump house and, in the absence of evidence of a lawful purpose for doing so, had the requisite intent to commit larceny therein.

5. Constitutional Law— double jeopardy—first-degree trespassing a lesser-included charge of felony breaking and entering

The trial court erred by failing to arrest judgment on a first-degree trespassing charge when the jury returned verdicts on both felonious breaking and entering and first-degree trespass. First-degree trespass is a lesser-included offense of felony breaking and entering.

Appeal by defendant from judgments entered 6 May 2009 by Judge W. Allen Cobb, Jr. in Sampson County Superior Court. Heard in the Court of Appeals 12 April 2010.

Roy Cooper, Attorney General, by Patrick S. Wooten, Assistant Attorney General, for the State.

William D. Spence, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged with possession of implements of housebreaking; felonious breaking and entering; felonious larceny pursuant to breaking and entering; felonious possession of stolen goods; resisting, delaying, or obstructing a public officer; and first-degree trespass. He was charged in an ancillary indictment with having obtained the status of an habitual felon.

The State's evidence at trial tended to show that on the evening of 2 October 2008, James Hairr set the silent alarm at his turkey farm, locked the gate across the vehicular entrance, and went to his home about one-and-a-quarter miles away. Later that night, the alarm went off at the farm. Mr. Hairr and his son went to the farm; when they arrived, the gate was still locked, but they saw a four-wheeler go-cart was parked near a shed. Mr. Hairr observed that the door to the pump house was cracked open. He then saw the light go out in the pump house and someone run out of the door and around the corner of the building. Mr. Hairr called 911.

Law enforcement officers responded to the call, including a canine unit. The dog led the officers to a bag just inside the wood line; the bag contained property belonging to Mr. Hairr. They observed a person dressed in dark clothing between two of the turkey houses and gave chase, eventually finding defendant curled up in the fetal position on the ground in a brushy area near the wood line. A flash-

light and a screwdriver were found on defendant's person. The officers found "[b]olt cutters, wire pliers, screwdrivers, wrenches; miscellaneous tools . . ." in the four-wheeler go-cart. Two of the officers testified that they had seen defendant driving the go-cart within a month and a half before the incident.

Defendant offered no evidence. A jury found him guilty of all charges. The trial court arrested judgment on the charge of possession of stolen goods. Defendant pled guilty to the charge of having attained the status of an habitual felon. He was sentenced as an habitual felon to concurrent active terms of imprisonment of a minimum of 168 months and a maximum of 211 months for each of the charges of possession of implements of housebreaking, breaking and entering, and larceny. He was also sentenced to a consecutive active sixty-day term for resisting a public officer, and a second consecutive active sixty-day term for first-degree trespass. Defendant gave notice of appeal.

---

[1] Defendant's first two arguments raise similar issues. He first contends the trial court erred by overruling his objection to testimony by Detective Parsons that the officers found, on the four-wheeler go-cart at the scene, "[b]olt cutters, wire pliers screwdrivers, wrenches; miscellaneous tools *that we consider house breaking tools*." (Emphasis added). Defendant contends the testimony was inadmissible opinion evidence and invaded the province of the jury. We conclude that even if the admission of the testimony was in error, it was not prejudicial.

In *State v. Turnage*, 190 N.C. App. 123, 660 S.E.2d 129, *rev'd in part on other grounds and remanded*, 362 N.C. 491, 666 S.E.2d 753 (2008), a police officer testified that "[w]e searched [the defendant] and found . . . a screwdriver and a metal rod in his pockets indicating that he was just probably in the process of breaking into a residence. Those types of tools used [sic] to break into residences." *Id.* at 129, 660 S.E.2d at 133 (alteration in original). This Court found that the officer's statements "particularly the first . . . impermissibly invaded the province of the jury, as he drew inferences from the evidence—a task reserved for the jury—to express an opinion as to Defendant's guilt." *Id.* We conclude that there is a slight difference between the testimony in *Turnage* and the detective's testimony in the case *sub judice*. In *Turnage*, the officer drew an inference about the defendant's guilt, "that he was just probably in the process of breaking into a residence," that was not present in Detective Parsons' testimony. It was this inference which seemed to be the emphasis of this Court's

analysis in *Turnage*. *Id.* However, assuming *arguendo* that Detective Parsons' testimony with respect to the character of the tools as implements of housebreaking impermissibly invaded the province of the jury and was, therefore, error, we conclude that the error would not be prejudicial.

To obtain a new trial, a defendant must show that the error was prejudicial, i.e., that absent the challenged testimony, there is a reasonable possibility that a different result would have been reached. *State v. Rasmussen*, 158 N.C. App. 544, 556, 582 S.E.2d 44, 53, *disc. review denied*, 357 N.C. 581, 589 S.E.2d 362 (2003). In addition to Detective Parsons' testimony, the State offered substantial circumstantial evidence that defendant broke into Mr. Hairr's pump house, and that when he was found, he had in his possession a screwdriver and a flashlight. Moreover, in the four-wheeler go-cart which defendant had been seen driving and which was found in close proximity to the pump house, were other tools of a similar nature. Although there are legitimate reasons for which one might possess these tools, their possession on someone else's property where a building has been broken into and property stolen therefrom gives rise to a reasonable inference that defendant possessed the tools for the purpose of using them to break into the building. *See State v. Nichols*, 268 N.C. 152, 154, 150 S.E.2d 21, 22 (1966). In light of the strong evidence of defendant's guilt of the offenses for which he was being tried, we conclude there is no reasonable possibility that, absent Detective Parsons' statement as to the character of the tools, a different result would have been reached by the jury as to the charge of possession of implements of housebreaking.

[2] Defendant also asserts the trial court committed plain error when he instructed the jury as follows:

> For you to find the defendant guilty . . . the State must prove two things beyond a reasonable doubt; first, that the defendant was in possession of implements of housebreaking. *Bolt cutters*, *vice grips*, *channel lock pliers*, *flashlights*, *screwdrivers*, *hacksaw*, *and a rachet and socket are such implements.*

(Emphasis added). Defendant did not object to the instruction at trial; thus, we review under a "plain error" standard of review. *State v. Gainey*, 355 N.C. 73, 106, 558 S.E.2d 463, 484, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). The burden is upon defendant to show that absent the contended plain error, a different result probably would have been reached at trial, or that the error was so fundamen-

tal as to have denied him a fair trial or resulted in a miscarriage of justice. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

For the reasons in our discussion of defendant's first argument relating to Detective Parsons' testimony, we believe the trial court invaded the province of the jury and erred by giving what was tantamount to a peremptory instruction that the tools were implements of housebreaking. It would have been preferable, and a correct statement of the law, for the court to have instructed the jury that, for conviction, it was necessary for the jury to find beyond a reasonable doubt that the listed tools were "made and designed for the purpose of housebreaking, or [are] commonly carried and used by housebreakers, or [are] reasonably adapted for such use." N.C.P.I. Crim. 214.35 (2002). Nevertheless, we conclude defendant has failed to show that absent the error, the jury would probably have reached a different result. As we have noted, the evidence against defendant was substantial, including the evidence that he had a screwdriver and flashlight on his person when he was apprehended after fleeing from the officers. Property identified as having been taken from Mr. Hairr's pump house was found near the place where defendant was found. In addition to the tools found on defendant's person, other tools of a similar nature were found on the four-wheeler go-cart upon which defendant had been observed to ride. The four-wheeler go-cart was parked at the scene of the break-in on Mr. Hairr's turkey farm. No explanation was offered for the combination of tools, which, according to common knowledge, can certainly be used as implements of housebreaking. *See State v. Cadora*, 13 N.C. App. 176, 178, 185 S.E.2d 297, 298 (1971). In light of the substantial evidence of defendant's guilt, we conclude he has failed to show plain error.

[3] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of possession of implements of housebreaking at the close of all the evidence.

> Upon indictment for [possession of housebreaking implements] under G.S. 14-55, the State has the burden of proving the following two things: (1) that the defendant was found to have in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute and (2) that such possession was without lawful excuse.

State v. Beard, 22 N.C. App. 596, 598, 207 S.E.2d 390, 391 (1974). Defendant argues that the State failed to present sufficient evidence to show that defendant possessed the tools in question for the pur-

pose of using them to break into the building. However, we conclude the evidence presented by the State, as recited above in our consideration of the first two issues raised by defendant,

> is plenary circumstantial evidence which would permit the jury to infer, as it must have, that defendant was in actual or constructive possession of the [tools], that the [tools were] reasonably capable of use for the purpose of breaking into a building, and that defendant did in fact possess [them] for that purpose at the time and place of his arrest.

State v. Bagley, 300 N.C. 736, 741, 268 S.E.2d 77, 80 (1980).

[4] Defendant next argues that the trial court erred in denying de fendant's motion to dismiss the charge of breaking and entering pursuant to N.C.G.S. § 14-54(a). With respect to his motion to dismiss, defendant argues the State did not present sufficient evidence that he was the person who entered the victim's pump house. He also argues, in the alternative, if there was sufficient evidence to show he was the one who entered the pump house, then the State failed to show that he had the intent to steal or commit a felony inside the pump house. Thus, defendant argues his motion to dismiss should have been allowed, or only the charge of misdemeanor breaking and entering should have been submitted to the jury. "On a defendant's motion for dismissal on the ground of insufficiency of the evidence, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* We conclude the evidence recited above, as well as the evidence that defendant was apprehended by the officers after running away from the turkey farm and hiding in the woods in close proximity to goods stolen from the pump house, was substantial evidence that defendant was the person who entered the pump house and, in the absence of evidence of a lawful purpose for doing so, had the requisite intent to commit larceny therein. *See State v. Quilliams*, 55 N.C. App. 349, 351, 285 S.E.2d 617, 619, *cert. denied*, 305 N.C. 590, 292 S.E.2d 11 (1982). For the same reasons, we reject defendant's argument that the evidence was insufficient to support his conviction of felonious larceny pursuant to a breaking or entering.

[5] Finally, defendant argues that the trial court should have arrested judgment on the first-degree trespassing charge when the jury re-

turned verdicts on both felonious breaking and entering and first-degree trespass. Although defendant did not preserve this issue by motion or objection, "an error at sentencing is not considered an error at trial for the purpose of N.C. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure." *State v. Hargett*, 157 N.C. App. 90, 92, 577 S.E.2d 703, 705 (2003). "Double jeopardy bars additional punishment where the offenses have the same elements or when one offense is a lesser included offense of the other." *State v. McAllister*, 138 N.C. App. 252, 255, 530 S.E.2d 859, 862, *appeal dismissed*, 352 N.C. 681, 545 S.E.2d 724 (2000). "[F]irst-degree trespass is a lesser included offense of felony breaking or entering." *State v. Hamilton*, 132 N.C. App. 316, 320, 512 S.E.2d 80, 84 (1999). Therefore, the trial court should have arrested judgment on the charge of first-degree trespass.

08 CRS 53517—Possession of implements of housebreaking—No error.

08 CRS 53518—Felonious Breaking or Entering—No error.

08 CRS 53518—Felonious Larceny—No error.

08 CRS 53519—Resisting a public officer—No error.

08 CRS 53520—First degree trespassing—Judgment arrested.

Judges JACKSON and BEASLEY concur.

IN THE MATTER OF: D.W.C. AND J.A.C.

No. COA10-250

(Filed 6 July 2010)

1. Appeal and Error— preservation of issues—failure to appeal from order

In a termination of parental rights case, respondent mother did not preserve for appellate review her argument that the trial court erred by failing to enter an order appointing a guardian *ad litem* for the minor children when the petition alleging neglect

was filed because respondent mother did not appeal from the order adjudicating the children neglected.

2. Termination of Parental Rights— appointment of guardian ad litem—no error

In a termination of parental rights case, the trial court did not err by failing to enter an order appointing a guardian *ad litem* (GAL) for the minor children when respondent mother answered the petition to terminate her parental rights. Although the record did not disclose GAL appointment papers, the record disclosed that a GAL report was filed and the trial court specifically found that a GAL attended the termination of parental rights hearing on the minor children's behalf.

3. Termination of Parental Rights— best interests of the children—sufficient evidence

The trial court did not abuse its discretion in a termination of parental rights case where the trial court properly considered the factors set forth in N.C.G.S. § 7B-1110(a) in concluding that termination of respondent mother's parental rights was in the best interests of the minor children.

Appeal by respondent-mother from order entered 15 January 2010 by Judge Larry J. Wilson in Cleveland County District Court. Heard in the Court of Appeals 28 June 2010.

Charles E. Wilson, Jr., for Cleveland County Department of Social Services petitioner-appellee.

Janet K. Ledbetter for respondent-appellant. Pamela Newell for Guardian ad Litem.

HUNTER, JR., Robert N., Judge.

BACKGROUND

Respondent-mother ("Eloise")[1] appeals from the trial court's order terminating her parental rights to the minor children, D.W.C. ("Donnie") and J.A.C. ("Johnnie").

On 8 May 2008, Cleveland County Department of Social Services ("CCDSS") filed a juvenile petition alleging that Donnie and Johnnie were neglected juveniles, in that they lived in an environment injur-

1. Pseudonyms will be used throughout the remainder of this opinion for ease of reading and to protect the privacy of the children.

ious to their welfare. The petition was a response to an incident taking place on 5 May 2008, where police responded to a domestic violence call alleging that respondent-father ("Edward") and Eloise were abusing alcohol and becoming physically and verbally violent with the minor children in the home. During the incident, Edward was arrested for assault on a female and resisting a public officer. The minor children were one and three years old at the time. The petition filed by CCDSS alleged that the minor children were exposed to domestic violence, substance abuse, and improper supervision in their home.

A kinship care agreement was formed with the maternal grandmother to ensure the safety of the children. Eloise obtained a restraining order to ensure her and the children's safety following the incident on 5 May 2008. However, Eloise dropped the restraining order and married Edward on 6 May 2008 in Rutherford County. The maternal grandmother thereafter advised CCDSS that she could no longer provide care for the children, and asked that an alternative placement be found. CCDSS obtained non-secure custody of the children on 8 May 2008.

At an adjudication hearing on 21 May 2008, Eloise and Edward stipulated that Donnie and Johnnie were neglected. The trial court entered an order adjudicating the children neglected juveniles on 2 July 2008.

On 20 May 2009, CCDSS filed petitions to terminate Eloise and Edward's parental rights. CCDSS alleged that grounds existed to terminate parental rights because: (1) Eloise and Edward had neglected the children; (2) Eloise and Edward had willfully left the children in foster care for more than twelve months without showing reasonable progress; and (3) Eloise and Edward had willfully failed to pay a reasonable portion of the cost of care for the juveniles although physically and financially able to do so. The termination of parental rights hearing was held on 16 December 2009. On 15 January 2010, the trial court entered an order terminating Eloise's and Edward's parental rights. Only Eloise appeals.

ANALYSIS

I.

[1] Eloise argues that the trial court's order terminating her parental rights must be reversed because the trial court failed to enter an order appointing a guardian *ad litem* ("GAL") for the children: (1)

when the petition alleging neglect was filed on 8 May 2008, and (2) when Eloise answered the petition to terminate her parental rights. We disagree.

As a preliminary matter, we note that Eloise has filed a notice of appeal only to the trial court's 15 January 2010 order terminating her parental rights, and accordingly this order is the only order properly before this Court for appellate review. N.C.R. App. P. 3.1(a) (2010) ("[E]xcept as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable."); N.C.R. App. P. 3(d) (2010) ("The notice of appeal . . . shall designate the judgment or order from which appeal is taken and the court to which appeal is taken[.]"); *see In re L.B.*, 187 N.C. App. 326, 332, 653 S.E.2d 240, 244 (2007) (Rule 3.1 is "jurisdictional, and if not complied with, the appeal must be dismissed."), *aff'd*, 362 N.C. 507, 666 S.E.2d 751 (2008). Therefore, Eloise's first argument that a GAL should have been appointed when the petition alleging neglect was filed in May 2008 is dismissed. *In re N.B.*, —— N.C. App. ——, ——, 688 S.E.2d 713, 717 (2009) ("We find that any alleged violation of N.C. Gen. Stat. § 7B-601(a) (2007), with respect to the prior termination hearings, may not be used to challenge the [order terminating parental rights].").

[2] As to Eloise's second argument that a GAL should have been appointed when she answered the petition to terminate her parental rights, section 7B-1108 of our General Statutes provides that "[i]f an answer or response denies any material allegation of the petition or motion, the court shall appoint a guardian *ad litem* for the juvenile to represent the best interests of the juvenile, unless . . . a guardian *ad litem* has already been appointed pursuant to G.S. 7B-601." N.C. Gen. Stat. § 7B-1108(b) (2009). However, even though appointment of a GAL is mandatory by statute in this situation, this Court has held that "failure of the record to disclose guardian *ad litem* appointment papers does not necessitate reversal of the district court's decision," when the guardian *ad litem* has carried out her duties under N.C. Gen. Stat. § 7B-601(a). *In re A.D.L.*, 169 N.C. App. 701, 707, 612 S.E.2d 639, 643 (2005).

In *In re J.E.*, 362 N.C. 168, 655 S.E.2d 831 (2008), our Supreme Court overturned a decision by this Court where we reversed an order terminating parental rights based on the holding in *In re R.A.H.*, 171 N.C. App. 427, 614 S.E.2d 382 (2005). The dissent from this Court, adopted by the Supreme Court, distinguished *R.A.H.*:

> This Court in *In re R.A.H.*, 171 N.C. App. 427, 614 S.E.2d 382 (2005), held that prejudice will be presumed where "a child was not represented by a [GAL] at a critical stage of the termination proceedings." *Id.* at 431, 614 S.E.2d at 385. In that case, the child was not represented by a GAL during the first three and a half days of a termination hearing and the mother's parental rights were terminated. *Id.* at 430, 614 S.E.2d at 384. The mother then appealed "[f]rom the order terminating her parental rights" to the child. *Id.* at 428, 614 S.E.2d at 383.
>
> In the instant case, respondent is also appealing the order terminating her parental rights. Unlike respondent in *In re R.A.H.*, however, respondent in this case points to the children's lack of representation at prior hearings, to which she did not object nor later appeal, as grounds to overturn the trial court's termination order. Unlike the child in *In re R.A.H.*, the children in this case were represented at every stage of the termination hearing.
>
> . . . .
>
> [T]he trial court's order should be affirmed because the prior orders in which the children were purportedly unrepresented are not on appeal before this Court and because a GAL represented the children during the entire termination proceeding. Thus, because it cannot be said that the children were unrepresented during a "critical stage" of the termination hearing, I would affirm the trial court as to this issue.

In re J.E., 183 N.C. App. 217, 228-29, 644 S.E.2d 28, 34-35 (2007), *rev'd*, 362 N.C. 168, 655 S.E.2d 831 (2008). In *J.E.*, a GAL was present in the courtroom during the termination of parental rights proceedings on behalf of the minor children. *Id.* at 227, 644 S.E.2d at 34.

In this case, the same situation as *J.E.* is present, and Eloise's reliance on *R.A.H.* is similarly misplaced. The record here shows that a GAL report was filed recommending the termination of Eloise's parental rights, and the trial court specifically found that a GAL attended the termination of parental rights hearing on the minor children's behalf.

> [T]he Guardian ad Litem of the juveniles is Betsy Sorrell, District Administrator for the Guardian ad Litem Program, 27-B Judicial District. She is present in court today, and the juveniles and the Guardian ad Litem are represented by the attorney advocate for the Guardian ad Litem program.

Under *J.E.*, it is apparent that the GAL performed its statutory duties under N.C.G.S. § 7B-6-01 in this case, and we conclude that the minor children were properly represented at all critical stages, including the termination of parental rights hearing. This argument is overruled.

II.

[3] Eloise also claims that the trial court abused its discretion when it concluded that terminating her parental rights was in the minor children's best interests because there was insufficient evidence to address N.C. Gen. Stat. § 7B-1110(a)(5) (2009).[2] We disagree.

Once the trial court has determined that a ground for termination exists, the court moves on 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). The determination of whether termination is in the best interests of the minor child is governed by N.C. Gen. Stat. § 7B-1110, which states that the trial court shall consider the following factors:

(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). "We review the trial court's decision to terminate parental rights for abuse of discretion." *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). The trial court is "subject to reversal for abuse of discretion only upon a showing . . . that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

2. In her argument in this section, Eloise reiterates her objections concerning the representation of the minor children's GAL at the termination hearing. Since we have already concluded that the duties outlined in section 7B-601 were satisfied by the minor children's GAL under *J.E.*, we do not address Eloise's corollary argument that the GAL in this case was required to put on any further evidence at the hearing.

In its order, the trial court found:

102. That [Donnie] is now 5 years old.

103. That [Johnnie] is now 2 years old.

. . . .

105. That the juveniles are placed together in a licensed family foster home. The juveniles have been in this foster home since April 2009.

106. That the social worker has observed the juveniles in the home and care of the foster parents and observed the juveniles and foster parents to be very bonded. The children refer to the foster parents as "mom" and "dad."

107. That the social worker has also observed the weekly visitation between the juveniles and [Edward] and [Eloise] and also observes the children to be bonded to their parents.

108. That the current foster parents of the juveniles are interested in adopting the juveniles. As licensed foster parents, there are no known barriers to their approval by the Cleveland County Department of Social Services as an adoptive placement.

. . . .

110. That as of the date of this hearing, neither [Eloise] nor [Edward] are able to provide a safe or stable home environment for the juveniles.

. . . .

112. That although [Eloise] has completed some court-ordered services, she has failed to make sufficient progress under the circumstances in the past 20 months to warrant the continuation of the juveniles in foster care for an indefinite period of time.

. . . .

114. That the Court has sanctioned a permanent plan of adoption as in the best interest of the juveniles, and the termination of the parental rights of [Edward] and [Eloise] would aid in the accomplishment of that permanent plan.

These findings show that the trial court properly considered the statutory factors, and did not abuse its discretion in terminating

Eloise's parental rights. Accordingly, the order of the trial court must be

Affirmed.

Judges WYNN and ELMORE concur.

ROBYN MUGNO, PLAINTIFF v. RICHARD MUGNO AND LIBERTY COMPUTER SYSTEMS, INC., DEFENDANTS

No. COA09-1158

(Filed 6 July 2010)

1. Divorce— equitable distribution—home equity loan—corporate expenses—corporation as separate property

The trial court erred in an equitable distribution action by ordering the corporation in which defendant-husband was a founding shareholder to make monthly payments to plaintiff for a home equity loan that had been used for corporate expenses. The court had classified the corporation as separate property and there were no findings to suggest a subterfuge that would make the corporation subject to a legal action to secure marital property.

2. Divorce— equitable distribution—unequal distribution—no abuse of discretion

The trial court did not abuse its discretion in an equitable distribution action where its unequal distribution was supported by findings concerning plaintiff's income, role as primary caretaker for two young children, contribution to defendant's career, and the non-liquid character of the marital home, the primary marital asset.

Appeal by Richard Mugno and Liberty Computer Systems, Inc., from an order filed 20 March 2009 in Wake County District Court by Judge Christine Walczyk granting Robyn Mugno alimony, child support, attorney's fees and ordering an equitable distribution of the marital estate. Heard in the Court of Appeals 9 February 2010.

Smith Moore Leatherwood, LLP, by Sidney S. Eagles, Jr., Elizabeth Brooks Scherer, and Matthew N. Leerberg, for the defendant appellant.

Wake Family Law Group, by Michael F. Schilawski and Julianne B. Rothert, for plaintiff appellee.

HUNTER, JR., Robert N., Judge.

Richard Mugno ("Mr. Mugno") and Liberty Computer Systems, Inc. ("LCS"), (collectively "defendants") appeal the trial court's equitable distribution order granting an unequal distribution of the marital estate in favor of Robyn Mugno ("Mrs. Mugno"). On appeal, defendants argue that (1) the trial court lacked statutory authority to order LCS to make payments to Mrs. Mugno in its equitable distribution order, and (2) the court abused its discretion by ordering an unconscionably disproportionate distribution of the marital estate to Mrs. Mugno. While we agree that the trial court lacked the statutory authority to require LCS to make payments to Mrs. Mugno, we otherwise hold that the order is within the bounds of the district court's discretion.

I. FACTUAL BACKGROUND

Mr. and Mrs. Mugno were married on 23 April 1995 and two children were born of the marriage. Prior to their marriage, Mr. Mugno worked for Retail Computer Systems Corporation, a computer software company that serviced dry cleaning businesses. In 1993, two other individuals and Mr. Mugno bought Retail Computer Systems and changed its name to Liberty Computer Systems, Inc. ("LCS"). In 2006, LCS moved from New York where it was originally domiciled to North Carolina where the corporation was reincorporated as a North Carolina corporation, and the assets of the original entity were transferred to the new entity. As a North Carolina corporation, LCS continued to maintain the same officers and shareholders.

From the proceeds of the sale of their marital residence in New York, Mr. and Mrs. Mugno bought a house in Wake County, making a substantial down payment at the time of the initial purchase. Mrs. Mugno stopped working at the time the couple's children were born, and she and the children were residing in the residence on 21 December 2007, the date of the couple's separation, when Mr. Mugno vacated the home.

Prior to their separation on 18 November 2006, Mr. Mugno had arranged a $100,000 personal loan to him which was to be secured by a home equity line of credit ("HELOC") through USAA Savings Bank. The promissory note was not produced at trial. The deed of trust, which was not prepared by a North Carolina attorney, was signed and acknowledged by both Mr. and Mrs. Mugno at the Mugno's bank by a notary public on 5 January 2007, and was subsequently recorded on 25 January 2007 in the Wake County Registry. Shortly thereafter, Mr. Mugno withdrew approximately $100,000 from this line of credit and transferred the funds to LCS for the purpose of paying LCS debts, some of which were solely Mr. Mugno's, and to purchase the equity interest of one of the three founding shareholders in LCS.

In September 2007, Mr. Mugno met another woman in Tennessee. Prior to the date of separation, he placed a down payment on an apartment for this woman and purchased a car for her. Mr. Mugno subsequently listed the apartment as his address on bank applications and ultimately signed the apartment lease.

On 2 January 2008, Mr. Mugno and the President of LCS signed a purported "promissory note" which required LCS to pay off the Mugno's line of credit loan through a monthly payment by depositing the amount of the payment into the Mugno's joint checking account. On 3 March 2008, Mrs. Mugno filed a complaint in Wake County District Court seeking, among other relief, equitable distribution of property acquired during the couple's twelve-year marriage.

During the proceeding, both parties filed equitable distribution affidavits, listing all property claimed by each party to be either marital or separate property, and gave the estimated fair market value for each item of property at the date of separation. In the affidavits, the parties disagreed as to whether LCS should be classified as separate or marital property. As such, LCS was deemed, by consent order, to be a necessary party. The consent order provided that LCS was being joined "as a party defendant in this action for purposes of equitable distribution only."

The equitable distribution issues, along with the other claims, were heard during a bench trial held on 13 November 2008. In their submissions to the trial court, the parties agreed that the fair market value of the marital home was $385,000 on the date of separation and that the mortgage indebtedness included a first mortgage in the amount of $194,424 and a second home equity mortgage in the

amount of $92,969. As computed by the trial court, the percentage value of the marital home was approximately 88% of the gross marital estate. The value of LCS was not determined or included in the estate because the trial court concluded that it was the separate property of Mr. Mugno. The value of the purported "promissory note" was valued by Mr. Mugno at $96,000 and by Mrs. Mugno at $0. The court distributed the promissory note to Mr. Mugno and valued it at $0. The parties agreed upon the distribution of cars and credit card debt.

In an order entered on 20 March 2009, the trial court awarded the marital home to the wife to enable her to continue to raise the children therein. This decision necessitated the further conclusion that an unequal distribution of the couple's marital assets was equitable and awarded 86% of the marital estate to Mrs. Mugno and 14% to Mr. Mugno. The marital home represented 81% of the net marital estate. In addition, the district court ordered LCS to make monthly payments of $907.38 to Mrs. Mugno in repayment of the $100,000 HELOC which was taken out against the marital home by Mr. Mugno to fund LCS during the marriage. From this order, defendants gave timely notice of appeal.

II. JURISDICTION & STANDARD OF REVIEW

This Court has jurisdiction over defendants' appeal because the equitable distribution order is a final judgment of a district court in a civil action under N.C. Gen. Stat. § 7A-27(c) (2009). On appeal, when reviewing an equitable distribution order, this Court will uphold the trial court's written findings of fact "as long as they are supported by competent evidence." *Gum v. Gum*, 107 N.C. App. 734, 738, 421 S.E.2d 788, 791 (1992). However, the trial court's conclusions of law are reviewed *de novo*. *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004). Finally, this Court reviews the trial court's actual distribution decision for abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

III. DISTRIBUTION OF LCS'S FUNDS

[1] Defendants contend that the trial court erred by ordering LCS to pay Mrs. Mugno monthly payments for the $100,000 HELOC after the court classified the corporation as separate property. We agree.

Pursuant to the North Carolina Equitable Distribution Act, the trial court is required to determine whether the property is marital or

divisible and "provide for an equitable distribution of the marital property and divisible property between the parties[.]" N.C. Gen. Stat. § 50-20 (2009). In accordance with the Act, the trial court is required to follow a three-step analysis: (1) identify the property as either marital, divisible, or separate property after conducting appropriate findings of fact; (2) determine the net value of the marital property as of the date of the separation; and (3) equitably distribute the marital and divisible property. *See Little v. Little*, 74 N.C. App. 12, 16-20, 327 S.E.2d 283, 287-89 (1985). With regard to the distribution phase, there is generally a presumption in favor of equal distribution. N.C. Gen. Stat. § 50-20(c). However, the trial court may conclude, within its discretion, that unequal distribution is equitable after considering the factors listed in N.C. Gen. Stat. § 50-20(c) and making sufficient findings of fact to support its conclusion. *See id.*

It is clear from this record that LCS is not a sole proprietorship, but a corporation in which Mr. Mugno only owns stock. As a corporation, LCS is a separate legal entity which has more than one shareholder. While third-party entities, whether corporations or individuals, holding marital assets in trust or whom are transferees defrauding a creditor spouse may be subject to legal action to secure marital property in an equitable distribution action, there are no findings here to suggest that such subterfuge was present. *Upchurch v. Upchurch*, 122 N.C. App. 172, 176, 468 S.E.2d 61, 63-65 (1996).

Here, the trial court identified the property, determined that LCS stock was Mr. Mugno's separate property, and subsequently ordered LCS to pay Mrs. Mugno $907.38 each month in repayment of the HELOC which was taken out on the marital home for the purpose of supporting LCS. Pursuant to the Equitable Distribution Act, the trial court is only permitted to distribute marital and divisible property. N.C. Gen. Stat. § 50-20(a); *see also Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E.2d 228, 232 (1987) (providing that the Equitable Distribution Act does not affect separate property acquired before the marriage or given to one spouse by a third party). An equitable distribution order is not the proper means to hold LCS, a third party, responsible for a debt owed, and should Mrs. Mugno desire to further LCS's obligation to pay the HELOC, an equitable lien or another lawsuit would be the proper method for obtaining such relief. Accordingly, we hold that the trial court erred by ordering LCS to pay funds to Mrs. Mugno; therefore, we vacate paragraphs 6 and 7 of the trial court's equitabledistribution order.

IV. UNEQUAL DISTRIBUTION

[2] Mr. Mugno next argues that the trial court abused its discretion by ordering an unconscionably disproportionate distribution of the marital estate to Mrs. Mugno. We disagree.

As provided above, we review the trial court's distribution of the marital and divisible property pursuant to an abuse of discretion standard. *Leighow v. Leighow*, 120 N.C. App. 619, 621-22, 463 S.E.2d 290, 291-92 (1995). Where the trial court decides that an unequal distribution is equitable, the court must exercise its discretion to decide how much weight to give each factor supporting an unequal distribution. *White*, 312 N.C. at 777, 324 S.E.2d at 833. A single distributional factor may support an unequal division. *Judkins v. Judkins*, 113 N.C. App. 734, 741, 441 S.E.2d 139, 143 (1994).

In the present case, the trial court determined that an unequal distribution of the marital and divisible assets and debts was equitable. In making its determination the court made the following findings of fact with regard to the distributional factors:

a. Plaintiff earns less income than Defendant;

b. The marriage lasted twelve (12) years and the parties dated since Plaintiff was fourteen (14) years old;

c. Plaintiff is the primary caretaker of two (2) young children and has a need to occupy and own the marital residence and its household effects;

d. During the marriage, Plaintiff assisted Defendant in his career by caring for the minor children, maintaining the home, and using marital equity to help Defendant's business survive. Defendant was thereby able to continue his business and to travel and work; and

e. The primary marital asset is the marital home. Given the current market, the marital home is non-liquid in character.

Pursuant to the abuse of discretion standard, our Courts have held that where the trial court finds that a factor justifies an unequal distribution, that finding will not be disturbed on appeal if supported by competent evidence. *See, e.g.*, *Upchurch v. Upchurch*, 128 N.C. App. 461, 495 S.E.2d 738 (1998); *Becker v. Becker*, 127 N.C. App. 409, 489 S.E.2d 909 (1997); *Jones v. Jones*, 121 N.C. App. 523, 466 S.E.2d 342

(1996). As such, we conclude that the court did not abuse its discretion by ordering an unequal distribution and affirm the remainder of the trial court's order.

V. CONCLUSION

For the reasons stated above, we hold that the trial court erred by ordering LCS to pay Mrs. Mugno monthly payments for the HELOC after the court classified the corporation as separate property; however, the trial court did not abuse its discretion by ordering that the marital and divisible property be distributed unequally. In accordance with our decision, we vacate paragraphs 6 and 7 of the equitable distribution order, remand the matter to the trial court to modify the order not inconsistent with this opinion, and affirm the remainder of the order.

Vacated in part, affirmed in part, and remanded.

Chief Judge MARTIN and Judge JACKSON concur.

DIAMOND J. MATTHEWS, PLAINTIFF v. FOOD LION, LLC, DEFENDANT

No. COA10-73

(Filed 6 July 2010)

Negligence— summary judgment—respondeat superior—no error

The trial court did not err in granting summary judgment in favor of defendant on plaintiff's negligence claim arising out of injuries allegedly sustained as a result of defendant's employee entering the bathroom and hitting plaintiff with the door. Defendant was not liable for the actions of its employee under the theory of *respondeat superior* because there was no genuine issue of material fact that the employee was not operating within the scope of her employment at the time of the incident.

Appeal by Plaintiff from an order entered 30 November 2009 by Judge Craig Ellis in Harnett County Superior Court. Heard in the Court of Appeals 10 June 2010.

Law Offices of James M. Johnson and Brent Adams & Associates, by James M. Johnson and Brenton D. Adams, for Plaintiff-Appellant.

Patterson Dilthey, LLP, by Julie L. Bell, for Defendant-Appellee.

BEASLEY, Judge.

Plaintiff appeals from a trial court order granting Defendant's motion for summary judgment. For the reasons stated herein, we affirm.

The complaints and evidentiary stipulations on file disclose the following: On 31 December 2006, Brigitte Hall, an employee of Food Lion, LLC (hereinafter Defendant) allegedly injured Plaintiff, Diamond J. Matthews, while Hall entered the bathroom at a brisk pace. While on duty, Hall's responsibilities as a part-time cashier consisted of serving customers and bagging groceries. At the time of the incident, Hall had "clocked out" of work and was heading towards the bathroom before leaving the premises. Upon opening the door, Hall discovered the Plaintiff on the floor, some distance from the door, injured and upset. Hall called for assistance from other employees of Defendant and called 911. Hall waited with Plaintiff until assistance arrived. Rescue assistance accompanied the Plaintiff to the hospital.

On 24 March 2009, Plaintiff-appellant filed a Complaint against Food Lion, Inc. and Delhaize America, Inc. In the complaint the Plaintiff alleged that she suffered constant pain as a result of her injury and incurred substantial medical costs. Plaintiff argued that there was sufficient evidence to create a genuine issue of fact as to Hall's negligence and Defendant's liability under the theory of respondeat superior. The original Complaint improperly alleged negligence caused by "Brittany Hall," an employee of Defendant. Plaintiff alleged, inter alia, that "Brittany Hall" was negligent and as an employee of Defendant, acting within the scope of her employment, Defendant was liable for Plaintiff's damages under a theory of respondeat superior and/or agency.

On 7 May 2009, Defendant filed its answer denying negligence and a Motion to Dismiss due to Plaintiff's failure to properly identify Defendant as Food Lion, LLC. On 28 July 2009, Plaintiff filed an Amended Complaint which properly identified Defendant as Food Lion, LLC. Defendant responded on 6 August 2009, by filing an Answer to the Amended Complaint denying negligence and a Motion

to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 209 November 2009, Plaintiff filed a Motion to amend its Complaint, along with its Second Amended Complaint, which properly identified Defendant's employee as "Brigitte Hall." After completion of discovery, the trial court entered an Order on 30 November 2009 granting Defendant's Motion for Summary Judgment.

On appeal, Plaintiff argues that there is a genuine issue of fact as to whether Hall, Defendant's employee, was acting within the scope of her employment at the time of the alleged negligence. We disagree.

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 from a grant or denial of summary judgment is de novo. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). Because summary judgment is a "drastic remedy" that eliminates the need for a full trial, summary judgment should be "granted cautiously." *See Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972). Summary judgment is particularly regarded as an extreme remedy in negligence cases and rarely appropriate, since the reasonable person or due care standard is ordinarily a jury question. *See generally Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979). However, where no genuine issue of material fact exists and reasonable people could only conclude that Defendant was not negligent, summary judgment is proper. *See Wilson Brothers v. Mobil Oil*, 63 N.C. App. 334, 337, 305 S.E.2d 40, 43 (1983); *see also Byrd Motor Lines v. Dunlop Tire and Rubber*, 63 N.C. App. 292, 304, 304 S.E.2d 773, 779-81 (1983).

I. Doctrine of Respondeat Superior

Generally, employers are liable for torts committed by their employees who are acting within the scope of their employment under the theory of respondeat superior. *See Estes v. Comstock Homebuilding Cos.*, —— N.C. App. ——, ——, 673 S.E.2d 399, 402 ("[A] master is responsible for the negligence of his servant which results in injury to a third person when the servant is acting within the scope of his employment and about the master's business."), *disc. review denied*, 363 N.C. 373, 678 S.E.2d 238 (2009). As a general rule, liability of a principal for the torts of its agent may arise in three situations:

(1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business, or (3) when the agent's act is ratified by the principal. *See Snow v. DeButts*, 212 N.C. 120, 122, 193 S.E. 224, 226 (1937). There is no contention that Defendant expressly authorized or ratified Hall's conduct. For this Court to conclude that summary judgment was inappropriate, there must be a genuine issue of material fact as to whether Hall was acting within the scope of her employment at the time of the incident and her negligence can therefore be imputed to the Defendant.

In *Overton v. Henderson*, 28 N.C. App. 699, 222 S.E.2d 724 (1976), this Court stated that

> [t]he principal is liable for the acts of his agent, whether malicious or negligent, and the employer for similar acts of his employees,. . . . The test is whether the act was done within the scope of his employment and in the prosecution and furtherance of the business which was given him to do.

Id. at 701, 222 S.E.2d at 726.

In the event that an employee is "engaged in some private matter of his own or outside the legitimate scope of his employment" the employer is no longer responsible for the negligence of the employee. *Van Landingham v. Sewing Machine Co.*, 207 N.C. 355, 357, 177 S.E. 126, 127 (1934). "It is only when the relation of master and servant between the wrongdoer and his employer exists at the time and in respect to the very transaction out of which the injury arose that liability therefore attaches to the employer." *Estes v. Comstock Homebuilding Cos.*, —— N.C. App. at ——, 673 S.E.2d at 402 (quoting *Tomlinson v. Sharpe*, 226 N.C. 177, 179, 37 S.E.2d 498, 500 (1946)).

II. Scope of Employment

In order for this Court to find Defendant liable for the actions of its employee under the theory of respondeat superior, the employee must be found to have been operating within the scope of her employment at the time of the incident. "To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment." *Troxler v. Charter Mandela Center*, 89 N.C. App. 268, 271, 365 S.E.2d 665, 668 (1988). This Court has held that if an employee departs from the purpose of accomplishing the duties of her employment to accomplish a private

purpose, the employer is not liable. *See Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 491, 340 S.E.2d 116, 122 (1986). However, "Restatement of Agency, section 236 states that a servant may be [acting] within the scope of [her] employment if 'the servant, although performing [her] employer's work, is at the same time accomplishing [her] own objects or those of a third person which conflict with those of the master.' " *Estes v. Comstock Homebuilding Cos.*, —— N.C. App. at ——, 673 S.E.2d at 403 (quoting Restatement (Second) of Agency § 236 (1958)).

Plaintiff argues that although Hall was an off-duty employee at the time of the incident, Hall was still under a duty to inspect the bathroom and report back to Defendant regarding its cleanliness. Even when viewed in the light most favorable to the Plaintiff, there is insufficient evidence to demonstrate that the Defendant is liable under the theory of respondeat superior for actions conducted by an employee while off-duty. Rather, the evidence establishes that Defendant has no control over the actions of its employees once they have "clocked out" of work. It is not enough that the employee was present on the employer's premises at the time of the incident. *Id.* at 492, 340 S.E.2d at 122. Although Hall was on the premises of Defendant at the time of the incident, there is not sufficient evidence to support a finding that Hall was acting within the scope of her employment or in the furtherance of any purpose of Defendant at the time the incident occurred.

Plaintiff further references *Estes* in support of the position that Hall was still operating under the scope of her employment even though she departed from the course of business of her employer. *See generally Estes*, —— N.C. App. ——, 673 S.E.2d 399. In *Estes*, it was the employer's policy that a sales assistant not leave the premises of the model home for any reason other than to show a property to a potential customer. The employee in *Estes* followed the instructions of her employer while she was on duty and did not leave the premises as instructed. Although the employee had stepped outside of the model home for a purely personal purpose, she ran back into work to answer a work related phone call, a responsibility of the employee while on duty and in furtherance of the employer's business. This Court held in *Estes* that there must be a "nexus between the negligent act and the performance of the employee's duties." *Id.* at ——, 673 S.E.2d at 404.

The distinction between *Estes* and the present case is that in *Estes* the employee remained on duty at the time the incident oc-

curred. In contrast, the facts of the case *sub judice* indicate that the employee, Hall, was not on duty, was not required to be on the premises at the time of the incident, and was not going to the bathroom in furtherance of Defendant's business. Hall was not acting within the scope of her employment at the time of the incident and Hall had completely departed from the course of business of her employer. *See id. at* ——, 673 S.E.2d at 402 (citing *Parrot v. Kantor and Martin v. Kantor*, 216 N.C. 584, 589, 6 S.E.2d 40, 43 (1939)). Therefore, Defendant is not liable for Hall's conduct.

In addition, Plaintiff references *Hunt v. State* in support of the proposition that Hall was acting within the scope of her employment even though she was an off-duty employee. 201 N.C. 707, 161 S.E. 203 (1931). Plaintiff contends that *Hunt* stands for the proposition that a "reasonable margin" of time must be allowed for the employee to arrive and leave her place of employment. *Id.* at 710-11, 161 S.E. at 205. However, this case does not apply to the instant case because it does not involve a similar respondeat superior claim. Rather, *Hunt v. State* applies the Workers' Compensation Act to an employee recovering directly from an employer. Plaintiff fails to cite, nor could we find, a case in which this rule allows a third party to recover from an employer under the theory of respondeat superior.

North Carolina courts have held that where the employee is no longer acting in furtherance of the company's business at the time of the accident, the company is not liable under the theory of respondeat superior. *See generally Felts v. Hoskins*, 115 N.C. App. 715, 446 S.E.2d 110 (1994) (employer not held liable for the alleged negligence of vice-president and shareholder who was not acting in furtherance of company's business at time of accident); *see also Camalier v. Jeffries*, 340 N.C. 699, 460 S.E.2d 133 (1995) (newspaper reporter not in scope of employment, when attending party of newspaper, inter alia because he was not required to attend the party, attendance was not required, and the employee was not compensated).

In the case *sub judice*, Defendant had no control over Hall once she had clocked out of work. Although Hall was on the premises of her employer, her employer had no control over her conduct once she was "off the clock." Therefore, Hall was acting outside the scope of her employment at the time she entered the bathroom and Defendant is not liable under the theory of respondeat superior. Accordingly, the trial court properly granted Defendant's motion for summary judgment.

Affirmed.

Judges GEER and JACKSON concur.

THE STATE OF NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, PLAINTIFF v. ANNA MARIE THOMPKINS, EXECUTRIX OF THE ESTATE OF SALLIE DYE ANTHONY, DEFENDANT

No. COA09-1137

(Filed 6 July 2010)

Statutes of Limitation and Repose— recovery of costs of Medicaid assistance—doctrine of nullum tempus occurritt regi

The trial court did not err by awarding summary judgment in favor of plaintiff Department of Health and Human Services in the amount of $52,575.14 for Medicaid assistance in connection with decedent's nursing home and hospital expenses based upon application of the doctrine of *nullum tempus occurritt regi*, which exempts the State and its political subdivisions from the running of time limitations on claims unless the pertinent statute expressly includes the State. The General Assembly failed to explicitly subject the State to the bar created by N.C.G.S. § 28A-19-3(a).

Appeal by defendant from judgment entered 10 July 2009 by Judge Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 10 December 2009.

Attorney General Roy Cooper, by Assistant Attorney General Joel L. Johnson, for the State.

Morgan, Herring, Morgan, Green and Rosenblutt, LLP, by John Haworth, for defendant-appellant.

ERVIN, Judge.

Defendant Anna Marie Thompkins, Executrix of the Estate of Sallie Dye Anthony, appeals from an order awarding summary judgment in favor of the Plaintiff Division of Medical Assistance of the North Carolina Department of Health and Human Services in the

amount of $52,575.14. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we affirm the trial court's judgment.

Ms. Anthony died on 27 August 2004. Prior to her death, Plaintiff expended a total of $52,575.14 in Medicaid assistance in connection with her nursing home and hospital expenses.

On 5 July 2005, Defendant contacted Ida Henry, an employee of Plaintiff's Estate Recovery Section, and inquired about the "process of resolving the debt owed to the Division of Medical Assistance." According to Ms. Henry, Defendant stated that Ms. Anthony had owned real property at the time of her death that had sufficient value to satisfy the debt in the event that it was sold and that she would contact the tenants who currently occupied the property to ascertain their interest in purchasing it.

On 1 July 2008, Defendant qualified as Executrix of Ms. Anthony's estate. A notice to Ms. Anthony's creditors was published on 5 July 2008. Plaintiff never received a copy of the notice to creditors; Defendant did not claim to have sent one to Plaintiff.

On 10 July 2008, Ms. Anthony's devisees[1] sold the real property that Ms. Anthony owned at the time of her death to High Point University for $110,000. The deed reflecting this transaction was recorded at Book 6922, Page 1937 in the Guilford County Register of Deeds' office on 5 August 2008. With the exception of $6,079.62 applied toward funeral bills, legal fees, and administrative expenses, the proceeds from the sale of the property were retained by Ms. Anthony's devisees. On 10 November 2008, Defendant filed a final accounting with the Office of the Clerk of Superior Court of Guilford County, North Carolina, which was approved on 8 December 2008. Upon approval of final account, the personal representative was discharged.

By means of a letter dated 8 December 2008, Plaintiff transmitted a claim for reimbursement of the cost of the medical and skilled care services provided to Ms. Anthony to the Clerk of Superior Court of Guilford County. Defendant denied Plaintiff's claim on the grounds that it had not been presented within the time limitations specified in N.C. Gen. Stat. § 28A-19-3(f).

---

1. Ms. Anthony's devisee's were Jamaal Ageel Thompkins, Tamara Anderson, LaShandra McClendon Denson, and Rodriques Denson.

On 31 March 2009, Plaintiff filed a complaint alleging that Ms. Anthony "had received Medicaid services in the form of nursing home services and hospital services" in the total amount of $52,575.14 and that "[t]he provided services subjected [decedent's] estate to the Estate Recovery Plan of the State of North Carolina pursuant to N.C. Gen. Stat. § 108A-70.5 . . . ." As a result, Plaintiff alleged that it was entitled to the entry of judgment against Defendant in the amount of $52,575.14, plus penalties and interest. In an answer filed on 10 June 2009, Defendant asserted as an affirmative defense, among other things, that Plaintiff's claim was barred by the provisions of N.C. Gen. Stat. § 28A-19-3(f). On the same date, Defendant filed a motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. On 10 July 2009, the trial court entered an order granting summary judgment in favor of Plaintiff on the grounds that, "[i]n order for the governmental purpose to be barred by a statute of limitations, the statute must expressly include the State in the limitation," and that "[t]he provisions of N.C. Gen. Stat. § 28A-19-3(f), cited by Defendant as the applicable statute of limitations, do not expressly include the State in the limitation." The trial court also concluded that N.C. Gen. Stat. § 28A-19(3)(a) and N.C. Gen. Stat. § 28A-19-3(b), "which are referenced in subsection (f), also do not expressly include the State in the limitation." As a result, the trial court entered "judgment against Defendant in the amount of $52,575.14," with each party to "bear its own costs in relation to this action."[2]

On appeal, Defendant argues that the trial court erred in granting summary judgment to Plaintiff and denying Defendant's summary judgment. More specifically, Defendant contends that the trial court erroneously entered summary judgment in favor of Plaintiff based upon a misapplication of the doctrine of *nullum tempus occurritt regi*. We disagree.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). In considering a motion for summary judgment, the trial court must view the evidence in the light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C.

2. Although the Defendant raised as a defense N.C. Gen. Stat. § 28A-17-12(b) to the claims of the State, neither the trial court nor the parties have raised this issue on appeal. We have, therefore, not addressed the issues arising from the application of this statute.

492, 496, 586 S.E.2d 247, 249 (2003) (citation omitted). We review a trial court's decision to grant summary judgment using a *de novo* standard of review. *Durham Land Owners Ass'n v. County of Durham*, 177 N.C. App. 629, 632, 630 S.E.2d 200, 202, *disc. review denied*, 360 N.C. 532, 633 S.E.2d 678 (2006).

The doctrine of *nullum tempus occurritt regi* "survives in North Carolina and applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State." *Rowan County v. U.S. Gypsum Co.*, 332 N.C. 1, 8, 418 S.E.2d 648, 653 (1992). The Supreme Court has adopted a two-pronged test for use in determining whether the doctrine *nullum tempus occurritt regi* applies to cases in which the State was a party in order to reconcile the doctrine with N.C. Gen. Stat. § 1-30, "which provides that limitations apply to the State 'in the same manner as to actions by or for the benefit of private parties.' " *Rowan County*, 332 N.C. at 19, 418 S.E.2d at 654.

> If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly *includes* the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly *excludes* the State.

Id. (emphasis in original). Since Defendant has not argued that the State's claim arises from a non-governmental activity and since she has argued that the relevant statutory provision expressly includes the State, she has implicitly conceded that the claim that the State has advanced here arises from a governmental function. In this case, Defendant contends that the time limitation has run because the applicable provision, N.C. Gen. Stat. § 28A-19-3(a), "expressly includes the State."[3] As a result, the ultimate issue before us revolves around the proper construction of N.C. Gen. Stat. § 28A-19-3(a).

---

3. Since Ms. Anthony's estate was opened more than three years after her death, the directly-applicable statutory provision is that set out in N.C. Gen. Stat. § 28A-19-3(f), which provides that "[a]ll claims barrable under the provisions of [N.C. Gen. Stat. § 28A-19-3(a)] and [N.C. Gen. Stat. § 28A-19-3(b)] shall, in any event, be barred if first publication or posting of the general notice to creditors as provided for in [N.C. Gen. Stat. §] 28A-14-1 does not occur within three years after the death of the decedent." Given that N.C. Gen. Stat. § 28A-19-3(b) relates to claims "which arise at or after the death of the decedent," that statutory provision has no relation to the present dispute. As a result, if the State's claim had been barrable under N.C. Gen. Stat. § 28A-19-3(a), the fact that more than three years had elapsed since Ms. Anthony's death would have prevented its assertion against Defendant even if no notice had been published or delivered.

N.C. Gen. Stat. § 28A-19-3(a) provides, in pertinent part, that:

> All claims against a decedent's estate which arose before the death of the decedent, except contingent claims based on any warranty made in connection with the conveyance of real estate and claims of the United States and tax claims of the State of North Carolina and subdivisions thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis, which are not presented to the personal representative or collector pursuant to [N.C. Gen. Stat. §] 28A-19-1 by the date specified in the general notice to creditors as provided for in [N.C. Gen. Stat. §] 28A-14-1(a) or in those cases requiring the delivery or mailing of notice as provided for in [N.C. Gen. Stat. §] 28A-14-1(b), within 90 days after the date of the delivery or mailing of the notice if the expiration of said 90 day period is later than the date specified in the general notice to creditors, are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.

According to Defendant, N.C. Gen. Stat. § 28A-19-3(a) begins by including "all claims" within its coverage. As a result of the fact that N.C. Gen. Stat. § 28A-19-3(a) then excludes "tax claims of the State of North Carolina and subdivisions thereof," Defendant argues that the statute covers all other claims asserted on behalf of the State, including the type of claim advanced by Plaintiff in this case. According to Plaintiff, this construction of N.C. Gen. Stat. § 28A-19-3(a) is consistent with the underlying policy justification for statutes of this nature,[4] which is that "in the normal course of events there should be a specified time period after which claims against an estate can no longer be filed, even if the creditor is the State of North Carolina or one of its subdivisions."[5] Furthermore, Defendant contends that including Plaintiff's claim within the scope of the claims barrable by N.C. Gen. Stat. § 28A-19-3(a) does not impose an unfair burden on

4. Technically speaking, N.C. Gen. Stat. § 28A-19-3 is a "non-claim statute" rather than a statue of limitation. *Ragan v. Hill*, 337 N.C. 667, 671, 447 S.E.2d 371, 374 (1994).

5. At one point in her brief, Defendant appears to acknowledge the inconsistency of this underlying policy argument with the Supreme Court's decision that North Carolina adheres to the doctrine of *nullum tempus occurritt regi* by commenting that, "[i]f this appeal were before the Supreme Court[,] it would present an excellent fact situation for review of the *Rowan County v. U.S. Gypsum Co.* decision . . . ." However, given that this Court is bound by the decisions of the Supreme Court, *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985), we are not, as Defendant implicitly acknowledges, in a position to entertain a challenge to the continuing validity of the doctrine in question. Thus, we will not address Defendant's policy argument in our opinion.

Plaintiff given the fact that it will learn of a beneficiary's death when the flow of benefit payments stops and given that it has the authority to obtain the appointment of a personal representative pursuant to N.C. Gen. Stat. § 28A-5-2(b)(1) against whom its claim for reimbursement can be asserted. We do not find Defendant's construction of argument to be persuasive.

The fundamental problem with Defendant's argument is that it rests upon an inference of inclusion, rather than an express inclusion of the sort contemplated by *Rowan County*. The *American Heritage Dictionary 2d College Edition* defines "express" as "definitely and explicitly stated;" "particular;" and "specific." A reference to "all claims" is simply not an express reference to claims brought by the State. Nothing in N.C. Gen. Stat. § 28A-19-3(a) "explicitly" and "specifically" states that claims by the State are subject to the claim presentation requirement created by that statutory provision. The only reference to claims brought by the State or other governmental agencies in N.C. Gen. Stat. § 28A-19-3(a) is the express exclusion for "tax claims of the State and subdivisions thereof." Although Defendant's argument that this express exclusion of tax-related claims implies that all other governmental claims are included within the statutory bar, that argument rests on an implied rather than an express exclusion of the type required by *Rowan County*. As a result, given the General Assembly's failure to explicitly subject the State to the bar created by N.C. Gen. Stat. § 28A-19-3(a), we conclude under these facts that the trial court correctly determined that the "doctrine of *nullum tempus occurritt regi* exempts the State from any statute of limitation defense" because the State was otherwise not "expressly included in the statute of limitation." Thus, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

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

STATE OF NORTH CAROLINA v. RODERICK DARNELLE MILLER

No. COA09-1193

(Filed 6 July 2010)

1. Probation and Parole—activation of sentence—active term—consecutive days—no abuse of discretion

The trial court did not abuse its discretion by sentencing defendant to a term of consecutive days in prison for violating his probation. The trial court was not under a mistaken impression of law as N.C.G.S. § 15A-1353(a) did not authorize the courts to impose an active sentence over multiple intervals of time.

2. Appeal and Error— preservation of issues—sentencing—credit for time served

Defendant did not preserve for appellate review his argument that the trial court erred by not giving him sixteen days of credit for time served as defendant had not yet raised the issue before the trial court.

Appeal by defendant from judgment entered 12 June 2009 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 25 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General Tenisha S. Jacobs, for the State.

Robert W. Ewing for defendant.

ELMORE, Judge.

On 5 May 2008, Roderick Darnelle Miller (defendant) was convicted of violating a domestic violence protective order and making a threatening phone call. The district court sentenced defendant to a term of thirty days in the custody of the Guilford County Sheriff and ordered defendant to pay $170.00 in court costs. However, the district court suspended the sentence and placed defendant on supervised probation for twelve months.

On 14 July 2008, a probation officer filed a violation report alleging that defendant had willfully violated conditions of his probation by testing positive for marijuana on four dates, by failing to report to his supervising officer as directed, and by being away from his residence during established curfew hours. On 17 July 2008, defendant

moved the court to activate his sentence. On 31 July 2008, the district court entered an order on violation of probation. The order modified defendant's special conditions of probation as follows: "Upon completion of active sentence, defendant's probation is to be terminated. Intensive sanction is lifted while offender is serving active sentence." The order modified defendant's sentence of intermediate punishment as follows: "comply with the additional conditions of intermediate punishment which are set forth on AOC-CR-603, Page Two, attached." Those additional conditions required defendant to serve an active term of thirty days in the custody of the Guilford County Sheriff, but only on the weekends. Defendant had to "report in a sober condition" to the Guilford County Prison Farm at 6:00 p.m. each Friday and remain in custody until 6:00 p.m. each Sunday. The order required defendant to serve out his sentence two days at a time for fifteen weeks.

On 25 November 2008, the probation officer filed another probation violation report. The officer alleged that defendant had violated the terms of his probation by again testing positive for marijuana six more times, and defendant had failed to pay the $170.00 court costs. The probation officer filed an addendum to the probation violation report on 27 February 2009. The addendum added two more days on which defendant tested positive for marijuana, in violation of the special conditions of his probation.

On 5 March 2009, the district court entered a judgment and commitment upon revocation of probation or election to serve sentence. The district court concluded that defendant had violated a valid condition of probation upon which the execution of the active sentence was suspended. Pursuant to structured sentencing, the district court revoked defendant's probation, activated his suspended sentence, and ordered that defendant be imprisoned for a term of thirty days in the Guilford County Prison Farm. The order ordered that defendant be given sixteen days' credit for time served. Defendant gave notice of appeal to the superior court.

Following a hearing, the superior court also concluded that defendant had violated the conditions of his probation and revoked his probation, activated his sentence, and ordered him to serve thirty days in the Guilford County Prison Farm. This judgment and commitment upon revocation of probation or election to serve sentence was also entered pursuant to structured sentencing. However, the superior court only gave defendant three days' credit for time served. Defendant now appeals.

[1] Defendant argues that the superior court abused its discretion by sentencing him to serve the remainder of his sentence on consecutive days. We review the revocation of probation for an abuse of discretion. *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008).

At the hearing, defendant asked the court to serve the remainder of the time, "not on the weekends but from Monday 6 p.m. to Wednesday at 6 p.m." The court responded:

> I have never been able to convince myself that I have the authority to—I mean, I think—serves their sentence of they don't. And I'm open to you showing me where in the statutes it says that I can do what you want me to do, because nobody's ever been able to show it to me before but maybe you can.

Defense counsel replied:

> Well, I don't think there's any statute either. I think it's just the policy of the Sheriff's Department, sort of somewhat as we were speaking of yesterday, the—the—the rules of the jail and the county—the county facilities are—are run by the sheriff. And if they are willing to accept—accept someone to report, say, to the farm at a certain time and—and stay there for two days and leave at that same time two days later, that's, you know, that's permissible for the judge to—to order active time to be done in that manner. I mean, I—I don't think that there is a statute that says active time may be done by the weekend. I think that if a judge—my understanding, this happens all the time in district court[.]

After some discussion, the court announced:

> I'll revoke his probation, sentence him to 30 days in the custody of the sheriff, credit for time served. And it's not that—I don't have the authority to allow weekends. So, I'm not going to do it. So you can go with the sheriff.

Defendant now argues that the trial court did have the legal authority to allow defendant to serve his sentence on the weekends, contrary to the court's assertion otherwise. A trial court abuses its discretion when it "fail[s] to exercise its discretion regarding a discretionary matter and has ruled on it under the mistaken impression it is required to rule a particular way as a matter of law[.]" *State v. Partridge*, 110 N.C. App. 786, 788, 431 S.E.2d 550, 552 (1993) (quoting *Lemons v. Old Hickory Council*, 322 N.C. 271, 277, 367 S.E.2d 655,

658 (1988)). Defendant argues that the trial court was under the mistaken impression that, under the Structured Sentencing Act, it could not order defendant to serve the remaining fourteen days of his active sentence over the course of seven weekends. We disagree.

General Statute section 15A-1331(a) states that a criminal judgment entered in superior court "shall be consistent with the provisions of Article 81B of this Chapter and contain a sentence disposition consistent with that Article, unless the offense for which his guilt has been established is not covered by that Article." N.C. Gen. Stat. § 15A-1331(a) (2009). Article 81B is the Structured Sentencing Act. The Structured Sentencing Act authorizes courts to impose active punishment, N.C. Gen. Stat. § 15A-1340.20(b) (2009), which is a "sentence of imprisonment [that] is not suspended," N.C. Gen. Stat. § 15A-1340.11(l) (2009). "[A]n offender whose sentence of imprisonment is activated shall serve each day of the term imposed." N.C. Gen. Stat. § 15A-1340.20(b) (2009). "A sentence activated upon revocation of probation commences on the day probation is revoked[.]" N.C. Gen. Stat. § 15A-1344(d) (2009). We can find no provision of Article 81B that authorizes an active sentence of nonconsecutive days. Defendant directs our attention to § 15A-1353, which states that a court must issue an order of commitment "[w]hen a sentence includes a term or *terms* of imprisonment[.]" N.C. Gen. Stat. § 15A-1353(a) (2009) (emphasis added). Defendant argues that the legislature's inclusion of the word "terms" authorizes courts to impose an active sentence over multiple intervals of time, such as weekends. We disagree.

The confusion may stem from the interchangeability of "term" and "sentence" by both the legislature and the courts, as well as the linguistic convenience of using "sentence" as both a verb and a noun. *See*, *e.g.*, *State v. Hemby*, 333 N.C. 331, 336, 426 S.E.2d 77, 80 (1993) ("Here, defendant's three-year *sentences* imposed, respectively, in groups one and two, each of which consisted of consolidated indictments having equal presumptive *terms*, must be apportioned equally among the indictments in each group. Thus, in each group, defendant was, in effect, *sentenced* to a one-year *term* on each indictment; and after consolidation the *terms* were totaled to arrive at the three-year *term* ultimately imposed.") (emphases added). Regardless, we read the legislature's use of "terms of imprisonment" to refer to instances in which a defendant has been convicted of multiple crimes, each carrying a separate term of imprisonment under structured sentencing, which together comprise the defendant's sentence and not, as de-

fendant argues, to refer to non-consecutive periods of imprisonment. *See*, *e.g.*, *State v. Harris*, 361 N.C. 400, 402, 646 S.E.2d 526, 527 (2007) ("After finding defendant had a prior record level of V, the trial court sentenced defendant to a term of active imprisonment of 132 to 168 months for felony possession of cocaine as an habitual felon and to a 20 day concurrent term for misdemeanor possession of marijuana."); *State v. Sexton*, 357 N.C. 235, 236, 581 S.E.2d 57, 57 (2003) ("The trial court sentenced defendant to concurrent prison terms of a minimum of sixty-four and a maximum of eighty-six months' imprisonment on the first two convictions.").

Accordingly, we find that Judge Eagles was not under the "mistaken impression that she was required to rule a particular way as a matter of law," and we hold that she did not abuse her discretion by sentencing defendant to a term of imprisonment comprised of consecutive days.

[2] Defendant next argues that the trial court erred by not giving him sixteen days of credit for time served. We agree that he has demonstrated that he is likely entitled to credit for time served; however, this issue is not properly before us. This Court recently explained:

> [T]he proper procedure to be followed by a defendant seeking to obtain credit for time served in pretrial confinement in addition to that awarded at the time of sentencing or the revocation of the defendant's probation is for the defendant to initially present his or her claim for additional credit to the trial court, with alleged errors in the trial court's determination subject to review in the Appellate Division following the trial court's decision by either direct appeal or *certiorari*, as the case may be. Such an approach makes sense given the reality that, in at least some instances, factual issues will need to be resolved before a proper determination of the amount of credit to which a particular defendant is entitled can be made, and such issues are best addressed, as an initial matter, in the trial courts rather than in the Appellate Division.

State v. Cloer, —— N.C. App. ——, ——, 678 S.E.2d 399, 403 (2009) (footnote omitted). It does not appear that defendant has yet raised this issue before the trial court. However, defendant is not without relief. As suggested by this Court in *Cloer*, defendant may "file a motion for an award of additional credit in the superior court of [Guilford] County pursuant to N.C. Gen. Stat. § 15-196.4." *Id.* at ——, 678 S.E.2d at 404.

Accordingly, we affirm the judgment and order of the trial court.

Affirmed.

Judges JACKSON and STROUD concur.

WILLIAM C. HANSON, AND WIFE, ALESE C. HANSON, PLAINTIFFS v. LEGASUS OF NORTH CAROLINA, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, AND TED MORLOCK, INDIVIDUALLY, DEFENDANTS

No. COA09-1155

(Filed 6 July 2010)

Statute of Frauds— specific terms of agreement—not found

The trial court correctly entered judgment for defendants in an action arising from a failed real estate closing where the trial court relied on the statute of frauds in arguments concerning an agreement to extend the closing date. The record and transcript do not reveal the terms of the agreement or that the parties ever came to a meeting of the minds. Without an agreement there could be no contract, and without a contract the statute of frauds issue was not reached.

Appeal by plaintiff from judgment entered on 15 June 2009 by Judge James U. Downs in Superior Court, Jackson County. Heard in the Court of Appeals 10 February 2010.

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

Coward, Hicks & Siler, P.A., by Andrew C. Buckner, for defendants-appellees.

STROUD, Judge.

Plaintiffs sued defendants for money they alleged defendants owed them pursuant to an agreement between the parties. The trial court entered judgment in favor of defendants, concluding that the agreement demonstrated by the evidence was required by N.C. Gen. Stat. § 22-2, the Statute of Frauds, to be in writing, but that the agreement was not in compliance with the Statute of Frauds. Plaintiffs

appeal. As we can discern no agreement between plaintiffs and defendants, we affirm.

I. Background

On 20 May 2008, plaintiffs sued defendants alleging that "[o]n or about May 1, 2007, Defendants entered into an agreement wherein Defendant agreed to pay Plaintiffs one hundred thirty-three thousand eight hundred and 00/100 dollars ($133,800.00) with nine percent (9%) interest, due and payable on October 15, 2007." Plaintiffs further alleged that "[d]efendants defaulted in payment[.]" Plaintiffs sued for breach of contract and attorneys' fees. Plaintiffs also requested, in the alternative, a constructive trust.

On 21 July 2008, defendants filed a motion to dismiss plaintiffs' complaint. On 15 September 2008, defendants' motion to dismiss was granted as to the claim for attorneys' fees but otherwise denied. On or about 15 September 2008, defendants answered plaintiffs' complaint and alleged affirmative defenses of accord and satisfaction and the Statute of Frauds. In June 2009, a bench trial was held. The trial court made the following uncontested findings of fact:

> 1. That in 2006, plaintiffs and defendants entered into a contract for the purchase and sale of real property known as "Trout Creek" in Glenville, North Carolina ("Agreement"), for a purchase price of $3,617,600.00. Said property consists of approximately 261.58 acres and is more particularly described in Deed Book 1471, Page 420 of the Jackson County Public Registry.
>
> 2. That the Agreement was memorialized in writing.
>
> 3. That pursuant to the Agreement, defendants paid plaintiffs $60,000.00 in earnest money, plus an additional $10,000.00, for a total of $70,000.00 in an earnest money deposit.
>
> 4. That pursuant to the Agreement, closing was to occur on or before September 15, 2006.
>
> 5. That the closing date of September 15, 2006 arrived but defendants could not close the transaction because they did not have the funds to do so and could not obtain the necessary funds.
>
> 6. That proposals were exchanged between the parties to extend the closing date, one of which is plaintiffs' Exhibit 2, in which defendants proposed to pay 15% annual interest on the original purchase price, which sum was to be added to the con-

tract purchase price. Defendants proposed that said sums be paid to plaintiffs in equal monthly installments of $44,500.00 up to and including May 15, 2007, when closing was to occur.

7. That monies were paid by defendants to plaintiffs pursuant to the agreement to extend the closing date of the Agreement and that such monies were accepted by plaintiffs.

8. That defendants failed to make the first two payments to plaintiffs under the agreement to extend the closing date, then made two payments and finally made two more payments for a total of four payments in the total amount of $178,400.00.

8. [sic] That these payments made by defendants to plaintiffs left an outstanding balance under the agreement to extend the closing date of $178,000.00.

. . . .

10. That defendants assigned their interests in the Agreement to J. Patrick Kennedy, Trustee of the Patrick and Patricia Kennedy 2000 Trust u/a/d December 18, 2000 ("Kennedy Trust").

11. That there was no written agreement between defendants and the Kennedy Trust memorializing the assignment, nor was there a written agreement between plaintiffs and the Kennedy Trust regarding what obligations the Kennedy Trust was assuming under the Agreement.

12. That plaintiff William C. Hanson admitted under oath that he had knowledge of and agreed to the assignment of defendants' interests in the Agreement to the Kennedy Trust.

13. That the transaction was in fact closed on May 17, 2007.

14. That the plaintiffs were not physically present at the closing.

15. That at the time of the closing, the plaintiffs were in the country of Nicaragua.

16. That on May 15, 2007, plaintiffs executed a North Carolina General Warranty Deed before a Notary Public, which deed transferred the subject property to the Kennedy Trust.

17. That on November 19, 2007, defendant Ted Morlok emailed plaintiff William C. Hanson and stated, "Tony and I have every intention of paying the note we owe you." Said email was contained in plaintiffs' Exhibit 4.

18. That the note mentioned in the aforementioned email contained in plaintiffs' Exhibit 4 does not exist.

The trial court ordered "that judgment be entered in favor of defendants, that plaintiffs have and recover nothing of defendants and that the costs of this action be taxed to plaintiffs." Plaintiffs appeal.

II. Standard of Review

> In a bench trial in which the superior court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Hinnant v. Philips, 184 N.C. App. 241, 245, 645 S.E.2d 867, 870 (2007) (citation, quotation marks, and ellipses omitted).

III. Statute of Frauds

In its order, the trial court found "[t]hat both parties agreed that there were outstanding amounts due under the agreement to extend the closing date; however, no written agreement was ever entered into by plaintiffs and defendants regarding the payment of these amounts." The trial court further concluded "[t]hat defendants' obligation to pay plaintiff the outstanding balance under the agreement to extend the closing date, if any, was not in writing and therefore violated the provisions of N.C.G.S. § 22-2." Plaintiffs first contend that "the trial court erred in finding from the evidence presented that the agreement between plaintiffs and defendants concerning extension of the closing date was not in writing and therefore violated the Statute of Frauds." (Original in all caps.)

N.C. Gen. Stat. § 22-2 provides that

> [a]ll contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

N.C. Gen. Stat. § 22-2 (2007).

In *Hurdle v. White*, this Court noted that

> [e]ssential elements of an agreement to sell include a designation of the vendor, the vendee, the purchase price, and a description of the land, the subject-matter of the contract, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers.

Hurdle v. White 34 N.C. App. 644, 648, 239 S.E.2d 589, 592 (1977) (citation and quotation marks omitted), *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978).

An agreement is a pre-requisite to a contract and thus also a pre-requisite to a contract which is in compliance with the Statute of Frauds. *See*, *e.g.*, *McCraw v. Llewellyn*, 256 N.C. 213, 216, 123 S.E.2d 575, 578 (1962) ("*A contract is an agreement* between two or more persons upon sufficient consideration to do or to refrain from doing a particular act." (emphasis added) (citations and quotation marks omitted)); *see also* N.C. Gen. Stat. § 22-2 (noting N.C. Gen. Stat. § 22-2 is applicable to "[a]ll contracts . . ."). Therefore, in order to analyze plaintiffs' issue regarding the Statute of Frauds we must analyze the writings to determine if they demonstrate the terms of an agreement which is sufficiently "certain" to be enforceable. *See Hurdle* at 648, 239 S.E.2d at 592.

Though the trial court's unchallenged findings of fact and conclusions of law provide that an agreement to extend the original closing date of the purchase contract was entered into by the parties, the trial court fails to identify the specific terms of the "extension agreement," but instead merely notes "proposal" terms. We thus turn to the evidence before the trial court, including the documents in the record on appeal and the transcript. After a thorough analysis of the record and transcript before us, we are unable to discern the specific terms of any "extension agreement" between the parties. Plaintiffs' evidence consisted of various writings such as emails and letters. Plaintiffs request that this Court consider "several papers properly connected together[;]" in other words, plaintiffs request that we consider the separate documents in the record in order to compile the terms of the agreement. However, even when we view the record as plaintiffs argue, we are unable to discern a specific agreement between the parties beyond the initial contract to purchase land. The parties exchanged various proposals regarding the extension of the closing date, and some payments were made, but the written documents in the record do not demonstrate that the parties ever came to a meeting of the minds as to the exact terms of their "extension agreement." Plaintiffs also argue that the "extension agreement" was oral and thus

defendants should not be allowed to "avoid their obligations by hiding behind the Statute of Frauds." However, the trial court failed to make any findings or conclusions regarding an oral modification and plaintiffs fail to direct us to any evidence of such a modification. Without an agreement, there can be no contract, and without a contract, we need not reach the issue of compliance with the Statute of Frauds. *See*, *e.g.*, *McCraw* at 216, 123 S.E.2d at 578; N.C. Gen. Stat. § 22-2. Accordingly, we affirm. *See generally State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) ("The rule is that a correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned." (citation omitted)).

IV. Conclusion

As we have concluded that the parties never had a meeting of the minds as to the proposed agreement to extend the closing date, we cannot review plaintiff's contentions regarding the Statute of Frauds. Our conclusion also renders plaintiff's other contentions regarding the non-existent "extension agreement" moot, and we need not address them. Therefore, we affirm the trial court's judgment in favor of defendants.

AFFIRMED.

Judges BRYANT and ELMORE concur.

IN THE MATTER OF: J.C.

No. COA10-31

(Filed 6 July 2010)

1. Juveniles— delinquency—possession of weapon on school property—steel link equivalent to metallic knuckles

The trial court did not err by concluding that a steel link in a juvenile's possession on school property was a weapon under N.C.G.S. § 14-269.2(d) that was sufficiently equivalent to metallic knuckles. The focus of the statute is the increased necessity for safety in our schools.

2. Juveniles— adjudication—delinquency

The trial court did not err by adjudicating a juvenile as delinquent based on his possession, on school property, of a steel link that was a weapon under N.C.G.S. § 14-269.2(d).

Appeal by juvenile from order entered 8 September 2009 by Judge Judith M. Daniels in Robeson County District Court. Heard in the Court of Appeals 7 June 2010.

Roy Cooper, Attorney General, by Jane L. Oliver, Assistant Attorney General, for the State.

Mary McCullers Reece, for juvenile-appellant.

MARTIN, Chief Judge.

On 18 March 2009, a juvenile petition was filed alleging that J.C. was delinquent in that he possessed a weapon on school property in violation of N.C.G.S. § 14-269.2(d). In the petition, the weapon was described as a "steel link from chain." The juvenile moved to dismiss the proceeding on the grounds that the petition was insufficient to allege a violation of the statute because a "steel link from chain" is not a weapon as contemplated by the statute. The trial court reserved ruling until the conclusion of the evidence.

The State's evidence tended to show that while monitoring the students boarding the buses at the end of the school day on the afternoon of 25 February 2009, Brent Locklear, a school counselor at Fairgrove Middle School, observed thirteen-year-old J.C. reach into his pocket and retrieve a metallic, oval-shaped "link" through which J.C. slid several of his fingers. With the metallic link gripped in his fist and held securely across his knuckles, Mr. Locklear then observed J.C. begin to approach another student while keeping the hand carrying the metallic link down by his side. J.C. approached the other student in a manner that led Mr. Locklear to believe that J.C. was attempting to move toward the other student without being noticed. Because Mr. Locklear knew that J.C. and the student he was approaching had been in his office about a problem involving "[a] girl," after observing J.C. walk with the metallic link held securely across his knuckles for about six feet in the direction of the other student, Mr. Locklear "confronted" J.C. when he was about eight to ten feet behind the student, took the metallic link from J.C., and escorted him to the principal's office. The link was introduced into evidence; it was a C-shaped, oblong, solid metallic bar approximately three

inches long on each side, one-and-a-half inches wide, and capable of being opened and closed by turning a half-inch bolt to complete the oblong-shaped closed link. The bar was made of steel, approximately three-eighths of an inch thick, and weighed approximately one pound.

At the close of the State's evidence, the juvenile renewed his motion to dismiss on the grounds that the metallic link was not a weapon as contemplated by the statute. After considering the evidence and arguments from counsel, the trial court determined that the juvenile possessed a weapon, which it described as "a steel link from a chain which is equivalent in appearance and use to metallic knuckles," on school property in violation of N.C.G.S. § 14-269.2(d), and so entered an order adjudicating J.C. delinquent. The juvenile appeals.

---

[1] A juvenile petition "serves essentially the same function as an indictment in a felony prosecution and is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity that the accused is clearly apprised of the conduct for which he is being charged." *In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004). Since an indictment is "fatally defective" and will "fail[] to evoke the jurisdiction of the court . . . if it wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty," *In re R.P.M.*, 172 N.C. App. 782, 787, 616 S.E.2d 627, 631 (2005) (citations and internal quotation marks omitted) (second omission in original), we must first determine whether the trial court properly concluded that the petition, which identified the metallic link as an "other weapon" described as a "steel link from chain," averred a fact necessary to support the element of the offense that J.C. possessed or carried a weapon as contemplated by N.C.G.S. § 14-269.2(d).

" 'Legislative intent controls the meaning of a statute.' " *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998) (quoting *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81, 347 S.E.2d 824, 828 (1986)). "To determine 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." *Id.* "First among these considerations, however, is the plain meaning of the words chosen by the legislature; if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings." *Id.* at 522, 507 S.E.2d at 895-96. "The Court's analysis

therefore properly begins with the words themselves." *Id.* at 522, 507 S.E.2d at 896.

N.C.G.S. § 14-269.2(d) provides:

> It shall be a Class 1 misdemeanor for any person to possess or carry, whether openly or concealed, any BB gun, stun gun, air rifle, air pistol, bowie knife, dirk, dagger, slungshot, leaded cane, switchblade knife, blackjack, *metallic knuckles*, razors and razor blades (except solely for personal shaving), firework, or any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips and tools used solely for preparation of food, instruction, and maintenance, on educational property.

N.C. Gen. Stat. § 14-269.2(d) (2009) (emphasis added). While, in the same article of the General Statutes, "metallic knuckles" are recognized as a deadly weapon, *see* N.C. Gen. Stat. § 14-269(a) (2009) ("It shall be unlawful for any person willfully and intentionally to carry concealed about his person any . . . metallic knuckles . . . *or other deadly weapon of like kind* . . . ." (emphasis added)), the Legislature has provided no further guidance about the characteristics it intended should be ascribed to a weapon identified as "metallic knuckles" under N.C.G.S. § 14-269.2(d).

The purpose of N.C.G.S. § 14-269.2 is "to deter students and others from bringing any type of [weapon] onto school grounds." *See In re Cowley*, 120 N.C. App. 274, 276, 461 S.E.2d 804, 806 (1995). The juvenile's argument is that the petition was insufficient to give the trial court jurisdiction over the matter because the petition "failed to set forth that he possessed any of the items prohibited by the cited statute." Specifically, the juvenile argues that the petition was deficient because the box for "metallic knuckles" was left unchecked, while the box for "other weapon" was checked and was accompanied by the description of a "steel link from chain."

The object which the juvenile possessed in this case consisted of a three-eighths-inch thick solid metallic bar that formed a C-shaped "link" which was about three inches in length and one-and-a-half inches in width, and closed by tightening a one-half-inch thick bolt. The object, commonly referred to as a quick link, was said to be made of solid steel and to weigh at least one pound, and was distinguished in the testimony from a similarly shaped object, known as a carabiner, which is generally made of aluminum or some other lightweight alloy and is designed to hold a freely running rope or, in mod-

ern use, as a key chain. The weighted steel link was one through which the juvenile was capable of sliding several of his fingers so that three to four inches of the three-eighths-inch thick solid steel bar could be held securely across his knuckles and used as a weapon as he gripped the other half of the steel link with his fist. Thus, "because the focus of the statute [at issue] is the increased necessity for safety in our schools," *see In re Cowley*, 120 N.C. App. at 276, 461 S.E.2d at 806, we think it consistent with the plain language, the spirit, and the objectives of the statute that the item seized from the juvenile as described above is sufficiently equivalent to what the General Assembly intended to be recognized as "metallic knuckles" under N.C.G.S. § 14-269.2(d).

Moreover, with respect to the juvenile's argument that the weapon was described in the petition as an "other weapon" while the box for "metallic knuckles" was left unchecked, we believe this to be the type of "hyper technical scrutiny with respect to form" to which our courts have recognized an indictment or juvenile petition "should not be subjected." *See In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006); *see also id.* at 154, 636 S.E.2d at 280 (" '[I]t is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.' " (alteration in original) (quoting *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981))). Since the petition apprised the juvenile of the conduct for which he was charged and alleged sufficient facts of every element of the offense, *see In re Griffin*, 162 N.C. App. at 493, 592 S.E.2d at 16, we conclude the trial court had jurisdiction over the matter.

[2] Finally, the juvenile contends, based upon the same argument advanced in support of his motion to dismiss, that the evidence was insufficient to support the court's adjudication of J.C. as delinquent because the evidence did not show that he possessed a weapon in violation of N.C.G.S. § 14-269.2(d). He argues that "[a] link of chain is no more a weapon than a protractor, a combination lock or any number of other items routinely found in students' possession at school." Since we have already determined that the steel link in his possession on school property is a weapon under N.C.G.S. § 14-269.2(d), we reject this argument as well.

Affirmed.

Judges BRYANT and ELMORE concur.

ELLIS-WALKER BUILDERS, INC., PLAINTIFF v. DON REYNOLDS PROPERTIES, LLC, INSPIRATION OF WILMINGTON, L.L.C., AND WACCAMAW BANK, DEFENDANTS

No. COA10-32

(Filed 6 July 2010)

Liens— settlement agreement—cumulative remedies

The trial court erred by denying plaintiff's motion to enforce its lien on real property where plaintiff filed and perfected its claim of lien and subsequently entered into a settlement agreement which was not paid in full. Enforcement of a valid lien is a cumulative remedy that is available in addition to the money judgment plaintiff was awarded against defendant Reynolds.

Appeal by plaintiff from order dated 2 October 2009 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 13 May 2010.

Safran Law Offices, by Brian J. Schoolman and Lindsey E. Powell, for plaintiff-appellant.

Murchison, Taylor & Gibson, P.L.L.C., by Andrew K. McVey, for defendants-appellees Reynolds Properties, L.L.C., and Inspiration of Wilmington, L.L.C.

BRYANT, Judge.

On 19 August 2009, plaintiff Ellis-Walker Builders, Inc., moved to enforce a claim of lien on real property. Following a hearing, the trial court entered an order dated 2 October 2009 denying plaintiff's motion to enforce the lien. Plaintiff appeals. As discussed below, we reverse.

Facts

The factual background of this appeal is simple, but its procedural history is convoluted. In January 2006, plaintiff contracted with Reynolds Properties, L.L.C., to construct a Port City Java at 2099

Market Street in Wilmington ("the property"). Plaintiff began the project on 14 March 2006 and completed it on 1 March 2007. The final cost of the project was over three quarters of a million dollars. A dispute arose between plaintiff and Reynolds about the costs, and Reynolds withheld payment in the amount of $209,310.17.

On 28 June 2007, plaintiff timely filed a claim of lien on real property. On 27 August 2007, plaintiff acted to perfect its lien by filing a complaint against defendants Reynolds, Inspiration of Wilmington, L.L.C., and Waccamaw Bank. The complaint also contained claims for breach of express contract and quantum meruit. At the time, Reynolds and Inspiration each owned a one-half undivided interest in the property.

Following limited discovery and mediation, the parties entered a settlement agreement under which Reynolds was to pay plaintiff $112,500.00 in three installments. The agreement also provided, in pertinent part:

> 2. Dismissal of Law suit: Cancellation of Claims of Lien. The parties shall file a dismissal of the Lawsuit, and all claims and counterclaims asserted therein, with prejudice, with the New Hanover County Clerk of Superior Court. Promptly following payment of the total amount stated above by [Reynolds], [plaintiff] shall cancel any claims of lien it may have filed on the Property.
>
> 3. Release by [plaintiff]. Except as necessary to enforce the terms of this Agreement, [plaintiff] hereby irrevocably releases [Reynolds and Inspiration] from any and all claims, damages, demands, causes of action, or liability of any kind . . . .

No party has ever sought dismissal of the August 2007 lawsuit, nor was plaintiff's claim of lien on real property ever cancelled. Plaintiff received the first scheduled payment of $12,500.00 under the agreement, but did not receive the second or third payments, each of $50,000.00, which were due in November and December 2008.

According to the transcript of hearing in the record and the parties' briefs to this Court, plaintiff thereafter moved to enforce the settlement agreement.[1] On 13 January 2009, the trial court entered an order and judgment finding Reynolds in default of the agreement,

1. The record on appeal does not contain plaintiff's motion to enforce the agreement; however, the record does contain an "order and judgment" filed 13 January 2009 from the trial court granting plaintiff's motion to enforce the settlement agreement and awarding plaintiff a judgment in the amount of $100,000.00 against Reynolds.

awarding plaintiff $100,000.00, and concluding that all other provisions of the agreement remained in full force and effect. Plaintiff has been unable to collect on this judgment.

Plaintiff filed a second complaint on 27 April 2009. The April 2009 complaint sought enforcement of the claim of lien on real property, and also included claims for fraudulent transfer of assets, punitive damages, tortious interference with contract, joint liability and concert of action, and avoidance, levy and constructive trust. The complaint alleged that Donald Reynolds, sole member manager of defendant Reynolds, transferred assets to his wife to avoid the reach of plaintiff's January 2009 judgment. No response from any defendant nor any court order, judgment or other filing addressing plaintiff's claims appears in the record. On 10 August 2009, plaintiff filed a motion to enforce its lien on real property requesting entry of an order enforcing the lien and granting permission to foreclose on the subject property, which the trial court denied by order dated 2 October 2009. Plaintiff appeals therefrom.

On appeal, plaintiff argues the trial court erred in denying its motion to enforce the lien on real property. As discussed below, we reverse.

Analysis

Plaintiff argues the trial court erred in denying its motion to enforce its lien on real property because enforcement of a valid lien is a cumulative remedy and available in addition to the money judgment plaintiff was awarded against Reynolds. We agree.

Reynolds contends that plaintiff's contention conflicts with our decision in *Miller v. Lemon Tree Inn, Inc.*, 32 N.C. App. 524, 233 S.E.2d 69 (1977). However, *Miller* is inapposite. The question in *Miller* was "whether the trial court erred in its conclusion of law that plaintiff[]'s deed of trust had priority in the proceeds from the judicial sale of [real property] over [one] defendant[]'s judgment lien against [another] defendant[]." *Id.* at 527, 233 S.E.2d at 71. One defendant "contended [] that it perfected and enforced its materialmen's lien against [the other defendant] pursuant to G.S. 44A-12 and 44A-13, and that by virtue of the 'relation-back' effect of G.S. 44A-10, its lien [] was prior to plaintiffs' deed of trust." *Id.* Here, plaintiff is not seeking to have the 13 January 2009 order and judgment declared a lien on the property. Rather, plaintiff seeks a separate judgment enforcing the lien it previously filed and perfected under Chapter 44A.

We find no case in this State on point with plaintiff's argument but find instructive this Court's reasoning in a similar case. In *Lowe's of Fayetteville, Inc. v. Quigley*, the complaint alleged that the plaintiff sold and delivered to the defendants various building materials on account for which the defendants subsequently failed to pay. 46 N.C. App. 770, 771, 266 S.E.2d 378, 378 (1980). The complaint also stated that the plaintiff had filed a notice of claim of lien and prayed for judgment in the amount of the monies due under the account with interest and for the judgment to be declared a lien on the property. *Id.* However, the lien was fatally defective and the trial court dismissed the plaintiff's entire cause of action on that basis. *Id. We* reversed, quoting with approval the following language regarding the cumulative nature of materialmen's and mechanic's liens:

> "Enforcement of a . . . lien is not the exclusive remedy in regard to the obligation which such lien secures. The enforcement of the lien is a cumulative remedy provided by statute . . . and may be pursued in connection with ordinary remedies. The lienor may proceed to enforce his lien and simultaneously bring an action to recover a personal judgment for the amount due." 53 Am. Jur. 2d Mechanics' Liens § 340 (1970).

Id. at 772, 266 S.E.2d at 379. Thus, we reasoned, the plaintiff's action need not be dismissed since the plaintiff was entitled to seek a personal judgment separate and in addition to its right to a lien. Although the *Lowe's* discussion on this point was dicta, we find it persuasive, particularly as it is in accord with the rule in the majority of other states. *See Woodford v. Glenville State College Housing Corp.*, 225 S.E.2d 671, 675 n.6 (W. Va. 1976) ("the lien procedure provided for mechanics and materialmen is a cumulative remedy, and independently of the lien, such parties may resort to the ordinary common-law remedies, as by an action to recover a personal judgment. The two remedies may be pursued simultaneously, but there can be only one satisfaction."); *see also Madison Highlands Dev. Co. v. Dean & Son Plumbing Co.*, 415 So. 2d 1129 (Ala. Civ. App. 1982); *Great W. Sav. Bank v. George W. Easley Co.*, 778 P.2d 569 (Alaska 1989); *Phoenix Title & Trust Co. v. Garrett*, 237 P.2d 470 (Ariz. 1951); *Robinson v. Peardon*, 247 P.2d 83 (1952); *Hayutin v. Gibbons*, 338 P.2d 1032 (Colo. 1959); *J. Batten Corp. v. Oakridge Inv. 85, Ltd.*, 546 So. 2d 68 (Fla. App. 1989); *Cato v. David Excavating Co.*, 435 N.E.2d 597, 606 (Ind. App. 1982); *Frontier Properties Corp. v. Swanberg*, 488 N.W.2d 146 (1992); *Rafaelsen v. Olson*, 254 P.2d 268 (Kan. 1953); *Poulos v. Stewart*, 233 S.W.2d 994 (Ky. 1950); *Friedman v. Stein*, 71

A.2d 346 (N.J. 1950); *Wiggins v. Southwood Park Corp.*, 350 P.2d 436 (Ore. 1960); *Neiderhauser Builders & Dev. Corp. v. Campbell*, 824 P.2d 1193 (Utah App. 1992); *West Virginia Sanitary Eng'g Corp. v. Kurish*, 74 S.E.2d 596 (W. Va. 1953).

Here, plaintiff filed and perfected its claim of lien on real property and subsequently entered into the settlement agreement with Reynolds. Reynolds argues that plaintiff's entry into the settlement agreement waived his right to pursue the lien. However, as noted above, the agreement specified that, "[p]romptly following payment of the total amount stated above by [Reynolds], [plaintiff] shall cancel any claims of lien it may have filed on the Property." It is undisputed that Reynolds did *not* pay the total amount stated in the agreement, either in accordance with the agreement's terms or by satisfying the judgment for $100,000.00 entered by the trial court on 13 January 2009. Thus, plaintiff was under no obligation to cancel its claim of lien and the trial court erred in denying its motion to enforce the lien. We reverse and remand for entry of an order enforcing plaintiff's lien on real property.

Reversed and remanded.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD GOBLE

No. COA09-1192

(Filed 6 July 2010)

1. Criminal Law— felony failure to appear—substantial evidence—personal appearance required

The trial court did not err in denying defendant's motion to dismiss a charge of felony failure to appear because the State presented substantial evidence of all elements of the crime charged, including that defendant was required to personally appear before the court on the second day of his trial on his original charges.

2. Criminal Law— instructions—lesser-included offense—not warranted by the evidence

The trial court in a felony failure to appear action did not err in denying defendant's request that jurors receive an instruction on the lesser-included offense of misdemeanor failure to appear. Because defendant was released on bond in connection with felony charges, an instruction on the lesser-included offense was not warranted by the evidence.

Appeal by Defendant from judgment entered 3 June 2009 by Judge A. Robinson Hassell in Caldwell County Superior Court. Heard in the Court of Appeals 24 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General James C. Holloway, for the State

Leslie C. Rawls, for Defendant.

BEASLEY, Judge.

Defendant appeals from trial court's denial of his motion to dismiss a charge of felony failure to appear, and a request that jurors receive an instruction on a lesser included offense. Because the State presented substantial evidence of Defendant's guilt, and an instruction on the lesser included offense was not warranted by the evidence, we find no error.

In September 2007, Defendant, James Edward Goble, was indicted for felonious breaking and entering, felony larceny, and felony possession of stolen goods. Defendant's trial on these offenses began on 7 July 2008. Though he was present for the first day of the proceedings, Defendant failed to appear the second day of trial. The trial proceeded in Defendant's absence and at its conclusion, he was convicted of misdemeanor offenses. Following the verdict, the trial court instructed the bailiff to call Defendant for sentencing. After Defendant failed to respond to the call, the trial court continued judgment in the case.

On 25 August 2008, Defendant was indicted for felony failure to appear and habitual felon status. On 4 September 2008, Defendant contacted his bail bondsman and made arrangements to turn himself over to the custody of law enforcement officials. On 2 June 2009, Defendant's trial for felony failure to appear and habitual felon status began. During pre-trial motions, the trial court denied Defendant's

motion to dismiss the felony failure to appear charge. On 3 June 2009, Defendant was convicted of felony failure to appear. Thereafter, Defendant admitted to his status as an habitual felon and reserved his right to appeal the failure to appear conviction.

Defendant appeals the felony failure to appear conviction arguing that: (I) the trial court erred by failing to grant his motion to dismiss or "order a directed verdict at the close of the State's evidence and motion to set aside the verdict;" and (II) the trial court erred when it denied a request to instruct jurors on misdemeanor failure to appear.

I.

[1] Defendant contends that there is insufficient evidence to support a conviction for felony failure to appear. Specifically, Defendant contends that the State failed to present any evidence that he was required to personally appear before the trial court. We disagree.

"In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). " 'Substantial evidence' is defined as that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000).

> [T]o survive a motion to dismiss a charge of felonious failure to appear, the State must present substantial evidence: (1) the defendant was released on bail pursuant to Article 26 of the North Carolina General Statutes in connection with a felony charge against him or, pursuant to section 15A-536, after conviction in the superior court; (2) the defendant was required to appear before a court or judicial official; (3) the defendant did not appear as required; and (4) the defendant's failure to appear was willful.

State v. Messer, 145 N.C. App. 43, 47, 550 S.E.2d 802, 805 (2001).

Here, the State presented jurors with substantial evidence that Defendant was required to appear on the second day of his trial. On 9 October 2007, before the beginning of his original trial, Defendant

and his surety executed form AOC-CR-201, styled as "Appearance Bond for Pretrial Release." The conditions set forth in the bond were as follows:

> The conditions of this Bond are that the above *named defendant shall appear* in the above entitled action(s) *whenever required* and will at all times remain amenable to the orders and processes of the Court. It is agreed and understood that this Bond is effective and binding upon the defendant and each surety *throughout all stages* of the proceedings in the trial divisions of the General Court of Justice until the entry of judgment in the district court from which no appeal is taken or until the entry of judgment in the superior court. If the defendant appears as ordered and otherwise performs the foregoing conditions of the bond, then the bond is to be void, but if the defendant fails to obey any of the conditions, the Court will forfeit the bond pursuant to Part 2 of Article 26 of Chapter 15A of the General Statutes. (emphasis added).

Following the execution of the bond form, the magistrate set the date and time for Defendant's required first appearance in court. Thereafter, the trial court set further dates for Defendant to appear in the event that his case was not reached for trial on the date set by the magistrate. Because the bond form specifies that Defendant, as the named party, had to appear before the trial court "whenever required," there is substantial evidence in the record that Defendant was personally required to appear before the trial court for the second day of his trial.

Defendant argues that because he failed to sign a "Conditions of Release and Release Order," there is no evidence that he was required to personally appear before the trial court. This order contains the following language: "To The Defendant Named Above, you are ORDERED to appear before the Court as provided above and at all subsequent continued dates. If you fail to appear, you will be arrested and you may be charged with the crime of willful failure to appear." While the record reveals that Defendant did indeed fail to sign the order, the provisions of the order only apply to situations where a defendant is released upon a written promise to appear or a custody release. It does not apply where, as in the instant case, Defendant was released upon the posting of a surety bond.

Accordingly, we hold that the trial court's order denying Defendant's motion to dismiss was not erroneous.

II.

[2] At trial, Defendant requested that the jurors be instructed on misdemeanor failure to appear. The trial court denied Defendant's request. Defendant now argues that the trial court's decision to deny his request was erroneous. We disagree.

"It is well established that when a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in substance." *State v. Garner*, 340 N.C. 573, 594, 459 S.E.2d 718, 729 (1995). A conviction for misdemeanor failure to appear requires only that a defendant be "released in connection with a misdemeanor charge." N.C. Gen. Stat. § 15A-543(c) (2009). However, the legislature fails to define the phrase "in connection with" as it applies to a willful failure to appear.

"Statutory interpretation properly begins with an examination of the plain words of a statute." *State v. Dellinger*, 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning. When, however, a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (internal citations and quotations marks omitted). Plainly defined, a "connection" is "an association or a relationship: *a connection between two crimes*." *American Heritage College Dictionary* 295 (3d ed. 1993).

N.C. Gen. Stat. § 15A-543(c) becomes operative when a violator is released in connection with a misdemeanor charge. Upon a plain reading of the statute, it appears that the intent of the legislature was to punish defendants fleeing from the threat of misdemeanor convictions, and not defendants that were actually convicted of those misdemeanors. In the case *sub judice*, Defendant was released on bond following an indictment for three felonies. Thereafter, Defendant fled from the jurisdiction of North Carolina when faced with the possibility of felony convictions. Because Defendant was released in connection with felony charges, the trial court appropriately denied his request to instruct jurors on the offense of misdemeanor failure to appear.

Accordingly, we conclude that the trial court appropriately refrained from granting Defendant's request that jurors receive an

instruction on the lesser included offense of misdemeanor failure to appear.

No Error.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA v. ALVIN DWIGHT FAIR

No. COA09-1381

(Filed 6 July 2010)

Sentencing— prior record level—stipulation—determination of whether conviction counted for felony sentencing purposes reviewable on appeal

The trial court erred in a second-degree murder case by determining defendant's prior sentencing level as Level IV instead of Level III. Although defendant stipulated to his prior record level on three separate occasions, the trial court's determination as to whether a conviction may be counted for felony sentencing purposes is reviewable on appeal. In the instant case, two felonies occurred within a single week and only one could be counted toward defendant's point total as provided in N.C.G.S. § 15A-1340.14(d).

Appeal by defendant from judgment entered 19 March 2009 by Judge J. Gentry Caudill in Lincoln County Superior Court. Heard in the Court of Appeals 9 June 2010.

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

Jarvis John Edgerton, IV, for defendant-appellant.

STEELMAN, Judge.

Unlike a stipulation to the existence of a prior conviction, which is binding on appeal, the trial court's determination as to whether a conviction may be counted for felony sentencing purposes is reviewable on appeal.

I. Factual and Procedural Background

Defendant was found guilty by a jury of second degree murder. At the sentencing hearing, the prosecutor and defense counsel stipulated in writing to the defendant's prior convictions and his record level. At the sentencing hearing, the following exchanges took place:

> [Prosecutor]: . . . The only matter in sentencing, I have prepared a prior record worksheet on Mr. Fair and find that he has nine prior points for sentencing making him a record level four. Does defendant stipulate to that?
>
> [Defense Attorney]: Yes.
>
> [Prosecutor]: Your Honor, the defendant's attorney has signed that stipulation . . . .
>
> . . . .
>
> The Court: And have you had the opportunity to look over the worksheet that has been presented to the Court by the state?
>
> [Defense Attorney]: Yes.
>
> The Court: Do you agree and stipulate that he has nine prior record points and is a prior record level four?
>
> [Defense Attorney]: I do. We did mark out the driving while license revoked charge on the back with the district attorney's permission, and I don't think that affects it, but we did do that.
>
> The Court: So this is a B-2 felony and it is a prior record level four?
>
> [Defense Attorney]: Yes, sir.
>
> [Prosecutor]: That's correct, Your Honor.
>
> The Court: Thank you very much.

Based upon these stipulations, the trial court held that defendant was a Level IV for felony sentencing purposes based upon nine (9) prior record points. Defendant appeals.

II. Stipulations Under Structured Sentencing

Defendant argues that the trial court erred in determining his sentencing level. We agree.

A. Proof of Convictions Under Structured Sentencing

N.C. Gen. Stat. § 15A-1340.14(f) provides for the methods of proof of a defendant's prior convictions:

> Proof of Prior Convictions.—A prior conviction shall be proved 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) (2009).

In this case, counsel stipulated in writing, and orally to the court, to the following convictions of defendant:

Offense	File No.	Date of Conviction	County	Class
Possession with intent to sell or deliver Cocaine	98 CRS 2590	3/24/1999	Lincoln	H
Assault on a female	98 CRS 5645	11/6/1998	Lincoln	1-MD
Possession of Cocaine	98 CRS 6316	3/24/1999	Lincoln	I
Larceny	97 CR 19177	8/6/1998	Catawba	1-MD
Assault on a female	02 CR 57689	8/28/2002	Gaston	1-MD
Assault on a female	02 CR 57692	8/28/2002	Gaston	1-MD
Conspiracy to Possess Cocaine	5:03 CR ——	9/05/2006	Federal Court	I

The stipulation also covered the point scoring of these convictions under Section I of the Worksheet and the record level determinations under Section II of the Worksheet.

B. Appealability of Trial Court's Determination of Sentencing Level

The question presented is to what extent defendant is bound by the stipulations made before the trial court on appeal. Under the provisions of N.C. Gen. Stat. § 15A-1340.14(f) a prior conviction may be established by stipulation. The existence of the conviction is an issue of fact. *State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006). Defendant is bound on appeal by any stipulation as to the existence of a conviction.

However, even though defendant stipulated to his prior record level on three separate occasions, our cases have held that whether defendant's convictions can be counted towards sentencing points for determination of his structured sentencing level is a conclusion of law, fully reviewable by this Court on appeal. *State v. Williams*, 200 N.C. App. 767, 771, 684 S.E.2d 898, 901 (2009); *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009); *State v. Mack*, 188 N.C. App. 365, 380, 656 S.E.2d 1, 12 (2008); *State v. Goodwin*, 190 N.C. App. 570, 576, 661 S.E.2d 46, 50 (2008); *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007). We are bound by the holdings in these cases. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

C. Multiple Convictions in a Single Week of Court

N.C. Gen. Stat. § 15A-1340.14(d) provides:

> Multiple Prior Convictions Obtained in One Court Week.—For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used. If an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used.

N.C. Gen. Stat. § 15A-1340.14(d) (2009).

In the instant case, the convictions for two of the felonies listed occurred on 24 March 1999. Under subsection (d) only one of these could be counted toward defendant's point total. The removal of one

of these felony convictions places defendant as a Level III rather than a Level IV. The trial court erred in determining defendant's sentencing level. *Goodwin*, 190 N.C. App. at 577, 661 S.E.2d at 51. This matter must be remanded for resentencing.

REMANDED FOR RESENTENCING.

Judges STEPHENS and HUNTER, JR. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 July 2010)

BARNES v. BARNES No. 09-1257	Northampton (99CVD506)	Appeal dismissed
CHERRY v. THOMAS No. 09-1608	Guilford (02CVD11379)	Affirmed
CORDELL v. DOYLE No. 09-313	Buncombe (03CVD460)	Affirmed
DUBOSE v. N.C. DEP'T OF CORR. No. 09-571	Indus. Comm. (TA18758)	Affirmed
GONZALES v. GONZALES No. 09-1109	Rowan (06CVD264)	Affirmed in part, reversed and remanded in part
HELMS v. LANDRY No. 09-904	Mecklenburg (01CVD13214)	Affirmed
HENSLEY v. McDOWELL CNTY. No. 09-1319	McDowell (07CVS175)	Affirmed
IN RE A.B.E. & B.N.E. No. 10-127	Chatham (08JT1) (06JT16)	Affirmed
IN RE A.D.T. & D.R.T., III No. 10-214	Gaston (05JT157-158)	Reversed
IN RE A.L.B., B.J.R., B.L.R., J.E.B. No. 10-109	Buncombe (07JT213) (08JT361-363)	07JT213: modified and affirmed; remanded for modification of judgment. 08JT361, 08JT362, 08JT363: affirmed
IN RE A.P. & A.P. No. 10-173	Gaston (08JA186-187)	Affirmed
IN RE H.L.B., H.V.B., A.W., A.W. No. 10-185	Cleveland (07JT2) (07JT188) (05JT216-217)	Affirmed
IN RE I.M.L., A.M., C.M., P.M., A.M. No. 10-175	Rowan (09JA169-172) (09JA192)	Affirmed
IN RE M.B.L. & K.R.L. No. 10-147	Rockingham (07JT103-104)	Affirmed

IN RE McCRAY No. 09-1623	Wake (08SPC1271)	Reversed
IN RE M.L.A. No. 09-1354	Mecklenburg (05J1248)	Affirmed
IN RE P.C.H. No. 10-148	New Hanover (00JT297)	Affirmed
IN RE SUTTON No. 09-1209	Pitt (09CRS5244)	Reversed
IN RE T.H., J.S., B.W. No. 10-179	Wayne (09JA51-53)	Affirmed
IN RE WEBBER No. 09-760	Cleveland (07SPC207)	Affirmed
IN RE Z.D.A. No. 09-1565	Sampson (08JB78)	Reversed and Remanded
LANGDON v. AM. VINYL No. 10-18	Indus. Comm. (860398)	Dismissed
MARSH v. UNION CNTY. BD. No. 09-1353	Union (09CVS30)	Affirmed
RICE v. COHOLAN No. 09-1034	Mecklenburg (06CVS22261)	Affirmed
SHUPE v. CITY OF CHARLOTTE No. 09-1555	Indus. Comm. (388253)	Affirmed
STATE v. ALSTON No. 09-990	New Hanover (07CRS60349)	No error in part; vacated and remanded in part
STATE v. BOMBO No. 09-1339	Mecklenburg (05CRS251273)	No Error
STATE v. BRAMLETT No. 10-24	Cleveland (08CRS5297)	No Error
STATE v. BROOKS No. 09-1590	Brunswick (08CRS55873)	Dismissed
STATE v. BURNS No. 09-1437	Mecklenburg (08CRS82400)	Affirmed
STATE v. CARTER No. 09-1547	Mecklenburg (08CRS208540)	Affirmed
STATE v. CHAPMAN No. 09-1480	Pitt (08CRS53890)	No Error
STATE v. CRISP No. 09-1262	Graham (08CRS322)	No Error

STATE v. CROMARTIE No. 09-1431	Bladen (07CRS51375)	Dismissed in part; no error in part
STATE v. DUMAS & PARKS No. 09-859	Stanly (07CRS54202) (07CRS54203) (07CRS54201) (07CRS54204)	No Error
STATE v. DUPREE No. 09-1261	Edgecombe (07CRS53328)	No Error
STATE v. EBERSOLE No. 09-617	Wilkes (08CRS458) (07CRS50932) (08CRS1850) (07CRS50933) (07CRS50906)	No Error
STATE v. FORD No. 09-1428	Hoke (07CRS51626-27)	Affirmed
STATE v. GRIFFIN No. 09-1419	Wake (07CRS79153)	No Error
STATE v. HARPER No. 09-1604	Moore (08CRS53977-79)	No Error
STATE v. HARRELL No. 09-1359	Carteret (07CRS2298) (07CRS2291-95)	No Error
STATE v. JACKSON No. 09-1346	Forsyth (08CRS53233)	Reversed
STATE v. JACKSON No. 09-1424	Orange (03CRS55666)	Reversed
STATE v. JENKINS No. 09-1347	Johnston (07CRS56032)	Appeal dismissed
STATE v. JOHNSON No. 09-232	McDowell (02CRS50619)	No Error
STATE v. JONES No. 09-1488	Mecklenburg (07CRS241669-71)	No Error
STATE v. MABE No. 09-1648	Forsyth (08CRS62666) (08CRS62889) (08CRS62664)	No Error
STATE v. McVAY No. 09-1474	Mecklenburg (05CRS254196)	Affirmed

STATE v. MESSICK No. 09-940	Forsyth (08CRS62344)	Affirmed
STATE v. O'KELLEY No. 09-1338	Buncombe (09CRS29) (08CRS63336)	No prejudicial error
STATE v. PHILIPSHECK No. 09-1698	Henderson (09CR52206-08)	Affirmed
STATE v. PIERCE No. 10-1	Guilford (07CRS104653)	No Error
STATE v. PUCKETT No. 09-1632	Surry (07CRS53756-57)	No Error
STATE v. RILEY No. 09-1436	Granville (08CRS2206-2209)	Affirmed; Remanded for correction of clerical error
STATE v. ROBERTSON No. 09-1483	Forsyth (05CRS63257)	Affirmed
STATE v. RUCKER No. 09-1686	Cabarrus (08CRS53941) (08CRS53935)	New trial
STATE v. SANTIANO No. 09-506	Randolph (06CRS55684) (06CRS55683)	No Error
STATE v. SHEHAN No. 10-106	Randolph (08CRS7885-86)	Affirmed
STATE v. SHIVERS No. 09-1489	Pitt (08CRS54179-80)	No prejudicial error
STATE v. SHOEMAKER No. 09-1440	Onslow (04CRS61940)	Dismissed
STATE v. SLEDGE No. 09-1594	Halifax (07CRS56621)	Reversed
STATE v. SMITH No. 09-1439	Cleveland (07CRS55414)	Dismissed
STATE v. SMITH No. 09-1549	Scotland (08CRS1890-91)	No Error
STATE v. STIKELEATHER No. 09-848	Alexander (06CRS51263)	No Error
STATE v. THOMPSON No. 09-1510	Union (08CRS4459) (08CRS54626)	No Error

STATE v. WIGGINS No. 09-1650	Martin (08CRS50137-39)	Dismissed in part; no error in part
STATE v. WOLFE No. 09-1546	Onslow (07CRS52556)	No Error
STATE v. WOOD No. 09-1509	Nash (05CRS53809-10)	Reversed
STATE v. WOOTEN No. 09-1550	Lenoir (08CRS51637)	New trial
U.S. BANK v. CUTHBERTSON No. 09-1605	Rowan (09CVS1700)	Affirmed
WARD v. BUCKEYE HOMEOWNERS ASS'N No. 09-1683	Forsyth (09CVS1829)	Dismissed

CATHY LOU STEWART BURGESS, INDIVIDUALLY AND AS A SHAREHOLDER OF BURGESS & ASSOCIATES, INC., PLAINTIFF v. JAMES THOMAS BURGESS, JR. AND BURGESS & ASSOCIATES, INC., DEFENDANTS

No. COA09-825

(Filed 20 July 2010)

1. Corporations— equitable distribution—shareholder suit —jurisdiction—equitable divestiture of shares

The superior court erred by exercising subject matter jurisdiction over an equitable divestiture of defendant husband's shares in plaintiff wife's shareholder suit given the nature of the relief sought and a prior equitable distribution action pending in the district court. The relief sought could be addressed in the equitable distribution action.

2. Corporations— shareholder suit—inspection—accounting —breach of fiduciary duties—subject matter jurisdiction

The superior court did not err by concluding it had subject matter jurisdiction over plaintiff's cause of action for inspection, accounting, and breach of fiduciary duties. The district court was barred by N.C.G.S. § 55-7-40 from hearing plaintiff's derivative action.

Judge STROUD concurring in part and dissenting in part.

Appeal by defendants from order entered 24 March 2009 by Judge John L. Holshouser, Jr., in Rowan County Superior Court. Heard in the Court of Appeals 19 November 2009.

Womble Carlyle Sandridge & Rice, PLLC, by Mark P. Henriques and Sarah A. Motley, for plaintiff-appellee.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by Edwin H. Ferguson, Jr., and James R. DeMay, for defendant-appellants.

HUNTER, JR., Robert N., Judge.

James Thomas Burgess, Jr. ("James"), and Burgess & Associates, Inc. (collectively "defendants"), appeal the trial court's order denying defendants' motion to dismiss for lack of subject matter jurisdiction under Rule 12(h)(3). In the motion, defendants argued that Cathy

Burgess's ("plaintiff's") shareholder suit regarding Burgess & Associates was precluded by N.C. Gen. Stat. § 7A-244 (2009), which vests the district court with proper jurisdiction for matters concerning equitable distribution. After careful review, we affirm in part and reverse in part.

I. BACKGROUND

James and plaintiff were married on 1 June 1996 in Rowan County, North Carolina. After ten years of marriage, the parties separated on 2 October 2006. On 13 October 2006, plaintiff instituted an action against James for divorce from bed and board and equitable distribution of marital property pursuant to Chapter 50 of our General Statutes in Rowan County District Court.

Plaintiff and James each own 50% of the shares of a residential contracting company, Burgess & Associates, Inc. James serves as sole director and president, and plaintiff serves as corporate secretary. In her divorce complaint, plaintiff requested "exclusive possession and full use" of Burgess & Associates pending an equitable distribution of the company.

On 11 July 2008, plaintiff wrote a letter to James in his capacity as president of Burgess & Associates. In the letter, plaintiff requested an inspection of Burgess & Associates' records and books. James refused plaintiff's request, and on 25 July 2008, plaintiff filed a shareholder action (1) demanding an inspection of the books; (2) asking for an accounting; (3) seeking damages for breach of fiduciary duties in excess of $10,000; and (4) requesting that James be divested of his shares in the corporation as an alternative equitable remedy. With respect to the damages claim for James' alleged breach of fiduciary duties, plaintiff asked for recovery "on behalf of the corporation as a shareholder."

On 13 March 2009, defendants filed a motion to dismiss plaintiff's shareholder suit for lack of subject matter jurisdiction. In the motion, defendants argued that plaintiff had already invoked the jurisdiction of the district court over the ownership of Burgess & Associates. Defendants contended that the district court's jurisdiction included plaintiff's claims for inspection of books, an accounting, and damages for breach of fiduciary duties. The superior court entered an order denying defendants' motion to dismiss on 24 March 2009. Defendants thereafter applied for a writ of certiorari to this Court under Rule 21 of the North Carolina Rules of Appellate Procedure, and the writ was granted on 15 May 2009.

II. ANALYSIS

A. Jurisdiction and Standard of Review

We review a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12 of the North Carolina Rules of Civil Procedure *de novo*. *See Harper v. City of Asheville*, 160 N.C. App. 209, 215, 585 S.E.2d 240, 244 (2003). Under the *de novo* standard of review, this Court "considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)). This case is properly before this Court on a writ of certiorari. N.C.R. App. P. 21(a)(1) (2009) (certiorari available as to otherwise interlocutory orders of the trial court).

B. Subject Matter Jurisdiction

[1] Defendants contend that the shares of Burgess & Associates are marital property between James and plaintiff, and that the district court's jurisdiction to divide the parties' shares has already been invoked by the equitable distribution action. Relying on our holdings in *Garrison v. Garrison*, 90 N.C. App. 670, 369 S.E.2d 628 (1988) and *Hudson Int'l, Inc. v. Hudson*, 145 N.C. App. 631, 550 S.E.2d 571 (2001), defendants argue that this disposition strips the superior court of subject matter jurisdiction over plaintiff's shareholder action.

We agree that the scope of the district court's jurisdiction in the equitable distribution action includes plaintiff's superior court claim for divestiture of James' shares. However, given that the district court is barred by statute from hearing plaintiffs' derivative action, we conclude that the superior court properly found that it retained jurisdiction over plaintiff's causes of action for breach of fiduciary duties, accounting, and inspection of the corporate books.

Jurisdiction is "the power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and enforce a judgment." *High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941) (citation and internal quotation marks omitted); *State v. Batdorf*, 293 N.C. 486, 493, 238 S.E.2d 497, 502 (1977) ("Jurisdictional issues . . . relate to the authority of a tribunal to adjudicate the questions it is called upon to decide."). "Subject matter jurisdiction, a threshold requirement for a court to hear and adjudicate a contro-

versy brought before it, is conferred upon the courts by either the North Carolina Constitution or by statute." *In re M.B.*, 179 N.C. App. 572, 574, 635 S.E.2d 8, 10 (2006) (citations and internal quotation marks omitted). "It is fundamental that a court cannot create jurisdiction where none exists." *McClure v. County of Jackson*, 185 N.C. App. 462, 471, 648 S.E.2d 546, 551 (2007). "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), *aff'd*, 362 N.C. 170, 655 S.E.2d 712 (2008).

If a trial court has "exclusive jurisdiction," the court has the " 'power to adjudicate an action or class of actions to the exclusion of all other courts[.]' " *In re H.L.A.D.*, 184 N.C. App. at 386, 646 S.E.2d at 430 (quoting *Black's Law Dictionary* 869 (8th ed. 2004)). " '[O]riginal jurisdiction' means '[a] court's power to hear and decide a matter before any other court can review the matter[.]' " *Id.* at 386-87, 646 S.E.2d at 430 (citation omitted). "Continuing jurisdiction" is defined as " '[a] court's power to retain jurisdiction over a matter after entering a judgment, allowing the court to modify its previous rulings or orders.' " *Id.* at 387, 646 S.E.2d at 430 (quoting *Black's Law Dictionary* 868 (8th ed. 2004)).

In the cases cited by defendant regarding subject matter jurisdiction, *Garrison* and *Hudson*, the district court's powers were first invoked under section 7A-244 as to a portion of marital property, and this Court concluded in each case that the superior court lacked subject matter jurisdiction to enter orders involving the same marital property. *See Garrison*, 90 N.C. App. at 670, 369 S.E.2d at 628 (partition action to divide marital home improperly brought in superior court where the marital home was already part of a pending equitable distribution claim); *Hudson*, 145 N.C. App. at 631, 550 S.E.2d at 571 (declaratory action brought in superior court by third parties concerning ownership of real property that was the subject of a prior equitable distribution action in district court held properly dismissed); *cf. McKoy v. McKoy*, —— N.C. App. ——, 689 S.E.2d 590 (2010) (where the clerk of superior court previously obtained jurisdiction over guardianship of incompetent adult under Chapter 35A, the district court was barred from entering subsequent custody order concerning same incompetent adult under Chapter 50).

At the core of *Garrison* and *Hudson* were two principles: (1) the same property was the subject of both the superior and district court actions, and (2) the relief sought and available was similar in

each suit.[1] *Contra Sparks v. Peacock*, 129 N.C. App. 640, 500 S.E.2d 116 (1998) (husband's suit against wife for default on joint promissory notes properly brought in superior court where no equitable distribution action was pending); *Diggs v. Diggs*, 116 N.C. App. 95, 446 S.E.2d 873 (1994) (distinguishing *Garrison*, partition action properly filed in superior court where jurisdiction of district court not yet invoked on same real property). In *Sparks*, the same disposition as *Garrison* and *Hudson* would have been presented if an equitable distribution action had been pending in district court prior to the husband's suit in superior court. *Sparks*, 129 N.C. App. at 640-41, 500 S.E.2d at 117. However, because the joint promissory notes were not subject to both an equitable distribution action as to who was liable for payment and a concurrent superior court action for contribution, this Court held that the superior court action was proper. *Id.* at 641, 500 S.E.2d at 117 ("It is of critical importance to this case that there is not an equitable distribution action currently pending between the parties.").

Applying these principles to this case, defendants contend that plaintiff's shareholder claims can be adequately addressed through the action pending in district court because: (1) the inspection and accounting requests can be handled through discovery in the equitable distribution action; (2) the claim for breach of fiduciary duties can be addressed as a distributional factor under N.C. Gen. Stat. § 50-20(c)(11a) (2009);[2] (3) plaintiff's equitable claim for divestiture of James' shares in Burgess & Associates in the derivative suit is the same claim awaiting disposition in plaintiff's equitable distribution action; and (4) plaintiff will not be prejudiced by the dismissal of her shareholder suit, since plaintiff may seek to join Burgess & Associates in the equitable distribution action. These contentions require this Court to examine the scope of the equitable distribution statutes to determine whether plaintiff's shareholder suit can be subsumed into the equitable distribution action.

---

1. In these cases, the district court's subject matter jurisdiction was limited to the real property in dispute. See 3 Suzanne Reynolds and Jacqueline Kane Connors, *3 Lee's North Carolina Family Law* § 12.107, at 12-313, -314 (5th ed. 2002) ("If a party has invoked the jurisdiction of the court in equitable distribution, it is the only court that has jurisdiction *over the property*. . . . As long as there is a close relationship between the parties in the two actions, the prior action in district court for equitable distribution *precludes jurisdiction over the property* in superior court."). (Emphasis added.)

2. When distributing marital property, the trial court shall consider the "[a]cts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution." N.C.G.S. § 50-20(c)(11a).

In an equitable distribution action, the district court is empowered to "determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section." N.C. Gen. Stat. § 50-20(a) (2009). The purpose of the Equitable Distribution Act is "to divide property equitably, based upon the relative positions of the parties at the time of divorce, rather than on what they may have intended when the property was acquired." *Mims v. Mims*, 305 N.C. 41, 54, 286 S.E.2d 779, 788 (1982).

Under section 50-20, "the trial court is required to conduct a three-step analysis: 1) identification of marital and separate property; 2) determination of the net market value of the marital property as of the date of separation; and 3) division of the property between the parties." *Estate of Nelson v. Nelson*, 179 N.C. App. 166, 168, 633 S.E.2d 124, 126-27 (2006), *aff'd*, 361 N.C. 346, 643 S.E.2d 587 (2007). The district court is instructed by the General Assembly to effectuate an "equal" distribution, unless such a distribution of the property "is not equitable" under the circumstances. N.C.G.S. § 50-20(c). In making an unequal allocation of property, the district court is required to consider the factors listed within subsection (c) of N.C.G.S. § 50-20. *Id.*

Under the broad scope of our equitable distribution statutes, it is clear that plaintiff's equitable claim for divestiture of James' shares is squarely addressed in her equitable distribution action. Plaintiff has already invoked the powers of the district court to divide the shares of Burgess & Associates, and plaintiff may not use her shareholder suit as an end-around to obtaining sole ownership of the company. To the extent the trial court allowed plaintiff to pursue an equitable divestiture of James' shares in her shareholder derivative suit, we reverse the trial court's order.

We do not, however, reach the same conclusion on plaintiff's derivative claims for breach of fiduciary duties, inspection, and accounting.

1. Breach of Fiduciary Duties

[2] In her divorce action, plaintiff seeks "exclusive possession and full use" of Burgess & Associates prior to an order of equitable distribution being entered, and otherwise only requests "a reasonable and fair portion of the marital property" as to a final decision on equitable distribution. The sole parties in the action are plaintiff and James,

and the relevant property at issue are the shares that each party has in Burgess & Associates. If plaintiff is successful, the most she can acquire is the relief she has sought in her equitable distribution complaint: a "reasonable and fair portion" of the available shares in Burgess & Associates pursuant to section 50-20.

By contrast, plaintiff's derivative claim in her shareholder suit does not concern the division of marital property, and instead she asserts a separate claim for relief, outside the scope of section 50-20 and on behalf of the corporation, in superior court. Burgess & Associates is a separate legal entity, recognized as distinct from the holders of its shares, *Lumber Co. v. Hunt*, 251 N.C. 624, 627, 112 S.E.2d 132, 134 (1960); and though plaintiff and James are in the midst of their divorce, the company continues to exist as a corporation owned and managed by its shareholders. This legal principle entitles plaintiff to bring a shareholder derivative suit "in the right of" Burgess & Associates in order to assert the corporation's rights, and recover damages on behalf of the corporation[3] for James' alleged breaches of the duties of good faith and due care. N.C. Gen. Stat. § 55-7-40.1(1) (2009). As part of this cause of action, plaintiff is entitled to relief that she is barred from seeking in the equitable distribution action: a jury trial. *Kiser v. Kiser*, 325 N.C. 502, 511, 385 S.E.2d 487, 492 (1989) (holding that no jury trial is available in an equitable distribution action but is available in a shareholder derivative suit). In her shareholder complaint, plaintiff has requested a jury trial for her claims concerning breach of fiduciary duties.

It is apparent that if plaintiff is successful in her equitable distribution action, she can only receive a portion of the issued shares of Burgess & Associates, along with any other marital or divisible property she may be awarded in the trial court's discretion. Should she prove that she is entitled to an unequal distribution, she may, at the most, receive a larger portion of marital or divisible property as an offset—property which she assisted in contributing to the marriage. *See* N.C.G.S. § 50-20; *Nelson*, 179 N.C. App. at 168, 633 S.E.2d

3. Though plaintiff alleges in the shareholder complaint that James has breached his fiduciary duties to both plaintiff individually and Burgess & Associates, the record shows that plaintiff's complaint is brought pursuant to N.C.G.S. 55-7-40, which solely authorizes shareholder actions on behalf of the corporation. *See* N.C.G.S. §§ 55-7-40, 55-7-40.1. Moreover, in *Outen v. Mical*, this Court held that a 50% shareholder may not receive individual damages against another 50% shareholder for, *inter alia*, breach of fiduciary duties. 118 N.C. App. 263, 267, 454 S.E.2d 883, 886 (1995); *see generally* Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 17.02[3], at 17-10 (2009). Thus, even though this issue is not before us, it appears that plaintiff is precluded from seeking individual damages in her derivative suit as a matter of law.

at 126-27. She would not be entitled to any of James' separate property. *See id.*

In stark comparison, if plaintiff is successful in prosecuting her derivative suit for breach of the duties of good faith and due care, she may obtain a judgment against James in the right of the company in excess of $10,000 from a jury verdict. The judgment would be against James in his individual capacity, and Burgess & Associates would be able to enforce the judgment against James' separate property. Despite the breadth and variety of the factors in section 50-20, there is no similarity between the relief sought in plaintiff's equitable distribution action and the derivative suit. In particular, plaintiff sets out several factual allegations in the shareholder suit predating James' and plaintiff's separation. Were we to follow defendants' suggestion to lump the derivative suit here into subsection (11a) of N.C.G.S. § 50-20(c), those allegations would not be available to plaintiff in the distribution of marital property. N.C.G.S. § 50-20(c)(11a) (only waste or neglect occurring "during the period *after separation* of the parties and *before the time of distribution*" considered in making an unequal distribution) (emphasis added). Even if pre-separation acts could be considered pursuant to N.C. Gen. Stat. § 50-20(c)(12) (allowing consideration of "[a]ny other factor which the court finds to be just and proper," the district court cannot, as we have already noted, reach James' separate property in equitable distribution. Moreover, if Burgess & Associates was added as a party to the equitable distribution action, plaintiff's right to relief would not be expanded to include the type of relief sought in the derivative suit. *Contra Hudson*, 145 N.C. App. at 638, 550 S.E.2d at 575 ("We note that dismissal of such actions without prejudice further allows litigants to then intervene in the pending district court action by virtue of Rule 24 of our Rules of Civil Procedure.").

The district court in this case does not, and more importantly, cannot, obtain jurisdiction over plaintiff's shareholder derivative suit by statute. N.C.G.S. § 55-7-40. Even if the district court could obtain jurisdiction over plaintiff's derivative suit, it cannot grant plaintiff the relief she has sought. *Kiser*, 325 N.C. at 511, 385 S.E.2d at 492. Thus, retention of plaintiff's cause of action for breach of the duties of good faith and due care was proper by the superior court.[4]

4. We note further that there is no overlap in this case, as a matter of law, between plaintiff's status as a wife and plaintiff's status as a shareholder. Just because plaintiff has exercised her rights in one capacity does not necessarily prelude the exercise of separate rights in another capacity. We accordingly limit our analysis of plaintiff's claims to an examination of subject matter jurisdiction—the context in which they were challenged in defendants' motion to dismiss.

2. Accounting

An accounting is "[a] rendition of an account, either voluntarily or by court order. The term frequently refers to the report of all items of property, income, and expenses prepared by a personal representative, trustee, or guardian and given to heirs, beneficiaries or the probate court." *Black's Law Dictionary* 22 (9th ed. 2009). An accounting is an equitable remedy sometimes pled in claims of breach of fiduciary duty. *See*, *e.g.*, *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 70, 614 S.E.2d 328, 337 (2005) ("Plaintiffs sought an accounting as an equitable remedy for the alleged breaches of fiduciary duty and constructive fraud."). Our Supreme Court has said:

> All fiduciaries may be compelled by appropriate proceeding to account for their handling of properties committed to their care. When the fiduciary is an executor, administrator, collector, or personal representative of a deceased, he may, at the instance of an interested party, be compelled to account by special proceeding or civil action, G.S. 28-122 and 147; or the court which appointed him may, *ex mero motu*, compel a proper accounting by attachment for contempt, G.S. 28-118.

Lichtenfels v. Bank, 260 N.C. 146, 148-49, 132 S.E.2d 360, 362 (1963).

Here, given that plaintiff's claim for accounting is inextricably tied to her claim for breach of fiduciary duties, the superior court correctly concluded that it had subject matter jurisdiction over this claim as well.

3. Inspection

As to the claim for inspection in the shareholder suit, defendants claim that plaintiff has brought her shareholder action as a tactical strategy to gain an advantage in the divorce suit. If this is true, the superior court has the power to dismiss or stay this claim, because prior to allowing plaintiff's claim for inspection the superior court must find: (1) the "*demand is made in good faith and for a proper purpose*; (2) [plaintiff] describes with reasonable particularity h[er] purpose and the records [s]he desires to inspect; and (3) [t]he records are directly connected with h[er] purpose." N.C. Gen. Stat. § 55-16-02(c)(1)-(3) (2009) (emphasis added); *see* N.C.G.S. § 55-16-04(b). If plaintiff is indeed bringing her inspection claim for an improper purpose, defendants will have ample opportunity to present their concerns pursuant to sections 55-16-02 and 55-16-04,

which we think is a sufficient safeguard to any abuses that may be present from a possible overlap in discovery as to plaintiff's shareholder suit and equitable distribution action. As it stands, we see no reason in the instant action to inhibit the procedures set in place for the quick resolution of disputes in a corporate setting pursuant to Chapter 55, especially when inspection of the books would likely be germane to plaintiff's cause of action for breach of fiduciary duties. Furthermore, since plaintiff's claim does not involve a competing claim to marital property that is already under consideration in the equitable distribution action.

III. CONCLUSION

Since the superior court is the only court with subject matter jurisdiction over plaintiff's shareholder suit, we hold that the superior court properly concluded that it had subject matter jurisdiction over plaintiff's causes of action for inspection, accounting, and breach of fiduciary duties. However, given the nature of the relief sought and the prior equitable distribution action pending, the superior court erred in exercising subject matter jurisdiction over the claim for equitable divestiture of James' shares in plaintiff's shareholder suit. Accordingly, we affirm in part, reverse in part, and remand this case for further proceedings not inconsistent with this opinion.

Affirmed in part and reversed in part and remanded.

Judge ERVIN concurs.

Judge STROUD concurs in part and dissents in part with separate opinion.

STROUD, Judge concurring in part and dissenting in part.

I concur in the result in the majority opinion as to affirming the trial court's order on the shareholder derivative claims pursuant to N.C. Gen. Stat. § 55-7-40; and thus I agree the trial court has jurisdiction as to the claims for accounting and defendant Mr. Burgess's alleged breach of fiduciary duty. I also concur in the result in the majority opinion as to reversing the trial court order on the claim to divest defendant of his shares in the corporation, due to the prior pending equitable distribution action. I respectfully dissent from the majority opinion in affirming the trial court's order as to inspection of corporate records pursuant to N.C. Gen. Stat. § 55-16-04 as this

statute does not state that the Superior Court has exclusive original jurisdiction over this claim. I would therefore affirm the order of the Superior Court denying defendants' motion to dismiss the Superior Court action as to the claims for accounting and defendant Mr. Burgess's alleged breach of fiduciary duties and reverse as to the claims for inspection of the corporate records and divestiture of shares.

I first note that I differ somewhat from the majority opinion as to the interpretation of *Garrison v. Garrison*, 90 N.C. App. 670, 369 S.E.2d 628 (1988) and *Hudson Int'l, Inc. v. Hudson*, 145 N.C. App. 631, 550 S.E.2d 571 (2001). The majority opinion notes that "[a]t the core of *Garrison* and *Hudson* were two principles: (1) the same property was the subject of both the superior and district court actions, and (2) the relief sought and available was similar in each suit." However, I differ with the majority opinion as to its assertion that identity of the property and similarity of relief are the controlling principles of *Garrison* and *Hudson*. The controlling principle of *Garrison* and *Hudson* is the invocation of the jurisdiction of the District Court. *See Hudson Int'l, Inc. v. Hudson*, 145 N.C. App. 631, 550 S.E.2d 571 (2001); *Garrison v. Garrison*, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

In *Garrison*, the husband brought an action for partition of real property while an equitable distribution action was pending, and this Court determined that

> [t]he superior court ha[d] no authority to partition marital property pursuant to the provisions of G.S. 46-1 *et seq.* where . . . the jurisdiction of the district court ha[d] been properly invoked to equitably distribute such marital property. Had the parties not asserted their right to have the property equitably distributed pursuant to G.S. 50-20, either tenant in common could have filed a special proceeding to have the property partitioned as provided by G.S. 46-1 *et seq.*

Garrison at 671-72, 369 S.E.2d at 629. *Garrison* plainly states that where the jurisdiction of the District Court under N.C. Gen. Stat. § 50-20 had already been invoked, the remedy of partition in Superior Court under N.C. Gen. Stat. § 1-46 was no longer available. *See id.* at 672, 369 S.E.2d at 629.

In *Sparks v. Peacock*, 129 N.C. App. 640, 500 S.E.2d 116 (1998), the husband filed a complaint against the wife seeking contribution under several promissory notes which the couple had executed dur-

ing their marriage. *Sparks* at 640-41, 500 S.E.2d at 117. The wife filed a motion to dismiss, claiming that the husband's claims against her could be addressed solely before the District Court in equitable distribution. *Id.* at 641, 500 S.E.2d at 117. However, the husband and wife had already divorced, and no equitable distribution claim was pending. *Id.* This Court noted that "[i]t is of critical importance to this case that there is not an equitable distribution action currently pending between the parties. In fact, both parties are now procedurally barred from bringing such an action." *Id.* This Court concluded that the motion to dismiss should have been denied, stating that

> [d]efendant correctly states that the district court has jurisdiction over equitable distribution actions. *It is also true that where parties have brought an action in district court under G.S. 50-20 to equitably distribute their marital property, the superior court does not have jurisdiction to divide marital property.* However, where, as here, the jurisdiction of the district court has not been invoked, the superior court is not precluded from exercising jurisdiction merely because the parties are former spouses.

Id. at 641, 500 S.E.2d at 118 (emphasis added) (citations omitted).

Hudson follows *Garrison* and *Sparks* in its recognition of the importance of the invocation of the jurisdiction of the District Court in the equitable distribution action. *See Hudson*, 145 N.C. App. 631, 550 S.E.2d 571. In *Hudson*, this Court concluded that the Superior Court was divested of jurisdiction to hear an action for declaratory judgment brought by a corporation which held title to real estate which the wife, in an equitable distribution action, alleged was actually marital property which was titled to the corporation in an effort "to deprive her of marital rights[.]" 145 N.C. App. at 632-38, 550 S.E.2d at 572-75. Despite the fact that the Superior Court action included multiple parties, including numerous business entities and individuals this Court determined that

> in accordance with *Garrison* and *Sparks*, where, as here, an action listed in section 7A-244 has been previously filed in district court and another action relating to the subject matter of the previously filed action is then filed in superior court, the district court's jurisdiction over the subject matter has already been invoked by the parties to the first action. It follows that the superior court does not have jurisdiction in the subsequently filed action, irrespective of the parties to the first action.

> Because the Superior Court, Mecklenburg County, was divested of subject matter jurisdiction in the case *sub judice*, it properly dismissed the action without prejudice.

Id. at 637-38, 550 S.E.2d at 575. Thus, the primary inquiry is whether the jurisdiction of the District Court has been invoked as to a particular claim, not the identity of the property involved or the similarity of relief sought in the District Court action and the Superior Court action. *See id.* at 637-38, 550 S.E.2d at 575; *Sparks* at 641, 500 S.E.2d at 118; *Garrison* at 671-72, 369 S.E.2d at 629.

The majority opinion also bases its conclusion upon the view that the District Court cannot address all of the issues raised by the parties in regard to the corporation based on two propositions: (1) the District Court cannot order distribution of separate property in order to compensate plaintiff for damages, as distribution in equitable distribution is limited to distribution of marital and divisible property; and (2) the District Court does not have jurisdiction to determine the issues arising under Chapter 55 of the General Statutes, specifically plaintiff's claims for breach of fiduciary duties, inspection of records, and accounting. I disagree that the first proposition is controlling and agree with the second proposition as to the shareholder derivative claim only.

Although I agree that the District Court cannot order a "distribution" of separate property of either husband or wife, there is no doubt that the District Court can order a distributive award as part of its equitable distribution judgment. *See generally Pellom v. Pellom*, 194 N.C. App. 57, 68-69, 669 S.E.2d 323, 329-30 (2008) (Trial court properly considered both marital property, divisible property, and the plaintiff husband's substantial ongoing income, "an obvious liquid asset from which he could pay the award[,]" in making the determination that he had the ability to pay the distributive award.); *disc. review denied*, 363 N.C. 375, 678 S.E.2d 667 (2009). The amount of a distributive award is not limited by the amount of marital property available to a party, but the party who has to pay a distributive award must do so from any available assets, including his separate property. *See id.* As also noted by the majority, the District Court has the authority to consider "any other factor the court finds to be just and proper" in making an unequal distribution, and defendant Mr. Burgess's alleged mismanagement of the corporation, a marital asset, could be such a factor. Therefore, I disagree with the majority that a judgment for an unequal distribution in plaintiff's

favor, which includes payment of a distributive award, could not reach separate property of defendant Mr. Burgess, as he would be required to pay the distributive award from any available property, including separate property. However, I agree that the District Court does not have jurisdiction to determine some of plaintiff's claims under Chapter 55 of the General Statutes.

In order to determine the extent of the concurrent jurisdiction of the District Court and Superior Court, I must examine the applicable provisions from N.C. Gen. Stat. § 7A-240 *et seq.* in conjunction with Chapter 55 of the General Statutes. First, N.C. Gen. Stat. § 7A-240 sets out the general rule as to original civil jurisdiction in the General Court of Justice:

> Except for the original jurisdiction in respect of claims against the State which is vested in the Supreme Court, original general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice. Except in respect of proceedings in probate and the administration of decedents' estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division.

N.C. Gen. Stat. § 7A-240 (2007). Therefore, except for "claims against the State . . . vested in the Supreme Court" and "probate and the administration of decedents' estates," jurisdiction is vested concurrently in the District Court and Superior Court. *See id.*

N.C. Gen. Stat. § 7A-242 makes it clear that the allocations of various types of actions by Chapter 7A of the General Statutes to the District Court and Superior court are only "[f]or the efficient administration of justice." N.C. Gen. Stat. § 7A-242 (2007). Specifically, N.C. Gen. Stat. § 7A-242 provides that

> [f]or the efficient administration of justice in respect of civil matters as to which the trial divisions have concurrent original jurisdiction, the respective divisions are constituted proper or improper for the trial and determination of specific actions and proceedings in accordance with the allocations provided in this Article. But no judgment rendered by any court of the trial divisions in any civil action or proceeding as to which the trial divisions have concurrent original jurisdiction is void or voidable for the sole reason that it was rendered by the court of a trial division

> which by such allocation is improper for the trial and determination of the civil action or proceeding.

Id.

"In civil matters as to which the trial divisions have concurrent original jurisdiction, G.S. 7A-243 through G.S. 7A-250 designate the superior court division or the district court division as proper or improper for trial." *Boston v. Freeman*, 6 N.C. App. 736, 739, 171 S.E.2d 206, 209 (1969). Our Supreme Court has determined that the allocations of various types of actions to either the District Court or Superior Court by N.C. Gen. Stat. § 7A-240 *et seq.* are not jurisdictional, but administrative, and thus the two divisions have concurrent jurisdiction unless there is a statutory provision vesting jurisdiction exclusively in either the District Court or the Superior Court. *Stanback v. Stanback*, 287 N.C. 448, 457, 215 S.E.2d 30, 36-37 (1975).

> Under the Judicial Department Act of 1965 both trial divisions concurrently possess the aggregate of original civil trial jurisdiction reposed in the General Court of Justice excepting only matters involving claims against the State and probate and administration of decedents' estates as to which exclusive original jurisdiction is vested in the Supreme Court and the superior court division respectively. The Act further provides for the administrative allocations of case loads between the divisions. It is plain these allocations are not jurisdictional since a judgment is not void or voidable for reason that it was rendered by a court of the trial division which by the statutory allocation was the improper division for hearing and determining the matter.

Id. (citations omitted).

Here, the District Court has assumed jurisdiction over the equitable distribution action based upon plaintiff's own complaint requesting equitable distribution and defendant Mr. Burgess's counterclaim which also requested equitable distribution. Plaintiff and defendant Mr. Burgess were married in 1996 and formed Burgess & Associates, Inc. ("the corporation") in 1999. Plaintiff and defendant Mr. Burgess appear to be the sole shareholders of the corporation, with each owning equal amounts of stock in the corporation. In 2006, plaintiff specifically identified the corporation in her complaint for equitable distribution and requested "exclusive possession and full use" of the corporation pending completion of the equitable distribution case. Almost two years after filing the equitable distribution claim, plaintiff filed the shareholder derivative action in

Superior Court. Thus, we are dealing with a corporation wholly owned by the husband and wife, each of whom requested equitable distribution, and there is no dispute that the shares of the corporation are marital property.

Both plaintiff and defendant in the case *sub judice* elected to invoke the jurisdiction of the District Court by filing a complaint and counterclaim for equitable distribution; therefore, both plaintiff and defendant made a choice to seek the remedies available pursuant to equitable distribution to the exclusion of the various other types of remedies which might otherwise be available to distribute assets or debts between them. *See generally Garrison* at 672, 369 S.E.2d at 629. However, this election could be effective only to the extent that the District Court has subject matter jurisdiction to determine the issues arising in the particular claim.

Turning to plaintiff's complaint in this action, I note that plaintiff specifically alleged the basis for the Superior Court's jurisdiction over her claims: "This Court has jurisdiction over the subject matter of this dispute pursuant to §§ 7A-240 and 7A-243 of the North Carolina General Statutes." However, as noted above, N.C. Gen. Stat. § 7A-240 *et. seq.* provides that the District Court and Superior Court have *concurrent jurisdiction* except in specific types of actions which are not relevant here. *See* N.C. Gen. Stat. § 7A-240. Nor does N.C. Gen. Stat. § 7A-243 support plaintiff's claim of exclusive jurisdiction in Superior Court. *See* N.C. Gen. Stat. § 7A-243 (2007). N.C. Gen. Stat. § 7A-243 addresses the proper, non-jurisdictional, *see Stanback* at 457, 215 S.E.2d at 36-37, allocation of claims to a particular division of the General Court of Justice based upon the amount in controversy:

> Except as otherwise provided in this Article, the district court division is the proper division for the trial of all civil actions in which the amount in controversy is ten thousand dollars ($10,000) or less; and the superior court division is the proper division for the trial of all civil actions in which the amount in controversy exceeds ten thousand dollars ($10,000).

N.C. Gen. Stat. § 7A-243. Plaintiff then requests damages in excess of $10,000 in her prayer for relief, consistent with her invocation of N.C. Gen. Stat. § 7A-243. However, the very next section of Chapter 7A of the General Statutes, N.C. Gen. Stat. § 7A-244, specifically allocates domestic matters, including equitable distribution, to the District Court division, regardless of the amount in controversy:

> The district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, equitable distribution of property, alimony, child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof.

N.C. Gen. Stat. § 7A-244 (2007). Furthermore, the amount in controversy is not a controlling factor in this case, nor does any party so argue.

Plaintiff's complaint fails to mention the section of Chapter 7A of the General Statutes which specifically addresses her claims, N.C. Gen. Stat. § 7A-249, entitled "Corporate receiverships" which provides as follows:

> The superior court division is the proper division, without regard to the amount in controversy, for actions for corporate receiverships under Chapter 1, Article 38, of the General Statutes, and proceedings under Chapters 55 (North Carolina Business Corporation Act) and 55A (Nonprofit Corporation Act) of the General Statutes.

N.C. Gen. Stat. § 7A-249 (2007).

Plaintiff's claims herein were brought under Chapter 55 of the General Statutes, the North Carolina Business Corporation Act, specifically N.C. Gen. Stat. §§ 55-16-04 and 55-7-40. Although N.C. Gen. Stat. § 7A-249 provides that the proper allocation of a case arising under Chapter 55 of the General Statutes is to the Superior Court, *see* N.C. Gen. Stat. § 7A-249, under N.C. Gen. Stat. § 7A-240, "jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice," N.C. Gen. Stat. § 7A-240, so it would appear that the District Court has concurrent jurisdiction with the Superior Court over claims arising under Chapter 55 of the General Statutes.

However, N.C. Gen. Stat. § 55-7-40 presents a specific exception to the general rule of concurrent jurisdiction as stated by N.C. Gen. Stat. § 7A-240 by providing for "exclusive original jurisdiction over shareholder derivative actions." N.C. Gen. Stat. § 55-7-40.

> Subject to the provisions of G.S. 55-7-41 and G.S. 55-7-42, a shareholder may bring a derivative proceeding in the superior

> court of this State. *The superior court has exclusive original jurisdiction over shareholder derivative actions.*

N.C. Gen. Stat. § 55-7-40 (2007) (emphasis added).

Thus, it appears that as to shareholder derivative actions, the Legislature has vested subject matter jurisdiction solely in the Superior Court. *See id.* Although I can find no North Carolina case law defining "exclusive original jurisdiction," it would appear that only the Superior Court has jurisdiction to adjudicate a shareholder derivative action. *See id.* The term "original jurisdiction" refers to the jurisdiction of a trial court, as opposed to an appellate court, and more than one court may have "original jurisdiction" over a particular type of case. *See generally Williams v. Greene*, 36 N.C. App. 80, 84, 243 S.E.2d 156, 159 (1978) ("According to common interpretation 'original jurisdiction' should be distinguished from 'appellate jurisdiction' and means that the federal District Court shall have the power to hear such cases in the first instance. It follows that since the phrase does not contemplate 'exclusive jurisdiction,' the state courts have concurrent jurisdiction with the federal court to entertain § 1983 claims." (citations omitted)). Courts with "original jurisdiction" over the same matters are often described as having "concurrent jurisdiction." *See id.* However, the court with exclusive jurisdiction has subject matter jurisdiction "to the exclusion of all other courts." *See In re H.L.A.D.*, 184 N.C. App. 381, 386, 646 S.E.2d 425, 430 (2007) (citations, quotation marks, and brackets omitted) ("Blacks Law Dictionary, 869 (8th ed. 2004), defines 'exclusive jurisdiction' to mean 'a court's power to adjudicate an action or class of actions to the exclusion of all other courts.' Further, 'original jurisdiction' means 'a court's power to hear and decide a matter before any other court can review the matter.' (brackets omitted)), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008).

I would interpret N.C. Gen. Stat. §§ 7A-240, 7A-249, and 55-7-40 in such a way as to give effect to each provision and to harmonize the three sections. *See Bd. of Educ. v. Comrs. of Onslow*, 240 N.C. 118, 126, 81 S.E.2d 256, 262 (1954). Where a conflict between two statutes may appear,

> [t]he several sections are to be construed *in pari materia*. If possible, they are to be reconciled and harmonized. If and when confronted by inescapable conflicts and inconsistencies, these must be resolved by the Court as the occasion arises. In ascertaining

> the legislative intent, the judicial approach is well stated in 82 C.J.S., p. 912, Statutes, Section 385(b), as follows:
>
> > The different sections should be regarded, not as prior and subsequent acts, but as simultaneous expressions of the legislative will; but, where every means of reconciling inconsistencies has been employed in vain, the section last adopted will prevail, regardless of their relative positions in the code or revision. An unnecessary implication arising from one section, inconsistent with the express terms of another on the same subject, yields to the expressed intent, and the two sections are not repugnant. Any rules contained in the code itself for determining which provision is to prevail should be followed in case of conflict. Form must give way to legislative intent in case of conflict.

Id. (citations and quotation marks omitted).

Although the general provisions of N.C. Gen. Stat. §§ 7A-240 and 7A-249 would establish concurrent jurisdiction for cases arising under Chapter 55 of the General Statutes in the District Court and Superior Court, the more specific provision of N.C. Gen. Stat. § 55-7-40 controls as to shareholder derivative actions. *See* N.C. Gen. Stat. §§ 7A-240, -249, 55-7-40. In addition, N.C. Gen. Stat. §§ 7A-240 and 249 were enacted in 1965. *See* N.C. Gen. Stat. §§ 7A-240, -249. It appears N.C. Gen. Stat. § 7A-240 has not been revised since 1965 and N.C. Gen. Stat. § 7A-249 was last revised in 1989. *See* N.C. Gen. Stat. §§ 7A-240, -249. However, N.C. Gen. Stat. § 55-7-40 was enacted in 1989 and last revised in 1995. *See* N.C. Gen. Stat. § 55-7-40. Therefore, N.C. Gen. Stat. § 55-7-40, as the more specific and more recently enacted provision, controls as to the exclusive original jurisdiction of the Superior Court over shareholder derivative actions. *See Bd. of Educ.* at 126, 81 S.E.2d at 262.

However, application of the same principles to N.C. Gen. Stat. § 55-16-04, regarding inspection of corporate records, produces the opposite result. N.C. Gen. Stat. § 55-16-04 provides in pertinent part as follows:

> (a) If a corporation does not allow a shareholder who complies with G.S. 55-16-02(a) to inspect and copy any records required by that subsection to be available for inspection, the superior court of the county where the corporation's principal office (or, if none in this State, its registered office) is located may, upon application of the shareholder, summarily order

> inspection and copying of the records demanded at the corporation's expense.
>
> (b) If a corporation does not within a reasonable time allow a shareholder to inspect and copy any other record, the shareholder who complies with G.S. 55-16-02(b) and (c) may apply to the superior court in the county where the corporation's principal office (or, if none in this State, its registered office) is located for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this subsection on an expedited basis.

N.C. Gen. Stat. § 55-16-04(a)-(b) (2007).

Unlike N.C. Gen. Stat. § 55-7-40, N.C. Gen. Stat. § 55-16-04 does not provide that the Superior Court has "exclusive original jurisdiction" over actions for inspection of corporate records. *Compare* N.C. Gen. Stat. § 55-7-40, -16-04. Certainly, the Superior Court is the division to which these actions are allocated, but under N.C. Gen. Stat. § 7A-240, both the District and Superior Courts have concurrent jurisdiction over a claim under N.C. Gen. Stat. § 55-16-04. *See* N.C. Gen. Stat. § 7A-240. The parties each invoked the jurisdiction of the District Court by filing equitable distribution claims, and the District Court clearly has the power and authority to enter orders requiring discovery of corporate records and to sanction the defendant Mr. Burgess if he, as the party with possession and control of the records, has failed to produce any corporate records requested by plaintiff.

For example, N.C. Gen. Stat. § 50-21(e) provides that

> [u]pon motion of either party or upon the court's own initiative, the court shall impose an appropriate sanction on a party when the court finds that:
>
> (1) The party has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery pursuant to G.S. 1A-1, Rule 37, or has willfully obstructed or unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding, and
>
> (2) The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.

> Delay consented to by the parties is not grounds for sanctions. The sanction may include an order to pay the other party the amount of the reasonable expenses and damages incurred because of the willful obstruction or unreasonable delay, including a reasonable attorneys' fee, and including appointment by the court, at the offending party's expense, of an accountant, appraiser, or other expert whose services the court finds are necessary to secure in order for the discovery or other equitable distribution proceeding to be timely conducted.

N.C. Gen. Stat. § 50-21(e) (2007). Thus, the District Court has jurisdiction and authority to address any issues regarding discovery of corporate records for the corporation, which is wholly owned by the parties to the equitable distribution action. *See id.*

Because the District Court has no jurisdiction over shareholder derivative claims under N.C. Gen. Stat. § 55-7-40, I concur with the result reached by the majority opinion as to the shareholder derivative claims which includes the claims of accounting and the alleged breach of fiduciary duty. I also concur with the majority's reversal of the trial court's order as to plaintiff's claim for divestiture of defendant Mr. Burgess's shares in the corporation, as distribution of the corporate shares is precisely what plaintiff is seeking in the equitable distribution claim and this claim is clearly within the jurisdiction of the District Court. Because the District Court does have concurrent jurisdiction with the Superior Court over plaintiff's claim under N.C. Gen. Stat. § 55-16-04, regarding inspection of corporate records, I believe that the prior equitable distribution action did divest the Superior Court of jurisdiction as to that portion of plaintiff's claims. However, where the District Court does not have concurrent jurisdiction with the Superior Court over the shareholder derivative claim, it cannot divest the District Court of jurisdiction pursuant to *Hudson* and *Garrison*. *Hudson* at 637-38, 550 S.E.2d at 575; *Garrison* at 671-72, 369 S.E.2d at 629. I would therefore reverse the trial court's order denying dismissal of plaintiff's claims pursuant to N.C. Gen. Stat. § 55-16-04.

Although this dissent reaches nearly the same result as the majority opinion, although for different reasons, I also wish to state my concern that this case could have very damaging, and most likely unintended, consequences for parties to equitable distribution actions in North Carolina. I do not believe that this result is in keeping with the purpose and intent of the equitable distribution law. The majority's opinion, which leaves both the equitable distribution

action in District Court and the shareholder derivative action in Superior Court pending, with each action addressing portions of the issues arising as to Burgess & Associates, Inc., undermines the purpose and intent of equitable distribution and creates the possibility of conflicting rulings in the two actions which could lead to greatly increased delay, cost, and complication for the parties to this action as well as to the judicial system.

I fear that this case may introduce the corporate "strike suit" to a new forum: equitable distribution. The Official Comment to N.C. Gen. Stat. § 55-7-40, addressing shareholder derivative suits, notes as follows:

> A great deal of controversy has surrounded the derivative suit, and widely different perceptions as to the value and efficacy of this litigation continue to exist. On the one hand, the derivative action has historically been the principal method of challenging allegedly improper, illegal, or unreasonable action by management. On the other hand, it has long been recognized that the derivative suit may be instituted more with a view to obtaining a settlement favorable to the plaintiff and his attorney than to righting a wrong to the corporation (the so-called "strike suit.")

N.C. Gen. Stat. § 55-7-40, Official Comment.

In the context of an equitable distribution case involving a corporation which is solely owned by the husband and wife, where the District Court will ultimately distribute the shares of the corporation, the potential for abuse of a shareholder derivative action is tremendous. Many married couples own family businesses as closely-held corporations in which the husband and wife are the sole shareholders. Upon separation and divorce, it is unfortunately exceedingly common for one spouse to accuse the other of some sort of malfeasance in relation to the corporation. In any such case, there is now the potential for a shareholder derivative action in Superior Court. In fact, after this case, attorneys may believe that they must consider filing a shareholder derivative action in addition to the equitable distribution claim in order to secure the possibility of a complete recovery for their clients. As few attorneys who specialize in or routinely practice family law are also conversant in shareholder derivative actions in Superior Court, or vice-versa, each party would most likely have to retain two attorneys or law firms to provide representation in the two separate actions, thus increasing the costs of litigation substantially.

Depending upon the result of the equitable distribution action, it is quite possible that this particular shareholder derivative suit will be a very expensive and time-consuming exercise in futility. Of course, if this shareholder derivative action was intended as a "strike suit," it may succeed in the sense that it could force defendant Mr. Burgess to settle with plaintiff in the equitable distribution case on terms more to her liking, in order to avoid incurring more attorney fees and expenses in both lawsuits. On the other hand, the cases may not be settled. Plaintiff might succeed in her shareholder derivative suit and obtain a Superior Court judgment, for the benefit of the corporation, against defendant Mr. Burgess. At the same time, the District Court may enter an equitable distribution judgment which distributes one hundred percent of the shares of the corporation to defendant Mr. Burgess. Plaintiff, who filed and pursued this lawsuit, would no longer have any interest in this shareholder derivative action or the judgment obtained. As the sole shareholder of the corporation, no doubt Mr. Burgess would elect directors and management of the corporation who would promptly take action to forgive the judgment which Mr. Burgess owes to his own solely-owned corporation. Indeed, if an equitable distribution order distributing all of the stock in the corporation to defendant Mr. Burgess were entered before completion of the shareholder derivative action, the shareholder derivative action may even become moot. In this hypothetical, the only winners are the attorneys who have been paid for much unnecessary litigation. However, it is also possible that this shareholder derivative action will rectify real wrongs, provide well-deserved compensation to the corporation, and ultimately benefit even plaintiff as a shareholder of the corporation.

Certainly the hypothetical outcomes discussed above are not the only potential outcomes. I would note that our record includes no information regarding the substantive issues raised by the equitable distribution action between plaintiff and defendant Mr. Burgess, and nothing in this dissent should be considered as an expression of any opinion as to the merits of that claim or the shareholder derivative claim. My concern is only with the procedural dilemma which is created by the separation of the equitable distribution action from the shareholder derivative action in the context of a corporation entirely owned by the husband and wife because of the "exclusive original jurisdiction" provision of N.C. Gen. Stat. § 55-7-40. N.C. Gen. Stat. § 55-7-40. However, I highlight this issue in the hope that the North Carolina Legislature will consider this situation and revise N.C. Gen. Stat. § 55-7-40 to prevent po-

tential abuse of the shareholder derivative action in the context of equitable distribution.

For the reasons stated above, I therefore concur in part and dissent in part. I would reverse the Superior Court's order as to denial of dismissal of plaintiff's claims for divestiture of shares and inspection of corporate records; I would affirm as to denial of dismissal of plaintiff's shareholder derivative claim including claims for accounting and breach of fiduciary duty.

DUNCAN C. DAY AND ASHLEY-BROOK DAY, AS CO-ADMINISTRATORS OF THE ESTATE OF DUNCAN C. DAY, JR., DECEASED, PLAINTIFFS V. THOMAS ALAN BRANT, M.D., EDWARD WILLIAM HALES, P.A., MID-ATLANTIC EMERGENCY MEDICAL ASSOCIATES, P.A. AND MOORESVILLE HOSPITAL MANAGEMENT ASSOCIATES, INC. D/B/A LAKE NORMAN REGIONAL MEDICAL CENTER, DEFENDANTS

No. COA09-573

(Filed 20 July 2010)

1. Medical Malpractice— directed verdict—standard of care

The trial court erred in a medical malpractice case by directing verdict in favor of defendants based on its conclusion that plaintiffs' expert was not qualified to testify to the applicable standard of care. The expert's testimony as a whole met the requirements of N.C.G.S. § 90-21.12, and he specifically testified that the standard of care he was applying was the standard of care for defendant's community.

2. Medical Malpractice— directed verdict—proximate causation

The trial court erred in a medical malpractice case by directing verdict in favor of defendants based on its conclusion that plaintiffs' expert presented insufficient evidence of proximate causation. The expert's testimony established that the victim's survival was not merely possible, but rather was probable if defendants had complied with the standard of care. Absolute certainty was not required.

Appeal by plaintiffs from order entered 25 July 2008 by Judge Christopher M. Collier in Iredell County Superior Court. Heard in the Court of Appeals 4 November 2009.

John J. Korzen and David A. Manzi for plaintiffs-appellants.

Carruthers & Roth, P.A., by Norman F. Klick, Jr., Robert N. Young, and Kevin A. Rust, for Thomas Alan Brant, M.D., Edward William Hales, P.A., and Mid-Atlantic Emergency Medical Associates, P.A., defendants-appellees.

GEER, Judge.

Plaintiffs Duncan C. Day and Ashley-Brook Day have appealed from the trial court's grant of a directed verdict to defendants Thomas Alan Brant, M.D.; Edward William Hales, P.A.; and Mid-Atlantic Emergency Medical Associates, P.A. Plaintiffs' 16-year-old son, Duncan C. Day, Jr. ("Duncan"), was injured in a car accident and brought to Lake Norman Regional Medical Center ("LNRMC"). After being examined and released, he died from internal bleeding when his liver, which had sustained lacerations in the car accident, ruptured. Plaintiffs contend defendants were negligent in failing to discover the liver lacerations and failing to admit Duncan to the hospital for observation and treatment.

At trial, defendants made two arguments in support of their motion for a directed verdict: (1) that plaintiffs' standard of care expert, Dr. Paul Mele, was not qualified to testify to the applicable standard of care and (2) that plaintiffs' causation expert, Dr. James O. Wyatt, III, presented insufficient evidence of proximate causation. Based on our review of that testimony, we disagree and hold that the testimony of Dr. Mele and Dr. Wyatt was sufficient to defeat defendants' motion for a directed verdict. Accordingly, we reverse.

Facts

On 27 October 2003, Duncan was involved in a head-on collision after falling asleep while driving on U.S. 21 in Iredell County, North Carolina. When Duncan arrived at LNRMC, Dr. Brant and Mr. Hales were on duty in the emergency room. Duncan had a seatbelt abrasion from his left shoulder to his right upper abdomen and bruises on his arms and legs. He reported neck and chest pain. A physical examination, blood work, a chest x-ray, cervical spine x-rays, and a limited cervical spine CT scan were performed, and no significant problems were discovered. Neither Dr. Brant nor Mr. Hales ordered an ultrasound or CT scan of Duncan's abdomen. Duncan was given pain medication and discharged.

The next morning, 28 October 2003, Duncan was found unresponsive at home and was pronounced dead on arrival at LNRMC.

Internal bleeding from a liver rupture caused his death. Plaintiffs filed suit against Dr. Brant, Mr. Hales, Mid-Atlantic Emergency Medical Associates, and LNRMC in Iredell County Superior Court on 15 November 2004, but subsequently voluntarily dismissed the claim against LNRMC.

At trial, plaintiffs called Dr. Paul Mele, a board certified emergency medicine physician with 20 years experience, to give an expert opinion on the standard of care. After the trial court admitted Dr. Mele as an expert over defendants' objection, Dr. Mele explained that the liver and the spleen are the organs most commonly injured after blunt force trauma to the abdomen. According to Dr. Mele, simply being restrained by a seat belt can injure these organs.

Dr. Mele concluded that Dr. Brant and Mr. Hales failed to follow the standard of care in treating Duncan. He testified that given the facts known by the two men—Duncan was in a car accident, had chest pain, was bruised across his chest from his shoulder harness, was overweight, and was a teenager—Dr. Brant and Mr. Hales should have been alerted to the possibility that Duncan might have suffered an abdominal injury despite not reporting abdominal pain or suffering a broken rib. According to Dr. Mele, Dr. Brant and Mr. Hales "just really didn't give the abdomen a fair chance to be evaluated," and "[i]t was just too easily dismissed as not an abdominal injury scenario at all . . . ."

Plaintiffs tendered, without objection, their causation expert, Dr. James O. Wyatt, III, as an expert in trauma surgery. Dr. Wyatt explained that Duncan's death was due to exsanguination caused by a Grade IV or V laceration to his liver and a Grade II injury to his spleen. According to Dr. Wyatt, a "fair amount" of blood had built up underneath the laceration to Duncan's liver, and when it subsequently broke loose, it resulted in rapid bleeding that caused Duncan to pass out and go into cardiac arrest.

Dr. Wyatt testified that none of the studies performed on Duncan when first seen at the hospital would have diagnosed this problem and that such a diagnosis is usually made using a CT scan of the abdomen and pelvis. He testified that if the diagnosis had been made, Duncan should have been admitted to the hospital, where the injury should have initially been handled non-operatively. Dr. Wyatt detailed the options if non-operative management failed, including "[a]ngiography with possible embolization," "[s]urgical management with possible hepatic repair," and/or "[s]urgical management with damage

control packing." In his written report, he concluded that "[s]urvival is excellent (>51%) in patients who arrive in the hospital and get proper initial and subsequent management." Dr. Wyatt believed that if Duncan had been in the hospital when his liver ruptured, "he would have survived it."

At the conclusion of plaintiffs' evidence, defendants moved for a directed verdict on the grounds that Dr. Mele was not qualified to give an expert opinion on the standard of care and that plaintiffs had not shown proximate cause. The trial court granted the motion without specifying its grounds. Plaintiffs timely appealed to this Court.

Discussion

" 'This Court reviews a trial court's grant of a motion for directed verdict *de novo*.' " *Kerr v. Long*, 189 N.C. App. 331, 334, 657 S.E.2d 920, 922 (quoting *Herring v. Food Lion, LLC*, 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005), *aff'd per curiam*, 360 N.C. 472, 628 S.E.2d 761 (2006)), *cert. denied*, 362 N.C. 682, 670 S.E.2d 564 (2008). The Court must determine " 'whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence [is] sufficient to be submitted to the jury.' " *Id.* (quoting *Brookshire v. N.C. Dep't of Transp.*, 180 N.C. App. 670, 672, 637 S.E.2d 902, 904 (2006)).

"When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether the plaintiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care, (2) breach of the standard of care, (3) proximate causation, and (4) damages." *Turner v. Duke Univ.*, 325 N.C. 152, 162, 381 S.E.2d 706, 712 (1989). In this case, the sole issues are the sufficiency of the evidence as to the standard of care and proximate causation.

I

[1] There is no dispute that Dr. Mele testified that defendants breached the standard of care. Defendants, however, contend that plaintiffs did not properly establish that Dr. Mele was qualified to provide expert testimony on the applicable standard of care. In medical malpractice cases, " '[b]ecause questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony.' " *Billings v. Rosenstein*, 174 N.C.

App. 191, 194, 619 S.E.2d 922, 924 (2005) (quoting *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671-72 (2003)), *disc. review denied*, 360 N.C. 478, 630 S.E.2d 664 (2006).

N.C. Gen. Stat. § 90-21.12 (2009) sets out the standard of care applicable in a medical malpractice action:

> 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.

An expert witness may testify regarding this standard of care " 'when that physician is familiar with the experience and training of the defendant and either (1) the physician is familiar with the standard of care in the defendant's community, or (2) the physician is familiar with the medical resources available in the defendant's community and is familiar with the standard of care in other communities having access to similar resources.' " *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 478, 624 S.E.2d 380, 384 (2006) (quoting *Barham v. Hawk*, 165 N.C. App. 708, 712, 600 S.E.2d 1, 4 (2004), *aff'd per curiam by an equally divided court*, 360 N.C. 358, 625 S.E.2d 778 (2006)).

In arguing that Dr. Mele was not qualified to testify regarding the applicable standard of care, defendants first point out that Dr. Mele never testified he was a licensed physician. *See* N.C.R. Evid. 702(b) (requiring expert witness giving testimony on standard of care to be "a licensed health care provider in this State or another state"). While Dr. Mele was not specifically asked whether he had a medical license, he testified that he was an emergency medicine physician, that he was board certified, that he used to have emergency room privileges at Rex Hospital in Raleigh, North Carolina, and that he now had other hospital privileges at Rex Hospital. A jury could reasonably infer from this testimony that Dr. Mele did in fact have a medical license.

Defendants next contend that plaintiffs failed to show Dr. Mele's familiarity with defendants' community at the time of the alleged

breach. If a plaintiff's standard of care expert witness "fail[s] to demonstrate that he [is] sufficiently familiar with the standard of care '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,' " then the "plaintiff [is] unable to establish an essential element of his claim, namely, the applicable standard of care," and the trial court properly enters judgment on behalf of the defendant. *Smith*, 159 N.C. App. at 197, 582 S.E.2d at 673 (quoting N.C. Gen. Stat. § 90-21.12).

Dr. Mele testified at trial that he reviewed defendants' depositions to determine the standard of practice for emergency medicine at LNRMC in 2003. He confirmed that the way they practiced emergency medicine was no different than his practice and that their training and experience in emergency medicine was no different. Dr. Mele reviewed documents describing the population of the community, the number of beds in the hospital, the kinds of facilities available in the hospital, the kinds of patients seen, and the diagnostic services available.[1] He testified that the descriptions of the facilities, the equipment available, the number of beds, and the services performed were all similar to that of hospitals in which he has worked, including Rex Hospital.[2] Dr. Mele also did internet research to obtain demographics regarding Mooresville and determined that it was similar to Wake County where Rex Hospital is located. Additionally, Dr. Mele testified that during his career, he has had an opportunity to consult with practitioners working in communities very similar to Iredell County and has determined that the standard of care in those communities is the same as in Iredell County and in the facilities in which he has worked. Finally, Dr. Mele reviewed the website of the medical group employing Dr. Brant and Mr. Hales and "read through the qualifications and trainings of their doctors and PA's." He concluded that the physicians had similar academic backgrounds, training, and experience.

This testimony was sufficient to establish Dr. Mele's familiarity with defendants and the standard of care in their community or similar communities. *See Billings*, 174 N.C. App. at 195, 619 S.E.2d at 925 (holding that doctor established sufficient familiarity with standard of care for neurologists in Wilkes County, North Carolina, when he

1. Although defendants contend that Dr. Mele did not specify in his trial testimony that he was reviewing 2003 information about the community and the hospital, his testimony as a whole indicates that he was looking at information from 2003.

2. Dr. Mele had in fact worked in the emergency department at LNRMC in 1992 or 1993.

examined demographic data on Wilkes County, he testified he was familiar with similar communities, he was licensed in North Carolina, and he had practiced in multiple communities in North Carolina); *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 199, 605 S.E.2d 154, 157 (2004) (holding doctor qualified to testify when he reviewed demographic information regarding Rocky Mount, North Carolina, drove through Rocky Mount, drove by hospital, determined surgical resources available from report of operation, and had practiced in other small towns in North Carolina), *aff'd per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005); *Coffman v. Roberson*, 153 N.C. App. 618, 624, 571 S.E.2d 255, 259 (2002) (holding that doctor could testify regarding standard of care where doctor testified that: (1) he practiced in Charlotte, North Carolina and was licensed to practice throughout State; (2) he was familiar with standard of care of communities similar to Wilmington, North Carolina; and (3) he based his opinion on internet research he conducted about hospital's size, training program, and other information), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003); *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 22-23, 564 S.E.2d 883, 888 (2002) (reversing directed verdict when plaintiffs' expert specifically testified that he had knowledge of standards of care in Asheville, North Carolina, and similar communities because of his practice in communities of size similar to Asheville and because he had attended rounds as medical student in Asheville hospital at issue), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 368 (2003).

To the extent defendants are challenging the fact that Dr. Mele acquired most of his information regarding the community after reaching his opinions and having his deposition taken, this Court has already rejected the argument that such an approach disqualifies the doctor's testimony. In *Roush v. Kennon*, 188 N.C. App. 570, 576, 656 S.E.2d 603, 607, *disc. review denied*, 362 N.C. 361, 664 S.E.2d 309 (2008), the expert witness dentist, who was from Atlanta, Georgia, had similarly testified in a deposition that he had never been to the community at issue (Charlotte) and knew nothing about the dental community in Charlotte, but, prior to trial, had "supplement[ed] his understanding of the applicable standard of care in the Charlotte metropolitan area by reviewing, *inter alia*, the demographic data for the Charlotte metropolitan area, the Dental Rules of the North Carolina State Board of Dental Examiners, and the deposition of [the defendant] regarding the procedures, techniques, and implements which he used . . . ." Based on this supplemented knowledge, the Court concluded that the expert witness had sufficient familiarity

with Charlotte to testify consistent with N.C. Gen. Stat. § 90-21.12. 188 N.C. App. at 576-77, 656 S.E.2d at 608. We can see no meaningful distinction between this case and *Roush*.

Defendants also argue that Dr. Mele "never testified as to what he specifically learned about the relevant community from reading Defendants' depositions and did not give any specific testimony regarding the physician skill and training in the community, facilities, equipment, funding or physical and financial environment of the relevant medical community." Defendants have cited no authority requiring that an expert witness testify "as to what he specifically learned," and we have found none.

Smith establishes that an expert witness cannot simply assert that he is familiar with the applicable standard of care without also providing an explanation of the basis for his familiarity. *Smith*, 159 N.C. App. at 196, 582 S.E.2d at 672 ("Although Dr. Heiman asserted that he was familiar with the applicable standard of care, his testimony is devoid of support for this assertion."). *Smith* does not, however, require the degree of specificity urged by defendants. In *Smith*, the proposed expert admitted that the only basis for his claim of familiarity with the standard of care was verbal information received from the plaintiff's attorney regarding the size of the community and " 'what goes on there.' " *Id.* at 196-97, 582 S.E.2d at 672. The expert knew nothing about the medical community, had never visited the community, had not spoken to health care practitioners in the community, and was " 'not acquainted with the medical community' " in the area involved. *Id.* at 197, 582 S.E.2d at 672. Further, the expert "offered no testimony regarding defendants' training, experience, or the resources available in the defendants' medical community." *Id.*, 582 S.E.2d at 673.

In this case, Dr. Mele established in his testimony that he had done research and had personal knowledge that supplied the information that the expert in *Smith* lacked. While Dr. Mele did not testify to specific numbers or actual details regarding the hospital and community, his testimony provided a basis—his research and personal knowledge—for his claim of familiarity. This case does not involve a bare statement of familiarity such as that present in *Smith*.

Finally, defendants argue that Dr. Mele incorrectly applied a national standard of care rather than the " 'same or similar community' " standard applicable in North Carolina. In *Smith*, although the plaintiff's expert testified he was familiar with the standard of care

for orthopedic surgeons practicing in the relevant community, he ultimately admitted that he was basing his opinions on the fact that the standard of care for orthopedic surgeons all over the country was " 'very similar.' " *Id.* at 194, 582 S.E.2d at 671. In affirming the trial court's exclusion of the expert's testimony, this Court observed that the expert could comment only on the standard of care anywhere in the country regardless of what the medical community involved in the case might do. *Id.* at 197, 582 S.E.2d at 672. Because "there was no evidence that a national standard of care is the same standard of care practiced in defendants' community[,]" this testimony was insufficient. *Id.*, 582 S.E.2d at 673.

It is, however, established that mere mention of a national standard is not sufficient to warrant disregard of an expert's testimony if the expert has testified regarding his or her familiarity with the standard of care in the same or similar communities. In *Roush*, 188 N.C. App. at 576, 656 S.E.2d at 607-08, once this Court concluded that the plaintiff's expert was qualified to testify given the evidence of his familiarity with Charlotte and his conclusion that the standard of care there was similar to that of Atlanta, "[t]he fact that [the plaintiff's expert] previously testified that he believed in a national standard of care [did] not invalidate this conclusion." *See also Pitts*, 167 N.C. App. at 197, 605 S.E.2d at 156 ("Although Dr. Strickland testified that the standard of care for laparoscopic surgery is a national standard, we are not of the opinion that such testimony inexorably requires that his testimony be excluded. Rather, the critical inquiry is whether the doctor's testimony, taken as a whole, meets the requirements of N.C. Gen. Stat. § 90-21.12."); *Cox v. Steffes*, 161 N.C. App. 237, 244, 246, 587 S.E.2d 908, 913, 914 (2003) (holding that although witness testified that standard of care at issue "was in fact the same across the nation," testimony was sufficient to support jury's verdict of negligence, despite reference to national standard of care, because expert had testified specifically that he knew standard of care practiced in defendant's community), *disc. review denied*, 358 N.C. 233, 595 S.E.2d 148 (2004).

Defense counsel, in this case, asked Dr. Mele whether he was testifying that he was applying a national standard of care, to which Dr. Mele responded:

> A. I testified that I understood the national standard of care to mean that any hospital that's a Level Two trauma center, perhaps the way we are, would have the same kind of care and the

> same kind of expertise no matter what city or state it was located in, if it was a Level Two trauma center with particular surgeons and diagnostic capabilities available.

Defense counsel then asked: "And the standard of care that you're applying is the standard of care that you believe would be the same in any city in America; correct?" Dr. Mele replied:

> A. Standard of care applying is a board certified ER doctor who has CAT scan available and has a surgeon available, who has nurses and paramedics available. . . . Those are a more generic definition of what's available to practice medicine in that ER.
>
> . . . .
>
> A. The word national doesn't have the same meaning to me as perhaps you. And if I missed the legal point with that, I apologize. But the standard I'm applying is the training that was available to the physician, the training that was available to the P.A. and the resources that are available for him to do that. It doesn't, in my mind, change his skill or his abilities, what building he's practicing or what the name of the city is if he has those facilities available. So maybe I misspoke on that, but that's my concept.
>
> Q. And your concept is that the standard of care is the same in any city in the [sic] America, isn't that right?
>
> A. The concept is the standard of care is the same if those other conditions are met.

It is questionable whether this testimony could even be viewed as embracing a national standard of care since Dr. Mele repeatedly rejected defense counsel's attempt to extend Dr. Mele's opinion to all cities and limited his opinion, as our courts require, to those cities having the same facilities, resources, and training available. In any event, Dr. Mele's testimony as a whole met the requirements of N.C. Gen. Stat. § 90-21.12, and he specifically testified that the standard of care he was applying was the standard of care for defendants' community, just like the experts in *Roush*, *Pitts*, and *Cox*.

We, therefore, hold that Dr. Mele was qualified to testify as to the applicable standard of care. Since defendants have not disputed that Dr. Mele further testified that defendants breached that standard of care, plaintiffs presented sufficient evidence to go to the jury on the question of the breach of the standard of care.

II

[2] Defendants argued alternatively that plaintiffs presented insufficient evidence that any breach of the standard of care proximately caused Duncan's death. As this Court has explained, "[o]ur courts rely on medical experts to show medical causation because 'the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen[.]' " *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 371, 663 S.E.2d 450, 453 (2008) (quoting *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)), *cert. denied*, 363 N.C. 372, 678 S.E.2d 232 (2009). The expert testimony must establish that the connection between the medical negligence and the injury is " 'probable, not merely a remote possibility.' " *Id.* (quoting *White v. Hunsinger*, 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988)). If, however, "this testimony is based merely upon speculation and conjecture, . . . it is no different than a layman's opinion, and as such, is not sufficiently reliable to be considered competent evidence on issues of medical causation." *Id.* (citing *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)).

Defendants argue that Dr. Wyatt's testimony was insufficient evidence of proximate cause because Dr. Wyatt's testimony as to Duncan's chances of survival, had he been admitted and observed at the hospital, amounted to mere speculation.[3] Dr. Wyatt testified that had a CT scan been performed on Duncan's abdomen, the liver lacerations would have been discovered. He also testified that he believed Duncan died from the bleeding caused by the liver lacerations and subsequent rupture.

Dr. Wyatt was then asked, "And you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty that had [Duncan's] liver laceration been diagnosed and treated that he would have had a better than 51 percent chance of survival?" Dr. Wyatt responded, "Yes." He testified: "I believe he would have survived it." This was in conformity with Dr. Wyatt's conclusion in his written report, admitted into evidence, that "[s]urvival is excellent (>51%) in patients who arrive in the hospital and get proper initial and subsequent management."

On cross-examination, Dr. Wyatt was asked, "And you cannot say to a reasonable degree of medical certainty that had he been admit-

3. Defendants also argue that Dr. Wyatt's testimony as to when Duncan's liver began to bleed and the process that ultimately caused his death was speculation. This testimony is immaterial to the issues raised on appeal and we do not address it.

ted for observation that the outcome would have been any different, because it's speculation, correct?" He replied: "It is speculation, but I do think he would have had a better chance of surviving." He admitted that he could not "say for certainty" that Duncan would have survived. Dr. Wyatt was then asked:

> Q. And where you talked about in response to the questions of [plaintiffs' counsel], in your report where it says "survival is excellent," that's . . . where you say "greater than 51 percent," . . . you're talking generally, patients generally have survival chances above 51 percent, correct?

He responded:

> A. Well, I was talking specifically about this injury. If—if he had been observed in the proper unit when he started to bleed or showed signs of instability, then I think he had a greater than 50 percent chance of surviving.

When defense counsel pressed him to agree that "he would have had a better chance, but no one can say—it would be speculation to say he would have had a 51 percent or a 49 percent chance, correct?", Dr. Wyatt replied: "That's all speculation."

Finally, Dr. Wyatt was asked:

> Q. And that with regard to this particular case and Duncan Day's particular circumstances, you cannot say to any certainty that he would have, in fact, survived, correct?
>
> [Plaintiffs' Counsel]: Objection.
>
> A. I'm not quite sure if I understand the question.
>
> Q. Okay. Meaning that with regard to Duncan Day's situation, as you just testified to, all you can say is that he would have had a better chance of survival. You can't say what percentage it would have been. Correct?
>
> A. I can say; but, I mean, that's—it's all just specu—I mean, it's—it's guessing. I don't—
>
> Q. Okay.
>
> A. He certainly would have had a better chance of survival.
>
> Q. Okay. But in terms of what percentage, then it would all be speculation, correct?
>
> A. Right.

Q. And all you can say is he just would have had a better chance, correct?

A. Yes.

On re-direct, Dr. Wyatt was asked:

Q. Based on the patients that you have treated with Type IV or Type V liver lacerations, is it still your opinion of the over—based on your overall experience that those people given proper management have a better than 51 percent [sic] of survival?

A. What I can—

[Defendants' Counsel]: Objection.

A. What I can say from my experience is that those who have been managed in the hospital with Grade IV liver lacerations and some Grade V's, most of them have survived.

Q. Would it be more than 51 percent?

A. Yes.

We believe this case is controlled by *Felts v. Liberty Emergency Serv., P.A.*, 97 N.C. App. 381, 388 S.E.2d 619 (1990). In *Felts*, the plaintiffs' expert witness testified that it was " 'possible' " that the plaintiff's heart attack could have been prevented if the plaintiff had been admitted to the hospital's Coronary Care Unit. *Id.* at 388, 388 S.E.2d at 623. Although acknowledging that this testimony that the heart attack could have possibly been prevented, standing alone, would not be sufficient, the Court pointed out that the expert had also given "a detailed explanation of how admission to a hospital . . . could have prevented plaintiff's heart attack." *Id.* at 389, 388 S.E.2d at 623.

The Court held that the testimony as a whole "raise[d] more than a 'mere possibility or conjecture' and [wa]s sufficient to withstand a directed verdict." *Id.* (quoting *Bruegge v. Mastertemp, Inc.*, 83 N.C. App. 508, 510, 350 S.E.2d 918, 919 (1986)). The Court explained:

> We find that plaintiffs' evidence at trial establishes more than a minimal "showing that different treatment would have improved [his] chances of recovery." Plaintiffs' evidence before the trial court tended to show that defendants' failure to hospitalize and failure to more thoroughly diagnose plaintiff's condition contributed to his myocardial infarction and its severity. We

> hold that this is sufficient to overcome a directed verdict motion on the issue of proximate cause.

Id. at 390, 388 S.E.2d at 624.

Here, Dr. Wyatt specifically testified that "if [Duncan] had been observed in the proper unit when he started to bleed or showed signs of instability, then I think he had a greater than 50 percent chance of surviving." On top of specifically testifying that had he been admitted and observed, Duncan would have had a greater than 50% chance of survival, Dr. Wyatt's report explicitly set out how, if the laceration had been discovered, a rupture and internal bleeding could have been prevented or stopped. Under *Felts*, this was sufficient evidence of proximate cause.

Defendants, however, argue that Dr. Wyatt's proximate cause testimony amounted to speculation. In *Young*, the Supreme Court recognized that "when . . . expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion. As such, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." 353 N.C. at 230, 538 S.E.2d at 915. In that case, the Court held that the plaintiff's expert's opinion as to what caused the plaintiff's fibromyalgia "was based entirely upon conjecture and speculation." *Id.* at 231, 538 S.E.2d at 915. The expert had testified that there were several potential causes of the plaintiff's fibromyalgia other than her work-related back injury, but that he had not performed any testing to determine what was, in fact, the cause of her symptoms. *Id.* This was not sufficient evidence of proximate causation. *Id.* at 233, 538 S.E.2d at 917.

Similarly, in *Azar*, 191 N.C. App. at 371, 663 S.E.2d at 453, this Court held there was not sufficient evidence of causation when the plaintiff's expert testified that the plaintiff's bedsores were " 'at least one cause of infection' " and that she died " 'as a result of all of [her] complications.' " The Court held that the expert's testimony was mere speculation because he could not identify which complication was the ultimate cause of her death. *Id.* at 372, 663 S.E.2d at 453. *See also Campbell v. Duke Univ. Health Sys., Inc.*, 203 N.C. App. 31, 45, 691 S.E.2d 31, 37 (2010) (holding expert testimony constituted speculation where expert unable to point to any specific action by defendants during plaintiff's surgery that would have caused injury).

Here, there is no dispute that Duncan died because of the bleeding due to lacerations to his liver sustained in the car accident. This

case is, therefore, unlike *Young*, in which the question was what caused the injurious condition (fibromyalgia), and unlike *Azar*, in which the issue was which condition was the immediate cause of death. It is also unlike *Campbell* in that Dr. Wyatt, in discussing the cause of Duncan's death, specifically pointed to defendants' failure to uncover the lacerations through a CT scan and to hospitalize Duncan for observation and treatment. Dr. Wyatt also gave a detailed explanation of how the failure to perform a CT abdomen scan and admit Duncan to the hospital caused Duncan's death, explaining the list of steps that could have been taken to treat the injury had the scan been performed and the lacerations been discovered while Duncan was in the hospital.

Although defendants also have cited *Gaines v. Cumberland County Hosp. Sys., Inc.*, 195 N.C. App. 442, 446, 672 S.E.2d 713, 716 (2009), this Court granted rehearing in that case, 203 N.C. App. 213, 220-23, 692 S.E.2d 119, 124-25 (2010). Initially, this Court held that expert testimony was speculative and insufficient to show proximate cause when the expert testified that if the health care provider defendants had pursued an investigation of potential child abuse of the plaintiff, they would have reported the situation to the Department of Social Services ("DSS"). DSS would have then investigated and substantiated the report and removed the plaintiff from the home, preventing further injury. The Court reasoned that while the expert "did testify regarding what she believed was more likely than not the proximate cause of [the plaintiff's] injuries, her testimony was based on speculation and was not grounded in fact." *Gaines*, 195 N.C. App. at 446, 672 S.E.2d at 716.

On rehearing, however, this Court held that this testimony *was* sufficient evidence of proximate cause to survive summary judgment, explaining that the expert, who was familiar with DSS policies and procedures, had specifically listed how and why the plaintiff would have been removed from the home, and how the defendants' negligence in not investigating more likely than not caused the plaintiff's injuries. *Gaines*, 203 N.C. App. at 220-23, 692 S.E.2d at 124-25. The Court held that any competing testimony was a question for the jury. *Id.* at 223, 692 S.E.2d at 125.

Similarly, in this case, Dr. Wyatt had experience treating patients with comparable liver lacerations, specifically listed what would have been done had the lacerations been diagnosed and Duncan hospitalized, and testified that "most" patients with Duncan's level of lac-

erations survive if hospitalized and properly managed. Under *Gaines*, this testimony was sufficient to take the case to the jury.

Defendants nonetheless contend that Dr. Wyatt admitted that his testimony was speculation. Although Dr. Wyatt used the word "speculation" in portions of his testimony, our review of the entirety of his testimony indicates that Dr. Wyatt was not labeling as speculation his opinion that if Duncan's liver laceration had been diagnosed and treated, he would have had a 51% chance of survival. Rather, we read his testimony as acknowledging that the practice of putting a specific percentage on Duncan's chance of survival is inherently speculative. Dr. Wyatt, however, ultimately testified that "most" patients with Duncan's injury who are treated in accordance with the standard of care will survive and that he believes Duncan "would have survived." This opinion is sufficient to establish a probability of survival regardless of the precise numerical percentage used. *See also Turner*, 325 N.C. at 160, 381 S.E.2d at 711 (reversing directed verdict entered based on lack of evidence of proximate cause when expert witness expressed opinion that defendant "should have carefully examined Mrs. Turner's abdomen [and] [h]ad he done so, a colostomy could subsequently have been performed which could have saved Mrs. Turner's life"; stating that "[s]uch evidence is the essence of proximate cause").

We also note that we cannot, as defendants urge, pull out portions of Dr. Wyatt's testimony that might support a directed verdict and disregard portions that would support sending the case to the jury. A defendant cannot justify a directed verdict by pointing to inconsistencies and contradictions in a plaintiff's evidence because "on a motion for directed verdict conflicts in the evidence unfavorable to the plaintiff must be disregarded." *Polk v. Biles*, 92 N.C. App. 86, 88, 373 S.E.2d 570, 571 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 798 (1989). Conflicts in the evidence and contradictions within a particular witness' testimony are "for the jury to resolve." *Shields v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 365, 374, 301 S.E.2d 439, 445, *disc. review denied*, 308 N.C. 678, 304 S.E.2d 759 (1983). *See also Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting) ("[I]t is [not] the role of this Court to comb through the testimony and view it in the light most favorable to the defendant, when the Supreme Court has clearly instructed us to do the opposite. Although by doing so, it is possible to find a few excerpts that might be speculative, this Court's role is not to engage in such a weighing of the evidence."),

rev'd per curiam for reasons in dissenting opinion, 359 N.C. 403, 610 S.E.2d 374 (2005).

Finally, defendants argue that Dr. Wyatt's testimony is insufficient because he merely testified that if the liver laceration had been discovered and Duncan had been in the hospital when his liver ruptured, he had a "better" chance of survival. In this respect, defendants contend this case is similar to *Lord v. Beerman*, 191 N.C. App. 290, 664 S.E.2d 331 (2008), and *White v. Hunsinger*, 88 N.C. App. 382, 363 S.E.2d 203 (1988).[4]

In *Lord*, 191 N.C. App. at 297, 664 S.E.2d at 336, the plaintiff's first expert testified that although earlier receipt of steroid therapy might hasten a patient's recovery with respect to most eye diseases, he could not say whether earlier treatment would have increased the plaintiff's prognosis due to the rarity of his particular eye disease and the lack of research. The plaintiff's second expert similarly testified that while earlier steroid treatment " 'perhaps' " could have led to a fuller recovery and that the plaintiff's eyesight " 'may have been improved to a better outcome,' " an attempt to quantify what improvement might have been obtained "would amount to sheer speculation[.]" *Id.* at 300, 664 S.E.2d at 338. This Court held, after reviewing this testimony, that "[p]laintiff's evidence was insufficient to establish the requisite causal connection between Defendants' alleged negligence and Plaintiff's blindness." *Id.*

In *White*, 88 N.C. App. at 383, 363 S.E.2d at 205, the plaintiff's expert testified that the decedent's chances of survival would have increased if he had been transferred to a neurosurgeon earlier. On appeal, the Court affirmed the order granting summary judgment in favor of the defendant, explaining that "plaintiff could not prevail at trial by merely showing that a different course of action would have improved [the decedent's] chances of survival." *Id.* at 386, 363 S.E.2d at 206. The Court emphasized that "[p]roof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery." *Id.* The Court concluded: "The connection or causation between the negligence and death must be probable, not merely a remote possibility." *Id.* at 387, 363 S.E.2d at 206.

---

4. Defendants also cite *Norman v. Branner*, 171 N.C. App. 515, 615 S.E.2d 738, 2005 WL 1669128, 2005 N.C. App. LEXIS 1324 (2005) (unpublished), but as that case is unpublished and not controlling authority, we do not discuss it.

In this case, Dr. Wyatt supplied the testimony that was missing in *Lord* and *White*. While the experts in *Lord* and *White* merely testified that complying with the standard of care would have given the plaintiffs a "better" chance, Dr. Wyatt specifically testified that when patients with liver lacerations like that suffered by Duncan are hospitalized, monitored, and treated, "most" of them survive. He further testified that if the defendants had followed the standard of care, Duncan would have had a better than 51% chance of survival and that he believes Duncan would have survived. In sum, Dr. Wyatt's testimony established that Duncan's survival was not merely possible but rather was probable if defendants had complied with the standard of care. Although defendants point out that Dr. Wyatt could not say to an absolute certainty that Duncan would have survived, absolute certainty is not required. We hold that Dr. Wyatt's testimony was sufficient to send the issue of proximate cause to the jury.

In sum, we hold that plaintiffs presented sufficient competent evidence through Dr. Mele that defendants breached the applicable standard of care. Further, Dr. Wyatt provided sufficient evidence of proximate causation. Since those are the only two elements at issue, we hold that the trial court erred in entering a directed verdict in favor of defendants.

Reversed.

Judges ROBERT C. HUNTER and CALABRIA concur.

WOODRIDGE HOMES LIMITED PARTNERSHIP, PLAINTIFF v. HEDY GREGORY, DEFENDANT

No. COA09-1024

(Filed 20 July 2010)

Landlord and Tenant— breach of lease—rent subsidy payments—forfeiture—findings of fact based on misapprehension of controlling law

The trial court erred by making findings of fact resting upon a misapprehension of controlling law, and thus, failed to support its conclusion of law that plaintiff landlord waived its claim that defendant tenant had breached a lease by accepting rent subsidy

payments with knowledge of defendant's acts of forfeiture. On remand, the trial court should take additional evidence and make additional findings on the issue of whether plaintiff accepted rental payments with knowledge of defendant's forfeiture of the lease.

Appeal by plaintiff from judgment entered 16 April 2009 by Judge John K. Greenlee in Gaston County District Court. Heard in the Court of Appeals 25 January 2010.

Manning, Fulton & Skinner, PA, by Mr. Michael S. Harrell, for plaintiff-appellant.

Legal Aid of North Carolina, Inc., by Missy Phelps, Theodore O. Fillette, III, and Linda S. Johnson, for defendant-appellee.

ERVIN, Judge.

Plaintiff Woodridge Homes Limited Partnership appeals from a judgment entered by the trial court granting a motion for involuntary dismissal made by Defendant Hedy Gregory pursuant to N.C. Gen. Stat. § 1A-1, Rule 41. After careful consideration of the facts in light of the applicable law, we conclude that the trial court erred by failing to apply the correct legal standard in deciding the legal issues arising upon the present record, that the trial court's judgment should be reversed, and that this case should be remanded to the trial court for further proceedings not inconsistent with this opinion.

I. Factual Background

A. Substantive Facts

In 1995, Plaintiff leased an apartment to Defendant at the Woodridge complex located in Mt. Holly, North Carolina. The initial lease period began on 16 January 1995, ran for one year, and was renewable for successive one-year terms "by written agreement signed by all parties . . . ." Apartments in the Woodridge complex are subsidized by the Rural Development Service of the United States Department of Agriculture.[1] Initially, Defendant was required to

1. Initially, the rent subsidies received by residents of the Woodridge complex were provided by the Farmer's Home Administration. The Farmer's Home Administration was subsequently renamed the Rural Housing Services. The offices of the Rural Housing Services are referred to as Rural Development. For ease of reference, we will refer to the source of the rent subsidies at issue in the remainder of this opinion as the Department of Agriculture.

make a monthly tenant contribution of $60.00 per month and to pay her own electric, cable, and telephone bills. By the time that this action commenced, Defendant's monthly rental payment and utility bills were completely subsidized by the Department of Agriculture, so that Defendant was not making any monthly tenant contribution or utility bill payments.

The lease under which Defendant occupied her apartment included a section entitled "Rules and Regulations." The specific regulations to which tenants were required to adhere provided, among other things, that:

> 4. Apartment garbage, rubbish, and other waste shall be removed in a clean and safe manner and all such matter shall be placed in receptacles provided.
>
> . . . .
>
> 7. TENANT is to conduct himself and require other persons in the apartment or on the premises, with his consent, to conduct themselves in such a manner that other TENANTS' peaceful and quiet enjoyment of the premises is not disturbed and to assure that actions are not offensive, noisy, dangerous or disruptive to the rights, privileges and welfare of other TENANTS and persons.
>
> . . . .
>
> 9. The sidewalks, entrances, porches, floors, and back yards shall be kept free from rubbish.
>
> . . . .
>
> 12. The TENANT shall remove any abandoned vehicle within 48 hours of notice to do the same. Failure to do so is a violation of the terms of this agreement and the LANDLORD reserves the right to terminate the TENANT'S Lease and have the abandoned vehicle towed at owner's expense. An abandoned vehicle is defined as one without current state registration, inspection sticker displayed or license plate, or a vehicle that is not covered by insurance mandated by state law, or a vehicle that is not operable. . . .
>
> . . . .
>
> 18. All maintenance requests shall be given to the LANDLORD in writing with the exception of emergencies. The LANDLORD

> will provide a "TENANT MAINTENANCE REQUEST" form for reporting maintenance requests.
>
> . . . .
>
> 20. TENANT shall neither deliberately nor negligently destroy, deface, damage, impair or remove any part of the apartment or premises, or permit or to fail to prevent any person in the apartment or on the premises to do so (whether known or unknown TENANT). TENANT shall immediately notify the LANDLORD as to any damages which occur and shall reimburse the LANDLORD for damages within 30 days of receipt of written statement from LANDLORD.

According to Section Twelve of the lease, "[a]t the close of the current lease period and for good cause, **either party may terminate this lease prior to expiration by giving the other written notice at least 30 days prior to move-out or date of termination."** (emphasis in the original). In addition, Section Twelve, Subsection 2 of the lease provides that "Landlord may terminate this lease agreement, with proper notice, for the following reasons:

> TENANT's **material noncompliance** with the terms of the lease, such as, but not limited to; (a) nonpayment of rent past a 10-day grace period; (b) nonpayment of any other financial obligations beyond the required date of payment; (c) repeated late payment of rent or other financial obligations; (d) admission to, or conviction of, any drug violations as defined in Section 18; (e) permitting unauthorized persons to live in the unit; (f) repeated minor violations of the lease; (g) one or more major violations of the lease.

(emphasis in the original). Finally, the lease provided that "[t]he failure or omission of LANDLORD to terminate this lease for any cause given above shall not destroy the right of the LANDLORD to do so later for similar or other causes" and that "[n]othing contained in this agreement shall be construed as waiving any of LANDLORD'S or TENANT'S rights under the laws of the State of North Carolina."

Between 29 January 2008 and 16 December 2008, Defendant received five separate notices that she had committed violations of the rules and regulations spelled out in the lease agreement. The first violation notice, which was dated 29 January 2008, cited Defendant for having left a trash can outside the door to her apartment. The second notice, dated 24 June 2008, involved Defendant's failure to report a

clogged air conditioner line. The third citation, which was dated 22 July 2008, alleged that Defendant left an abandoned vehicle on the property. The fourth notice, which was dated 9 December 2008, stemmed from Tenant's involvement in a confrontation with another tenant near a complex dumpster. The fifth and final notice, which was dated 16 December 2008, alleged that Defendant had failed to permit entry into her unit for maintenance performance on several occasions during 2008.

By means of a letter from Anitra McDaniel, a Senior Property Manager with GEM Management, Inc.,[2] dated 26 December 2008, Plaintiff notified Defendant of its decision not to renew the lease due to her "material noncompliance with the terms of the lease such as but not limited to (f) repeated minor violations of the lease" and "(g) one or more major violations of the lease."[3] According to the 26 December 2008 letter:

> We have observed you breaking your lease and we have issued Lease Violations to you over the past year for the following reasons: failure to dispose of garbage properly, failure to allow the peaceful and quiet enjoyment of other residents, failure by the resident to report Maintenance repairs in a timely manner, and refusing to allow Maintenance or other such hired Contractors entry [into] the unit to make necessary repairs and preventative maintenance. We have placed in your file a copy of all Lease Violations issued as well as additional supporting documentation to support our findings. In addition, you have repeatedly called and left disturbing messages on our office answering machine. Your messages have been disturbing to our staff and an intrusion of our business operation.

---

2. GEM is a management company that operates the Woodridge complex for Plaintiff.

3. At various points in its brief, Plaintiff contends that it merely attempted to terminate the lease at the end of the lease period and that Defendant was subject to removal pursuant to N.C. Gen. Stat. § 42-26(a)(1) since she was holding over after the term of her lease had expired. Plaintiff was not, however, entitled to seek to have Defendant ejected pursuant to N.C. Gen. Stat. § 42-26(a)(1). 7 C.F.R. § 3560.159(a) provides that "[b]orrowers, in accordance with lease agreements, may terminate or refuse to renew a tenant's lease only for material non-compliance with the lease provisions, material non-compliance with occupancy rules, or other good causes . . . ." Thus, Plaintiff would have been required to demonstrate adequate cause consistently with 7 C.F.R. § 3560.159(a), in order to refrain from renewing the lease. As a result, Plaintiff's contention that, "[a]s a holdover tenant, [Defendant] no longer could assert any defense to [its] summary ejectment action" lacks merit.

As a result, Plaintiff requested Defendant to vacate her apartment by 31 January 2009. Defendant did not, however, comply with Plaintiff's request. Following Defendant's refusal to vacate her apartment, Plaintiff initiated ejectment proceedings against Defendant. After sending the 26 December 2008 letter and initiating summary ejectment proceedings against Defendant, Plaintiff placed the rent subsidy payments which it received from the Department of Agriculture into a separate, non-interest bearing account which it labeled as an "escrow account."[4]

B. Procedural History

On 13 February 2009, Landlord filed a complaint for summary ejectment against Tenant in the small claims division of the Gaston County District Court.[5] On 24 February 2009, the Magistrate entered judgment ordering that Defendant "be removed from and [Plaintiff] be put in possession of the premises described in the complaint." On 4 March 2009, Defendant noted an appeal to the District Court from the Magistrate's judgment.

On 16 April 2009, this case came on for a trial *de novo* before Judge John K. Greenlee in the Gaston County District Court. At the conclusion of Plaintiff's evidence, Defendant made an oral motion for involuntary dismissal of Plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b), which the trial court granted. On 29 April 2009, the trial court entered a written order granting Defendant's motion. In its written order, the trial court found as a fact that:

> 2. [Plaintiff] rented a dwelling at 166 Houston Street, Apt. 41, Mt. Holly, NC to [Defendant] pursuant to a written lease.

---

4. Plaintiff did not receive a separate rent subsidy check relating to Defendant or any other Woodridge tenant. Instead, it received a single rent subsidy check for all of the occupants of the Woodridge complex. The Department of Agriculture does not have the ability to stop a subsidy payment relating to a particular tenant until the relevant apartment is no longer occupied. As a result, upon receipt of the single rent subsidy check, Plaintiff deposited the amount attributable to Defendant in this separate "escrow account." In the event that Defendant prevailed in this case, Plaintiff intended to apply the escrowed amount to the amount owed for the occupancy of Defendant's apartment. The record is silent concerning Plaintiff's intentions regarding the disposition of the escrowed money in the event that Plaintiff prevailed in the present litigation. In addition, the record does not indicate whether the Department of Agriculture would readily accept repayment of the subsidy amount paid on Defendant's behalf pending resolution of this litigation.

5. Plaintiff alleged in its complaint that Defendant had breached the lease because of a "failure to dispose of garbage," a "failure to allow the peaceful [and] quiet enjoyment," "[a]bandoned vehicle–not legal," and "failure to allow management in to make repairs."

3. [Plaintiff] sent to [Defendant] five (5) notices of lease agreement violation(s) throughout the year of 2008.

4. [Plaintiff] sent [Defendant] a notice on December 26, 2008 stating it was not renewing [Defendant's] lease because of good cause, citing the alleged violations that occurred during 2008.

5. [Plaintiff] continued to accept [Defendant's] rent subsidy from the U.S. Department of Housing and Urban Development (HUD)[6] through 2008 after having knowledge of the alleged lease violations.

6. [Plaintiff] waived its claims of [Defendant's] alleged breaches by continuing to accept [Defendant's] rent subsidy following each claimed violation during 2008.

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

1. [Plaintiff] has failed to meet its burden of proof in that [Plaintiff] waived its claims of [Defendant's] breaches by continuing to accept [Defendant's] rent subsidy after knowledge of such breaches.

2. [Plaintiff] did not promptly exercise its right to declare forfeiture of the lease, as required by *Charlotte Housing Authority v. Fleming*, 473 S.E.2d 373, 375 (N.C. App. 1996).

3. [Plaintiff] is not entitled to summary ejectment pursuant to N.C. [Gen. Stat. §] 42-26(a)(2).

Thus, the trial court dismissed Plaintiff's complaint with prejudice. Plaintiff noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Standard of Review

"The proper standard of review for a motion for an involuntary dismissal under Rule 41 is (1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment." *Dean v. Hill*, 171 N.C. App. 479, 483, 615 S.E.2d 699, 701 (2005)

6. The trial court's finding that the subsidy for Defendant's rent was provided by the Department of Housing and Urban Development rather than the Department of Agriculture is erroneous. However, Plaintiff acknowledges, and we agree, that the trial court's error in identifying the source of the rent subsidy is of no consequence for purposes of evaluating the validity of Plaintiff's challenges to the trial court's judgment.

(quoting *McNeely v. Railway Co.*, 19 N.C. App. 502, 505, 199 S.E.2d 164, 167, *cert. denied*, 284 N.C. 425, 200 S.E.2d 660 (1973)). In addition, factual findings made "under a misapprehension of the controlling law" "may be set aside on the theory that the evidence should be considered in its true legal light." *African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church*, 64 N.C. App. 391, 411, 308 S.E.2d 73, 85 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 649 (1984) (citing *Helms v. Rea*, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973), and *McGill v. Town of Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939)). "[A] trial court's conclusions of law are reviewable *de novo* on appeal." *Riley v. Ken Wilson Ford, Inc.*, 109 N.C. App. 163, 168, 426 S.E.2d 717, 720 (1993). We will now apply this standard of review in examining the trial court's judgment.

B. Plaintiff's Challenges to the Trial Court's Judgment

1. Adequacy of Trial Court's Legal Conclusions

The essential thrust of the argument advanced by Defendant at trial, and accepted by the trial court, is that each of the notices of violation transmitted by Plaintiff to Defendant during the course of 2008 constituted a separate violation of the lease and that Plaintiff's decision to continue to accept a rent subsidy payment made by the Department of Agriculture on behalf of Defendant, instead of terminating the lease and seeking to have her evicted at the time that the violation occurred, constituted a waiver of the breach of the lease in question. After careful consideration of the language of the lease, we conclude that this argument is fundamentally inconsistent with the provisions of the agreement between the parties and that the trial court's decision to enter an order predicated on the validity of this argument constituted an error of law which necessitates an award of appellate relief.

"It is the settled law, no doubt, that the landlord who, with knowledge of the breach of the condition of a lease for which he has a right of reentry, receives rent which accrues subsequently, waives the breach, and cannot afterwards insist on the forfeiture." *Winder v. Martin*, 183 N.C. 410, 412, 111 S.E. 708, 709 (1922); *see also Community Housing Alternatives, Inc. v. Latta*, 87 N.C. App. 616, 618, 362 S.E.2d 1, 2 (1987) (stating that, "upon defendant's failure to vacate his apartment . . ., plaintiff had two choices: 1) it could commence proceedings to remove defendant from the premises, or 2) it could continue to accept rent from defendant and permit the lease to remain in force," but "could not do both," and by choosing "to accept

defendant's August and September rent" "it waived its right to assert defendant's prior violations of the lease provisions as grounds for termination of the lease"). In order for the common law waiver rule to apply, however, there must be both a "breach of the condition of a lease for which [the landlord] has a right of reentry" and a subsequent acceptance of rent. *Winder*, 183 N.C. at 412, 111 S.E. at 709. In other words, Plaintiff was not precluded from seeking to have Defendant ejected under the common law waiver rule until (1) it was entitled to terminate the lease, and (2) after becoming entitled to terminate the lease, it accepted rent payments with knowledge of its ability to declare the lease forfeited.

A careful reading of the relevant provision of Section Twelve, Subsection 2 of the lease indicates that Plaintiff was not entitled to terminate the lease in the absence of "repeated minor violations of the lease."[7] For that reason, Plaintiff did not have the right to terminate the lease based on just one of the five violations that are described in the record; instead, "repeated" violations were necessary in order to justify a decision to terminate the lease. For that reason, the mere fact that Plaintiff continued to accept rent subsidy payments made by the Department of Agriculture on Defendant's behalf throughout 2008 did not suffice, in our opinion, to trigger application of the common law waiver rule, since Plaintiff would not have had the right to terminate the lease and seek to have Defendant ejected from her apartment based upon the occurrence of an isolated minor violation of the lease.

Furthermore, even if one or more of Defendant's actions during 2008 constituted a "major" violation entitling Plaintiff to seek immediate termination of the lease or even if Plaintiff was entitled to terminate the lease prior to 26 December 2008 based on some lesser number of "repeated minor violations of the lease," the fact that Plaintiff did not act to terminate the lease prior to 26 December 2008 did not constitute a waiver of its right to terminate on that date because of the non-waiver provision of the lease. As we have already noted, Section Twenty-Two of the lease provides that "[t]he failure or

7. Although the 26 December 2008 letter makes reference to both "repeated minor violations of the lease" and "one or more major violations of the lease," the record does not reflect the extent to which the particular incidents specified in the 26 December 2008 letter constituted major or minor lease violations. In addition, the trial court's order does not specify the extent to which Defendant's alleged breaches of the lease are "minor" or "major." As a result, we will, for purposes of this opinion, assume that Plaintiff was proceeding against Defendant on a theory that she had engaged in "repeated minor violations of the lease."

omission of LANDLORD to terminate this lease for any cause given above shall not destroy the right of the LANDLORD to do so later for similar or other causes." When read in context, this provision clearly means that Plaintiff's failure to terminate the lease at a time when it otherwise could have done so did not preclude Plaintiff from terminating the lease "for similar or other causes" at a later time.[8] *See Long Drive Apartments v. Parker*, 107 N.C. App. 724, 729, 421 S.E.2d 631, 634 (1992), *disc. review denied*, 333 N.C. 345, 426 S.E.2d 706 (1993) (holding that a non-waiver clause in a HUD-approved lease "precludes an automatic waiver where the landlord has acquiesced to certain past conduct in violation of the lease agreement"). Thus, even if, as Defendant argues, Plaintiff was entitled to terminate the lease prior to 26 December 2008 and failed to do so, the language of Section Twenty-Two of the lease preserves its right to terminate the lease "for similar or other causes" at some point in the future. As a result, even if Plaintiff had the right to terminate the lease prior to 26 December 2008, it was not precluded from terminating the lease at that point, so that acceptances of rental payments prior to 26 December 2008 would not result in a waiver of its right to seek to have Defendant summarily ejected from her apartment based on a decision to terminate the lease at that time.

The trial court's findings of fact focus entirely on the events that occurred prior to the transmission of the 26 December 2008 letter. For example, Finding of fact No. 5 states that "[Plaintiff] continued to accept defendant's rent subsidy . . . through 2008 after having knowledge of the alleged lease violations." Similarly, Finding of Fact No. 6 states that "[Plaintiff] waived its claims of [Defendant's] alleged breaches by continuing to accept defendant's rent subsidy following each claimed violation during 2008."[9] However, given that Plaintiff did not have the right to terminate, or did not actually terminate, the lease until near the end of 2008, its acceptance of rental payments during 2008 would not work a waiver of its right to seek to eject De-

8. The reference to "similar or other causes" in this particular lease provision deprives Defendant's argument that Plaintiff was not entitled to terminate the lease because Defendant's lease violations were of different kinds of any persuasive force.

9. Although Plaintiff has not assigned error to these findings of fact, rendering them conclusive for purposes of appellate review, *Persis Nova Construction, Inc. v. Edwards*, 195 N.C. App. 55, 64, 671 S.E.2d 23, 28 (2009) (stating that, since "[d]efendants did not assign error to this finding," it "is binding on this Court"), it has challenged the legal sufficiency of the trial court's conclusions of law. The error we have identified in the trial court's order revolves around the extent to which the trial court's conclusion of law rests upon a proper understanding of the applicable law, which is an issue that Plaintiff has properly preserved.

fendant from her apartment despite the operation of the common law waiver rule. As a result, the trial court's findings of fact simply do not support its conclusion that Plaintiff "waived its claims of [Defendant's] breaches by continuing to accept [Defendant's rent subsidy after knowledge of such breaches" because they were predicated on an incorrect legal theory. *African Methodist Episcopal Zion Church*, 64 N.C. App. at 411, 308 S.E.2d at 85.[10]

2. Effect of Post-26 December 2008 Rental Assistance Payments

After Plaintiff exercised the right to terminate the lease for "repeated minor violations of the lease" by sending the 26 December 2008 letter, the common law rule does potentially become applicable. *Community Housing Alternatives, Inc.*, 87 N.C. App. at 618, 362 S.E.2d at 2 (holding that landlord's acceptance of rent beyond the date of termination resulted in a waiver of the landlord's right to assert tenant's prior repeated violations of the lease as grounds for termination of the lease). In the event that Plaintiff accepted rent payments made on behalf of Defendant after sending the 26 December 2008 letter, it would arguably have waived the right to seek to have Defendant summarily ejected for the "repeated minor violations" outlined in that document.[11] As a result, we must next determine the extent, if any, to which the evidence concerning whether Plaintiff accepted rent payments with knowledge of Defendant's breaches of the lease agreements is in dispute. This requires us to determine both whether rental assistance payments provided by the Department of Agriculture constitute "rent" for purposes of the common law rule

10. The same logic disposes of Defendant's argument that Plaintiff failed to promptly exercise its right to declare a forfeiture as required by *Charlotte Housing Authority v. Fleming*, 123 N.C. App. 511, 513, 473 S.E.2d 373, 375 (1996). Since Plaintiff either terminated the lease as soon as it was allowed to do so or had the discretion to overlook earlier opportunities to terminate the lease by virtue of the non-waiver provision, we conclude that the trial court erred by concluding that Plaintiff "did not promptly exercise its right to declare forfeiture of the lease . . . ."

11. In its brief, Plaintiff appears to take the position that the non-waiver provision of Section Twenty-Two of the lease precludes the application of the common law waiver rule in this set of circumstances as well. However, we do not agree with this argument for two different reasons. First, the literal language of the non-waiver clause, which simply preserves the landlord's right to terminate the lease in the future despite having overlooked prior lease violations, does not apply to situations in which the landlord has acted to terminate the lease. Secondly, such an interpretation of Section Twenty-Two would eviscerate the second sentence of that provision, which states that "[n]othing contained in this agreement shall be construed as waiving any of LANDLORD'S or TENANT'S rights under the laws of the State of North Carolina." In the event that we were to read the non-waiver provision of the lease as expansively as Plaintiff suggests, nothing would be left of the second sentence of Section Twenty-Two.

and, if so, whether Plaintiff waived the right to terminate the lease by accepting rental payments.

The issue of whether rent subsidy payments made by the Department of Agriculture constitute rent for purposes of the common law waiver rule appears to be one of first impression. Although other jurisdictions have reached differing conclusions with respect to this issue in the context of subsidies provided under Section 8 of the United States Housing Act of 1937, neither party has cited us to any decision addressing this issue involving rent subsidy payments made by the Department of Agriculture. In concluding that rent subsidy payments made under Section 8 of the United States Housing Act did not constitute rent for purposes of the common law waiver rule, courts have relied upon four basic premises:

> (1) Under the terms of the lease agreement between Midland and the tenant, which controlled the parties' rights and obligations, the housing assistance payments were not defined or referred to as rent;
>
> (2) HUD was not a party to the lease agreement, and it did not appear from the lease agreement that HUD obtained any possessory interest in the property;
>
> (3) When a subsidized housing unit becomes vacant following the eviction of an eligible tenant, under the terms of the housing assistance contract, the landlord is entitled continue to receive vacancy payments for 60 days (suggesting that the housing assistance payment flows with the rental unit, and not the section 8 tenant); and
>
> (4) To characterize housing assistance payments as rent would effectively defeat HUD's interest in the development and availability of economically mixed housing for low-income families because landlords would be less apt to open their doors to low-income families and would seek to fill their vacancies with non-rent-assisted families.

Westminster Corp. v. Anderson, 536 N.W.2d 340, 342 (Minn. Ct. of App. 1995) (summarizing *Midland Management Co. v. Helgason*, 158 Ill.2d 98, 102-07, 630 N.E.2d 836, 839-41 (1994); *see also Savett v. Davis*, 29 Cal. App. 4th Supp. 13, 17-20, 34 Cal. Rptr. 2d 550, 552-54 (1994); *contra Greenwich Gardens Ass'n v. Pitt*, 126 Misc. 2d 947, 953-55, 484 N.Y.S.2d 439, 444-45 (1984); *Central Brooklyn Development Corp. v. Copeland*, 122 Misc. 2d 726, 729-30, 471

N.Y.S.2d 989, 993 (1984). Although these factors may be persuasive in the Section 8 context,[12] they do not satisfy us that rent assistance payments made under the Department of Agriculture program should be treated as something other than rent for purposes of the common law waiver rule.

Admittedly, the first two propositions set out in *Midland Management* apply to the present case, given that the lease clearly does not treat rent assistance provided by the Department of Agriculture as "rent" and given that the Department of Agriculture is neither a party to the lease nor receives any possessory interest in units in the Woodridge complex. However, we are not convinced that these factors are entitled to significant weight in our decision making process. First, the lease in question was clearly a standard Farmers Home Administration form. For that reason, it can hardly be taken as creating a bargained-for agreement between the parties to the effect that the rent assistance payments received by Plaintiff did not constitute rent. Secondly, the fact that the Department of Agriculture was not a party to the lease and did not receive a possessory interest in the apartment occupied by Defendant does not strike us as a particularly compelling reason for concluding that rent assistance payments provided by the Department of Agriculture do not constitute rent for purposes of the common law waiver rule, since there are many examples of third parties making rental payments on behalf of actual occupants of rented premises (such as parents making rental payments for premises occupied by their children). *Fairchild Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 468, 98 S.E.2d 871, 879 (1957) (holding that acceptance of rents paid by a lessee on behalf of a sublessee sufficed to waive the operation of a lease provision prohibiting subletting the premises in question). As a result, while both of the first two factors cited in *Midland Management* are also present here, we conclude that they are not entitled to significant weight in our decision making process.

In addition, we have found nothing tending to indicate that, under the Department of Agriculture rent assistance program, "the landlord is entitled to continue to receive vacancy payments for 60 days" "following the eviction of an eligible tenant." *See Westminster Corp.*, 536 N.W.2d at 342. Instead, rent assistance payments made under the Department of Agriculture program appear to be based on actual unit

12. For that reason, we express no opinion as to whether rent assistance payments made in connection with the Section 8 program constitute rent for purposes of the common law waiver rule.

occupancy. 7 C.F.R. § 3560.256(a) (stating that "[t]he borrower must submit monthly requests for [rental assistance] payments to the Agency based on occupancy as of the first day of the month previous to the month for which the request is being made"). Thus, unlike rent assistance payments made pursuant to the Section 8 program, rent assistance payments made in connection with the Department of Agriculture program are based on unit occupancy rather than simply "flow[ing] with the rental unit." *Westminster Corp.*, 536 N.W.2d at 342. As a result, this factor cuts in favor of treating rent assistance payments made in connection with the Department of Agriculture program as rent for purposes of the common law waiver rule.

The last reason given in *Midland Management* for treating rent assistance payments made under the Section 8 program as something other than "rent" for purposes of the common law waiver rule is essentially a policy justification. In essence, the final *Midland Management* argument amounts to a contention that, since treating rent assistance payments as something other than rent for purposes of the common law rule would ease the eviction process, that fact would make landlords more willing to accept low income families as tenants. Although this same policy justification could be deemed applicable in the Department of Agriculture context, there are other policy considerations which should be taken into consideration too, such as the principle that " '[o]ur courts do not look with favor on lease forfeitures.' " *Lincoln Terrace Associates, Ltd. v. Kelly*, 179 N.C. App. 621, 623, 635 S.E.2d 434 436 (2006) (quoting *Stanley v. Harvey*, 90 N.C. App. 535, 539, 369 S.E.2d 382, 385 (1988)). As a result, while the final *Midland Management* consideration is relevant to the situation that we face here, we do not believe that it is entitled to much weight in our decision making process given the existence of well-recognized countervailing policy considerations.

After carefully weighing the relevant considerations, we conclude that rent assistance payments under the Department of Agriculture program do, in fact, constitute rent for purposes of the common law waiver rule. Since "rent" is not defined in the lease itself, we look to the ordinary meaning of that term for purposes of informing our analysis and feel free to use dictionaries to determine the ordinary meanings of word in appropriate instances. *Charlotte Housing Authority*, 123 N.C. App. at 514, 473 S.E.2d at 375 (citing *E.L. Scott Roofing Co. v. State of N.C.*, 82 N.C. App. 216, 223, 346 S.E.2d 515, 520 (1986)). "Rent" is defined as "[c]onsideration paid, usu[ally] periodically, for the use or occupancy of property (esp. real

property)." B. Garner, *Black's Law Dictionary* 1410 (9th ed. 2009). Under that definition, the rent assistance payments that Plaintiff received clearly constitute "rent." Although the lease at issue here did not define the rent assistance payments made by the Department of Agriculture as rent and although the Department of Agriculture was not a party to the lease and did not obtain any sort of a possessory interest in the Woodridge complex, those facts do not persuade us to overlook the consistency of the rent assistance payments at issue here with the ordinary meaning of "rent." Similarly, the fact that treating the rent assistance payments at issue here as rental might make low income tenants eligible for rent assistance under the Department of Agriculture program less desirable tenants than they might otherwise be does not, in light of North Carolina's policy of looking with disfavor on lease forfeitures, tip the balance in favor of treating rent assistance payments as something other than rent for purposes of the common law waiver rule either. Thus, for all of these reasons, we conclude that rent assistance payments under the Department of Agriculture program are "rent" for purposes of the common law waiver rule.

Our conclusion that rent assistance payments under the Department of Agriculture program constitute rent does not, however, end our inquiry. Instead, we must also consider whether Plaintiff accepted rent payments made on behalf of Defendant with knowledge that Defendant had breached provisions of the lease so as to entitle Plaintiff to declare the lease forfeited. According to Ms. McDaniel, Plaintiff receives a single rent subsidy payment each month for all of the units in the Woodridge complex. Furthermore, the Department of Agriculture continues to send subsidy payments "unless the unit is vacant." In light of that fact, GEM created a non-interest bearing "eviction escrow account" into which subsidy payments relating to units which are the subject of ejectment proceedings could not be "touched, used, or consumed" by Plaintiff. Thus, the record reflects that subsidy payments relating to Defendant's apartment made since 26 December 2008 have been placed into such a non-interest bearing escrow account pending final resolution of this case.

In support of her contention that Plaintiff's actions since 26 December 2008 constitute acceptance of rent with knowledge of her alleged acts of forfeiture, Defendant cites *Office Enterprises, Inc. v. Pappas*, 19 N.C. App. 725, 200 S.E.2d 205 (1973). In *Office Enterprises*, this Court held that a landlord that received a rent

check and delivered that check to its attorney without cashing it had still accepted a rent payment for purposes of the common law waiver rule. 19 N.C. App. at 728, 200 S.E.2d at 207-08. In essence, *Office Enterprises* seems to suggest that the landlord should have returned the check to the tenant in order to have avoided waiving its right to declare the lease forfeited. It is not, however, clear that such an option was available to Plaintiff in this case. Given the payment mechanism employed by the Department of Agriculture, there does not appear to have been any way for Plaintiff to have avoided taking that portion of the overall subsidy payment relating to Defendant into its bank account in some form. We do not believe that we should hold landlords to a standard that it is not realistically possible for them to meet. For that reason, we hold that the mere fact that rent subsidy money relating to Defendant that was transmitted to Plaintiff as part of a larger payment entering Plaintiff's bank account does not constitute acceptance of rent from Defendant for purposes of the common law waiver rule. Moreover, once rent subsidy money relating to Defendant entered Plaintiff's bank account, it is not clear whether any mechanism under which the Department of Agriculture could have accepted a refund of that money from Plaintiff was readily available. If such a refund process was readily available, then Plaintiff should have taken advantage of it at the risk of being held to have waived the right to declare a lease forfeiture pursuant to the common law waiver rule. If no such refund process was readily available, then the escrow arrangement that Plaintiff actually adopted seems to be the closest that Plaintiff could have come to declining to accept the rent payment made by the Department of Agriculture on behalf of the Defendant.

At this point, the record is simply insufficient to permit a determination as to whether Plaintiff accepted rent paid on behalf of Defendant with knowledge that she had breached the terms of the lease. The trial court's findings of fact simply do not address the extent to which Plaintiff accepted rent payments made on behalf of Defendant after the transmission of the 26 December 2008 letter. In the event that the undisputed evidence permitted us to resolve the controversy between the parties, we would not hesitate to do so. *Green Tree Financial Servicing Corp. v. Young*, 133 N.C. App. 339, 341, 515 S.E.2d 223, 224 (1999) (stating that "when a court fails to make appropriate findings or conclusions, this Court is not required to remand the matter if the facts are not in dispute and only one inference can be drawn from them") (citing *Harris v. N.C. Farm Bureau Mut. Ins. Co.*, 91 N.C. App. 147, 150, 370 S.E.2d 700, 702 (1988). However, while the record does contain what appears to be undis-

puted evidence tending to show the manner in which Plaintiff handled rent payments made on behalf of Defendant after 26 December 2008, the record lacks sufficient evidence to permit a determination of what, if any, options were available to Plaintiff in terms of rejecting that portion of the monthly rental assistance payment received from the Department of Agriculture. Thus, we conclude that, on remand, the trial court should take additional evidence and make additional findings on the issue of whether Plaintiff accepted rental payments with knowledge of Defendant's forfeiture of the lease.

III. Conclusion

As a result, we conclude that the trial court erred by making findings of fact that rested upon a misapprehension of controlling law and, for that reason, the trial court's findings of fact failed to support its conclusion of law that Plaintiff had waived its claim that Defendant had breached the lease by accepting rent subsidy payments with knowledge of Defendant's acts of forfeiture. Thus, we reverse the trial court's judgment and remand this case to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

Chief Judge MARTIN and Judge ROBERT C. HUNTER concur.

DONALD PRICE, JR., EMPLOYEE, PLAINTIFF v. PIGGY PALACE D/B/A HANNAH'S BBQ, EMPLOYER, ST. PAUL TRAVELERS, CARRIER, DEFENDANTS

No. COA09-981

(Filed 20 July 2010)

1. Workers' Compensation— medical compensation—travel expenses incurred by parents

The Industrial Commission did not err in a workers' compensation case by awarding plaintiff medical compensation for travel expenses incurred by his parents. The evidence established that plaintiff's mother provided critical physical and psychological care to plaintiff during his treatment and rehabilitation in the hospital, in addition to emotional support. Workers' Compensation Rule 407(6) does not limit the party incurring the travel expenses,

but instead requires reimbursement for travel when it is medically necessary.

2. Findings of fact—conclusions of law

The Industrial Commission's award of $5,000 in attorney fees under N.C.G.S. § 97-88-1 to plaintiff in a workers' compensation case was remanded to the full Commission for proper findings of fact and conclusions of law.

Appeal by Defendants from Opinion and Award of the North Carolina Industrial Commission filed 26 May 2009. Heard in the Court of Appeals 28 January 2010.

Randy D. Duncan for Plaintiff-Appellee.

Mullen Holland & Cooper P.A., by J. Reid McGraw and Gerald L. Liska, for Defendants-Appellants.

STEPHENS, Judge.

I. Facts

Plaintiff Donald Price, Jr. was a 20-year-old[1] male who began working as a cook for Defendant Hannah's BBQ on 29 December 2004. Plaintiff was working in that capacity on 16 July 2006 when a co-worker slipped and fell, spilling approximately three gallons of hot grease onto Plaintiff. As a result, Plaintiff suffered burns to his head, left arm, and legs.

Plaintiff was immediately taken to Caldwell Memorial Hospital. Due to the extent of his burns, Plaintiff was transferred to North Carolina Baptist Hospital's trauma unit for further assessment and treatment. Defendants admitted that the claim was compensable pursuant to a North Carolina Industrial Commission Form 60 filed 19 July 2006.

On 27 July 2006, Plaintiff underwent surgery to attach skin grafts to Plaintiff's right foot. Plaintiff was discharged from Baptist Hospital on 28 July 2006. Dr. James H. Holmes of Baptist Hospital saw Plaintiff for a follow-up evaluation on 7 August 2006 and noted that Plaintiff's burns had completely healed and that the skin had re-epithelized without evidence of hypertrophic scarring. Dr. Holmes also noted that the skin graft on Plaintiff's right foot was a "100% graft take."

1. Plaintiff was 20 years old at the time of his testimony.

Plaintiff was released to return to work with the restrictions that he limit sun exposure to his healed scars and limit thermal heat exposure. According to Plaintiff, as of 11 December 2006, none of the grafted or healed skin had broken and the hypertrophic scars had healed.

Plaintiff returned to Baptist Hospital on 2 April 2007 complaining of continued neuropathic pain in his right lower extremity. Dr. Joseph Molnar, a hand and burn specialist at Baptist Hospital, noted that Plaintiff's pain was resolving "somewhat" and that Plaintiff had begun administering scar massage therapy at home on his own.

Plaintiff was seen by Dr. Holmes at Baptist Hospital on 9 July 2007. Dr. Holmes noted that Plaintiff had developed hypertrophic scarring in healed as well as grafted areas of his skin and some pigmentation abnormalities in the burned areas. On that date, Plaintiff reported some focal pain on the edge of the skin graft on his lower leg. Plaintiff was scheduled to see Dr. Molnar later that day for the hypertrophic scarring and pigmentation abnormalities. Dr. Holmes indicated that Plaintiff "is not at maxim[um] medical improvement given the hypertrophic scarring and the pigmentation abnormalities." Although Dr. Holmes was pleased with Plaintiff's progress, he noted that

> the hypertrophic scar on the right Achilles and the pigmentation changes need to be addressed by Dr. Molnar and we have come up with a plan. This will extend over the next 6-12 months. Once all options have been exhausted for the hypertrophic scar and the pigmentation changes, then we can address maxim[um] medical improvement.

After evaluating Plaintiff on 9 July 2007, Dr. Molnar recommended that Plaintiff undergo pulse dye laser treatment to help relieve the pain, itching, and appearance of Plaintiff's scars.

Plaintiff filed a Form 33 hearing request on 4 September 2007 alleging that Defendants had refused to provide the recommended laser surgery. By letter dated 7 September 2007, Dr. Molnar explained to Defendants the importance of proceeding with the pulse dye laser treatment. However, Defendants continued to refuse to provide the treatment. At Dr. Molnar's deposition in this case, taken on 14 March 2008, Dr. Molnar again stressed the importance of proceeding with the treatment to help Plaintiff with the pain, itching, and appearance of his scars. Defendants again refused to provide the treatment.

The matter came on for hearing on 25 June 2008 before Deputy Commissioner James C. Gillen. Two issues before Deputy Commissioner Gillen were (1) whether the recommended laser treatment was medically necessary and (2) whether Plaintiff was entitled to reimbursement for medical travel expenses incurred by his parents as a result of their visiting Plaintiff in the hospital.

On 21 August 2008, Deputy Commissioner Gillen entered an Opinion and Award concluding, *inter alia*, that Defendants shall pay for Plaintiff's laser surgery and for Plaintiff's parents' travel expenses to and from the hospital. Additionally, Deputy Commissioner Gillen ordered Defendants to pay $10,000 for serious bodily disfigurement to Plaintiff's lower extremities, pursuant to N.C. Gen. Stat. § 97-31(22). From this Opinion and Award, Defendants appealed to the Full Commission.

The Full Commission reviewed the case on 19 March 2009. By Opinion and Award entered 26 May 2009, the Full Commission affirmed Deputy Commissioner Gillen's Opinion and Award, ordering Defendants to pay for Plaintiff's laser treatment and for Plaintiff's parents' travel expenses. The Full Commission reversed the portion of the Opinion and Award awarding Plaintiff $10,000 for serious bodily disfigurement.[2] Additionally, the Full Commission awarded Plaintiff attorney's fees.

From the Opinion and Award of the Full Commission, Defendants appeal.

II. Discussion

A. Medical Expenses

[1] Defendants first contend that the Full Commission erred in awarding Plaintiff medical compensation for travel expenses incurred by Plaintiff's parents. Upon careful consideration and for the following reasons, we disagree.

The standard of appellate review of an opinion and award of the Industrial Commission "is limited to a determination of (1) whether

2. The Full Commission concluded that although Plaintiff "may be entitled to permanent partial disability compensation for his serious bodily disfigurement" in the future, "because the Full Commission has found [P]laintiff would benefit from laser surgery to address his scarring, the Commission deems it proper to hold in abeyance an award pursuant to N.C. Gen. Stat. § 97-31(22), until the laser surgery has been performed and until any applicable healing time has passed."

the Commission's findings of fact are supported by any competent evidence in the record, and (2) whether the Commission's findings justify its legal conclusions." *Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997) (citation and quotation marks omitted). "The findings of fact by the Industrial Commission are conclusive on appeal, if there is any competent evidence to support them, and even if there is evidence that would support contrary findings." *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998). This Court's duty goes no further than to determine whether the record contains any evidence tending to support the findings of the Commission, and it does not have the authority to weigh the evidence and decide the issue on the basis of its weight. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). This Court reviews the Commission's conclusions of law *de novo*. *Lewis v. Craven Reg'l Med. Ctr.*, 122 N.C. App. 143, 149, 468 S.E.2d 269, 274 (1996).

Under N.C. Gen. Stat. § 97-25, "[m]edical compensation shall be provided by the employer." N.C. Gen. Stat. § 97-25 (2007). "The term 'medical compensation' means medical, surgical, hospital, nursing, and rehabilitative services, and medicines, *sick travel*, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability . . . ." N.C. Gen. Stat. 97-2(19) (2007) (emphasis added).

Defendants contend that the following findings of fact are not based on competent evidence:

> 6. While [P]laintiff was being treated at Baptist Hospital, the medical staff taught [P]laintiff's mother how to change [P]laintiff's dressings and how to stretch the scars. Plaintiff's mother also assisted in bathing [P]laintiff and helped [P]laintiff through his physical therapy. Plaintiff's mother was at the hospital assisting every day from July 18 through 28, 2006. For example, [P]laintiff had extreme difficulty walking while he was in the hospital due to his injuries. It sometimes took [P]laintiff a full hour, with his mother's assistance, to walk down the hall. Plaintiff's mother provided necessary services to [P]laintiff through the recuperative and rehabilitative process. Plaintiff's father brought clothing and completed

other tasks every day to enable [P]laintiff's mother to spend time at the hospital.

. . . .

9. Plaintiff's parents incurred 18 round trips to Baptist Hospital at 163.74 miles per round trip. This is a total of 2,947.32 miles. All of these trips were medically necessary. The North Carolina Industrial Commission medical mileage reimbursement rate for that period of 2006 was $0.445 per mile. The mileage therefore has a reimbursement value of $1,311.56.

10. Plaintiff was released from the hospital earlier than he otherwise would have been because [P]laintiff's mother had been trained in how to change dressings and otherwise care for [P]laintiff. Furthermore, subsequent to his release, [D]efendants did not have to pay for nurses to be sent to [P]laintiff to provide services that [P]laintiff's mother was able to perform as a result of her attendance during [P]laintiff's hospital stay.

We conclude that the following evidence before the Commission provides ample support for the challenged findings:

Plaintiff was admitted to Baptist Hospital on 18 July 2006 and discharged on 28 July 2006. Plaintiff testified that either his mother, his father, or both of his parents were at the hospital each day. Plaintiff testified that every day he was put into a stainless steel bathtub or on a table where the dead skin was scrubbed off of his burns. It took two people to hold him down while his burns were scrubbed "[b]ecause the pain of it all and the fact that they're scrubbing nothing but rawness . . . ." He further testified that "when I was in the bathtub, [my mother] wasn't allowed in there, but when they put me on like a table . . . with like a little ledge on it, she got to come in there then and . . . help." His mother would "hold me . . . or she would either take a rag and wash and stuff."

Plaintiff was asked how often he would "have these baths," and Plaintiff responded, "[b]efore surgery, it would be once a day, and then they would still have to come out there and clean like all the wounds and everything. They would do that twice a day, and that's what mom would do."

On 27 July 2006, Plaintiff had skin graft surgery to his right ankle with a donor graft from his right thigh measuring approximately four inches by eight inches. Plaintiff testified that immediately after surgery,

> they made me start learning how to walk because the skin had growed [sic] and my ankle wasn't at like a ninety degree [angle] . . . so therefore, I couldn't walk. And say, there's a lot of stretching and a lot of working of all the muscles and stretching and everything that they taught [my mother] to do, so that once I come home, she could do all that because I left there and still couldn't walk.

When asked how his mother helped in that process, Plaintiff testified that "she would have to support me as in—I mean because I had fell more than once, and, say, she would have to pretty much like—you know, you wrap my arm around her, and then she just pretty much carrying your weight when you can't walk."

Plaintiff was asked if there were other people in the hospital who could have helped him walk other than his mother. Plaintiff responded:

> The doctor done it once, but then the doctor tells you that you got to do it two or three times a day and, you know, that's the reason they have—say, they showed my mom everything—how to clean all the wounds, how to, you know, help me stretch. They gave me all this stuff to stretch with and everything, so that when I come home—because they let me come home early—and they saying [sic] when I come home, they wouldn't have to send a doctor out there or nothing. My mom could take care of it all at that point.

Plaintiff's mother, Lynn Price, testified that she went to Baptist Hospital every day Plaintiff was in the hospital and cared for him "every minute of every day." She learned how to change all his dressings and did so two times a day, every day. She testified that she did this "[s]o I would learn how to do it correctly when we got home because a nurse couldn't be with him twenty-four/seven . . . ." She further testified that she assisted with "[b]athing, anything and everything he needed . . . ." Plaintiff "couldn't walk . . . until they done surgery. That's when they got him up and started walking him." Ms. Price would "just walk with him down the hall and back up, and that would sometimes take an hour . . . ." Sometimes she would assist him by "[h]olding on to [sic] his side, making sure he didn't fall over with the walker."

Ms. Price testified that she stayed with Plaintiff in the hospital "[t]wenty-four/seven. . . . What time I wasn't driving, my husband was driving, bringing me clothes . . . and providing me things to eat." Ms. Price also testified that she and her husband went "back and forth to

get clothes" but that she "didn't leave [the hospital] at all from the 26th on." She said she would not have been able to stay at the hospital had her husband not brought her clothes and other necessities. She further testified that Plaintiff was discharged early from the hospital and a nurse "only had to come one time" to visit Plaintiff after he left the hospital "because of me being able to do everything that the nurses did." Ms. Price and her husband made 18 round trips from their house to the hospital, totaling 2,947.32 miles.

Dr. Molnar was asked whether, in his opinion as a medical doctor, it is important for a patient to have support from his family while he is in the hospital. Dr. Molnar replied,

> Absolutely. Anyone who they're close to and that can give them support and you are dealing with a painful injury that is deforming to people. It's one of the most painful things that anyone can experience.
>
> . . . .
>
> So with the pain and with the emotional problems that come with dealing with the pain, the wound care, the need for surgery, . . . [o]ne likes to have the loved ones around. . . . I think the emotional support is necessary.

Dr. Molnar then acknowledged that, in his medical opinion, it is important to the process of recovery to have relatives with a patient at the hospital.

Contrary to Defendants' assertion that "the evidence in the record contains nothing more than general statements attesting to emotional benefit provided by family members[,]" the above-described evidence establishes that Plaintiff's mother provided critical physical and psychological care to Plaintiff during his treatment and rehabilitation in the hospital, in addition to emotional support. Furthermore, we disagree with Defendants' contention that the challenged findings of fact "contain misreadings of the relevant testimony from the Plaintiff, his mother, and Dr. Joseph A. Molnar," and conclude that the challenged findings of fact are wholly supported by the record evidence. Accordingly, the findings of fact are conclusive on appeal. *Grantham*, 127 N.C. App. at 534, 491 S.E.2d at 681.

Defendants further assert that the findings of fact do not support the conclusion of law that "[a]s part of [Plaintiff's medical] expenses, [P]laintiff is also entitled to reimbursement for his parents' medical

travel in the amount of $1,311.56." Specifically, Defendants assert that "[t]he presence of Plaintiff's parents was not medically necessary to the treatment of Plaintiff's condition[.]" We disagree.

Defendants do not contest that Plaintiff underwent the following treatment and rehabilitation during his 10-day stay in the hospital: Plaintiff was put into a stainless steel bathtub or placed on a table and the dead skin was scrubbed off of his burns. This took place once a day before surgery and twice a day after surgery. Due to the intense pain, two individuals had to hold Plaintiff down while his burns were scrubbed. The dressings on Plaintiff's wounds were also changed twice a day. On 27 July 2006, Plaintiff underwent skin graft surgery. Immediately after surgery, Plaintiff was required to walk in order to increase the range of motion in his ankle. Plaintiff also had to stretch and work his muscles on a daily basis.

Moreover, the uncontradicted testimony of Plaintiff and Plaintiff's mother establishes that Plaintiff's mother participated in Plaintiff's treatment and rehabilitation as follows: When Plaintiff was placed on the ledge for his burns to be scrubbed, his mother would hold him down or take a cloth and wash his wounds. Plaintiff's mother learned how to change the dressings on Plaintiff's wounds, and did so twice a day. Plaintiff's mother helped him start walking after his surgery and helped him stretch and work his muscles both in the hospital and after he was released.

Defendants do not contest that this treatment and rehabilitation effected a cure, gave relief, or tended to lessen the period of Plaintiff's disability. N.C. Gen. Stat. § 97-2(19). Instead, Defendants argue that because "there were doctors, nurses and physical therapists assisting [Plaintiff] during his stay[,]" the care provided by Plaintiff's mother was not medically necessary since those professionals could have provided the care. Defendants fail to persuade us that Plaintiff's treatment and rehabilitation would be considered medically necessary had it been provided by a doctor, nurse, or physical therapist, but not when it was provided by Plaintiff's mother. Accordingly, this argument is rejected.

Defendants further contend that there was "no medical testimony" to support the conclusion that Plaintiff's parents' presence was medically necessary. Furthermore, Defendants argue that any benefit derived from treatment "must be medical, as opposed to emotional or spiritual, and must be specific to a cure o[r] lessening of a disability." We disagree.

The Workers' Compensation Act provides three alternate grounds for medical treatment at the employer's expense: (1) to effect a cure, (2) to give relief, or (3) to lessen the period of disability. Thus, awards for medical expenses for treatment are appropriate "even if those treatments will not lessen the period of disability as long as they are required to 'effect a cure' or 'give relief.' " *Little v. Penn Ventilator Co.*, 317 N.C. 206, 213, 345 S.E.2d 204, 209 (1986). Moreover, in *Little*, the North Carolina Supreme Court concluded that the "psychological and emotional benefits which flow[ed] from monitoring the employee's [medical] condition constitute[d] 'relief' as that term is used in the statute." *Id.* at 214, 345 S.E.2d at 209-10; *see also Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 43, 415 S.E.2d 105, 107 (concluding that "relief from pain constitutes 'relief' as that term is used in N.C. Gen. Stat. § 97-25"), *disc. review denied*, 332 N.C. 347, 421 S.E.2d 154 (1992).

In this case, Dr. Molnar testified that "with the pain and with the emotional problems that come with dealing with the pain, the wound care, the need for surgery," the emotional support of loved ones is necessary and important in the recovery process. Just as the psychological and emotional benefits to an employee that flow from monitoring his condition constitute "relief" as that term is used in the statute, *see Little*, 317 N.C. at 214, 345 S.E.2d at 209-10, under the specific circumstances presented here, the psychological and emotional benefits to Plaintiff that flowed from having the support of his parents while he was recovering in the hospital from devastating burns likewise constitutes "relief" as that term is used in the statute. *See id.* Defendants' argument is overruled.

Defendants finally argue that Rule 407(6) of the Workers' Compensation Rules of the Industrial Commission is only intended to allow for "reimbursement to the employee traveling to receive medical treatment." We disagree.

Pursuant to Rule 407(6), "[e]mployees shall be entitled to reimbursement for sick travel when the travel is medically necessary . . . ." While the rule limits the individual entitled to *receive* reimbursement for travel expenses to the employee, the rule does not limit the party *incurring* the travel expenses and, instead, requires reimbursement for travel when it is "medically necessary."

Accordingly, we conclude that the Commission's findings of fact support the Commission's conclusion that Plaintiff's mother's care was "medically necessary" and, thus, that Plaintiff was entitled

to reimbursement for his parents' "medical travel" in the amount of $1,311.56.

Defendants further argue that compensation for "sick travel" expenses of family members is not authorized under the Workers' Compensation Act or Workers' Compensation Rules. Because we conclude that under the facts of this case, Plaintiff's mother's care was "reasonably . . . required to effect a cure or give relief," N.C. Gen. Stat. § 97-2(19), we hold that Plaintiff was entitled to reimbursement for his parents' "medical travel" as such travel was a necessary medical cost incurred as a result of Plaintiff's injuries.

Defendants' argument is overruled.

B. Attorney's Fees

[2] Defendants next argue that the Commission erred in awarding Plaintiff $5,000 in attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1.

The decision whether to award or deny attorney's fees rests within the sound discretion of the Commission and will not be overturned absent a showing that the decision was manifestly unsupported by reason. *Bryson v. Phil Cline Trucking*, 150 N.C. App. 653, 656, 564 S.E.2d 585, 587 (2002). Pursuant to N.C. Gen. Stat. § 97-88.1,

> [i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them.

N.C. Gen. Stat. § 97-88.1 (2007).[3]

This statute applies to an original hearing and its purpose "is to prevent 'stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees.' " *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54, 464 S.E.2d 481, 485 (1995) (*quoting Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990)), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). An award of attorney's fees under this section requires the Commission to find that the original hearing "has been brought, prosecuted, or defended without reasonable ground." N.C. Gen. Stat. § 97-88.1.

---

3. N.C. Gen. Stat. § 97-88.1 is entitled "Attorney's fees at original hearing[.]"

Pursuant to N.C. Gen. Stat. § 97-88,

> [i]f the Industrial Commission at a hearing on review[,] or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer[,] and the Commission or court[,] by its decision[,] orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

N.C. Gen. Stat. § 97-88 (2007). This section applies to appeals to the Full Commission or appellate courts and allows an injured employee to move that his attorney's fees be paid whenever an insurer appeals the decision rendered in the original hearing and the insurer is required to make payments to the injured employee. *Troutman*, 121 N.C. App. at 54, 464 S.E.2d at 485. An award of attorney's fees under this section does not require the Commission to find that the appeal "has been brought, prosecuted, or defended without reasonable ground." N.C. Gen. Stat. § 97-88.1.

In this case, the Full Commission found that "[D]efendants pursued this appeal, in particular the issue of laser treatment, without reasonable ground"[4] and concluded that "[D]efendants pursued this appeal, in particular the issue of laser treatment, without reasonable ground, and further conclude[d] an award of $5,000 in attorney's fees to be proper. N.C. Gen. Stat. § 97-88.1."

The Commission had the authority to award Plaintiff attorney's fees under N.C. Gen. Stat. § 97-88.1 if it determined that Defendants "brought, prosecuted, or defended" the *original hearing* "without reasonable ground[.]" N.C. Gen. Stat. § 97-88.1. Moreover, the Commission had the authority to award Plaintiff attorney's fees under N.C. Gen. Stat. § 97-88 if Defendants *appealed* the decision rendered in the original hearing and Defendants were required to make payments to Plaintiff. *See* N.C. Gen. Stat. § 97-88. However, we are unable to determine from the Commission's finding of fact and conclusion of law whether the Commission awarded Plaintiff attorney's fees for the original hearing or for Defendants' appeal from that hearing. We are

4. The issue of Plaintiff's entitlement to laser treatment is not on appeal to this Court.

thus unable to determine whether the Commission made the proper findings of fact to support its conclusion, and whether the Commission's decision was manifestly unsupported by reason. *Bryson*, 150 N.C. App. at 656, 564 S.E.2d at 587. Our inability to determine whether the Commission awarded Plaintiff attorney's fees for the original hearing or for Defendants' appeal from that hearing is particularly difficult in light of the fact that the Full Commission agreed with Defendants' contention that Deputy Commissioner Gillen's award of disfigurement compensation was premature given the award of medical compensation for laser surgery and held an award under N.C. Gen. Stat. § 97-31(22) in abeyance "until the laser surgery has been performed and until any applicable healing time has passed." Accordingly, we remand this matter to the Full Commission for proper findings of fact and conclusions of law resolving Plaintiff's motion for attorney's fees.

AFFIRMED in part and REMANDED in part.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA v. MARCUS ARNELL CRAVEN

No. COA09-1138

(Filed 20 July 2010)

1. Constitutional Law— right to confrontation—chemical analysis testimony

The trial court erred in a drugs case by admitting a special agent's testimony about the analyses conducted by other forensic analysts because the testimony violated defendant's state and federal constitutional rights to confrontation. Defendant's three convictions in 08 CRS 050529 were vacated.

2. Drugs— keeping and maintaining vehicle for keeping and selling cocaine—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the felony charge of keeping and maintaining a vehicle for keeping and selling cocaine under N.C.G.S. § 90-108(a)(7) in 08 CRS 050532. In the light most favorable to the State, the testimony of two witnesses constituted substantial evidence which a

reasonable mind might accept as adequate to support the conclusion that defendant had possession of cocaine in his mother's car over a duration of time and/or on more than one occasion.

3. Sentencing— prior record level—consent to continuation of sentencing hearing

The trial court had jurisdiction to enter judgment in 06 CRS 50435 and did not err by counting this charge as part of defendant's prior record level when sentencing him for the 2008 charges. Defendant never requested sentencing and thus consented to continuation of his sentencing hearing until 13 March 2009. Had the trial court entered judgment at some earlier point for the 06 CRS 50435 conviction, it would still have been used to determine his prior record level.

Appeal by defendant from judgments entered 13 March 2009 by Judge Kenneth Titus in Chatham County Superior Court. Heard in the Court of Appeals 24 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General Karen A. Blum, for the State.

Anne Bleyman for defendant.

BRYANT, Judge.

On 7 August 2006, the Chatham County Grand Jury issued a two-count indictment charging defendant Marcus Arnell Craven with possession with intent to sell and deliver cocaine, and with sale and delivery of cocaine. In January 2007, defendant pled guilty to the charge of sale of cocaine in exchange for dismissal of the other charge. In this matter, 06 CRS 050435, the trial court entered a prayer for judgment continued until a subsequent term for purposes of sentencing.

Subsequently, on 6 October 2008, the Chatham County Grand Jury issued four multi-count indictments for: two counts of conspiracy to sell or deliver cocaine; three counts of knowingly and intentionally keeping and maintaining a vehicle for keeping and selling cocaine; two counts of selling and delivering cocaine; and single counts of manufacturing cocaine, possession with intent to manufacture, sell and deliver cocaine, and possession of drug paraphernalia. During the trial, the State dismissed two of the three charges of knowingly and intentionally keeping and maintaining a vehicle for

keeping and selling cocaine and the charge of the possession of drug paraphernalia; the jury found defendant guilty of all the remaining charges in 08 CRS 050528-9 and 08 CRS 050531-2. On 13 March 2009, the trial court entered judgment for 06 CRS 050435 and sentenced defendant to ten to twelve months; consolidated the 08 CRS 050528-9 convictions and sentenced defendant to thirteen to sixteen months; and consolidated the 08 CRS 050531-2 convictions and sentenced defendant to sixteen to twenty months. Each sentence was to be served in the custody of the Department of Correction and all were to run consecutively. Defendant appeals. As discussed below, we vacate in part and find no error in part.

Facts

The evidence tended to show the following. The charges against defendant resulted from the work of Sergeant Phillip Wayne Cook of the Chatham County Sheriff's Department and Daniel Ortiz Chuchra Zbytniuk, a paid informant for the Moore County Sheriff's Office. On 3 March 2008, Sergeant Cook and two other officers observed a crack cocaine buy set up between Zbytniuk and Christina Marie Smith, a known drug dealer. Defendant drove Smith in his mother's car to the convenience store in Goldston where the drug buy was to occur. When Zbytniuk gave Smith the money, she handed the cocaine to Zbytniuk and passed the money to defendant. On 6 March 2008, Zbytniuk called Smith to arrange another drug buy, and a man named "Mark" or "Marcus" answered the phone before passing it to Smith. The buy was set up for the same convenience store as before, and defendant again drove Smith in his mother's car. On 21 March 2008, Zbytniuk arranged to buy cocaine from defendant and to learn to process crack cocaine from Smith. Defendant drove Smith to the America's Best Motel in Siler City that evening to meet Zbytniuk. Defendant dropped Smith off and drove away to get Zbytniuk's cocaine. Smith and defendant later spoke on the phone and Smith instructed defendant to pick up baking soda and a cigar in a glass tube so they could cook the cocaine. Defendant brought these materials to the hotel room, along with part of the cocaine Zbytniuk had requested. Defendant then left to try to find more cocaine but was unable to do so. Smith then left the motel in defendant's car to get the cocaine, but the car broke down and she had to call Zbytniuk and defendant to come and pick her up. Officers stopped their vehicle and arrested defendant. At trial, State Bureau of Investigation Special Agent Kathleen Schell, a forensic chemist, testified that the substances purchased by Zbytniuk were cocaine. Special Agent Schell

reviewed the analyses conducted by two other forensic analysts who tested the substances purchased on 3 and 6 March 2008. Special Agent Schell conducted the analysis of the substance bought 21 March 2008 herself.

Defendant made sixty-five assignments of error which he brings forward in four arguments to this Court: the trial court erred in (I) admitting Special Agent Schell's testimony about the analyses conducted by the other forensic analysts; (II) denying his motion to dismiss the charges against him in 08 CRS 050528-9 based on the drug buys from 3 March 2008 and 6 March 2008; (III) denying his motion to dismiss the charge against him in 08 CRS 050532 based in part on the drug buys from 3 March 2008 and 6 March 2008; and (IV) entering judgment for the 2006 offenses without jurisdiction and counting these offenses as part of defendant's prior record level for 2008 sentencing purposes. We vacate defendant's convictions in 08 CRS 050528-9 but find no error in his other judgments and convictions.

I and *II*

[1] Defendant first argues that the trial court erred in admitting Special Agent Schell's testimony about the analyses conducted by the other forensic analysts because this testimony violated his state and federal constitutional rights to confrontation. We agree.

"The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004) and *State v. Lewis*, 361 N.C. 541, 545, 648 S.E.2d 824, 827 (2007)). The United States Supreme Court has held that forensic analysts' affidavits certifying that a substance is cocaine are testimonial statements, and the analysts are "witnesses" under *Crawford* for purposes of the Sixth Amendment. *Melendez-Diaz v. Massachusetts*, —— U.S. ——, ——, 174 L. Ed. 2d 314, 322 (2009). In a series of opinions from this Court over the past two years, we have applied the reasoning of *Melendez-Diaz* to other types of witnesses and testimony.

In *Locklear*, "the State sought to introduce evidence of forensic analyses performed by a forensic pathologist and a forensic dentist who did not testify." *Locklear*, 363 N.C. at 452, 681 S.E.2d at 305. An

expert witness testified to the contents of the analyses. *Id.* at 451, 681 S.E.2d at 304. The Court held the admission was error because "[t]he State failed to show that either witness was unavailable to testify or that defendant had been given a prior opportunity to cross-examine them." *Id.* at 452, 681 S.E.2d at 305. However, in *State v. Mobley*, this Court held that the testimony of a forensic analyst regarding DNA tests performed by other analysts did not violate the Confrontation Clause where the witness "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 508, 511 (2009), *disc. review denied*, 363 N.C. 809, S.E.2d (2010).

More recently, we have established a four part process to be used in "[a]pplying the rules articulated in *Melendez-Diaz* and *Locklear*" to a particular case:

> (1) determine whether the document at issue is testimonial; (2) if the document is testimonial, ascertain whether the declarant was unavailable at trial and defendant was given a prior opportunity to cross-examine the declarant; (3) if the defendant was not afforded the opportunity to cross-examine the unavailable declarant, decide whether the testifying expert was offering an independent opinion or merely summarizing another non-testifying expert's report or analysis; and (4) if the testifying expert summarized another non-testifying expert's report or analysis, determine whether the admission of the document through another testifying expert is reversible error.

State v. Brewington, —— N.C. App. ——, ——, S.E.2d ——, —— (2010).

Here, the State contends Special Agent Schell testified not merely about the contents of the other analysts' reports, but also about her review of the underlying data and her own conclusions based thereupon. At trial, Special Agent Schell first explained how she and the other forensic chemists perform their work. The prosecutor and Special Agent Schell then engaged in the following exchange:

> Q. Now did you also bring with you notes and documentation for date of offense March 3, 2008?
>
> A. I did.
>
> Q. And who—who completed that analysis?

A. Mr. Tom Shoopman completed that analysis.

Q: And did you bring that file with you?

A: I did.

Q. And did you bring the notes supporting the underlying data?

A. I did.

Q. And did you bring the underlying data that supports the conclusion as to what was examined and the results of that examination?

A. I did.

The prosecutor then established the chain of custody for the report and asked:

Q. And did you bring [Mr. Shoopman's] report?

A. I did.

Q. Did you have a chance to review it?

A. I did.

Q. Do you agree with its conclusions?

A. I do.

Defendant objected, specifically noting that it was "a Constitutional confrontation clause objection." The trial court overruled the objection. An almost identical colloquy occurred regarding the substance obtained on 6 March 2008 which was analyzed by forensic chemist Irvin Allcox. Defendant again objected, and the trial court again overruled the objection. Special Agent Schell testified that she reviewed the data and analyses of both the other forensic chemists and agreed with their conclusions.

This testimony is strikingly similar to that which occurred in *Brewington*, which, like the case at bar, involved Special Agent Schell:

> Special Agent Schell testified extensively at trial about the testing procedures that are typically adhered to at the SBI lab. She testified regarding the manner in which tests are conducted in the regular course of business. However, the following exchange that occurred between Special Agent Schell and defense counsel on cross-examination is revealing:

Q. Okay. And it's true that you did not perform any of the tests on this evidence; is that correct?

A. It is. I did not perform these tests.

Q. So you didn't do any color test that came back negative—or the first test in this case you said didn't show any color change; is that right?

A. That's correct.

Q. So it didn't test—it didn't test positive on the first test. The second test you didn't observe any part of this evidence put in a liquid and turn blue.

A. I did not, but these are tests that are commonly performed in our section.

Q. Right. But my point is you didn't do this test so you don't know; you didn't see it turn blue for yourself.

A. I did not, no.

Q. Okay. And the crystal test, you didn't look through the slide that was where a part of the evidence was mixed with a liquid and showed cross crystals. You didn't actually see that, did you?

A. I did not, no.

Q. And the last test about the graph that had to be cleaned up, you didn't see this actual result being cleaned up or see the test performed, did you?

A. I did not see the test performed, but I have the data that Nancy Gregory obtained.

Id. at ——, —— S.E.2d at ——. We went on the state that:

It is clear from the testimony of Special Agent Schell that she had no part in conducting any testing of the substance, nor did she conduct any independent analysis of the *substance*. She merely reviewed the reported findings of Agent Gregory, and testified that if Agent Gregory followed procedures, and if Agent Gregory did not make any mistakes, and if Agent Gregory did not deliberately falsify or alter the findings, then Special Agent Schell "would have come to the same conclusion that she did." As the Supreme Court clearly established in *Melendez-Diaz*, it is precisely these "ifs" that need to be explored upon cross-

> examination to test the reliability of the evidence. *Melendez-Diaz*, 557 U.S. at —, 174 L. Ed. 2d at 327 (methodology that forensic drug analysts use "requires the exercise of judgment and presents a risk of error that might be explored on cross-examination"). Special Agent Schell could not have answered these questions because she conducted no independent analysis. She testified exclusively as to the tests that Agent Gregory claimed to have performed, and used testimonial documents not admissible under *Melendez-Diaz*. Her conclusion that she agreed with Agent Gregory's analysis assumes that Agent Gregory conducted the tests in the same manner that Special Agent Schell would have; however, the record shows that Special Agent Schell had no such actual knowledge of Agent Gregory's actions during the testing process.

Id. at —, — S.E.2d at —; *see also State v. Brennan*, — N.C. App. —, —, S.E.2d —, — (2010). We see no meaningful difference in the testimony Special Agent Schell gave in *Brewington* and in the case before us. Defendant's constitutional right to confront witnesses against him was violated by admission of the forensic analyses and Special Agent Schell's related testimony about the substances obtained on 3 and 6 March 2008.

Having determined that the trial court erred in admitting this evidence, we now consider whether admission of the analyses was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2009) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt.") The State bears the burden of proving harmless error beyond a reasonable doubt. *Id.* " 'Harmless beyond a reasonable doubt' has been interpreted to mean that 'there is no reasonable possibility' that the erroneous admission of evidence 'might have contributed to the conviction.' " *State v. Hooper*, 318 N.C. 680, 682, 351 S.E.2d 286, 288 (1987) (quoting *State v. Castor*, 285 N.C. 286, 292, 204 S.E.2d 848, 853 (1974)).

The erroneously admitted analyses and testimony related to the substances obtained on 3 and 6 March 2008. In 08 CRS 050528-9, defendant was convicted of and sentenced for three offenses which occurred on those dates: two counts of conspiracy to sell or deliver cocaine and one count of selling or delivering cocaine. "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) (citing N.C. Gen. Stat. § 90-95(a)(1)). The State contends that it presented lay opinion testimony that the substance was cocaine by way of Smith's testimony that she had used cocaine for twenty years and that the substances sold on 3 and 6 March 2008 were cocaine. The State contends this lay opinion testimony rendered the erroneous admission of the expert testimony harmless. We do not agree.

While this Court has held that testimony from a drug user that a substance she smoked was methamphetamine is admissible lay testimony under Rule 701, *State v. Yelton*, 175 N.C. App. 349, 353-54, 623 S.E.2d 594, 596-97 (2006), this does not suggest that a drug user's lay opinion has the same impact on a jury as expert scientific testimony admitted under Rule 702. To the contrary, we believe that scientific testing by an expert forensic analyst would be much more influential than lay opinion from an admitted drug user. We find additional support for this determination from our State's General Statutes and criminal procedure, as well of from our case law:

> By enacting such a technical, scientific definition of cocaine, it is clear that the General Assembly intended that expert testimony be required to establish that a substance is in fact a controlled substance. This is how drug cases have been handled and tried in the Superior Courts of this State for many years. Officers gather the evidence, carefully identify it with control numbers and submit it to a laboratory for chemical analysis. If the laboratory testing reveals the presence of a controlled substance, the prosecution of the defendant goes forward. If the laboratory testing reveals that no controlled substance is present, then the case is dismissed by the prosecutor.
>
> The General Assembly has further set forth procedures for the admissibility of such laboratory reports. *See* N.C. Gen. Stat. §§ 8-58.20, 90-95(g) and (g1). N.C. Gen. Stat. § 15A-903 provides that criminal defendants have broad pretrial access to discovery of materials obtained or prepared for the prosecution for use in its case in chief, including "not only conclusory laboratory reports, but also any tests performed or procedures utilized by chemists to reach such conclusions." *State v. Dunn*, 154 N.C. App. 1, 8, 571 S.E.2d 650, 655 (2002) (quotation and emphasis omitted). *This is due to "the extraordinarily high probative*

> *value generally assigned by jurors to expert testimony . . .*" *Id.* at 6, 571 S.E.2d at 654 (quotation omitted).

State v. Llamas-Hernandez, 189 N.C. App. 640, 652-3, 659 S.E.2d 79, 86-7 (2008) (Steelman, J., dissenting), *reversed per curiam for the reasons stated in the dissent*, 363 N.C. 8, 673 S.E.2d 658 (2009) (emphasis added). Because we cannot say that " 'there is no reasonable possibility' that the erroneous admission of [the lab analyses and related expert testimony regarding the substances sold on 3 and 6 March 2008] 'might have contributed to the conviction[,]' " we cannot hold this error harmless. *Hooper*, 318 N.C. at 682, 351 S.E.2d at 288. Thus, we vacate defendant's three convictions in 08 CRS 050528-9. We need not address defendant's argument II that the trial court erred in denying his motion to dismiss the charges in 08 CRS 050529.

III

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the felony charge of keeping and maintaining a vehicle for keeping and selling cocaine in 08 CRS 050532. We disagree.

> This Court has held that
>
> [u]pon review of a motion to dismiss, the court determines whether there is substantial evidence, viewed in the light most favorable to the State, of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Stancil*, 146 N.C. App. 234, 244, 552 S.E.2d 212, 218 (2001), *aff'd as modified*, 355 N.C. 266, 559 S.E.2d 788 (2002) (per curiam); *State v. Compton*, 90 N.C. App. 101, 103, 367 S.E.2d 353, 355 (1988). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990).

State v. Lane, 163 N.C. App. 495, 499, 594 S.E.2d 107, 110 (2004).

Under N.C. Gen. Stat. § 90-108(a)(7), it is illegal to "knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances]." N.C.G.S. § 90-108(a)(7) (2009).

> The statute thus prohibits the keeping or maintaining of a vehicle only when it is used for "keeping or selling" controlled substances. As stated by our Supreme Court in *State v. Mitchell*, the word " 'keep' . . . denotes not just possession, but possession that

> occurs over a duration of time." Thus, the fact "that an individual within a vehicle possesses marijuana on one occasion cannot establish . . . the vehicle is 'used for keeping' marijuana; nor can one marijuana cigarette found within the car establish that element." Likewise, the fact that a defendant was in his vehicle on one occasion when he sold a controlled substance does not by itself demonstrate the vehicle was kept or maintained to sell a controlled substance.

State v. Dickerson, 152 N.C. App. 714, 716, 568 S.E.2d 281, 282 (2002) (quoting *State v. Mitchell*, 336 N.C. 22, 32-33, 442 S.E.2d 24, 30 (1994)) (alteration in original)). In *Lane*, the evidence showed that police officers recovered cocaine from a car which the defendant had been driving. 163 N.C. App. at 498, 594 S.E.2d at 109-10. Because the evidence did "not indicate possession of cocaine in the vehicle that occurred over a duration of time, nor [was] there evidence that defendant had used the vehicle on a prior occasion to sell cocaine. . . . [we] agree[d] with defendant that his motion to dismiss should have been granted." *Id.* at 500, 594 S.E.2d at 111.

Here, as discussed above, without the erroneously admitted analyses and related testimony, there was no expert testimony or documentary evidence that defendant possessed cocaine in his mother's car on 3 or 6 March 2008. However, Smith's testimony that she and defendant had transported cocaine "eightballs" sold to Zbytniuk on 3 and 6 March 2008 in defendant's mother's car was admissible lay testimony under Rule 701. *Yelton*, 175 N.C. App. at 354, 623 S.E.2d at 597; N.C. Gen. Stat. § 8C-1, N.C.R. Evid. 701 (2009) (permitting lay opinion testimony when it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."). Special Agent Schell gave expert testimony that the substance defendant possessed on 21 March 2008 was cocaine. In the light most favorable to the State, the testimony of Smith and Special Agent Schell constituted substantial evidence which a reasonable mind might accept as adequate to support a conclusion that defendant had possession of cocaine in his mother's car over a duration of time and/or on more than one occasion. *Lane*, 163 N.C. App. at 499, 594 S.E.2d at 111. This assignment of error is overruled.

IV

[3] Defendant also argues that the trial court lacked jurisdiction to enter judgment in 06 CRS 50435 and erred in counting this charge as

part of his prior record level in sentencing him for the 2008 charges. We disagree.

This Court has summed up our State's law on prayers for judgment continued as follows:

> [t]he sentence of a criminal defendant "does not necessarily have to be imposed at the same term of court at which the verdict or plea of guilty was had." *State v. Graham*, 225 N.C. 217, 219, 34 S.E.2d 146, 147 (1945); *see also Miller v. Aderhold*, 288 U.S. 206, 211, 77 L. Ed. 702, 705-06 (1933) ("where verdict has been duly returned, the jurisdiction of the trial court . . . is not exhausted until sentence is pronounced, either at the same or succeeding term"). A trial court is authorized to continue the case to a subsequent date for sentencing. *Graham*, 225 N.C. at 219, 34 S.E.2d at 147; *Miller*, 288 U.S. at 211, 77 L. Ed. at 705-06. This continuance is frequently referred to as a "prayer for judgment continued." A continuance of this type vests a trial judge presiding at a subsequent session of court with the jurisdiction to sentence a defendant for crimes previously adjudicated. This procedure of delaying the imposition of judgment in criminal cases is recognized by our legislature, see N.C.G.S. § 15A-1334(a) (1988) (allowing "continuance of the sentencing hearing"); N.C.G.S. § 15A-1416(b)(1) (1988) (allowing state to move for imposition of sentence when prayer for judgment has been continued), and is an exception to the general rule that the court's jurisdiction expires with the expiration of the session of court in which the matter is adjudicated. *See State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984). The continuance may be for a definite or indefinite period of time, but in any event the sentence must be entered "within a reasonable time" after the conviction or plea of guilty. 21 Am. Jur. 2d Criminal Law § 526, at 870 (1981) (unreasonable delay can deprive trial court of jurisdiction). If not so entered, the trial court loses jurisdiction. *Id.* Thus, although pursuant to N.C.G.S. § 15A-1416(b)(1), the State may "[a]t any time after verdict" move for the imposition of sentence when prayer for judgment has been continued and grounds for the imposition of sentence are asserted, the State's failure to do so within a reasonable time divests the trial court of jurisdiction to grant the motion. Deciding whether sentence has been entered within a "reasonable time" requires consideration of the reason for the delay, the length of the delay, whether defendant has consented to the delay, and any actual prejudice to defendant which results from the delay. 21 Am. Jur. 2d Criminal Law § 561, at 924 (1981).

State v. Degree, 110 N.C. App. 638, 640-41, 430 S.E.2d 491, 493 (1993). A defendant's failure to request sentencing "is tantamount to his consent to a continuation of the sentencing hearing." *Id.* at 641-42, 430 S.E.2d at 493.

Here, defendant was indicted in 06 CRS 50435 on 7 August 2006 and the trial court accepted defendant's guilty plea on 22 January 2007. Judgment was continued from term to term. Thereafter, defendant never requested sentencing and, thus, consented to continuation of his sentencing hearing until 13 March 2009. *Id.* The two-year delay in and of itself is not unreasonable. *See State v. Lea*, 156 N.C. App. 178, 180, 576 S.E.2d 131, 133 (2003) (finding no error when judgment and sentence were entered more than five years after the defendant was convicted). Defendant contends he was prejudiced by the delayed entry of the judgment because the 06 CRS 50435 conviction was used to determine his prior record level for sentencing on the 2008 convictions. We disagree; had the trial court entered judgment at some earlier point for the 06 CRS 50435 conviction, that conviction would still have been used to determine his prior record level. This assignment of error is overruled.

Conclusion

We vacate defendant's convictions in 08 CRS 050528-9. We find no error in defendant's convictions in 08 CRS 050531-2 and 06 CRS 50435. In addition, we remand for resentencing not inconsistent with this opinion.

Vacated in part and no error in part; remanded.

Judges STEELMAN and BEASLEY concur.

NANCY FAGG STOVALL, PLAINTIFF v. MANLEY KEITH STOVALL, DEFENDANT

No. COA09-946

(Filed 20 July 2010)

1. Divorce— equitable distribution—marital property—contradictory stipulations in pretrial order

The trial court did not err in an equitable distribution case by concluding that it was limited by a pretrial order to determining the value of the divisible properly arising from defendant's pay-

ments on the New Madison debts and determining which party would receive the benefits of these payments. This interpretation harmonized the two contradictory stipulations in the pretrial order to provide for an equal distribution of marital property but also provided for the trial court to consider which party should receive credit for the prior payment of marital debts.

2. Divorce— equitable distribution—marital property—post-separation payments

The trial court did not err in an equitable distribution case by classifying defendant's postseparation payments as divisible property and concluding the New Madison property must be divided equally with the exception that defendant was entitled to a credit of $160,000 for the payments of marital debt in accordance with the pretrial order. To the extent defendant argued for any consideration of his contributions in addition to payments of the New Madison debts, the stipulation to an equal distribution in the pretrial order barred the trial court from consideration of these factors.

3. Divorce— equitable distribution—marital property—tax implications

The trial court did not abuse its discretion or act under a misapprehension of law in an equitable distribution case when it declined to consider the tax implications to defendant husband from the pending sale of the New Madison property. Tax consequences are only considered under N.C.G.S. § 50-20(c)(11) if the trial court determines that an equal division is not equitable, and the trial court was required by the parties' stipulations to divide the property equally except as to Schedule I, which included only debt payments.

4. Divorce—equitable distribution—marital property—money market account

The trial court did not err in an equitable distribution case by classifying the pertinent money market account as entirely marital property based on defendant husband's failure to rebut the presumption under N.C.G.S. § 50-20(b)(1) that the funds in the account as of the date of separation were marital.

Appeal by defendant and plaintiff from Order of Equitable Distribution entered 14 January 2009 by Judge Angela B. Puckett in District Court, Stokes County. Heard in the Court of Appeals 27 January 2010.

Bennett & West, by Michael R. Bennett, for plaintiff-appellee.

Randolph and Fischer, by J. Clark Fischer, for defendant-appellant.

STROUD, Judge.

Defendant and plaintiff appeal their equitable distribution order. For the following reasons, we affirm.

I. Background

On or about 31 October 2005, plaintiff filed a verified complaint requesting equitable distribution.[1] On 30 October 2006, the parties consented to entry of an equitable distribution pretrial order. The equitable distribution hearing was held on 17 November 2008, and on 14 January 2009, the trial court entered an order of equitable distribution. Both parties filed a notice of appeal from the equitable distribution order.

II. Standard of Review

> The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.

Pegg v. Jones, 187 N.C. App. 355, 358, 653 S.E.2d 229, 231 (2007) (citations and quotation marks omitted), *aff'd per curiam*, 362 N.C. 343, 661 S.E.2d 732 (2008). "The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998) (citations and quotation marks omitted).

As to the actual distribution ordered by the trial court, "[w]hen reviewing an equitable distribution order, the standard of review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only

1. On or about 10 October 2002, the parties were divorced. However, at the time of the divorce there was a pending equitable distribution claim which plaintiff had filed prior to the divorce.

upon a showing that its actions are manifestly unsupported by reason." *Petty v. Petty*, —— N.C. App. ——, ——, 680 S.E.2d 894, 898 (2009) (citations and quotation marks omitted), *disc. review denied and appeal dismissed*, 363 N.C. 806, 691 S.E.2d 16 (2010).

III. Credit for Debt

The trial court found that New Madison Tobacco Warehouse ("New Madison") is a warehouse which "was purchased during the marriage in approximately 1997 by the Defendant under the name Madison Enterprises, Inc." The trial court classified New Madison as marital property. New Madison was subject to two mortgages, one with the prior owner of New Madison and one with First Citizens Bank ("New Madison debts"). Defendant made payments on the New Madison debts after the date of separation; plaintiff did not. As to these payments, the trial court found, in part, as follows:

> that in a general sense debt payments on the New Madison Tobacco Warehouse have occurred in the amount of approximately $20,000.00 per year for a period of eight (8) years since the date of separation, for a total of approximately $160,000.00 in reduction of a marital debt since the date of separation by the individual defendant from his individual payments.

The trial court further found "that the Defendant should receive a credit for $20,000.00 per year for a period of eight (8) years for his payments on the debts on the New Madison Tobacco Warehouse." The trial court concluded

> [t]hat the divisible property associated with the New Madison Tobacco Warehouse and the marital value of the New Madison Tobacco Warehouse must be divided equally, with the exception that the defendant is entitled to a credit for $160,000 for the payments of marital debt in accordance with the Pre-trial Order.

Both plaintiff and defendant assign error to the trial court's findings and conclusions which gave defendant a "credit" for debt payments of $160,000.00 toward the New Madison debts after the date of separation. Plaintiff argues that the trial court erred by considering these payments as a credit to defendant; defendant argues that the trial court failed to give him enough credit for these payments.

A. Pretrial Order

[1] Our analysis of this issue is complicated by an ambiguity in the parties' stipulations in their pretrial order. We first note that

> [c]ourts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties, and such practice will be encouraged. While a stipulation need not follow any particular form, its terms must 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. Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position.

Moore v. Richard West Farms, Inc., 113 N.C. App. 137, 141, 437 S.E.2d 529, 531 (1993) (citations, quotation marks, and ellipses omitted). However, in this situation, the parties' stipulations have to a certain extent complicated this case, instead of simplifying it. The parties stipulated in the pretrial order that "an equal division would be equitable." However, the parties also stipulated in the pretrial order that "Schedule I attached hereto is a list of the debts, if any, of the parties hereto that were in existence and were unpaid as of the date of the separation of the parties upon which the parties' agreements and disagreements with regard to specific debts are noted" and that

> [t]he Presiding Judge shall rule . . . [w]ith regard to Schedule I, which debts are marital, what were and are the outstanding balances of said marital debts, *which party should receive credit for the prior payment of said marital debts*, and which party should pay the said marital debts that remain unpaid[.]

(Emphasis added.) Schedule I includes the New Madison debts. Thus, the parties had contradictory stipulations in the equitable distribution pretrial order; the parties agreed that an equal distribution would be equitable, but they also stipulated that the trial court should consider "credit for the prior payment of said marital debts[.]"

Essentially, plaintiff argues that under the stipulations the trial court could only treat the payments as divisible under N.C. Gen. Stat. § 50-20(b)(4)(d) and pursuant to the stipulations divide the divisible property equally; defendant argues that not only should the payments all be credited to him, but he should have been credited for more. Thus, we first have to interpret the terms of the pretrial order to determine if the trial court could consider the defendant's payments on the New Madison debts at all, given the stipulation to an equal distribution, and if the payments could be considered, in what manner they could be considered.

We believe that stipulations in pretrial orders should be construed in the same manner as a contract between the parties, and this

Court has previously set out the general principles for construction as follows:

> 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.
>
> 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. 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. However, extrinsic evidence may be consulted when the plain language of the contract is ambiguous. Whether or not the language of a contract is ambiguous is a question for the court to determine. 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. Where 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*. 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.

Lynn v. Lynn, —— N.C. App. ——, ——, 689 S.E.2d 198, 204-05 (2010) (citations, quotation marks, ellipses, and brackets omitted).

Here, the pretrial order is ambiguous, as it provides for an equal distribution, but then also provides for the trial court to consider "which party should receive credit for the prior payment of said marital debts," a factor for unequal distribution. *See* N.C. Gen. Stat. § 50-20(c) (2010). It is apparent from the evidence and arguments presented at trial in this matter that both parties understood the pretrial order as requiring the trial court to consider how the post-separation debt payments by defendant should be treated in the distribution, and it is also clear that defendant was asking to have some recovery of these funds, while plaintiff opposed this; defendant argued before the trial court for greater credit for his payments and efforts to maintain New Madison, and plaintiff argued that the increase in equity of New Madison as a result of defendant's debt payments should be considered as divisible property and must be divided

equally in accord with the stipulation to an equal distribution. Thus, both parties recognized that under the pretrial order, the trial court was to consider defendant's post-separation payments to some extent; however, plaintiff argued that the pretrial order limited the trial court to determining the value of divisible debt, which would have to be divided equally in accord with the stipulation to an equal distribution while defendant contended that the post-separation payments of debt should be classified as divisible property but he should receive a "dollar-for-dollar credit" for these payments as well as taxes, upkeep, and other expenses related to New Madison. Thus, defendant was essentially asking the trial court for an unequal distribution of the divisible property related to New Madison, based upon distributional factors under N.C. Gen. Stat. § 50-20(c)(11a).

The trial court noted the conflict within the pretrial order and specifically addressed it in the order. Most importantly, neither party has assigned error to the trial court's conclusion as to the meaning of the stipulations:

> [T]he Court cannot, as a matter of law, make any division of marital and divisible properties other than an equal division, *with the exception of the items in Schedule I regarding the stipulation that the Court was to determine any credit to be given for prior payments of marital debts.*

(Emphasis added.) We agree with the trial court in its construction of the stipulations of the pretrial order. The trial court was limited by the pretrial order to determining the value of the divisible property arising from the defendant's payments on the New Madison debts and determining *which party* would receive the benefit of these payments. Because the pretrial order provided that the trial court must determine "which party" would receive credit for the payments, the trial court could distribute the divisible property related to the New Madison debt unequally, if the trial court decided that an unequal distribution of this divisible property would be equitable. *See* N.C. Gen. Stat. § 50-20(c). This interpretation harmonizes the two apparently contradictory stipulations and is in accord with the manner in which the parties presented evidence before the trial court. We must now consider the parties' arguments on appeal within the context of the limitations of the stipulations in the pretrial order.

B. Plaintiff's Argument Regarding Amount of Credit

[2] Plaintiff argues that defendant

> could not receive credit for those payments [,post-separation payments on the New Madison debt,] as a matter of law because the equitable distribution statutes do not allow the Court discretion to give a credit, only to classify the payments as divisible property, then consider the payments as an unequal distributional factor.

As noted above, the trial court determined the value of the divisible property, but distributed it unequally by giving defendant a "credit" for the entire amount of post-separation payments.

In *Warren v. Warren*, this Court addressed the proper method of valuation of post-separation payments towards debt as divisible property. *See Warren v. Warren*, 175 N.C. App. 509, 516-17, 623 S.E.2d 800, 804-05 (2006). Mr. Warren, the defendant, argued

> that the trial court erred by making insufficient findings of fact regarding (1) post-separation payments he made with respect to marital debt . . . . On the date of separation, the parties had an equity line of credit with a balance of $17,738.72. Mr. Warren argues that he paid $4,320.27 in finance charges or interest on this line of credit with post-separation funds. . . .
>
> Mr. Warren argues that his post-separation payments on the line of credit constituted divisible property under N.C. Gen. Stat. § 50-20(b)(4)(d). Although this Court rejected such an argument in *Hay v. Hay*, 148 N.C. App. 649, 655, 559 S.E.2d 268, 273 (2002), in connection with post-separation mortgage payments, that opinion predated a 2002 amendment to N.C. Gen. Stat. § 50-20(b)(4)(d). At the time of *Hay*, the statute defined divisible property as including only increases in marital debt and financing charges and interest related to marital debt. The Court reasoned that the subsection did not apply because defendant's mortgage payments have not increased the marital debt, financing charges, or interest on the marital debt.
>
> The statute, as amended in 2002 . . . now provides that divisible property includes increases and decreases in marital debt and financing charges and interest related to marital debt. As a leading commentator has explained,
>
> With the 2002 amendment to the statute, the subsection authorizes the court to classify postseparation payments of marital debt as divisible property. Whether these payments reduce the principal of the debt, the finance charges related to the debt, or

> interest related to the debt, the court should consider the postseparation payments as divisible property. If the postseparation reduction of the marital debt increases the net value of the marital property, the court may classify the increase as divisible property.
>
> This amendment became effective 11 October 2002.
>
> Since Mr. Warren's payments decreased financing charges and interest related to marital debt, those payments—to the extent made after 11 October 2002—constituted divisible property. A trial court must value all marital and divisible property in order to reasonably determine whether the distribution ordered is equitable. On remand, the trial court must, therefore, make findings of fact regarding the post-separation debt payments made after 11 October 2002.

Id. (emphasis added) (citations, quotation marks, ellipses, and brackets omitted).

Here, the trial court properly classified defendant's post-separation payments as divisible property, *see Warren* at 516-17, 623 S.E.2d at 805, and went on to conclude that "New Madision Tobacco Warehouse must be divided equally, with the exception that the defendant is entitled to a credit of $160,000 for the payments of the marital debt in accordance with the Pre-trial Order." Though the trial court labeled the $160,000.00 as a "credit[,]" in actuality, it treated the $160,000.00 as divisible property and concluded that an equal distribution was not equitable, and thus gave defendant $160,000.00 more of New Madison due to his previous payments. See N.C. Gen. Stat. § 50-20(c) ("There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably."). The trial court specifically set forth findings as to its reasons for ordering an unequal distribution in this regard, and we conclude that the trial court's unequal distribution of divisible property arising from defendant's post-separation payments was not an abuse of discretion in the context of the parties' stipulations in the pretrial order, and thus this argument is overruled.

C. Defendant's Argument Regarding Amount of Credit

Defendant first contends that "the trial court committed reversible error in limiting defendant's credit for debt payments on the

New Madison Tobacco Warehouse to $160,000.00[.]" (Original in all caps.) Essentially, defendant first challenges the trial court's finding that he contributed $20,000.00 per year to payment of the New Madison debts, arguing that he actually contributed more because "the evidence at trial established that a significantly higher credit was required in order for the distribution of the warehouse proceeds to be fair and equitable." Defendant also argues that the trial court's order "is legally insufficient [as to the calculation of defendant's credit] to allow meaningful appellate review and thus is fatally flawed."

At trial, defendant testified that "[a]t the end of the year, I was probably putting twenty, thirty thousand dollars of my money out of the tobacco business in it[.]" Thus, defendant's own testimony supports the trial court's finding of fact, as he stated that he paid approximately $20,000.00 to $30,000.00 a year to maintain New Madison. Although there was also evidence which could have supported a finding of a higher amount of payments toward the New Madison debts, we do not reweigh the evidence on appeal. *See Pegg* at 358, 653 S.E.2d at 231. Therefore, the finding of fact that defendant paid approximately $20,000.00 per year on the New Madison debts is supported by the evidence.

Defendant further argues that the findings of fact are "legally insufficient [as to the calculation of defendant's credit] to allow meaningful appellate review and thus [are] fatally flawed." However, as the finding of fact as to the annual debt payment of $20,000.00 is supported by the evidence, the trial court's finding of the total amount of $160,000.00 is obviously a simple mathematical calculation of multiplying the annual amount of debt payment by eight, based upon the years when defendant had made these payments. We fail to see why these findings could be considered as insufficient to allow meaningful appellate review, as the calculation is very straightforward. Thus, the trial court did not err in concluding that defendant paid approximately $160,000.00 towards New Madison debts after the date of separation. To the extent that defendant has argued for any consideration of his contributions in addition to payment of the New Madison debts, the stipulation to an equal distribution in the pretrial order barred the trial court from consideration of these factors; only payments on these particular debts were excepted from the stipulation to an equal distribution. This argument is overruled.

IV. Tax Implications

[3] Defendant next contends that "the trial court abused its discretion and acted under a misapprehension of law when it declined to

consider the tax implications to defendant from the pending sale of the New Madison Tobacco Warehouse[.]" (Original in all caps.) Plaintiff responds that the trial court did not err because "tax implications can only be considered if there is a determination that an equal division is not equitable."

N.C. Gen. Stat. § 50-20(c) provides that

> [t]here shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection[.]

N.C. Gen. Stat. § 50-20(c). Factor 11 is "[t]he tax consequences to each party[.]" N.C. Gen. Stat. § 50-20(c)(11). As the trial court was required, pursuant to the parties' stipulations, to divide the marital and divisible property equally except as to Schedule I, which included only debt payments, it could not consider the tax consequences; tax consequences are only considered "[i]f the court determines that an equal division is not equitable[.]" N.C. Gen. Stat. § 50-20(c). Thus, the trial court did not err in not considering the tax implications to defendant.

V. First Citizen's Money Market Account

[4] Lastly, defendant argues that "[t]he trial court's finding that the First Citizen[']s Money Market Account had a marital value of $20,824.37 lacked evidentiary support and this figure should not have factored into the trial court's final division of assets[.]" (Original in all caps.) Defendant challenges the classification of the First Citizen's Money Market Account as entirely marital property.

Ms. Kim McKinney, Mr. Stovall's daughter and the secretary and treasurer for Madison Enterprises, testified that the First Citizen's Money Market account existed prior to the marriage and that "there was a lot more money [in it] before they got married[.]" Ms. McKinney further testified that between the marriage date and the date of separation, money "went in and out all along because if I didn't have the money, if we didn't a loan [sic] at the time or needed some quick, I'd holler and that's where I had to have the money from."

> N.C. Gen. Stat. § 50-20(b)(1) defines marital property as
>
> all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection. Marital property includes all vested and nonvested pension, retirement, and other deferred compensation rights, and vested and nonvested military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act. It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection. This presumption may be rebutted by the greater weight of the evidence.

N.C. Gen. Stat. § 50-20(b)(1) (2005). Although the evidence showed that the value of the account was greater as of the date of marriage, and that funds were removed from the account during the marriage, the evidence also showed that defendant deposited funds into the account during the marriage. The source of the funds deposited is unclear; defendant failed to show how much was deposited during the marriage or to trace the funds in and out of the account during the marriage. Even if the funds defendant deposited into the account during the marriage were separate funds,

> [c]ommingling of separate property with marital property, occurring during the marriage and before the date of separation, does not necessarily transmute separate property into marital property. Transmutation would occur, however, if the party claiming the property to be his separate property is unable to trace the initial deposit into its form at the date of separation.

Fountain v. Fountain, 148 N.C. App. 329, 333, 559 S.E.2d 25, 29 (2002) (citations omitted). Therefore, defendant failed to rebut the presumption under N.C. Gen. Stat. § 50-20(b)(1) that the funds in the account as of the date of separation were marital. *See* N.C. Gen. Stat. § 50-20(b)(1). The evidence presented at trial showed that defendant used the account during marriage by putting marital funds "in and out" of the account without presenting sufficient evidence to trace any separate contributions, so the trial court properly classified the entire account balance as marital property. *See id.* As plaintiff noted in her brief, "[t]he Trial Court's determination that the First Citizen's Bank money market account was marital property is clearly supported by the evidence."

VI. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges BRYANT and ELMORE concur.

JACQUELYN B. REAVES, WIDOW OF RONALD REAVES, DECEASED EMPLOYEE, PLAINTIFF v. INDUSTRIAL PUMP SERVICE, EMPLOYER, AMERICAN INTERSTATE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA09-1561

(Filed 20 July 2010)

1. Workers' Compensation— Pickrell presumption—work-relatedness of death unknown

The Industrial Commission did not err in a workers' compensation case by applying the presumption in *Pickrell*, 322 N.C. 363, when the findings indicated that decedent, after being exposed to extreme heat in the course of his employment, was found dead in his work truck and there was an unknown cause of dysrhythmia which ultimately resulted in his death.

2. Appeal and Error— mootness—alternative conclusion not reached

Defendant's issue challenging the Industrial Commission's alternative conclusion in a workers' compensation case that decedent's death was caused by extreme working conditions was not reached based on the Court of Appeals' conclusion that the Commission properly applied the *Pickrell*, 322 N.C. 363, presumption. Further, plaintiff's cross-assignment of error was deemed moot.

Appeal by defendants and plaintiff from opinion and award filed 16 July 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 April 2010.

Shipman & Wright, LLP, by Gary K. Shipman and William G. Wright, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Nicole D. Viele and Meredith Taylor Berard, for defendants-appellants.

BRYANT, Judge.

Industrial Pump Service, Employer, and American Interstate Insurance Company, Carrier, (collectively, defendants) and plaintiff, the widow of deceased employee Ronald Reaves (decedent), appeal from an opinion and award entered 16 July 2009 by the Industrial Commission. We affirm.

Facts

On 1 April 2004, decedent, a welder, was found dead in his work truck which was parked outside the International Paper plant in Franklin, Virginia. Decedent and Robert Templeman, a machinist, had been repairing a pump in a basement room of the plant that day. The temperature in the basement room was in the mid-80s, and the room was humid and poorly ventilated. Decedent spent a total of eight to nine hours inside the room, 45 minutes of which he spent heating up a metal sleeve to 300 degrees with a welding torch and "tack welding," and about three hours doing other types of physical work.

Around 7:00 p.m. that day, decedent told Templeman that "he wasn't feeling good" and that he was going out into the hallway to sit down. Around 10:30 p.m., decedent again complained to Templeman that he was "hot and fatigued" and that the heat was "getting to him." Templeman and decedent walked out to the work truck at that time, and decedent got into the truck while Templeman went back inside the mill to finish his clean up. When Templeman returned to the truck about 45 minutes later, he found decedent lying in a reclined position, unresponsive. Medical staff confirmed his death. An autopsy was performed on 2 April 2004. The autopsy concluded that decedent had evidence of severe atherosclerotic cardiovascular disease and stated "Cause of death: Coronary artery disease." However, at no time prior to 1 April 2004 had decedent complained of heart problems or tightness in his chest, and a prior physical examination from January 2004 revealed that his blood pressure was 120/80, that his resting heart rate was 76 beats per minute, and that he had no history of cardiovascular disease.

Procedural History

Plaintiff filed a workers' compensation claim for death benefits with the Industrial Commission on 22 September 2004, and on 22 September 2006, the deputy commissioner denied the claim. Plaintiff appealed to the Full Commission, and on 22 June 2007, the Full Commission affirmed the denial. Plaintiff appealed to this Court, and on 20 January 2009, this Court entered an opinion vacating the

Commission's opinion and award and remanding to the Commission, directing it to (I) make findings of fact and conclusions of law regarding the applicability of the *Pickrell* presumption; (II) consider the evidence under the correct legal standard to determine whether decedent's death was caused by extreme work conditions; and (III) make findings of fact and conclusions of law on whether inadequate safety measures of defendant employer Industrial Pump Service were a significant contributing factor in decedent's death. On 16 July 2009, the Full Commission entered an opinion and award concluding that the *Pickrell* presumption applied and that defendants did not rebut it, or, in the alternative, that decedent's death resulted from extreme work conditions, and that the lack of training in the recognition of health emergencies did not significantly contribute to decedent's death. Defendants and plaintiff appeal.

Defendants present two issues on appeal: whether the Commission erred in (I) applying the *Pickrell* presumption and concluding that defendants failed to rebut the *Pickrell* presumption; and (II) concluding alternatively that decedent's employment subjected him to extreme conditions. On cross-appeal, plaintiff alleges the Commission erred in (III) concluding that the lack of training in the recognition of health emergencies did not significantly contribute to decedent's death. As discussed below, we affirm the Commission's opinion and award.

Standard of Review

Our review of the Commission's opinion and award is limited to determining " 'whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.' " *Madison v. Int'l Paper Co.*, 165 N.C. App. 144, 149, 598 S.E.2d 196, 200 (2004) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)). We must view " '[t]he evidence tending to support plaintiff's claim . . . in the light most favorable to plaintiff,' " granting plaintiff the " 'benefit of every reasonable inference to be drawn from the evidence.' " *Id.* at 149-50, 530 S.E.2d at 200 (quoting *Deese*, 352 N.C. at 115, 530 S.E.2d at 553). "In reviewing the Commission's findings of fact," we do not "weigh the evidence presented to the Commission or decide the case on the basis of the weight of the evidence." *Id.* at 150, 530 S.E.2d at 200 (citation omitted). "[T]he Commission is the 'sole judge of the weight and credibility of the evidence.' " *Id.* (quoting *Deese*, 352 N.C. at 116, 530 S.E.2d at 553).

I

[1] Defendants first contend that application of the *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 368 S.E.2d 582 (1988), presumption was inappropriate because the circumstances surrounding decedent's death were known and because there was "evidence before the Commission that decedent died other than by a compensable cause." We disagree.

A workers' compensation claimant has the burden of proving that the employee suffered an injury (1) by accident (2) arising out of employment (3) in the course of employment, *see* N.C. Gen. Stat. § 97-2(6) (2009); however, " '[w]hen an employee is found dead under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death,' " courts should " 'indulge a presumption or inference that the death arose out of the employment.' " *See Pickrell*, 322 N.C. at 367, 368 S.E.2d at 584 (quoting 1 Larson, *The Law of Workmen's Compensation* § 10.32 (1985)). The presumption "may be used to help a claimant carry his burden of proving that death was caused by accident, or that it arose out of the decedent's employment, or both." *Id.* at 368, 368 S.E.2d at 585. The *Pickrell* presumption shifts the burden of proof to the defendant so that the "the defendant must come forward with some evidence that death occurred as a result of a non-compensable cause; otherwise, the claimant prevails." *Id.* at 371, 368 S.E.2d at 586. If the defendant introduces "evidence that death was not compensable, the presumption disappears" and the "Commission should find the facts based on all the evidence adduced, taking into account its credibility, and drawing such reasonable inferences from the credible evidence as may be permissible, the burden of persuasion remaining with the claimant." *Id.* Because an injury " 'shall not include a disease in any form, except where it results naturally and unavoidably from the accident,' " *Cody v. Snider Lumber Co.*, 328 N.C. 67, 70-71, 399 S.E.2d 104, 106 (1991) (quoting N.C.G.S. § 97-2(6)), "[w]hen an employee is conducting his work in the usual way and suffers a heart attack, the injury does not arise by accident and is not compensable." *Id.* at 71, 399 S.E.2d at 106 (citation omitted). "However, an injury caused by a heart attack may be compensable if the heart attack is due to an accident, such as when the heart attack is due to unusual or extraordinary exertion . . . or extreme conditions." *Id.* (internal citations and emphasis omitted).

In the instant case, the Commission entered the following relevant findings of fact:

15. Decedent's principal job . . . was to "tack weld" a metal sleeve to the front face of the pump. Decedent used a welding torch to heat the sleeve to approximately 300 degrees . . . . Decedent spent a total of approximately 45 minutes heating up the sleeve and tack welding, approximately three hours [sic] of other physical work, and a total of eight to nine hours in the hot, humid and poorly ventilated basement room.

16. At approximately 7:00 p.m., decedent told Mr. Templeman that "he wasn't feeling good" and was going outside in a hallway to sit down. . . .

17. At approximately 10:30 p.m., decedent again complained that he was "hot and fatigued" and the heat was "getting to him." . . .

18. Mr. Templeman walked with decedent to their work truck . . . and decedent got into the truck while Mr. Templeman went back into the mill to finish his clean up. There were no witnesses as to what occurred during the 45 minutes decedent was alone in the truck.

. . . .

20. When Mr. Templeman went back to the truck, he found decedent lying in a reclined position. . . . The medical staff found decedent dead in the truck.

21. An autopsy . . . performed on April 2, 2004 . . . noted that: "The decedent was a 54 year old white man with no known significant past medical history apart from [sic] recent ear ache. While he was at work he complained of feeling hot. He was later found collapsed inside of a vehicle. At autopsy the decedent had evidence of severe atherosclerotic cardiovascular disease. . . . Cause of death: Coronary artery disease." . . .

. . . .

26. According to Dr. Holt, poor ventilation and heat increase the stress on the cardiovascular system, which can lower the blood pressure and create additional stressors on the heart.

27. The autopsy finding of "no thrombosis" was significant to Dr. Holt, as it meant that decedent did not have a "myocardial infarction, which is a heart attack in layman's terms." Dr. Holt was of the opinion that decedent had a rhythm problem in his heart due to a lack of blood supply to the heart muscle, which was aggra-

vated by the heat and other work conditions to which decedent was exposed on April 1, 2004.

. . . .

29. Dr. Holt stated that the work conditions to which decedent was exposed on April 1, 2004 were significant contributing factors in decedent's death. Although the autopsy and death certificate did not state that decedent had suffered a heat stroke or heat exhaustion, Dr. Holt assumed that decedent was overheated, dehydrated and had low blood pressure.

30. . . . It was [Dr. Davis'[1]] opinion that decedent's work conditions were not a significant contributing factor to decedent's death.

31. Dr. Davis testified that decedent died from a dysrhythmia followed by an arrhythmia, or heart attack. He acknowledged that heat can be a precipitating cause of a cardiac event, including a dysrhythmia. Dr. Davis also acknowledged that the pre-existing coronary artery disease would not, by itself, have caused decedent's death, but that there had to be a "malignant dysrhythmia."

. . . .

33. The Full Commission gives greater weight to the expert opinions of Dr. Holt and Ms. Meurs than to the causation opinion of Dr. Davis and holds that the greater weight of the evidence establishes that decedent's extreme work conditions were a contributing factor to his death. Although the evidence does not establish that decedent suffered from heat exhaustion or heat stroke, the greater weight of the evidence does show that decedent was exposed to heat, a special hazard, in the course of his employment and that the special hazard was a contributing factor to this death.

Although defendants assign error to many of the Commission's findings of fact, they only argue in brief that the opinions of plaintiff's expert, Dr. William Holt, as set out in findings 27 and 29, were speculative, and that finding 33 is outside the Commission's authority on remand. We deem as abandoned the assignments of error not addressed on appeal, N.C. R. App. P. 28(b)(6) (2009), and "treat the

1. Upon review of the record, we have determined that the Commission's finding of fact 30 intends to refer to Dr. Davis' expert opinion, and not Dr. Holt's. We have therefore omitted "Dr. Holt's" and inserted "Dr. Davis' " in its place.

unchallenged findings of fact as conclusive on appeal." *Wooten v. Newcon Transp., Inc.*, 178 N.C. App. 698, 701, 632 S.E.2d 525, 528 (2006) (citation omitted), *disc. review denied*, 361 N.C. 704, 655 S.E.2d 405 (2007).

The Commission's findings, which indicate that decedent, after being exposed to extreme heat in the course of his employment, was found dead in his work truck and that there was an unknown cause of the dysrhythmia which ultimately resulted in his death, support its conclusion that "the circumstances regarding the work-relatedness of decedent's death are unknown and that the death occurred as the result of an injury by accident sustained in the course of decedent's employment." Specifically, the Commission concluded that:

> 3. . . . [T]he greater weight of the evidence indicates that the circumstances regarding the work-relatedness of decedent's death are unknown and that the death occurred as the result of an injury by accident sustained in the course of decedent's employment. It is uncontested that plaintiff was in the course of his employment and was engaged in his employer's business at the time of death. The fact that the immediate medical cause of decedent's death is known does not indicate that the *Pickrell* presumption does not apply.
>
> . . .
>
> 4. Therefore, plaintiff is entitled to the *Pickrell* presumption that decedent's cause of death was an injury by accident arising out of the employment. . . .

As a result, we hold that the Commission did not err by applying the *Pickrell* presumption. *See Pickrell*, 322 N.C. at 364-70, 368 S.E.2d at 583-86.

Defendants also contend, relying on this Court's holding in *Gilbert v. Entenmann's, Inc.*, 113 N.C. App. 619, 440 S.E.2d 115 (1994), that the *Pickrell* presumption was inappropriate because the testimony of their expert witness, Dr. Arthur Davis, that work conditions did not significantly contribute to decedent's death, was "evidence before the Commission that decedent died other than by a compensable cause." In *Gilbert*, we held that a plaintiff is not entitled to the *Pickrell* presumption when a decedent has died from "a non-compensable cause that is deadly in and of itself without a precipitating event." *Reaves v. Indus. Pump Serv.*, 195 N.C. App. 31, 37, 671 S.E.2d 14, 19 (2009) (citing *Gilbert*, 113 N.C. App. at 623, 440 S.E.2d

at 118). However, " 'an injury caused by a heart attack may be compensable if the heart attack is due to an accident, such as when the heart attack is due to unusual or extraordinary exertion or extreme conditions.' " *Wooten*, 178 N.C. App. at 702, 632 S.E.2d at 528 (quoting *Cody*, 328 N.C. at 71, 399 S.E.2d at 106) (emphasis omitted). In addition, although Dr. Davis opined that "work conditions were not a significant contributing factor to decedent's death," Dr. Davis also opined that "pre-existing coronary artery disease would not, by itself, have caused decedent's death," that "decedent died from a dysrhythmia," and that exposure to heat can cause dysrhythmia. Further, it was Dr. Holt's opinion "that the work conditions to which decedent was exposed on April 1, 2004 were significant contributing factors in decedent's death." We therefore overrule defendants' assignment of error on this point.

Defendants next contend that, "even if *Pickrell* were applicable," they rebutted it with Dr. Davis' causation testimony. We disagree.

A defendant may rebut the *Pickrell* presumption by "com[ing] forward with some evidence that death occurred as a result of a noncompensable cause; otherwise, the claimant prevails." *Pickrell*, 322 N.C. at 371, 368 S.E.2d at 586. Our review of the Commission's findings regarding whether defendants have rebutted the *Pickrell* presumption is limited to determining whether "any competent evidence in the record . . . support[s] the findings of the Commission[.]" *Horton v. Powell Plumbing & Heating of N.C., Inc.*, 135 N.C. App. 211, 216, 519 S.E.2d 550, 553 (1999) (citation omitted). If competent evidence supports the Commission's findings, "we are bound by [the Commission's] determination." *Id.* (citation omitted). Furthermore, "[c]ontradictions in . . . testimony go to its weight, and the Commission may properly refuse to believe particular evidence." *Harrell v. J. P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980).

The Commission's findings that Dr. Davis "acknowledged that heat can be a precipitating cause of a cardiac event" and that Dr. Davis "also acknowledged that the pre-existing coronary artery disease would not, by itself, have caused decedent's death, but that there had to be a 'malignant dysrhythmia' " support the Commission's conclusion that "an unknown precipitating cause for the dysrhythmia . . . resulted in decedent's death[,]" "[d]ecedent's pre-existing coronary artery disease did not by itself cause decedent's death[,]" and "defendants have not successfully rebutted the presumption by coming

forward with sufficient, credible evidence that death occurred as a result of a non-compensable cause." Because our review is limited to determining whether any competent evidence supports the Commission's findings, and whether those findings support the Commission's conclusions, *see Madison*, 165 N.C. App. at 149, 598 S.E.2d at 200, we hold that the Commission did not err by concluding that defendants failed to rebut the *Pickrell* presumption.

Furthermore, although defendants challenge findings 27 and 29 by arguing that the opinions of plaintiff's expert witness, Dr. Holt, were speculative and were therefore an improper basis for the Commission's conclusions regarding the *Pickrell* presumption, we disagree. To the extent Dr. Holt's opinion—derived from his review of the autopsy report, decedent's medical records, and various reports of the incident—served as a basis for the Commission's findings and conclusions regarding the *Pickrell* presumption, we believe it was sufficient "to take the case out of the realm of conjecture and remote possibility[.]" *Id.* at 150-51, 598 S.E.2d at 200. We are also unpersuaded by defendants' argument that finding 33 was outside the scope of the Commission's authority on remand because we believe the Commission "strictly follow[ed] this Court's mandate without variation," *see Crump v. Independence Nissan*, 112 N.C. App. 587, 590, 436 S.E.2d 589, 592 (1993), by making findings and conclusions addressing the *Pickrell* presumption.

II & III

[2] Because we affirm the Commission's award of death benefits on the ground that the Commission properly applied the *Pickrell* presumption, we do not reach defendants' second issue challenging the Commission's alternative conclusion that decedent's death was caused by extreme work conditions. By affirming the Commission's opinion and award, we also hold that plaintiff's cross-assignment of error is moot. *See Roset-Eredia v. F.W. Dellinger, Inc.*, 190 N.C. App. 520, 531, 660 S.E.2d 592, 600 (2008) (deeming plaintiff's cross-assignments of error moot after affirming the Commission's award).

Affirmed.

Judges ELMORE and ERVIN concur.

THOMAS MICHAEL KELLEY, PLAINTIFF v. CITIFINANCIAL SERVICES, INC. AND ERIC MOSER, TRUSTEE, DEFENDANTS

No. COA10-155

(Filed 20 July 2010)

1. Mortgages and Deeds of Trust— action to quiet title—motion to dismiss—sufficiency of evidence—cross-indexing of lis pendens provides notice

The trial court erred by granting defendants' motion to dismiss plaintiff's action to quiet title. Plaintiff's complaint established that he was the owner of the pertinent property and that defendants asserted an interest, through an invalid deed of trust, to the same land. Although the cross-indexing of a *lis pendens* does not, like an injunction, prevent transfers of or encumbrances on land, it makes clear that a subsequent purchaser or encumbrancer takes action knowledgeable of certain risks.

2. Unfair Trade Practices— motion to dismiss—sufficiency of evidence—refusal to cancel deed of trust

The trial court did not err by granting defendants' motion to dismiss plaintiff's unfair and deceptive trade practices claim. A defendant relying on a reasonable belief in the legal sufficiency of an interest in real property is not engaged in unscrupulous practices designed to deceive others with an interest in the same property.

3. Mortgages and Deeds of Trust— action to quiet title—erroneous grant of partial summary judgment—invalid cloud on title

The trial court erred by denying plaintiff's motion for partial summary judgment regarding a claim to quiet title in the same order dismissing all of plaintiff's claims. The consent judgment in the underlying suit, which was binding on defendants, made clear that defendants' deed of trust operated as an invalid cloud on plaintiff's title to the pertinent property. The claim was remanded for entry of judgment in favor of plaintiff.

Appeal by Defendants from order filed 15 December 2009 by Judge Theodore S. Royster, Jr., in Superior Court, Davie County. Heard in the Court of Appeals 8 June 2010.

Reginald F. Combs, P.C., by Reginald F. Combs, for plaintiff-appellant.

Robinson Bradshaw & Hinson, P.A., by Robert E. Harrington and Heyward H. Bouknight, III, for defendants-appellees.

WYNN, Judge.

When a notice of *lis pendens* is properly cross-indexed, indicating that title to certain property is disputed in pending litigation, subsequent encumbrancers of the subject property will be bound by the judgment resolving the title dispute.[1] Here, Plaintiff Thomas Michael Kelley filed a notice of *lis pendens* indicating the pendency of an action instituted against Francesca Agnoli to recover title to certain real property. Agnoli later deeded the property in trust to Defendant Eric Moser as trustee for the benefit of Defendant CitiFinancial Services. The action was resolved by consent judgment in favor of Plaintiff. Because Defendants are bound by that judgment, we reverse the trial court's grant of Defendants' motion to dismiss and remand for entry of judgment in favor of Plaintiff.

On 4 May 2007, Plaintiff acquired certain real property located in Bermuda Run, Davie County ("the Bermuda Run property"). On 6 August 2007, Plaintiff conveyed the Bermuda Run property to Francesca Agnoli ("Agnoli").

On 21 November 2007, Plaintiff commenced a civil action in Forsyth County alleging that he had been fraudulently induced to convey title to the Bermuda Run property to Agnoli. Plaintiff sought court action forcing Agnoli to return the property to him.[2] On 28 November 2007, Plaintiff filed a notice of *lis pendens* with the Clerk of Superior Court in Davie County.[3] The notice of *lis pendens* specifically referenced the pending litigation between Plaintiff and Agnoli

---

1. *See* N.C. Gen. Stat. § 1-118 (2009).

2. Although the complaint in the Forsyth County action is not included in the record on appeal, the consent judgment issued in that case indicates that Plaintiff "commenced [that] action on November 21, 2007, with the filing of a Complaint alleging fraud, constructive trust, resulting trust, and constructive fraud and seeking the return of [the Bermuda Run property], an engagement ring, and a savings account and seeking compensatory and punitive damages."

3. "Notice of pending litigation must be filed with the clerk of the superior court of each county in which any part of the real estate is located . . . in order to be effective against bona fide purchasers or lien creditors with respect to the real property located in such county." N.C. Gen. Stat. § 1-116(d) (2009).

and stated that Plaintiff sought the transfer of title to the Bermuda Run property.

On 24 March 2008, Agnoli deeded the Bermuda Run property in trust to Defendant Eric Moser as trustee for the benefit of Defendant CitiFinancial Services.

On 13 October 2008, the litigation between Plaintiff and Agnoli concluded when Superior Court Judge Cressie Thigpen entered a consent judgment resolving the dispute. The consent judgment ordered the following:

> 2. On or before November 7, 2008, [Agnoli] will deliver to plaintiff a quitclaim deed to plaintiff to the [Bermuda Run property].
>
> 3. [Agnoli] is solely responsible for and will hold plaintiff harmless on every encumberance placed on the house by [Agnoli]. This includes, but is not limited to, the deed of trust of Citifinancial . . . .
>
> 4. Plaintiff is the sole owner of the house; and [Agnoli] is hereby divested of any right, title, or interest in the house.

Agnoli complied with the Consent Judgment and, on 10 October 2008, conveyed to Plaintiff a quitclaim deed to the Bermuda Run property.

Subsequently, Plaintiff, through his agent, contacted Defendants and requested that they cancel the deed of trust, as it constituted a cloud on his title to the Bermuda Run property. Defendants did not comply with this request.

On 31 July 2009, Plaintiff filed the instant action. The complaint sought "a judgment of the Court establishing that Plaintiff's title to the [Bermuda Run property] is free and clear of the lien of the Deed of Trust" and a "permanent injunction ordering Defendants to cancel the Deed of Trust of record, pursuant to N.C. Gen. Stat. § 41-10." The complaint also alleged that Defendants had engaged in unfair and deceptive trade practices.

On 13 October 2009, Defendants filed a motion pursuant to Rule 12(b)(6) to dismiss Plaintiff's claims for failure to state a claim upon which relief can be granted. On 12 November 2009, Plaintiff filed a motion for partial summary judgment as to his claim to quiet title. On 7 December 2009, Superior Court Judge Theodore S. Royster, Jr., heard arguments as to both motions. By order filed 15 December 2009, Judge Royster denied Plaintiff's motion for partial summary

judgment and granted Defendants' motion to dismiss the action. Plaintiff timely filed notice of appeal from the order of dismissal, arguing that the trial court erred both by (I) granting Defendants' motion to dismiss and by (II) denying Plaintiff's motion for partial summary judgment.

I. Motion to Dismiss

Plaintiff first contends that the trial court erred by granting Defendants' 12(b)(6) motion. When considering an appeal from a motion to dismiss, this Court conducts a *de novo* review. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

> The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleadings, when taken as true, are legally sufficient to satisfy the elements of at least some legally recognized claim. In ruling upon a Rule 12(b)(6) motion, the trial court should liberally construe the complaint and should not dismiss the action unless it appears to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim.

Arroyo v. Scottie's Professional Window Cleaning, 120 N.C. App. 154, 158, 461 S.E.2d 13, 16 (1995) (citation omitted), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996).

A. Action to quiet title

[1] Plaintiff argues that the trial court erred in granting Defendants' motion to dismiss because his complaint stated a *prima facie* case for removing a cloud on the title to the Bermuda Run property.[4] "In order to establish a *prima facie* case for removing a cloud on title, a plaintiff must meet two requirements: (1) plaintiff must own the land in controversy, or have some estate or interest in it; and (2) defendant must assert some claim in the land which is adverse to plaintiff's title, estate or interest." *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 461, 490 S.E.2d 593, 597 (1997) (citing *Wells v. Clayton*, 236 N.C. 102, 107, 72 S.E.2d 16, 20 (1952)), *disc. review denied*, 347 N.C.

4. *See* N.C. Gen. Stat. § 41-10 (2009) ("An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims[.]"). Prior to the enactment of this statute, suits to remove a cloud from title were actions in equity. However, "[a]ny action that could have been brought under the old equitable proceeding to remove a cloud upon title may now be brought under the provision of G.S. 41-10." *York v. Newman*, 2 N.C. App. 484, 488, 163 S.E.2d 282, 285 (1968).

574, 498 S.E.2d 380 (1998). The purpose of the statute granting a cause of action to quiet title is to "free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion . . . ." *Development Co., Inc. v. Phillips*, 278 N.C. 69, 77, 178 S.E.2d 813, 818 (1971) (quoting *Christman v. Hilliard*, 167 N.C. 4, 8, 82 S.E. 949, 951 (1914)).

In his complaint, Plaintiff asserted that he owned the Bermuda Run property and that the deed of trust held by Defendant Moser for the benefit of Defendant CitiFinancial Services constituted a cloud on Plaintiff's title.[5] An invalid deed of trust would constitute an interest in real property adverse to the interest of the property owner.

> A deed of trust is a three-party arrangement in which the borrower conveys legal title to real property to a third party trustee to hold for the benefit of the lender until repayment of the loan. . . . When the loan is repaid, the trustee cancels the deed of trust, restoring legal title to the borrower, who at all times retains equitable title in the property.

Skinner v. Preferred Credit, 361 N.C. 114, 120-21, 638 S.E.2d 203, 209 (2006) (citations omitted), *reh'g denied*, 361 N.C. 371, 643 S.E.2d 591 (2007). Thus, if the deed of trust were invalid, the rightful property owner would be deprived of proper legal title to the property at least until the underlying loan was repaid.

Defendants contend that the consent judgment in the case between Plaintiff and Agnoli as well as the quitclaim deed conveying the land from Agnoli to Plaintiff (both of which were attached to Plaintiff's complaint in the instant case) reveal facts entitling them to dismissal of the action. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) ("A complaint may be dismissed pursuant to Rule 12(b)(6) if . . . facts are disclosed which will necessarily defeat the claim."). Specifically, Defendants maintain that "[b]ecause the Consent Judgment and the quitclaim deed establish as a matter of law that Agnoli owned the Bermuda Run Property on 24 March 2008 when she granted the deed of trust to CitiFinancial, the Superior Court properly dismissed Appellant's Complaint . . . ."

---

5. " 'A cloud upon title is, in itself, a title or encumbrance, apparently valid, but in fact invalid. It is something which, nothing else being shown, constitutes an encumbrance upon it or a defect in it—something that shows *prima facie* the right of a third party either to the whole or some interest in it, or to a lien upon it.' " *York*, 2 N.C. App. at 488, 163 S.E.2d at 285 (quoting *McArthur v. Griffith*, 147 N.C. 545, 549, 61 S.E. 519, 521 (1908)).

Essentially, Defendants argue that if Agnoli was the exclusive owner of the property at the time of the conveyance of the deed of trust then she had the right to subject the property to the encumbrance. Therefore, Defendants argue, when the trial court ordered a transfer of a quitclaim deed from Agnoli to Plaintiff, the title transferred was subject to the deed of trust.

This argument fails to recognize the importance of the notice of *lis pendens* filed by Plaintiff prior to the conveyance of the deed of trust. As generally stated, under the doctrine of *lis pendens*,

> When a person buys property pending an action of which he has notice, actual or presumed, in which the title to it is in issue, from one of the parties to the action, he is bound by the judgment in the action, just as the party from whom he bought would have been.

Hill v. Memorial Park, 304 N.C. 159, 164, 282 S.E.2d 779, 782 (1981) (quoting *Rollins v. Henry*, 78 N.C. 342, 351 (1878)); *see also* N.C. Gen. Stat. § 1-118 (2009) (discussing the effect of the cross-indexing of a notice of *lis pendens* on a subsequent "purchaser or incumbrancer of the property"). The judgment similarly binds grantees of a deed of trust secured during the pendency of litigation.

Although the cross-indexing of the *lis pendens* does not, like an injunction, prevent transfers of or encumbrances on land, it makes clear that a subsequent purchaser or encumbrancer takes action knowledgeable of certain risks. The applicable statute clarifies that once the notice of *lis pendens* is cross-indexed, it serves as

> constructive notice to a purchaser *or incumbrancer* of the property affected thereby; and every person whose conveyance *or incumbrance* is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action.

N.C. Gen. Stat. § 1-118 (2009) (emphasis added). Particularly relevant to this case, when a loan is issued and secured by the right to foreclose against property which the lendor knows or should know to be the subject of litigation, the risk is that the loan will be unsecured pending the outcome of the litigation. Indeed,

> [t]he sole object of lis pendens is to keep the subject in controversy within the power of the court until final decree and to make it possible for courts to execute their judgments. It gives

> notice of a claim of which otherwise a prospective purchaser would be ignorant. All property which is the subject matter of suit under the doctrine of lis pendens is *res litigiosa* and is in *custodia legis*.

Insurance Co. v. Knox, 220 N.C. 725, 727, 18 S.E.2d 436, 438 (1942) (emphasis omitted). The theory espoused by Defendants would permit Agnoli to offer her interest in the Bermuda Run property as security for a loan at any time preceding divestment of her title to the property and then permit that security instrument to bind Agnoli's opponent in litigation. This would render the trial court incapable of executing its full judgment (i.e., transferring the land, in its unencumbered state, back to its rightful owner, Plaintiff). Instead, upon the cross-indexing of the *lis pendens*, the property, although freely assignable, was subject, as a result of the judgment of the trial court, to a return to Plaintiff free of any encumbrances added subsequent to the cross-indexing.

In the instant case, Defendants were on notice, prior to the execution of the deed of trust, that the title to the Bermuda Run Property was subject to pending litigation. Plaintiff properly filed a notice of *lis pendens* on 28 November 2007 with the Clerk of Superior Court in Davie County. The notice of *lis pendens* bears the file number 07 M 142 as indexed in the office of the Clerk of Superior Court of Davie County. *See* N.C. Gen. Stat. § 1-117 (2009) ("Every notice of pending litigation filed under this Article shall be cross-indexed by the clerk of the superior court in a record, called the "Record of Lis Pendens[.]"). The cross-indexing of the notice of *lis pendens* placed Defendants on constructive notice of the pendency of the litigation. N.C. Gen. Stat. § 1-118 (2009).

Moreover, there is some evidence in the record that the Defendants had *actual* notice of pendency of litigation between Plaintiff and Agnoli. Defendants' interest was protected by a title insurance policy issued by First American Title Insurance Company. Notably, the policy specifically exempted coverage resulting from loss or damage due to the "Lis Pendens against Francesca Agnoli by Thomas Michael Kelley, in the amount (not given), filed 11/28/2007 in, ID number D7M142 in Davie County Records." "[W]here one buys from a litigant with full notice or knowledge of the suit and of its nature and purpose and the specific property to be affected, he is concluded or his purchase will be held ineffective and fraudulent as to decree rendered in the cause and the rights thereby established." *Morris v. Basnight*, 179 N.C. 298, 303, 102 S.E. 389, 392 (1920).

Because Defendants fail to recognize the operation of the doctrine of *lis pendens*, their argument on appeal also fails. Furthermore, because a notice of *lis pendens* was cross-indexed prior to the conveyance of the deed of trust, Defendants are bound by the consent judgment. *See* N.C. Gen. Stat. § 1-118 (2009); *see also Johnson v. Brown*, 71 N.C. App. 660, 323 S.E.2d 389 (1984) (holding that mortgagee would be bound by judicial determination of mortgagor's title because *lis pendens* evidencing challenge of conveyance to mortgagor was indexed prior to conveyance to mortgagee and any actual or constructive notice of pending litigation would bind mortgagee).

The language of the consent judgment made clear that the property was to be returned to Plaintiff.[6] It further stated that the deed of trust executed by Agnoli constituted a legal obligation that was not binding on Plaintiff and could not legally encumber the Bermuda Run property.[7]

In short, Plaintiff's complaint established that he was the owner of the Bermuda Run property and that Defendants asserted an interest, through an invalid deed of trust, in the same land. These averments were sufficient to state a cause of action to quiet title, and the trial court erred by granting Defendants' motion to dismiss with respect to that claim. *Wetherington*, 27 N.C. App. at 461, 490 S.E.2d at 597.

B. Action for unfair and deceptive trade practices

[2] Plaintiff further contends that the trial court erred by granting Defendants' motion to dismiss because he stated a *prima facie* case against Defendants for unfair and deceptive trade practices. "In order to establish a *prima facie* claim for unfair [or deceptive] trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001).

Even assuming the truth of the allegations in Plaintiff's complaint, he has failed to state therein a *prima facie* case for unfair or deceptive trade practices.

---

6. "Plaintiff is the sole owner of the house; and, except as provided in [a provision allowing Agnoli to stay in the house until 7 November 2008], defendant is hereby divested of any right, title, or interest in the house."

7. "Defendant is solely responsible for and will hold plaintiff harmless on every encumbrance placed on the house by defendant. This includes, but is not limited to, the deed of trust of Citifinancial . . . ."

> A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive. The determination as to whether an act is unfair or deceptive is a question of law for the court. . . . Moreover, some type of *egregious* or *aggravating* circumstances must be alleged and proved before the Act's provisions may take effect.

Id. at 656-57, 548 S.E.2d at 711 (citations and quotation omitted). The complaint states that "Defendants have failed and refused to cancel or otherwise remove the Deed of Trust of record." There was no indication in the complaint or supporting documents that Defendants refused to cancel the deed of trust in an attempt to deceive Plaintiff or other consumers.[8] Nor do the allegations in the complaint establish that Defendants acted unethically by refusing to voluntarily cancel the deed of trust. Rather, the complaint itself intimates that Defendants believed that they had a valid deed of trust, as evidenced by belief in the protection afforded by their title insurance as well as their understanding that there was no need to remove the encumbrance without payment of an amount sufficient to satisfy the debt secured by the Bermuda Run property. Furthermore, Defendants' answer vigorously contends that the deed of trust was valid. We are disinclined to hold that a Defendant relying on a belief in the legal sufficiency of an interest in real property is somehow engaging in unscrupulous practices designed to deceive others with an interest in the same property. *See Branch Banking & Trust Co. v. Columbian Peanut Co.*, 649 F. Supp. 1116, 1121 (E.D.N.C., 1986) ("To assert in good faith a claim predicated on an erroneous interpretation of the law is not an unfair act . . . as the remedy therfor [sic] lies in the law itself, i.e., such an erroneous view will not prevail."). As such, we hold that the trial court properly granted Defendants' motion to dismiss Plaintiff's action for unfair or deceptive trade practices.

II. Motion for Partial Summary Judgment

[3] Plaintiff's final argument on appeal is that the trial court erred by denying his motion for partial summary judgment as to the claim to quiet title.

---

8. The mere fact that the complaint alleged that Defendants "deceptively maintained the Deed of Trust on the public record" is insufficient to establish a deceptive trade practice on the part of Defendants. Indeed, there was no indication that the retention of the deed of trust was intended to deceive, as demonstrated by the fact that representatives of both Plaintiff and Defendants openly discussed the Defendants' refusal to cancel the deed of trust.

Ordinarily, the denial of a motion for summary judgment is an interlocutory order which is not appealable. *See Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 437, 477 S.E.2d 179, 180 (1996). An interlocutory order is one that "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). However, in this case, the order denying Plaintiff's motion for partial summary judgment was the same order dismissing all of Plaintiff's claims. "[T]he allowance of a motion to dismiss is final, and of course appealable." *Clements v. R. R.*, 179 N.C. 225, 226, 102 S.E. 399, 400 (1920). Thus, although Plaintiff's motion was one for summary judgment, the denial thereof, which coincided with the final judgment in the case, is properly subject to appellate review. *See Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 272, 257 S.E.2d 50, 59 ("Ordinarily, the denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken, but the moving party is free to preserve his exception for consideration on appeal from the final judgment."), *disc. review denied*, 298 N.C. 296, 259 S.E.2d 301 (1979); *see also Estes v. Comstock Homebuilding Companies*, 195 N.C. App. 536, 593 n. 3, 673 S.E.2d 399, 401 n.3 ("An appeal from an order denying partial summary judgment for defendant is typically interlocutory, however, a final determination as to liability and damages was reached in this case, therefore this appeal is not interlocutory."), *disc. review denied*, 363 N.C. 373, 678 S.E.2d 238 (2009).

We review the denial of a motion for summary judgment *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). 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 essential facts are undisputed and reproduced in greater detail above. In short, Plaintiff filed a suit affecting the title to the Bermuda Run property and subsequently filed a notice of *lis pendens*. The notice of *lis pendens*, when cross-indexed, served as constructive notice to Defendants that the validity of the deed of trust thereafter conveyed to them was subject to the judgment in the underlying suit.

The consent judgment in the underlying suit, which was binding on Defendants, makes clear that Defendants' deed of trust operated as an invalid cloud on Plaintiff's title to the Bermuda Run property. The judgment divested Agnoli of any "right, title, or interest" in the Bermuda Run property and stated that "Plaintiff is the sole owner of the house." The judgment further stated that "[Agnoli] is solely responsible for and will hold plaintiff harmless on every encumbrance placed on the house by [Agnoli]."

In light of these undisputed facts, we hold that the trial court erred when it denied Plaintiff's motion for partial summary judgment. As such, we remand to the trial court for entry of judgment in favor of Plaintiff as to his claim to quiet title.

Reversed and Remanded.

Judges ROBERT C. HUNTER and CALABRIA concur.

STATE OF NORTH CAROLINA v. CURTIS HAIRE

No. COA10-37

(Filed 20 July 2010)

1. Criminal Law— instructions—self-defense—plain error analysis

The trial court did not commit plain error, or error, in an assault with a deadly weapon inflicting serious injury case by its instruction on self-defense. The instruction, considered in context, revealed that the burden was upon the State to satisfy the jury beyond a reasonable doubt that defendant did not act in self-defense and the circumstances under which the jury could return a verdict of not guilty by reason of self-defense.

2. Jury— request for production of written copy of instructions—trial court discretion to deny request

The trial court properly exercised its discretion in declining to produce a written copy of the jury instructions when requested by the jury. Further, no party requested the instructions be provided.

Appeal by defendant from judgment entered 14 August 2009 by Judge Tanya Wallace in Richmond County Superior Court. Heard in the Court of Appeals 9 June 2010.

Attorney General Roy Cooper, by Assistant Attorney General Allison A. Angell, for plaintiff appellee.

Leslie C. Rawls for defendant appellant.

HUNTER, JR., Robert N., Judge.

Curtis Haire ("defendant") appeals his conviction of assault with a deadly weapon inflicting serious injury. On appeal, defendant asserts that the trial court (1) committed plain error by giving the jury an erroneous self-defense instruction and (2) abused its discretion by declining to tender a written copy of the jury instructions to jurors when asked by the jury to do so. After review, we affirm the judgment of the trial court and conclude that the court did not commit plain error or abuse its discretion.

I. Factual Background

On 9 March 2008, defendant was involved in a physical altercation with Vinh Michael Gazoo ("Gazoo"). During the altercation, Gazoo was stabbed numerous times, causing significant bodily injury.

On 21 April 2008, defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury. Defendant entered a plea of not guilty and was tried before a jury on 14 August 2009.

At trial, the State's evidence tended to show the following: Gazoo testified that he was spending the night at the residence of Shannon Lentz ("Lentz") located on Loch Haven Road, Rockingham, North Carolina. Lentz is defendant's former girlfriend.

On the morning of 9 March 2008, Gazoo, Lentz, and her children were playing softball in the front yard at Lentz's home. Gazoo was hitting softballs to the children and had a bat in his hand. As they were playing, defendant drove up to the house. Gazoo heard tires squeal and saw doughnut configurations in the road. Gazoo told Lentz to take the children into the house in case a problem arose.

As defendant got out of the car, Gazoo walked toward defendant and tossed the bat about twenty-five feet to his left across the driveway. At this time, Gazoo noticed that defendant was holding a knife

with a black blade. The two men exchanged words and Gazoo told defendant that Lentz did not want him at her house, and if defendant had a problem, he could come see Gazoo at his house. Gazoo also told defendant to leave the car he had driven to the scene because it belonged to Lentz. Defendant responded by saying he would not leave the car, but instead would contact the Sheriff's Department to help him recover his belongings which were still at Lentz's house. Defendant then muttered something that was inaudible to Gazoo and started walking back towards the vehicle. Then defendant said, "I'll be seeing you." At this point, Gazoo grabbed the bat from the yard and walked toward defendant. Gazoo then heard the sound of defendant's car door and turned his back to defendant. Gazoo took several steps towards the house. An altercation ensued and lasted several seconds.

Lentz testified that Gazoo grabbed the bat from the yard and approached defendant. Lentz testified further that as the men were fighting, Gazoo swung and hit defendant with the bat in his head and left arm and that the bat bounced off defendant's head and flew away.

Gazoo refutes this contention and said that he felt "three punches" to his left shoulder. Gazoo stumbled and leaned forward where he felt another large blow to the middle of his back. This blow dislodged the bat from Gazoo's hand, whereupon Gazoo swung his fist at defendant. Gazoo then saw defendant pull the knife from Gazoo's rib cage. Gazoo grabbed defendant and pulled him to the ground where they wrestled for control of the knife. This struggle caused two additional cuts to Gazoo's ear that nearly severed the ear. At this time, Gazoo wrapped his legs around defendant's arm, rolled his body around, and kicked defendant to free himself. Defendant returned to the vehicle and left the scene. Gazoo stood up and saw that blood was spraying from his body. Lentz's neighbor ran over and told Gazoo to lie down beside the road.

EMS arrived and paramedic Michael Sharpe ("Sharpe") observed Gazoo lying face down on the ground with several stab wounds to his back and left side. Gazoo told Sharpe he had been stabbed from behind. Gazoo was transported to the emergency room at Richmond Memorial Hospital. At the hospital, Gazoo was alert and conscious as x-rays and a CAT scan were performed. Gazoo was then airlifted to Charlotte to receive treatment at Carolinas Medical Center where he was admitted for four days. There, Gazoo told a nurse, Joy Austin, that he had been stabbed from behind. Gazoo's injuries included two

punctured lungs, a spleen that was cut in half, as well as a punctured trachea. Gazoo also suffered nerve damage throughout his body that causes him to tremble. While at the hospital, Gazoo was also diagnosed with post traumatic stress disorder, paranoid schizophrenia, and bipolar disorder. In addition, his thyroid is not functioning properly and he requires daily medication to manage his injuries.

After leaving the scene, defendant surrendered himself to the Sheriff's office. Defendant was interviewed by Detective Jay Childers ("Childers") and was advised of his *Miranda* rights. Defendant signed a waiver and gave a written statement to Childers detailing his recollection of the fight. Defendant subsequently provided consent for a search of his vehicle. The knife was recovered from defendant.

At trial, defendant took the stand and asserted that he acted in self-defense. Defendant testified that the physical altercation started when Gazoo came at him with the bat. Furthermore, defendant testified that he put his hands up and told Gazoo he did not want to fight.

At the conclusion of trial, the judge instructed the jury on all of the substantive elements of the case and thoroughly explained the law. The judge also gave the pattern jury instruction on self-defense pursuant to N.C.P.I., Crim. 308.45 (2008). The judge instructed the jury as follows:

> If you find from the evidence beyond a reasonable doubt that the defendant assaulted the victim, but not with a deadly weapon or other deadly force, and the circumstances would create a reasonable belief in the mind of ordinary firmness that the action was necessary or appeared to be necessary to protect that person from bodily injury or offensive physical contact, and the circumstances did create such a belief in the defendant's mind at the time the defendant acted, the assault would be justified by self defense even though the defendant was not thereby put in actual danger of death or great bodily harm.

After being instructed by the judge, the jury found defendant guilty of the lesser included charge of assault with a deadly weapon inflicting serious injury, and the judge sentenced defendant to 20-33 months' imprisonment. Defendant gave oral notice of appeal in open court.

Defendant asserts the following assignments of error on appeal: First, he argues that the trial court committed plain error in its jury instructions regarding self-defense. With regard to his first assign-

ment of error, defendant specifically contends that the trial court's jury instructions erroneously suggested that defendant must prove self-defense beyond a reasonable doubt, and that the jury could only find that defendant acted in perfect self-defense if he did not use a deadly weapon. Second, defendant argues that the trial court abused its discretion when it declined the jury's request for a written copy of the jury instructions.

II. Jury Instructions Regarding Self-Defense

[1] Defendant contends that the jury instructions given by the trial court were misleading and suggested that defendant had to prove self-defense beyond a reasonable doubt. After reviewing the evidence and the specific jury instruction, we conclude that there was no plain error that would warrant a new trial.

In the case at the bar, defense counsel failed to request a modified jury instruction at trial and lodged no objection to the pattern instruction. Therefore, as requested by defendant on appeal, this Court must review the issue for plain error. *See State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005). Under the plain error standard, defendant must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict. N.C. Gen. Stat. § 15A-1443(a) (2009); *State v. Lucas*, 353 N.C. 568, 584, 548 S.E.2d 712, 723 (2001). The error in the instructions must be " 'so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him.' " *Id.* (quoting *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993)). " '[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, 661, 300 S.E.2d 375, 378 (1983) (citation omitted). In deciding whether a defect in the jury instruction constitutes "plain error," the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt. *Id.*

In this case, defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. The jury was instructed on this charge and its lesser included offense, assault with a deadly weapon inflicting serious injury. In addition, during the charge conference, the trial court reviewed the instruction on self-defense with both attorneys and instructed the jury accordingly. The court used the pattern jury instructions for self-defense that accompany an

assault using deadly force. N.C.P.I., Crim. 308.45. Based on the court's instructions, defendant was convicted of assault with a deadly weapon inflicting serious injury.

Defendant asserts that the pattern jury instructions should have been modified to accommodate the specific facts of his case. Defendant further contends that absent that specific modification, the pattern instructions misled the jury. After review, we hold that defendant's contention is not supported by the evidence in the record.

The court instructed the jury as follows:

> If you find from the evidence beyond a reasonable doubt that the defendant assaulted the victim, but not with a deadly weapon or other deadly force, and the circumstances would create a reasonable belief in the mind of ordinary firmness that the action was necessary or appeared to be necessary to protect that person from bodily injury or offensive physical contact, and the circumstances did create such a belief in the defendant's mind at the time the defendant acted, the assault would be justified by self defense even though the defendant was not thereby put in actual danger of death or great bodily harm.

Defendant admits that the specific language in the pattern instruction was given pursuant to N.C.P.I., Crim. 308.45. (2003). It is also important to note that a trial court's use of pattern jury instructions is encouraged, but not required. *State v. Morgan*, 359 N.C. 131, 169, 604 S.E.2d 886, 909 (2004).

The trial judge has wide discretion in the manner of which issues are presented to the jury. *State v. Harris*, 306 N.C. 724, 728, 295 S.E.2d 391, 393 (1982). If clarification of the instructions was an issue, defendant could have submitted a request that the trial court give the jury a special instruction pursuant to N.C. Gen. Stat. § 15A-1231(a) (2009). The record clearly shows that defendant did not submit special jury instructions on self-defense nor did defendant object and request any changes to the charge after the court instructed the jury.

Defendant also argues that the self-defense instructions given by the trial court were misleading. Long-standing precedent in this Court explains that the charge to the jury will be construed contextually, and segregated portions will not be viewed as error when the charge as a whole is free from objection. *State v. Reese*, 31 N.C. App. 575, 230 S.E.2d 213 (1976). In the present case, the trial judge fully instructed

the jury first on the issue of self-defense and then on all of the elements of the crime and its lesser included offenses.

After the elements of each count were described by the judge an admonition regarding self-defense properly allocating the burden of proof was given to the jury. For example, the judge instructed the jury on the following issues:

> Again, if you are satisfied beyond a reasonable doubt that the defendant committed an assault with a deadly weapon inflicting serious injury, you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that the defendant did not reasonably believe that the assault was necessary, or appeared to be necessary to protect the defendant from bodily injury or offensive contact; or that the defendant used excessive force or was the aggressor.

Defendant contends that the following portion of the jury charge given by the judge contained in the final section of the charge taken from the pattern jury instructions would have been misleading to the jury.

> If you find from the evidence beyond a reasonable doubt that the defendant assaulted the victim, but not with a deadly weapon or other deadly force, and the circumstances would create a reasonable belief in the mind of ordinary firmness that the action was necessary or appeared to be necessary to protect that person from bodily injury or offensive physical contact, and the circumstances did create such a belief in the defendant's mind at the time the defendant acted, the assault would be justified by self defense even though the defendant was not thereby put in actual danger of death or great bodily harm.

Defendant relies upon *State v. McArthur*, 186 N.C. App. 373, 651 S.E.2d 256 (2007), for the proposition that the above-quoted language literally read incorrectly shifts the burden of proving self-defense to defendant. *McArthur* does caution judges as follows: "We urge trial judges to take care in using the pattern self-defense instruction and edit it in order to ensure that the burden of proof is correctly placed on the State throughout the instructions" *Id.* at 381, 651 S.E.2d at 261.

While we agree with this *dicta* in *McArthur* that the wording of this instruction is confusing, the trial court properly edited the pattern instructions by repeatedly expressing to the jury, that the State had the burden of proving beyond a reasonable doubt that defend-

ant's actions were not in self-defense. When the trial court's instructions to the jury are considered in context as a whole, "we think the jury clearly understood that the burden was upon the State to satisfy it beyond a reasonable doubt that defendant did not act in self-defense and clearly understood the circumstances under which it should return a verdict of not guilty by reason of self-defense." *State v. Gaines*, 283 N.C. 33, 43, 194 S.E.2d 839, 846 (1973). Consequently, we conclude that the trial court committed no error, much less no plain error, in its jury instructions on self-defense.

III. Jurors' Request to Review Jury Instructions

[2] Defendant also contends that the trial court abused its discretion when it declined to tender a written copy of the jury instructions after being asked by the jury to do so. We disagree.

This issue is subject to the abuse of discretion standard of review. In order to show that the trial court abused its discretion, defendant must demonstrate that the court's finding could not have been the result of a reasoned decision. *See, e.g., State v. Johnson*, 346 N.C. 119, 484 S.E.2d 372 (1997); *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

Here, there is no evidence in the record that specifically demonstrates that the court did not come to this decision after reasoned thought and careful consideration. During its deliberations, the jury verbally requested a copy of the jury instructions. Regarding this request, the trial judge informed both attorneys outside the presence of the jury: "I do not have a copy of the instructions and I don't know if that's really a good idea." In response, both attorneys stated that they believed the court was not authorized to give a copy of instructions to the jury.

Moreover, as a precaution, the trial judge requested that the jury put their requests and questions in writing, at which point the jury sent the trial judge a note asking for the written instructions. The trial court then informed the attorneys outside the presence of the jury that "[t]he Court does not have a copy [of the jury instructions], and will be unable to deliver a copy of the instructions." When the jury returned to the courtroom, the trial judge stated, "[i]n my discretion, I am not supplying a copy of the instructions."

A trial court has inherent authority, *in its discretion* to submit its instructions on the law to the jury in writing. *State v. Hester*, 111 N.C. App. 110, 432 S.E.2d 171 (1993). Because no party requested the

instructions be provided, we conclude that the trial court properly exercised its inherent authority and did not abuse its discretion.

IV. Conclusion

For the reasons stated herein, we hold that the trial court did not err in its jury instructions regarding self-defense. Moreover, the trial court properly exercised its discretion in declining to produce a copy of the jury instructions when requested by the jury. For the reasons stated herein, we conclude that defendant received a fair trial free of error.

No error.

Judges STEELMAN and STEPHENS concur.

JAMES SMITH WHITLOCK, III, PLAINTIFF v. TRIANGLE GRADING CONTRACTORS DEVELOPMENT, INC., AND MARIO ERNESTO LINARES, DEFENDANTS

No. COA09-1557

(Filed 20 July 2010)

1. Appeal and Error— preservation of issues—failure to include notice of appeal

The Court of Appeals lacked jurisdiction to review the trial court's order denying plaintiff's motion to strike an affidavit submitted by defendants on 4 May 2009 in support of their motion for summary judgment because the record on appeal did not include a notice of appeal from the court's order denying plaintiff's motion as required by N.C. R. App. P. 3. Further, there was no prejudicial error because virtually identical evidence remained in the record in the form of the 11 March 2009 affidavit.

2. Collateral Estoppel and Res Judicata— preclusion defense—negligence—prior arbitration decision between different parties

The trial court erred by granting defendants' motion for summary judgment on the basis that plaintiff's present negligence action was barred by a prior arbitration decision. Defendants failed to point to any evidence suggesting that plaintiff was a party to the pertinent arbitration agreement or that he sought to benefit directly from the arbitration.

Appeal by plaintiff from orders entered 16 June 2009 and 29 July 2009 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 28 April 2010.

James Smith Whitlock III, pro se, plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Steven M. Sartorio, for defendants-appellees.

HUNTER, Robert C., Judge.

Plaintiff James Smith Whitlock III appeals from the trial court's orders (1) denying his motion to strike an affidavit submitted by defendants Triangle Grading Contractors Development, Inc. ("TGCD") and Mario Ernesto Linares in support of their motion for summary judgment, (2) granting defendants' motion for summary judgment, and (3) denying plaintiff's motion for a new trial. We agree with plaintiff's primary contention that the trial court erred in entering summary judgment in favor of defendants, and, consequently, we reverse the court's order.

Facts

At approximately 8:00 a.m. on 15 August 2008, plaintiff was involved in an automobile accident with a truck owned by TGCD and driven by Mr. Linares, one of its employees. On 28 October 2008, plaintiff filed a negligence action against defendants, seeking to recover damages resulting from the 15 August 2008 accident. Defendants filed an answer on 14 November 2008, generally denying plaintiff's negligence claim and asserting the defense of contributory negligence. Plaintiff subsequently filed a reply, denying defendants' contributory negligence claim and alleging last clear chance.

On 8 May 2009, defendants filed a motion for summary judgment and a supporting affidavit by Lee Gahagan, the litigation examiner at defendants' insurance carrier, Frankenmuth Mutual Insurance Company, in which he stated that plaintiff's insurance carrier, Liberty Mutual Insurance Company, had filed a claim with Frankenmuth, requesting reimbursement for the funds it had paid plaintiff as a result of his insurance claim stemming from the car accident. Mr. Gahagan stated that when Frankenmuth denied Liberty Mutual's claim, it was referred to binding inter-company arbitration and that the "arbitration panel returned a decision in favor of Frankenmuth." Based on this affidavit, defendants asserted that they were entitled to judgment as a matter of law on the ground that the arbitration award

in Frankenmuth's favor "operates as *res judicata* upon the parties to this action." On 8 June 2009, plaintiff filed a motion to strike Mr. Gahagan's affidavit. The trial court conducted a hearing on the parties' motions on 12 June 2009, in which plaintiff made an oral motion for summary judgment. In three separate orders entered 16 June 2009, the trial court denied plaintiff's motion to strike, denied his motion for summary judgment, and granted defendants' motion for summary judgment. Plaintiff subsequently filed a motion for findings of fact and for a new trial. In orders entered 29 July 2009, the trial court denied plaintiff's motion for findings of fact and his motion for a new trial. Plaintiff timely appealed to this Court from the trial court's orders granting summary judgment in favor of defendants and denying his motion for a new trial.

Motion to Strike Affidavit

[1] Although plaintiff argues that the trial court erred in denying his 8 June 2009 motion to strike Mr. Gahagan's 4 May 2009 affidavit, the record on appeal does not include a notice of appeal from the court's order denying plaintiff's motion. Rule 3 of the Rules of Appellate Procedure requires that the notice of appeal filed by an appellant "designate the judgment or order from which appeal is taken . . . ." N.C. R. App. P. 3(d). The requirements of Rule 3 are "jurisdictional in nature." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 158, 392 S.E.2d 422, 425 (1990). "Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2." *Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994), *disc. review denied in part*, 339 N.C. 609, 454 S.E.2d 246, *aff'd in part*, 341 N.C. 702, 462 S.E.2d 219 (1995); *accord Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (stating that Rule 3's requirements are jurisdictional and that "[a] jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal"); *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563-64, 402 S.E.2d 407, 408 (1991) (per curiam) (holding that, because record did not contain notice of appeal in compliance with Rule 3, there was no appellate jurisdiction and appeal must be dismissed). We, therefore, lack jurisdiction to review the trial court's order denying plaintiff's motion to strike Mr. Gahagan's affidavit.

In any event, plaintiff cannot demonstrate prejudice from the denial of his motion. *See Starco, Inc. v. AMG Bonding and Ins.*

Services, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996) (explaining that, in order to obtain relief on appeal, appellant must demonstrate that any error by trial court is "material and prejudicial"). On appeal, plaintiff contends that Mr. Gahagan's affidavit (1) is not based on personal knowledge as required by N.C. R. Civ. P. 56(e) and (2) violates N.C. R. Evid. 1002, the "best evidence rule." Even assuming, without deciding, that the trial court erred on either of these grounds in considering Mr. Gahagan's *4 May 2009 affidavit* in ruling on the parties' motions for summary judgment, the record before the trial court also included Mr. Gahagan's *11 March 2009 affidavit* in which he provided substantially the same information about the arbitration between Frankenmuth and Liberty Mutual as he did in his 4 May 2009 affidavit. Plaintiff's motion to strike Mr. Gahagan's 11 March 2009 affidavit was denied by an order entered 23 April 2009, and plaintiff did not appeal from that order. Consequently, even if the 4 May 2009 affidavit had been excluded, virtually identical evidence remained in the record in the form of the 11 March 2009 affidavit.

Summary Judgment

[2] Plaintiff contends that the trial court erred in granting defendants' motion for summary judgment. An appellate court "review[s] the trial court's order allowing summary judgment de novo." *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (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." N.C. R. Civ. P. 56(c). The moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999). The evidence produced by the parties is viewed in the light most favorable to the non-moving party. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

On appeal, plaintiff argues that summary judgment is inappropriate in this case because "[t]he arbitration proceeding between Plaintiff's insurance carrier and Defendants' insurance carrier is not *res judicata* in this action." According to the doctrine of *res judicata* or claim preclusion, "a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). In contrast, the companion doc-

trine of collateral estoppel or issue preclusion provides that the determination of an issue in a prior proceeding precludes the relitigation of that issue in a later action, provided that the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 433-34, 349 S.E.2d 552, 560 (1986). Thus, "while *res judicata* precludes a subsequent action between the same parties or their privies based on the same *claim*, collateral estoppel precludes the subsequent adjudication of a previously determined *issue*, even if the subsequent action is premised upon a different claim." *Hales v. North Carolina Insurance Guaranty Assn.*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994).

Here, the trial court treated defendants' preclusion defense based on the arbitration award as one of *res judicata*, determining that the outcome of the arbitration between Liberty Mutual (plaintiff's insurer) and Frankenmuth (defendants' insurer), which was favorable to Frankenmuth, barred plaintiff's subsequent lawsuit premised on the allegation that Mr. Linares (Frankenmuth's insured) was negligent in causing the auto accident at issue in this case. This case may more properly come within the scope of the doctrine of collateral estoppel, given that plaintiff seeks recovery of alleged damages not covered by his insurance policy with Liberty Mutual. Here, however, the distinction is not determinative because, through either doctrine, the trial court ruled that the arbitration panel's decision in favor of Frankenmuth was binding on plaintiff as Liberty Mutual's insured.

Preclusive effect is not limited to court proceedings; it arises in the same manner from arbitration awards. *See Murakami v. Wilmington Star News, Inc.*, 137 N.C. App. 357, 360, 528 S.E.2d 68, 70 (holding doctrine of collateral estoppel may apply to unconfirmed arbitration award), *disc. review denied*, 352 N.C. 148, 544 S.E.2d 225 (2000); *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985) (applying doctrine of *res judicata* to confirmed arbitration award), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986). One who was not a party to a prior arbitration may use the arbitration award to bind an adverse party in a subsequent proceeding if, among other things, the adverse party or its privy was a party to the arbitration and "enjoyed a full and fair opportunity to litigate th[e] issue in the earlier proceeding." *Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880. The dispositive issue in this case is whether the result of an arbitration between insurers may be given preclusive

effect against an insured who was not a party to the arbitration. Under the facts of this case, we conclude that it may not.

While an unconfirmed arbitration award may be given preclusive effect in future litigation, the scope of that effect is "determined by the agreement to arbitrate." *Murakami*, 137 N.C. App. at 360, 528 S.E.2d at 70. The parties contracting for arbitration are free to "formulate their own contractual restrictions on [the] carry-over estoppel effect" of the arbitration award, but the parties "cannot, of course, impose similar limitations which would impair or diminish the rights of third persons." *American Ins. Co. v. Messinger*, 43 N.Y.2d 184, 194, 371 N.E.2d 798, 804, 401 N.Y.S.2d 36, 42 (1977).

Here, there is no dispute that Liberty Mutual and Frankenmuth contractually agreed to submit Liberty Mutual's claim to "binding intercompany arbitration through Automobile Subrogation Arbitration Forum[,]" and thus are bound by the panel's decision as to whether Mr. Linares "negligent[ly]" caused the auto accident in this case. However, unless plaintiff is a party to the arbitration agreement, he sought to benefit directly from the arbitration, or he actively participated in or controlled the arbitration, plaintiff is not bound by the outcome of the arbitration between Liberty Mutual and Frankenmuth. *See Rodgers Builders*, 76 N.C. App. at 29, 331 S.E.2d at 734 ("Although James McQueen was not named as a party to the arbitration, it is clear that he had a strong financial interest in the determination of the issues there because of his ownership interests in McQueen Properties and Parkhill Associates, and that he was an active and controlling participant in the arbitration. He thus is bound by the judgment entered on the arbitration award just as if he were a named party to the proceeding."); *see also Levin-Townsend Computer Corp. v. Holland*, 29 A.D.2d 925, 925, 289 N.Y.S.2d 12, 14 (N.Y. App. Div. 1968) (per curiam) ("Unless [appellant] is a party to an agreement to arbitrate, or unless by its actions or course of conduct it embraces or adopts such agreement, or seeks to benefit directly by provisions of such agreement, it, of course, is not bound by the result in arbitration proceedings between [respondent] and [appellant]'s wholly owned subsidiaries.").

On appeal, defendants fail to point to any evidence submitted on summary judgment suggesting that plaintiff is a party to the arbitration agreement between Liberty Mutual and Frankenmuth, that he adopted the agreement, or that he sought to benefit directly from the arbitration. *See Hartford Acc. & Indem. Co. v. Maryland Cas. Co.*, 75 Misc.2d 410, 412, 347 N.Y.S.2d 380, 383 (N.Y. Sup. Ct. 1973) (holding

that plaintiff's personal injury action against other driver in auto accident was not precluded by arbitration award between insurance carriers regarding damage to plaintiff's car because plaintiff did not participate in or control arbitration, was not a party to arbitration agreement, did not adopt agreement, or attempt to benefit from agreement). Nor is there any evidence that plaintiff controlled, participated in, or even had notice of the arbitration proceedings in this case. *See Baldwin v. Brooks*, 83 A.D.2d 85, 85-90, 443 N.Y.S.2d 906, 907-10 (N.Y. App. Div. 1981) (holding that driver was not bound in subsequent personal injury case by prior arbitration decision that plaintiff's injuries were related to auto accident because driver was not in privity with his insurance carrier and did not participate in arbitration). The trial court, therefore, erred in granting defendants' motion for summary judgment on the basis that plaintiff's present negligence action is barred by the prior arbitration decision finding that Mr. Linares was not negligent. Due to our disposition on appeal, we do not address plaintiff's remaining arguments.

Reversed.

Judges STEPHENS and ERVIN concur.

STATE OF NORTH CAROLINA v. ROBERT GREGORY BOYD

No. COA10-51

(Filed 20 July 2010)

Constitutional Law— right to counsel—initial forfeiture did not carry over to resentencing hearing

The trial court denied defendant his right to counsel at a resentencing hearing, and defendant was entitled to be resentenced. Defendant's initial forfeiture did not carry over to his resentencing hearing based on the fact that he was appointed counsel to represent him on appeal following his initial conviction, and a new inquiry conducted under N.C.G.S. § 15A-1242 was required in order for defendant to properly waive his right to counsel at the resentencing hearing.

Appeal by defendant from judgment entered 29 September 2009 by Judge Alma L. Hinton in Halifax County Criminal Superior Court. Heard in the Court of Appeals 26 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General Kathryn J. Thomas, for the State.

Attorney Ryan McKaig, for Defendant.

ERVIN, Judge.

Defendant Robert Gregory Boyd appeals from a judgment entered by the trial court sentencing him to a minimum term of 21 months and a maximum term of 26 months imprisonment in the custody of the North Carolina Department of Correction based upon his conviction on one count of indecent liberties with a minor. After careful consideration of the record in light of the applicable law, we vacate Defendant's sentence and remand for resentencing.

I. Factual Background

On 23 May 2007, a warrant for arrest charging Defendant with taking indecent liberties with a child was issued. On 6 August 2007, the Halifax County grand jury returned a bill of indictment charging Defendant with taking indecent liberties with a child.

Defendant was initially represented by Jamal M. Summey; however, Mr. Summey was allowed to withdraw as Defendant's attorney at the 2 June 2008 session of the Halifax County Superior Court as a result of disagreements over strategic issues and communication difficulties, including a refusal to subpoena one superior court judge and file a motion seeking the recusal of another. On 8 July 2008, Jimmie R. "Sam" Barnes was appointed to represent Defendant. On or about 11 August 2008, Mr. Barnes filed a motion seeking to have the case against Defendant continued from the 18 August 2008 session of the Halifax County Superior Court and requesting leave of court to withdraw from his representation of Defendant. Although Mr. Barnes' request for leave to withdraw as counsel for Defendant was denied, this case was continued until the 8 September 2008 session of the Halifax County Superior Court.

At the 8 September 2008 session, this case came on for trial before Judge Quentin T. Sumner. On 8 September 2008, Mr. Barnes filed another withdrawal motion in which he alleged that he had met with Defendant prior to 18 August 2008, at which point "Defendant

was totally uncooperative;" that, at that time, Defendant stated that he did not wish Mr. Barnes to represent him and asked him to move to withdraw; that, at a meeting held in Mr. Barnes' office on 2 September 2008, Defendant stated that "this case was not going to be tried" and that, if Mr. Barnes was unwilling to represent Defendant in the manner in which Defendant wished to be represented, then Defendant did not want Mr. Barnes to represent him; and that Mr. Barnes wished to be relieved of the obligation to represent Defendant. On the same day, Defendant filed a *pro se* motion seeking to have Judge Sumner recused from hearing his case. Judge Sumner denied Defendant's recusal motion, allowed Mr. Barnes' withdrawal motion, informed Defendant that the trial would begin at 2:00 p.m., and told Defendant that he would be representing himself in the event that he was unable to procure counsel.

As a result of the fact that he did not obtain counsel, Defendant proceeded *pro se* at trial, with Mr. Barnes serving as standby counsel. At trial, Defendant's daughter, who was eleven years old at the time of the offense, testified that Defendant touched her vagina while rubbing lotion on her back and legs, at which point the victim told Defendant to stop. After the jury returned a verdict finding Defendant guilty as charged, Judge Sumner sentenced Defendant to a minimum of 21 months and a maximum of 26 months imprisonment in the custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment.

After Defendant gave notice of appeal, Judge Sumner appointed the Office of the Appellate Defender to represent Defendant on appeal. The Office of the Appellate Defender subsequently assigned responsibility for representing Defendant to Ryan McKaig, who represented Defendant throughout the initial round of appellate proceedings in this case.

On appeal, a panel of this Court unanimously found no error at Defendant's trial. More particularly, we found that Defendant had forfeited his right to counsel by refusing to cooperate with either of his appointed attorneys and insisting that his case would not be tried, so that Judge Sumner did not err by failing to either appoint substitute counsel after allowing Mr. Barnes to withdraw or by following the procedures for waiver of counsel specified in N.C. Gen. Stat. § 15A-1242 prior to allowing Defendant to represent himself. However, we ordered that the Defendant be resentenced because Judge Sumner erred in determining that Defendant should be sentenced as a Level III offender in the absence of a stipulation to the

prior record worksheet prepared by the State and of acceptable proof of Defendant's prior record. *State v. Boyd*, —— N.C. App. ——, ——, 682 S.E.2d 463, 469 (2009); *disc. review denied*, —— N.C. ——, 691 S.E.2d 414 (2010).

Defendant appeared before the trial court for resentencing on 29 September 2009. At that time, the following exchange took place between the trial court and the Defendant:

THE COURT: Mr. Boyd, do you wish to be represented by counsel at the resentencing?

[DEFENDANT]: No.

THE COURT: Mr. Barnes, I am going to appoint you as standby counsel based on the defendant's election to represent himself. Sheriff, would you ask him to sign a waiver indicating that he is going to be representing himself.

[DEFENDANT]: I ain't signing nothing.

THE COURT: Let the record reflect that the defendant has been offered an opportunity to execute a waiver of his rights after he announced to the Court that he wishes to represent himself.

As a result, Defendant represented himself at the resentencing hearing. At the conclusion of that proceeding, the trial court found that Defendant had six prior record points and should be sentenced as a Level III offender. Based upon these findings, the trial court sentenced Defendant to a minimum of 21 months and a maximum of 26 months imprisonment in the custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

The right to counsel at all critical stages in criminal proceedings is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 23 of the North Carolina Constitution. *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977). "[S]entencing is a critical stage of the criminal proceeding at which [a defendant] is entitled to the effective assistance of counsel." *State v. Davidson*, 77 N.C. App. 540, 544, 335 S.E.2d 518, 521, *disc. review denied*, 314 N.C. 670, 337 S.E.2d 583 (1985) (quoting

Gardner v. Florida. 430 U.S. 349, 358, 97 S. Ct. 1197, 1205, 51 L. Ed. 2d 393, 402 (1977)). As a result, an indigent defendant is entitled to be represented at a resentencing proceeding at which he or she is at risk of being sentenced to imprisonment. N.C. Gen. Stat. § 7A-451(a)(1) (2009).[1]

A valid waiver of a criminal defendant's right to the assistance of counsel requires compliance with N.C. Gen. Stat. § 15A-1242, which provides that:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

After a careful review of the transcript, it is clear that no inquiry of the type required by N.C. Gen. Stat. § 15A-1242 occurred in this instance. In fact, the State concedes as much. Instead, the State contends that the trial court was not required to conduct an inquiry pursuant to N.C. Gen. Stat. § 15A-1242 in this case because Defendant's forfeiture of his right to counsel at his original trial carried over to the resentencing proceeding.[2] We do not find the State's argument to be persuasive.

---

1. This Court has held that the threat of imprisonment at a resentencing hearing triggers an absolute right to counsel under the Sixth Amendment and N.C. Gen. Stat. § 7A-451. *State v. Lambert*, 146 N.C. App. 360, 364-65, 553 S.E.2d 71, 75 (2001), *disc. review denied*, 355 N.C. 289, 561 S.E.2d 271 (2002). There is no question but that Defendant was subject to a threat of imprisonment at his resentencing hearing.

2. The State does not contend that Defendant's conduct at the resentencing hearing constitutes independent grounds for finding a forfeiture of the right to counsel. A forfeiture of the right to counsel requires "willful actions on the part of the defendant that result in the absence of defense counsel . . . ." *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006) (citing *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000). The mere fact that Defendant stated that he did not want to be represented by counsel and refused to sign a written waiver does not rise to the level of conduct that has been held sufficient to constitute a forfeiture of the right to counsel in prior cases. *See Illinois v. Allen*, 397 U.S. 337, 343, 25 L. Ed. 2d 353, 358,

The State has not cited any authority delineating the length of time which a forfeiture of the right to counsel lasts, and we have not found any such authority during our own independent research. Instead, in attempting to argue that Defendant's forfeiture of counsel at trial carried over to his resentencing hearing, the State relies on decisions addressing the duration of waivers of the right to counsel. Such an approach seems reasonable to us, in the absence of more directly relevant authority, and so we adopt that approach for purposes of deciding this case.

"Once given, a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him." *State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999) (citing *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540-41, *cert. denied*, 285 N.C. 595, 206 S.E.2d 866 (1974)). Moreover, "the burden of showing the change in the desire of the defendant for counsel rests upon the defendant." *Watson*, 21 N.C. App. at 379, 204 S.E.2d at 540-41.[3] In this case, we are unable to find a continuous forfeiture of counsel beginning at the time the case was called for trial and continuing until Defendant's resentencing hearing of the type contended for by the State. Instead, a break in the period of forfeiture occurred when counsel was appointed to represent Defendant on appeal following his initial conviction. Thus, under the logic of the waiver decisions upon which the State relies, Defendant affirmatively ended his forfeiture of the right to counsel by accepting the appointment of counsel on appeal following his first trial and allowing appointed counsel to represent him throughout the initial

---

rehearing denied, 398 U.S. 915, 26 L. Ed. 2d 80 (1970) (holding that a forfeiture of the right to be present at trial occurred when the defendant tore up his attorney's files and threatened the trial judge); *Quick*, 179 N.C. App. at 650, 634 S.E.2d at 918 (finding a forfeiture of the right to counsel where defendant failed to retain counsel over an eight month period); *Montgomery*, 138 N.C. App. at 525, 530 S.E.2d at 69 (finding a forfeiture of the right to counsel where defendant failed to retain counsel over a fifteen month period, released court-appointed counsel on two different occasions, and was disruptive in the courtroom twice, resulting in continuances of his trial). As a result, we would reject any contention that Defendant's conduct at the resentencing hearing worked a new forfeiture of his right to counsel.

3. The State's reliance upon *State v. Dorton*, 182 N.C. App. 34, 641 S.E.2d 357, *disc. review denied*, 361 N.C. 571, 651 S.E.2d 225 (2007), is misplaced. Although we held in *Dorton* that the trial court was not required to inquire as to whether defendant wanted to withdraw his waiver at a second resentencing hearing held two days after his initial sentencing, the resentencing hearing in that case was held only two days after the initial sentencing hearing, unlike the thirteen month time lapse which is at issue here.

appellate process. For that reason, we conclude that Defendant's forfeiture ended with his first trial and did not continue through the resentencing hearing resulting from our decision stemming from Defendant's prior appeal. Any other result would require the Court to treat the appointment of counsel on appeal as irrelevant to the "duration of forfeiture" analysis, which is something that we are unwilling to do.[4] As a result, since Defendant's initial forfeiture did not carry over to his resentencing hearing, a new inquiry conducted pursuant to N.C. Gen. Stat. § 15A-1242 was required in order for Defendant to properly waive his right to counsel at the resentencing hearing. Since no such inquiry occurred, Defendant was deprived of his right to counsel at the resentencing hearing and is entitled to be resentenced.

VACATED AND REMANDED FOR RESENTENCING.

Judges McGEE and STROUD concur.

JERRY OWEN, PLAINTIFF v. HAYWOOD COUNTY, HAYWOOD BOARD OF COMMISSIONERS, HAYWOOD COUNTY SHERIFF'S DEPARTMENT, SHERIFF TOM ALEXANDER, MIKE SHULER, MARK WILLIAMS, DEFENDANTS

No. COA09-929

(Filed 20 July 2010)

1. Appeal and Error— interlocutory orders and appeals—defense of sovereign immunity—substantial right

Defendant deputy sheriffs' appeal from an interlocutory order denying their motion for summary judgment affected a substantial right and was immediately appealable based on their assertion of the defense of sovereign immunity.

2. Immunity— deputy sheriffs—liability insurance—sovereign immunity defense excluded from coverage—summary judgment

The trial court erred by denying defendant deputy sheriffs' motion for summary judgment on the basis of sovereign immunity. Defendants' insurance policy expressly excluded coverage

4. As an aside, we note that the trial court did not believe that Defendant's forfeiture continued to the resentencing proceeding, since it would not have inquired of Defendant whether he wished to have counsel appointed had it taken that position.

for claims for which the defense of sovereign immunity would be applicable, and plaintiff's action was against defendants in their official capacities only.

Appeal by defendants from order entered 15 June 2009 by Judge Laura J. Bridges in Haywood County Superior Court. Heard in the Court of Appeals 2 December 2009.

McLean Law Firm, P.A., by Russell L. McLean, III and Lisa A. Kosir, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Scott D. MacLatchie, for defendant-appellants Tom Alexander, Mike Shuler, and Mark Williams.

STEELMAN, Judge.

Where defendants' insurance policy expressly excludes coverage for claims for which the defense of sovereign immunity would be applicable, the trial court erred by denying defendants' motion for summary judgment on that basis.

I. Factual and Procedural Background

On 14 April 2008, Jerry Owen (plaintiff) filed a complaint that alleged the following: on 18 April 2006, plaintiff was at the Haywood County Sheriff's Department attempting to secure warrants on certain individuals whom he alleged had entered his property and held his family at gun point. While plaintiff was at the Sheriff's Department, Deputy Sheriffs Mike Shuler (Shuler), Mark Williams (Williams), and a Deputy unknown to plaintiff, approached plaintiff and requested that he step outside of the building where they would discuss these matters further. Plaintiff alleged that while they were standing at the entrance to the facility, Shuler and the unknown Deputy jerked plaintiff's arm, pulled it around to his back, placed plaintiff in an arm lock position, and slammed him up against the wall. Plaintiff alleged this injured his arm and rotator cuff. Plaintiff was escorted into the building by Shuler and Williams, and was placed under arrest for unlawfully and willfully resisting, delaying, and obstructing Shuler in the performance of his duty, and assault on a government official. The charges were subsequently dismissed.

Plaintiff's complaint alleged nine causes of action against Shuler and Williams in their official capacities only: (1) assault by Shuler; (2) abuse of process by Shuler; (3) assault by Williams; (4) abuse of

process by Williams; (5) false arrest; (6) malicious prosecution by Shuler; (7) malicious prosecution by Williams; (8) compensatory damages; and (9) punitive damages. Plaintiff alleged that Sheriff Tom Alexander (Alexander), the Haywood County Sheriff's Department, and Haywood County were all liable for the complained of conduct based upon *respondeat superior*. On 15 May 2008, Alexander, Shuler, and Williams (collectively, defendants)[1] filed an answer denying the material allegations of plaintiff's complaint and raising seven affirmative defenses, including that the action was barred by sovereign immunity. On 17 September 2008, defendants moved for summary judgment based upon sovereign immunity. On 15 June 2009, defendants' motion was denied. Defendants appeal.

II. Interlocutory Nature of Appeal

[1] Generally, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order is interlocutory and does not affect a substantial right. *Bockweg v. Anderson*, 333 N.C. 486, 490, 428 S.E.2d 157, 160 (1993). "However, when the motion is made on the grounds of sovereign and qualified immunity, such a denial is immediately appealable, because to force a defendant to proceed with a trial from which he should be immune would vitiate the doctrine of sovereign immunity." *Smith v. Phillips*, 117 N.C. App. 378, 380, 451 S.E.2d 309, 311 (1994) (citation omitted). In the instant case, defendants have asserted the defense of sovereign immunity and, thus, their appeal is properly before this Court.

III. Standard of Review

The standard of review on a trial court's ruling on a motion for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). The entry of summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted). Summary judgment is proper when "an essential element of the opposing

1. The record on appeal does not contain any pleadings filed by Haywood County, Haywood Board of Commissioners, or Haywood County Sheriff's Department. Nor does the record indicate whether there was a voluntary or involuntary dismissal of these named defendants.

party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense . . . ." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citation omitted).

IV. Sovereign Immunity

[2] In their sole argument, defendants contend that the trial court erred by denying their motion for summary judgment on the basis of sovereign immunity. We agree.

"The doctrine of sovereign immunity generally bars recovery in actions against deputy sheriffs sued in their official capacity. A county may waive sovereign immunity by purchasing liability insurance, but only to the extent of coverage provided." *Cunningham v. Riley*, 169 N.C. App. 600, 602, 611 S.E.2d 423, 424 (citations omitted), *disc. review denied and appeal dismissed*, 359 N.C. 850, 619 S.E.2d 405 (2005), *cert. denied*, 546 U.S. 1142, 163 L. Ed. 2d 1008 (2006). "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." *Guthrie v. State Ports Authority*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983) (citations omitted); *see also Orange County v. Heath*, 282 N.C. 292, 296, 192 S.E.2d 308, 310 (1972) ("The State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a clear waiver by the lawmaking body."). A plaintiff that has brought claims against a governmental entity and its employees acting in their official capacities must allege and prove that the officials have waived their sovereign immunity or otherwise consented to suit. *Sellers v. Rodriguez*, 149 N.C. App. 619, 623, 561 S.E.2d 336, 339 (2002).

In the instant case, it is undisputed that a liability insurance policy for the Haywood County Sheriff's Department was in effect on 18 April 2006. The "Law Enforcement Liability Coverage" stated:

> The Pool will pay on behalf of the Covered Person all sums which the Covered Person shall become legally obligated to pay as money damages because of an Occurrence which results in personal injury, bodily injury, or property damage and occurring while a Covered Person is acting within the course and scope of the Covered Person's duties to provide law enforcement.

"Covered Person" is defined as, *inter alia*:

> each individual law enforcement officer or other employee of such department who is officially employed to engage in law

> enforcement duties, but only while acting within the course and scope of the official pursuits of the law enforcement department or other Pool approved activities for claims *brought against him/her in his/her individual capacity*.

(Emphasis added). The insurance policy also includes the following exclusion: "Section VI (Law Enforcement Liability Coverage) of this Contract does not apply to any claim as follows: 1. any claim, demand, or cause of action against any Covered Person as to which the Covered Person is entitled to sovereign immunity or governmental immunity under North Carolina law."

The dispositive issue in this case is whether the exclusionary provision bars plaintiff's action. In *Patrick v. Wake Cty. Dep't of Human Servs.*, 188 N.C. App. 592, 655 S.E.2d 920 (2008), this Court examined a similar exclusion in a liability insurance policy. In *Patrick*, the plaintiff filed a complaint against the defendants in their official capacities as supervisors of the Child Protective Services of the Wake County Department of Human Services. *Id.* at 593, 655 S.E.2d at 922. The defendants acknowledged the purchase of liability insurance, but argued that the policy excluded coverage for claims for which sovereign immunity was a defense. *Id.* at 596, 655 S.E.2d at 922. The insurance policy at issue contained the following exclusion: "this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defense[] is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable." *Id.* at 596, 655 S.E.2d at 923 (emphasis omitted).

> "If the language in an exclusionary clause contained in a policy is ambiguous, the clause is 'to be strictly construed in favor of coverage.' " *Daniel v. City of Morganton*, 125 N.C. App. 47, 53, 479 S.E.2d 263, 267 (1997) (quoting *State Auto. Mut. Ins. Co. v. Hoyle*, 106 N.C. App. 199, 201-02, 415 S.E.2d 764, 765, *disc. rev. denied*, 331 N.C. 557, 417 S.E.2d 803 (1992)). "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."

Id. at 596-97, 655 S.E.2d at 924. We held that the exclusionary provision in *Patrick* was clear and unambiguous, and that based upon that

provision the defendants had not waived sovereign immunity through the purchase of the policy. *Id.* at 597, 655 S.E.2d at 924.

Recently, in *Estate of Earley v. Haywood Cty. Dep't of Soc. Servs.*, this Court followed the holding and analysis in *Patrick*, and upheld a similar exclusionary clause:

> We acknowledge the arguably circular nature of the logic employed in *Patrick*. The facts are that the legislature explicitly provided that governmental immunity is waived to the extent of insurance coverage, but the subject insurance contract eliminates any potential waiver by excluding from coverage claims that would be barred by sovereign immunity. Thus, the logic in *Patrick* boils down to: Defendant retains immunity because the policy doesn't cover his actions and the policy doesn't cover his actions because he explicitly retains immunity. Nonetheless in this case, as in *Patrick*, where the language of both the applicable statute and the exclusion clause in the insurance contract are clear, we must decline Plaintiff's invitation to implement "policy" in this matter. Any such policy implementation is best left to the wisdom of our legislature.

204 N.C. App. 338, 343, 694 S.E.2d 405, 409-10 (June 1, 2010) (No. COA09-1558).

The exclusionary provision in the instant case is materially indistinguishable from the provisions in *Patrick* and *Estate of Early*. We are therefore bound by this Court's prior holdings. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Because plaintiff's action was against defendants in their official capacities only, plaintiff's claims are barred. *See Patrick*, 188 N.C. App. at 596, 655 S.E.2d at 923 ("A governmental entity does not waive sovereign immunity if the action brought against them is excluded from coverage under their insurance policy."). The trial court erred in denying defendants' motion for summary judgment on the basis of sovereign immunity.

REVERSED.

Judges McGEE and STEPHENS concur.

DOROTHY LEWIS GRIFFITH, PLAINTIFF v. COLGATE McSHANE CURTIS, DEFENDANT

No. COA09-942

(Filed 20 July 2010)

1. Judgments— consent judgment—motion to set aside—mistake

The trial court did not abuse its discretion by denying plaintiff wife's N.C.G.S. § 1A-1, Rule 60 motion to set aside a consent judgment that ordered her to remove a lien from the pertinent real property. There was competent evidence that plaintiff signed the agreement as "fair and equitable" to both parties and that plaintiff specifically agreed to remove the lien from the property. Any mistake on the part of plaintiff was unilateral and not a mutual mistake.

2. Judgments— consent judgment—unconscionability

Although plaintiff contended that the trial court abused its discretion by adopting an unconscionable memorandum of judgment and failing to set it aside, this argument was dismissed. A consent judgment properly entered by the trial court may not be subsequently attacked on the grounds of unconscionability. Further, once a memorandum of judgment is incorporated into a consent judgment, the parties lose their contract defenses.

Appeal by plaintiff from order entered 13 March 2009 and the amended order entered 16 March 2009 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 27 January 2010.

Respess & Jud, by W. Wallace Respess, Jr. and W. Russ Johnson, III, for plaintiff-appellant.

Leake, Scott & Stokes, by Ward D. Scott, for defendant-appellee.

STEELMAN, Judge.

The Consent Judgment entered by the court distributed the marital debt owed upon the parties' Boone residence to plaintiff. A consent judgment properly entered by the court may not be subsequently attacked on the grounds of unconscionability.

I. Factual and Procedural Background

On 26 June 1993, Dorothy Lewis Griffith (plaintiff) and Colgate McShane Curtis (defendant) were married. On 19 August 2006, plaintiff and defendant separated. On 6 December 2007, plaintiff filed a complaint seeking an absolute divorce, joint custody of the minor children, and an unequal distribution of marital property in favor of plaintiff. On 17 January 2008, defendant filed an answer and counterclaim seeking an absolute divorce, joint custody of the minor children, child support, post separation support, an unequal distribution of marital property in favor of defendant, and attorney's fees. On 11 February 2008, an order of absolute divorce was entered. The parties went to pre-trial mediation on the equitable distribution claims. On 30 May 2008, the parties entered into a Memorandum of Judgment that resolved the claims for post separation support, retroactive child support, and equitable distribution. This Memorandum was presented to Judge Knight as a consent judgment that was entered on 11 June 2008.

The Consent Judgment was signed by both parties and their respective attorneys. Paragraph five of the Consent Judgment states, "[t]he agreement is fair and equitable and the court should adopt the agreement as set forth herein." Paragraph ten states, "[t]he parties waive further findings of fact." Paragraphs 1(a) and 1(h) state,

> Defendant shall have as his sole and separate property the following:
>
> (a) The real property located at 783 Wilson Ridge Road, Boone, North Carolina. Plaintiff shall be responsible for removing the lien against the property within a reasonable time for the debt owed to David Griffith in the approximate amount of $160,000 plus interest. Defendant shall be solely responsible for all liabilities including taxes that may be due for the property;
>
> . . . .
>
> (h) All debts titled in his name.

On 8 December 2008, defendant filed a motion seeking to have plaintiff held in contempt of court for failure to remove the lien against the real property located in Boone. On 16 December 2008, plaintiff's counsel filed a motion to withdraw. This motion was granted on 5 January 2009. On 14 January 2009, plaintiff filed a motion for relief from judgment pursuant to Rule 60(b)(1), (4), and

(6). Plaintiff asserted that the 11 June 2008 Consent Judgment and Order failed to distribute significant marital debt and was "completely and utterly unfair."

On 20 February 2009, Judge Knight held plaintiff to be in willful contempt of court. Judge Knight concluded as a matter of law that the Consent Judgment distributed the Boone property to defendant free and clear of any lien, which would be accomplished if plaintiff removed the lien. Judge Knight found that plaintiff had reasonable time and means to remove the lien, but refused to do so without good cause. Judge Knight deferred entering an order setting a sanction for contempt until plaintiff's Rule 60 motion was heard and ruled upon.

On 13 March 2009, the trial court denied plaintiff's Rule 60 motion to set aside the Consent Judgment and ordered plaintiff to remove the lien from the real property at 783 Wilson Ridge Road.

Plaintiff appeals from the orders denying her Rule 60 motion.

II. Standard of Review

Because "a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court . . . appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

III. Distribution of Marital Debt

[1] In her first argument, plaintiff contends that the trial court abused its discretion in denying plaintiff's Rule 60 Motion. We disagree.

Plaintiff contends that the phrase, "[p]laintiff shall be responsible for removing the lien," in paragraph 1(a) of the Consent Judgment is ambiguous and fails to distribute significant marital debt to either the plaintiff or defendant. Plaintiff argues that "removing the lien" could include merely transferring the lien to another property rather than actually distributing this marital debt to either spouse. Plaintiff contends that such a result would cause the Equitable Distribution Consent Judgment to fail for not distributing all marital property.

The parties' mediated settlement agreement, entitled Memorandum of Judgment, was executed 30 May 2008, and was wholly incorporated into Judge Knight's Consent Judgment and Order on 11 June 2008. The Consent Judgment orders that "[p]laintiff shall be responsible for removing the lien against the property within a reasonable time for the debt owed to David Griffith in the approximate amount

of $160,000 plus interest." Judge Knight, in her order on plaintiff's Rule 60 Motion, found that this paragraph unambiguously distributed that marital debt owed to plaintiff's father to plaintiff.

It must be presumed that the parties intended what the language in the Memorandum of Judgment clearly expresses, and the agreement must "be construed to mean what on its face it purports to mean." *Hartman v. Hartman*, 80 N.C. App. 452, 455, 343 S.E.2d 11, 13 (1986) (quoting *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946)). The Memorandum of Judgment and the Consent Judgment were signed by both parties. The trial court properly found that "removing the lien" transferred this marital debt to plaintiff. *See Wiencek-Adams v. Adams*, 331 N.C. 688, 694, 417 S.E.2d 449, 452 (1992) (referring to paying down martial debt distributed to the husband as "payments to remove the debt"); *Glaspy v. Glaspy*, 143 N.C. App. 435, 441-42, 545 S.E.2d 782, 786 (2001) (holding that a federal tax lien was marital debt).

Because there is competent evidence that plaintiff signed the agreement as "fair and equitable" to both parties and that plaintiff specifically agreed to remove the lien from the real property at 783 Wilson Ridge Road, the Consent Judgment is not ambiguous. *Hartman*, 80 N.C. App. at 454, 343 S.E.2d at 12-13 (citations omitted).

Plaintiff further contends under Rule 60(b)(1) and (6), that the Consent Judgment should be set aside because she mistakenly signed the Memorandum of Judgment and the Consent Judgment.

To set aside a judgment based upon mistake, the moving party must prove mutual mistake or that a unilateral mistake was made because of some misconduct. *In re Baity*, 65 N.C. App. 364, 368, 309 S.E.2d 515, 518 (1983), *cert. denied*, 311 N.C. 401, 319 S.E.2d 266 (1984). Although Rule 60(b)(6) grants a "vast reservoir of equitable power," a consent judgment will stand absent extraordinary circumstances beyond lack of understanding. *See Anderson Trucking Serv., Inc. v. Key Way Transp., Inc.*, 94 N.C. App. 36, 40, 379 S.E.2d 665, 667-68 (1989) (citations omitted). Any mistake on the part of the plaintiff was a unilateral mistake and not a mutual mistake. *Id.* Further, even if plaintiff executed the Memorandum of Judgment at mediation by mistake, she "ratified her original consent agreement when she signed the Consent Judgment" eleven days later.

The trial court did not abuse its discretion in denying plaintiff's Rule 60 Motion.

This argument is without merit.

IV. Unconscionability

[2] In her second argument, plaintiff contends that the trial court abused its discretion by first adopting an unconscionable memorandum of judgment and then failing to set aside an unconscionable consent judgment. We disagree.

A. Memorandum of Judgment

Because the Memorandum was subsumed by the Consent Judgment, we do not address plaintiff's unconscionability argument as to the Memorandum of Judgment. *Mitchell v. Mitchell*, 270 N.C. 253, 256, 154 S.E.2d 71, 73 (1967).

This argument is dismissed.

B. Consent Judgment

Once a memorandum of judgment is incorporated into a consent judgment, the parties lose their contract defenses. *Id.* (holding that when the parties' agreement is incorporated into a judgment, the agreement is superseded by the court's decree). The doctrine of *res judicata* bars those defenses that could have been addressed before the entry of judgment, including unconscionability. *See generally Wells v. Wells*, 132 N.C. App. 401, 415, 512 S.E.2d 468, 476-77, *disc. review denied*, 350 N.C. 599, 537 S.E.2d 495 (1999); *see also* N.C. Gen. Stat. § 52-10(c) (2009) (defense of public policy is not applicable to judgments of any state court construing contracts between husband and wife). Parties seeking to set aside a consent judgment are limited to proving lack of consent, fraud, mutual mistake, or unilateral mistake under some misconduct. *Yurek v. Shaffer*, 198 N.C. App. 67, 69, 678 S.E.2d 738, 746 (2009) (citations omitted); *Coppley v. Coppley*, 128 N.C. App. 658, 663-64, 496 S.E.2d 611, 616 (1998) (holding that a consent judgment may be attacked only on the limited grounds of fraud, mutual mistake, duress, or undue influence); *Stevenson v. Stevenson*, 100 N.C. App. 750, 752, 398 S.E.2d 334, 336 (1990). Unconscionability is not an available defense because the Memorandum of Judgment has been incorporated into the Consent Judgment. *Mitchell*, 270 N.C. at 256, 154 S.E.2d at 73.

This argument is dismissed.

AFFIRMED.

Judges McGEE and BEASLEY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 JULY 2010)

ADAMS v. KALMAR No. 09-1168	Duplin (06CVS695)	Dismissed
ARMACELL LLC v. BOSTIC No. 09-1160	Alamance (08CVS224)	Affirmed
BERRIER v. RECOVERY CONST. No. 09-376	Indus. Comm. (IC599789) (IC616555) (IC478731)	Dismissed
BOLEJACK v. MOBILIFT OF BURLINGTON No. 09-986	Indus. Comm. (655056)	Affirmed
BRATTAIN v. NUTRI-LAWN, INC. No. 09-377	Indus. Comm. (IC588981)	Affirmed
BROWN & BROWN ENTER. v. BROWN No. 09-1665	Martin (08CVS62)	Affirmed
CURRITUCK ASSOCS. v. COASTLAND CORP. No. 09-1279	Currituck (04CVS97)	Affirmed
DIGGS v. FORSYTH MEM'L HOSP., INC. No. 09-890	Forsyth (02CVS7066)	Affirmed
FRONTIER LEASING CORP. v. HUNT No. 09-275	Wayne (08CVS1767)	Affirmed
IN RE B.B., C.B., N.B., N.M., S.B. No. 10-67	Brunswick (09J27-31)	Dismissed in part; affirmed in part
IN RE CHURCH No. 09-1058	Ashe (07SPC162)	Reversed
N RE JONES No. 09-951	Gaston (07E565)	Affirmed
IN RE J.T.H. No. 09-1383	Guilford (07JB615)	Affirmed
IN RE J.W., D.W., D.W., D.W., K.W. No. 10-190	Durham (08J212-216)	Affirmed in part; remanded in part
ILEGGETT v. AAA COOPER TRANSP. No. 09-944	Indus. Comm. (600560)	Affirmed in part; remanded in part

McCANN v. TOWN OF SPARTA No. 10-192	Alleghany (09CVS100)	Affirmed
McDOWELL v. RANDOLPH CNTY. No. 09-1113	Randolph (08CVS3377)	Dismissed
MJM INVESTIGATIONS v. SJOSTEDT No. 09-596	Wake (08CVS19165)	Reversed and Remanded
MOORE v. SLEEPY CREEK FARMS No. 09-1243	Indus. Comm. (675766)	Affirmed
N.C. FARM BUREAU MUT. v. SUTTON No. 09-1298	Durham (08CVS6393)	Affirmed
REPATH v. DUGGER No. 09-1404	Catawba (08CVS2544)	Dismissed
SMITH v. VALLEY PROTEINS No. 09-1125	Indus. Comm. (763801)	Affirmed
STATE v. BLAINE No. 09-1472	Pitt (08CRS11925)	No Error
STATE v. DRAUGHN No. 09-1641	Edgecombe (08CRS54095)	No Error
STATE v. FORSE No. 10-5	Mecklenburg (06CRS251612-15)	Affirmed
STATE v. GODWIN No. 09-1429	Wake (08CRS85149) (08CRS74099)	Dismissed
STATE v. HORTON No. 09-1396	Wake (08CRS34312)	No Error
STATE v. ISAAC No. 09-1658	Person (09IFS700039)	Affirmed
STATE v. JOYNER No. 09-1680	Pitt (07CRS61341-43)	No Error
STATE v. LANDETA-SOTO No. 09-1603	Brunswick (06CRS3819)	No Error
STATE v. LINCOLN No. 09-1486	Mecklenburg (08CRS40864)	Remanded for resentencing
STATE v. LONG No. 10-56	Cabarrus (09CRS8903)	Affirmed
STATE v. MABRY No. 09-1390	Stanly (07CRS563-565) (07CRS50127-29) (05CRS5906-13)	Judgment vacated and case remanded for resentencing

STATE v. McGRIFF No. 09-1256	Mecklenburg (07CRS252803)	No Error
STATE v. McNEILL No. 09-1585	Vance (08CRS2793) (08CRS50913)	Judgment for conspiracy is reversed. Judgment imposed for habitual felon status is vacated
STATE v. PAIT No. 09-870	Robeson (08CRS53860)	Affirmed in part and dismissed in part
STATE v. PHILLIPS No. 09-1044	Rutherford (08CR54482-85)	Affirmed
STATE v. RODRIGUEZ No. 09-1194	Cumberland (08CRS59682)	No Error
STATE v. SMITH No. 09-1626	Moore (08CRS6583) (08CRS54799)	No Error
STATE v. THOMPSON No. 09-1326	Davidson (08CRS60846) (08CRS60849) (09CRS571)	No Error
STATE v. WATKINS No. 09-1502	Wake (08CRS85486) (08CRS85487) (08CRS85484) (09CRS6924)	Affirmed
STATE v. WRIGHT No. 09-1674	Mecklenburg (08CRS54573) (08CRS219683)	No Error
STEVENSON v. N.C. DEP'T OF CORR. No. 09-991	Indus. Comm. (TA-20236)	Dismissed
THAMES v. N.C. DEP'T OF CORR. No. 09-1376	Indus. Comm. (TA-19451)	Affirmed
WATTS v. N.C. DEP'T OF ENVTL. No. 09-1499	Indus. Comm. (TA-18068)	Affirmed in Part, Reversed in Part and Remanded

STATE OF NORTH CAROLINA v. AHMED BABIKER IBRAHI MOHAMED, DEFENDANT

No. COA09-943

(Filed 20 July 2010)

1. Constitutional Law— Miranda warnings—limited English proficiency

There was no plain error in admitting a robbery defendant's inculpatory statements to officers where defendant contended that the *Miranda* warnings were not adequate and that his waiver was not freely and voluntarily given because his English was limited. The record and the totality of the circumstances reveal that the trial court had ample basis for believing that defendant had a significant command of the English language, that he was able to comprehend the *Miranda* warnings, and that he knowingly and intelligently waived his rights. Had defendant made a timely motion to suppress, the trial court would have had an opportunity to evaluate the credibility of the arresting officers and defendant and address the dispute about defendant's ability to comprehend English.

2. Constitutional Law— effective assistance of counsel—evidentiary issues—further development

A robbery defendant's contention that he received ineffective assistance from his trial counsel was not addressed where the record revealed that certain evidentiary issues needed further development. Defendant's right to assert the claim in a subsequent motion for appropriate relief or a postconviction petition was not precluded.

3. Appeal and Error— plain error—adequacy of interpreters

A robbery defendant's challenge to the adequacy of the interpreters that assisted him in the trial court was not cognizable under the plain error doctrine. Moreover, the interpreters used at trial were selected by defendant, and the record does not reflect that the interpreters were actually ineffective.

4. Criminal Law— plea transcript—erroneous file number—clerical error

The use of an erroneous file number on a transcript of plea was a mere clerical error to be corrected on remand.

5. Evidence— prior crimes or bad acts—common plan or scheme—identity of perpetrator

The trial court did not err in a robbery prosecution by admitting evidence of a prior robbery where the similarities between the two robberies were striking and the evidence tended to prove both a common plan or scheme and defendant's identity as the perpetrator.

6. Robbery— sufficiency of evidence—doctrine of recent possession—prior similar crime

There was substantial evidence that defendant committed an armed robbery under the doctrine of recent possession, even if his challenged inculpatory statements were excluded. Defendant used a stolen credit card within six minutes of the robbery and was involved in a prior robbery that was similar.

Appeal by defendant from judgment entered 11 February 2009 by Judge Kenneth C. Titus in Guilford County Superior Court. Heard in the Court of Appeals 11 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General Michael D. Youth and Derrick C. Mertz, for State.

Donald R. Vaughan and Angela Bullard Fox, for defendant.

ERVIN, Judge.

Defendant Ahmed Babiker Ibrahi Mohamed appeals his convictions for robbery with a dangerous weapon and obtaining property by false pretenses on the grounds that (1) his confession was obtained in violation of his constitutional rights against compulsory self-incrimination, (2) he received ineffective assistance from his trial counsel, (3) the interpreters utilized at his trial were inadequate, (4) his guilty plea to obtaining property by false pretenses was unlawfully accepted, (5) the trial court erred in admitting evidence of his involvement in another robbery, and (6) the evidence was not sufficient to support his robbery conviction. After carefully considering Defendant's challenges to his convictions in light of the record and the applicable law, we find no error of law, but remand this case to the trial court for correction of a clerical error.

I. Factual Background

A. Substantive Facts

1. State's Evidence

At trial, the State presented evidence tending to show that, at approximately 8:50 p.m. on 13 May 2007, Defendant approached Douglas Whitlock at a Greensboro carwash, took $20 and a credit card from him at gunpoint, and fled the scene on foot. At the time that he robbed Mr. Whitlock, Defendant was wearing a black baseball cap.

Approximately six minutes later, Defendant, who was still wearing the black baseball cap, entered a nearby Shell station and purchased cigarettes using Mr. Whitlock's credit card. Tewodros Tessma, the clerk in the Shell station who handled Defendant's transaction, knew Defendant's last name. Mr. Tessma also noted that the name on the credit card differed from Defendant's name and contacted the police immediately after Defendant left the premises. As a result of that call to the police, Mr. Tessma provided Officer B.J. Wingfield of the Greensboro Police Department with a description of the vehicle Defendant was driving and its license plate number. In addition, Mr. Tessma provided Officer Wingfield with a surveillance videotape depicting Defendant's purchase and a copy of the credit card receipt that Defendant had signed.

Officer J.P. McSweeney of the Greensboro Police Department ran the license plate number on the vehicle that Defendant was driving and discovered that the last name of the person to whom the vehicle was registered matched that of Defendant. Officer McSweeney spotted the car at approximately 12:15 a.m. on 14 May 2007, stopped the vehicle, and took Defendant into custody. At the time that Officer McSweeney stopped the vehicle, Defendant complied with Officer McSweeney's orders to turn the car off, step out of the car with his hands up, and walk backwards towards him. A search of the vehicle resulted in the discovery of a black baseball cap in the back seat and a spent .22 caliber shell in the ash tray; however, no firearm was found in the vehicle.

At approximately 3:45 a.m., Detective Eric Miller of the Greensboro Police Department read Defendant's *Miranda* rights to him at the police station. Detective Miller wrote the word "yes" next to each sentence that he read after receiving affirmation from Defendant that he understood its meaning. According to Detective Miller, Defendant was capable of communicating effectively

in English. Defendant signed the Statement of Rights and Waiver of Rights form. Although Defendant spoke with an accent, Detective Miller testified that Defendant had no comprehension problems and that he did not request an interpreter prior to or during the interrogation.

During his conversation with Detective Miller, Defendant reported making a purchase at the Shell gas station "with a credit card I found. I did not rob anybody." Detective Miller pointed out that no one had mentioned a robbery and asked Defendant why he robbed Mr. Whitlock. Defendant became emotional and cried out, "I was broke." Defendant later admitted:

> I saw the guy outside his car. I told Maaz[1] I was going to rob him and he said, "I don't care." I got out of the car. [The] gun was in my pocket. I went up to the guy and pointed the gun at him and said "Give me the money." . . . . He gave me $20.00 and a credit card. Then we went to the store.

Defendant stated that, after the robbery, he threw the gun and the credit card out of the car window. Defendant also provided a written statement to the police, in which he explained, "I want to same white gay and I poot the gun in has face and I take 20$ and cradet card and after that I went to the par[t]y."

2. Defendant's Evidence

Defendant is the son of a Sudanese native who had been granted political asylum in the United States and whose family had also been allowed to enter the country in order to escape political persecution. Defendant speaks Classical Arabic, with a native dialect of Sudanese and a native tongue of Egyptian Colloquial Arabic or Donglawi. At the time of the alleged robbery, Defendant had been in the United States less than six months. Defendant's ability to speak and understand English at the time of his interrogation was limited. Although Defendant requested an interpreter at the beginning of the interrogation and during the questioning by Officer Miller, none was provided. Neither the events that led up to the waiver of Defendant's *Miranda* warnings nor the substantive interview that Detective Miller conducted with Defendant were recorded.

On the evening of 13 May 2007, Defendant was at home preparing to attend a wedding reception when his friend, Maaz Shogar, arrived.

1. "Maaz" is Maaz Shogar, a friend of Defendant's, with whom Defendant claimed to have spent the night of the robbery.

Defendant and Mr. Shogar left Defendant's residence in order to obtain gasoline for Defendant's car. Mr. Shogar provided Defendant with a credit card for use in making the necessary purchase. Subsequently, Defendant was detained and arrested. Without an interpreter to assist him in the interrogation process, Defendant signed and dated the written statement at the behest of Detective Miller. According to Defendant, the statement that he provided to Detective Miller consisted of information that Mr. Shogar had provided to him about the origin of the credit card.

B. Procedural History

On 14 May 2007, warrants for arrest charging Defendant with obtaining property by false pretenses and robbery with a dangerous weapon were issued. On 2 July 2007, the Guilford County grand jury returned bills of indictment charging Defendant with robbery with a dangerous weapon and obtaining property by false pretenses. The cases against Defendant came on for trial before the trial court and a jury at the 9 February 2009 criminal session of the Guilford County Superior Court. Before the beginning of the trial, Defendant acknowledged on the record that he had consented to allow his trial counsel to admit his guilt of obtaining property by false pretenses. Prior to the beginning of the jury's deliberations, Defendant entered a guilty plea to obtaining property by false pretenses. On 11 February 2009, the jury returned a verdict finding Defendant guilty of robbery with a dangerous weapon. After determining that Defendant had no prior record points and should be sentenced as a Level I offender, the trial court consolidated Defendant's convictions for judgment and sentenced Defendant to a minimum term of 60 months and a maximum term of 81 months imprisonment in the custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Admission of Defendant's Inculpatory Statements

[1] First, Defendant contends that the trial court committed plain error by failing to exclude the statement he provided to investigating officers following his arrest. In essence, Defendant contends both that the *Miranda* warnings that were given to him were inadequate and that he did not freely and voluntarily waive his *Miranda* rights. We disagree.

With commendable candor, Defendant acknowledges that his trial counsel failed to move to suppress his post-arrest statements and

contends that, given the absence of such a contemporaneous objection, his challenge to the admission of his statements to investigating officers is subject to plain error review.

> T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation marks and citations omitted). "Under plain error review, 'the appellate court must be convinced that absent the error the jury probably would have reached a different verdict.' " *State v. Doe*, 190 N.C. App. 723, 732, 661 S.E.2d 272, 278 (2008) (citations omitted).

According to Defendant, the trial court should have suppressed the statements that he gave to investigating officers because of his age and status as a non-native speaker of the English language. More specifically, Defendant argues that, as an 18-year-old tenth-grader who had only been in the United States for six months at the time of the alleged robbery, Defendant's ability to comprehend the nuances of the English language were extremely limited, so that he lacked the ability to understand and to knowingly and intelligently waive the *Miranda* warnings that were administered to him. In other words, Defendant's challenges to the substance of the *Miranda* warnings that were given to him and to the voluntariness of his waiver of his *Miranda* rights both stem from his allegedly deficient command of the English language.

Ordinarily, when this Court reviews a challenge to the trial court's denial of a motion to suppress, the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the record contains evidence that would support contrary findings. *State v. Downing*, 169 N.C. App. 790, 793-94, 613 S.E.2d 35, 38 (2005). Assuming that the trial court's findings of fact have adequate evidentiary support, the question then becomes whether the conclusions of

law are supported by the factual findings. *State v. Coplen*, 138 N.C. App. 48, 52, 530 S.E.2d 313, 317, *cert. denied*, 352 N.C. 677, 545 S.E.2d. 438 (2000). The trial court's conclusions of law are reviewable *de novo*. *State v. Mahaley*, 332 N.C. 583, 592-93, 423 S.E.2d 58, 64 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995). However, since no motion to suppress was made in this instance, the usual standard of review cannot be employed in evaluating Defendant's challenge to the admission of his statements. Instead, we must simply examine the information before the trial court in order to determine if it committed plain error by allowing the admission of the challenged statements.

Before being subjected to custodial interrogation, a criminal suspect must be advised that he:

> has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda v. Ariz., 384 U.S. 436, 479, 16 L. Ed. 2d 694, 726 (1966). When reviewing the adequacy of *Miranda* warnings given to a criminal defendant, this Court must decide whether the warnings reasonably apprised the suspect of his rights. *State v. Ortez*, 178 N.C. App. 236, 245, 631 S.E.2d 188, 195 (2006), *disc. review denied and appeal dismissed*, 361 N.C. 434, 649 S.E.2d 642 (2007). In order "to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Miranda*, 384 U.S. at 467, 16 L. Ed. 2d at 719. If the individual decides to confess after being appropriately advised of his or her *Miranda* rights and deciding to freely and voluntarily waive them, then the voluntariness of the resulting statement is "controlled by that portion of the Fifth Amendment . . . commanding that no person shall be compelled in any criminal case to be a witness against himself." *Id.* at 461, 16 L. Ed. at 716 (1966) (internal quotation omitted). Whether a waiver of one's *Miranda* rights is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused. *Id.* at 468-69, 16 L. Ed. 23 at 720. As a result, we determine whether a proper waiver of a defendant's *Miranda* rights occurred by examining the totality of the circumstances, including: (1) the familiarity of the accused with the criminal justice system, (2) the length of the interrogation, (3) whether the

accused has been deprived of sleep, (4) whether the accused was held incommunicado, (5) whether there were threats of violence, (6) whether promises were made in exchange for a statement, (7) whether the accused has been deprived of food, and (8) the age and mental condition of the accused. *State v. Kemmerlin*, 356 N.C. 446, 458, 573 S.E.2d 870, 880-81 (2002). "The presence of any one of these factors is not determinative." *Id.*

At bottom, Defendant's challenge to the substance of the *Miranda* warnings that were given to him on the night that he was taken into custody hinges on his alleged minimal command of English. Defendant cites *Ortez* and *U.S. v. Perez-Lopez*, 348 F.3d 839 (9th Cir. 2003), in support of his contention that the *Miranda* warnings that were given to him were inadequate. Defendant's reliance on these decisions, however, is misplaced. Neither of the defendants in those cases had any command of the English language. The Court in *Perez-Lopez* ruled in the Spanish-speaking defendant's favor based on a translation glitch that significantly altered the explanation of his right to a court-appointed attorney. *Id.* at 847-48. The literal translation at issue in *Perez-Lopez* warned the defendant that he had "the right to solicit the court for an attorney," which the United States Court of Appeals for the Ninth Circuit held could be interpreted to suggest that a defendant's request for counsel might be rejected. *Id.* at 848. In *Ortez*, this Court found that an imprecise Spanish translation did not invalidate the *Miranda* warnings given to the defendant because there had been no material alteration of the warning's meaning. *Ortez*, 178 N.C. App. at 246, 631 S.E.2d at 196. As a result, both of these decisions hinge upon alleged mistranslations of specific *Miranda* warnings rather than upon generalized allegations that a Defendant did not understand English sufficiently well to properly waive his *Miranda* rights.

A review of the record reveals that the trial court had ample basis for believing that Defendant had significant command of the English language. Officer Marcus Pollock testified that he conferred with Defendant and his attorney during an investigation of a separate robbery and that Defendant "seemed as though he understood most of the questions." Defendant drafted his confession in English. Although Defendant's written statement is not a model of English composition, it is easily comprehensible. At the time that his car was stopped, Officer McSweeney ordered Defendant "to turn the car off. He turned the car off." In addition, Officer McSweeney also noted that, "I told the driver to step out of the car with his hands up, and once he did

that, I instructed him to walk backwards towards our cars, and he did[.]" Defendant's compliance with Officer McSweeney's instructions provided further evidence of Defendant's ability to comprehend the English language. According to Detective Miller, Defendant did not express any comprehension difficulties during the interrogation process. On cross-examination, Detective Miller testified that:

Q. Do you recall that he is from the Sudan?

A. Yes, sir.

Q. And he speaks with, well, broken English, or his English is not that well, is it?

A. I don't remember having any problems communicating with him.

Q. And so would you say his English is good?

A. He has an accent, definitely. I mean, he has a definite accent, but I don't remember having a problem communicating with him.

A. And, therefore, would you say his English is good?

Q. I would say.

A. Did he—at any time did you tell him—or did he advise you that he also speaks Arabic?

A. No, sir.

Q. Did you ever ask of any other languages that he spoke?

A. No, I didn't.

Q. So it's fair to say that no interpreter or nothing was brought in case—for a better understanding in his native language.

A. It was never an issue, because it's my understanding that nobody that whole evening had any problems communicating with him. Generally, when you get called out in the middle of the night, and most of your on-call leaders and your veteran officers on the scene, like [Officer] McSweeney, address those issues for you, and there was no mention of any kind of language barrier or difficulty talking to him. If there had been, they would have put in motion a plan to get an interpreter there. My understanding, nobody had any issues communicating with him.

Q. But you weren't on the scene, were you?

A. No, but I didn't have any problems communicating with him either.

Q. So it's fair to say, with the explanation, you did not get an interpreter for him.

A. No, sir; I didn't get an interpreter. Didn't see the need for it.

As a result, we conclude that there was ample evidence before the trial court to support a conclusion that Defendant's English skills were sufficient to enable him to understand the contents of the *Miranda* warnings that were read to him on the night that he was taken into custody.

Similarly, considering the "totality of the circumstances," the evidence before the trial court is more than sufficient to permit a finding that Defendant's command of English was sufficient to permit him to knowingly and intelligently waive his *Miranda* rights. In seeking a contrary result, Defendant relies primarily on *People v. Redgebol*, 184 P.3d 86, 95-100 (Colo. 2008), in which the Colorado Supreme Court held that a defendant's waiver of his *Miranda* rights was ineffective where the defendant, who was a Sudanese refugee, only spoke the Dinka language, had limited intellectual functioning, had never attended school, had gained his understanding of English from watching daytime television, and, during his custodial interrogation by investigating officers, experienced substantial communication difficulties involving himself, his interpreter, and the police. In this case, however, the record before the trial court contained evidence tending to show that Defendant had a command of conversational English, that Defendant had not sought the aid of an interpreter, that less than four hours had lapsed between the time of Defendant's arrest and the time that Defendant made his statements to Detective Miller, that Defendant had not been deprived of food or sleep in the interim between his arrest and the time that he made his statement to Officer Miller, that there had not been any threats or any promises made to Defendant in order to induce him to waive his *Miranda* rights or make a statement, and that Defendant had not been prevented from contacting his parents or an attorney. In light of the testimony provided by the investigating officers concerning their interactions with Defendant, the trial court had ample basis for concluding that Defendant's limited familiarity with the American criminal justice system did not translate into an inability to comprehend

his rights or to make a valid decision to waive his rights against compulsory self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 23 of the North Carolina Constitution.

On appeal, Defendant places considerable emphasis upon factual material concerning his English comprehension skills that had not been admitted into the record at the time that the trial court allowed the admission of Defendant's statements to investigating officers. Aside from the fact that the trial court had to base its decision to allow the admission of Defendant's statements on the information available at the time they were offered, much of the information upon which Defendant now relies either never made it into the trial record at all or directly contradicted the testimony of the investigating officers. Had Defendant made a timely motion to suppress his statements to investigating officers, the trial court would have had an opportunity to evaluate the relative credibility of the investigating officers, who contended that Defendant had no trouble communicating in English at the time that he was interrogated, as well as Defendant, who claimed to have been unable to effectively communicate in English and to have requested an interpreter during his conversations with the investigating officers. However, the absence of such a motion precluded the trial court from having any opportunity to address this fundamental dispute between the investigating officers and Defendant relating to Defendant's ability to comprehend English. Under that set of circumstances, we believe that the trial court would not have committed plain error in the event that there was any evidence in the record that supported its decision. Since the record contains ample evidence tending to show that Defendant was able to comprehend the *Miranda* warnings that were administered to him and that Defendant knowingly and intelligently waived his *Miranda* rights, the record supports the trial court's decision not to intervene. Thus, the trial court did not commit plain error by failing to exclude Defendant's statements to investigating officers.

B. Ineffective Assistance of Counsel

[2] Secondly, Defendant contends that he received ineffective assistance from his trial counsel because his trial counsel failed to move to suppress or object to the admission of the verbal and written statements that were introduced into evidence. In order to establish that he has received ineffective assistance of counsel, Defendant must show (1) that "counsel's performance was deficient," meaning it "fell below an objective standard of reasonableness," and (2) that "the

deficient performance prejudiced the defense," meaning that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693 (1984). Ineffective assistance of counsel "claims brought on direct review will be decided on the merits when the cold record reveals that no further factual 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." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). "Accordingly, should the reviewing court determine that [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *Id.*, 354 N.C. at 167, 557 S.E.2d at 525; *see also State v. Long*, 354 N.C. 534, 540, 557 S.E.2d 89, 93 (2001) (stating that "[t]he record discloses that in this case evidentiary issues may need to be developed before defendant will be in a position to adequately raise his possible [ineffective assistance of counsel] claim," so "[w]e direct that defendant not be precluded from raising this issue in a postconviction motion for appropriate relief"). In this case, the record reveals that certain evidentiary issues need further development before Defendant may adequately raise and the courts may adequately consider this claim, such as the showing, if any, that could have been made in support of Defendant's claims that the *Miranda* warnings given to him were inadequate and that he did not knowingly and intelligently waive his *Miranda* rights; the extent, if any, to which Defendant's trial counsel made a strategic or tactical decision to refrain from challenging the admission of Defendant's statements to investigating officers; and the extent, if any, to which any deficient performance on the part of Defendant's trial counsel in failing to challenge the admission of these statements prejudiced Defendant. As a result, consistently with the Supreme Court's decision in *Fair*, we decline to address Defendant's ineffective assistance of counsel claim at this time without prejudice to his right to assert it in a subsequent motion for appropriate relief and direct that Defendant not be precluded from raising this issue in any such postconviction petition he may choose to file.

C. Adequacy of Interpreters at Trial

[3] Thirdly, Defendant challenges the adequacy of the interpreters that assisted him at trial on the basis that these individuals were not

certified by the Administrative Office of the Courts, that their dialects differed from his own,[2] and that the trial court failed to inquire about their fluency in the language that Defendant spoke. According to Defendant, the inadequacies of the interpreters deprived him of his constitutional right to a fair trial, confrontation, and due process of law. We disagree.

As a result of the fact that Defendant did not challenge the adequacy of the interpreters that assisted him at trial, Defendant contends that this Court must apply the plain error standard of review discussed above in determining whether he is entitled to relief on the basis of the alleged inadequacies of the interpreters who assisted him at trial. In arguing for the applicability of plain error review, Defendant relies upon this Court's ruling in *State v. Uvalle*, 151 N.C. App. 446, 452, 565 S.E.2d 727, 731 (2002), *disc. review denied*, 356 N.C. 692, 579 S.E.2d 95 (2003), in which a defendant's challenge to the adequacy of the interpretation services provided to him at trial was reviewed under a plain error standard. In *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003), however, our Supreme Court held that "an error, even one of constitutional magnitude, that [the] defendant does not bring to the trial court's attention is waived and will not be considered on appeal."[3] *State v. Smith*, 352 N.C. 531, 557-58, 532 S.E.2d 773, 790 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001); *see also State v. Nobles*, 350 N.C. 483, 498, 515 S.E.2d 885, 895 (1999). In addition, "plain error analysis applies only to jury instructions and evidentiary matters." *Wiley*, 355 N.C. at 615, 565 S.E.2d at 39-40. For that reason, Defendant's challenge to adequacy of the interpreters that assisted him in the trial court is not cognizable under the plain error doctrine.

Furthermore, the record reflects that the interpreters used at trial were ones that Defendant selected. Having procured the interpreters in question, Defendant is in no position to complain about the adequacy of their services. *State v. Chatman*, 308 N.C. 169, 177, 301 S.E.2d 71, 76 (1983) (stating that " 'Defendant cannot invalidate a trial

2. According to Defendant's brief, the interpreters spoke Lebanese Arabic, while he spoke "Sudanese Arabic combined with a native tongue of Egyptian Colloquial Arabic and local language of Donglawi." The record does not reflect that the trial court was aware of the existence of this language disparity.

3. *Wiley* was decided approximately one month prior to *Uvalle*. The restrictions upon the availability of plain error review enunciated in *Wiley* and the decisions upon which it relied in limiting the availability of plain error review to evidentiary and instructional issues were not mentioned in *Uvalle*.

by introducing evidence or eliciting evidence on cross-examination which he might have rightfully excluded if the same evidence had been offered by the State,' " since " 'invited error [is not] ground for a new trial' ") (quoting *State v. Waddell*, 289 N.C. 19, 25, 220 S.E.2d 293, 298 (1975), *vacated in part by* 428 U.S. 904, 49 L. Ed. 2d 1210 (1976), and citing *State v. Gaskill*, 256 N.C. 652, 657, 124 S.E.2d 873, 877 (1962); *State v. Williams*, 255 N.C. 82, 88, 120 S.E.2d 442, 447 (1961); *State v. Case*, 253 N.C. 130, 139, 116 S.E.2d 429, 435 (1960), *cert. denied*, 365 U.S. 830, 5 L. Ed. 2d 707 (1961); *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971); *Overton v. Overton*, 260 N.C. 139, 145, 132 S.E.2d 349, 353 (1963)); see also N.C. Gen. Stat. § 15A-1443(c) (stating that "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct").

Finally, even assuming that plain error review is available and that invited error considerations do not prohibit further examination of Defendant's argument, the record does not reflect that the two interpreters at trial were actually ineffective. One of the two interpreters was utilized for the purpose of assisting Defendant. However, Defendant testified, for the most part, in English and claimed that his English proficiency was "about 65 percent." The other interpreter was utilized to assist Defendant's brother Ibrahim. However, Ibrahim did not rely on the interpreter during his testimony to any appreciable extent either. Defendant has not directed our attention to any specific translation difficulties or other instances in which deficiencies in the translators' performances impaired Defendant's ability to "confront[] and cross-examin[e] the [S]tate's witnesses or [to] present[] its evidence for the jury's consideration," *Uvalle*, 151 N.C. App. at 452, 565 S.E.2d at 731, nor have we identified any such problems during our own review of the record. As a result, even if Defendant is entitled to plain error review of this claim, he has not shown any entitlement to relief.

D. Acceptance of Defendant's Guilty Plea

[4] Fourth, Defendant argues that the trial court erred in accepting his plea of guilty to the charge of "obtaining property by false pretense" since the transcript of plea utilized in connection with his guilty plea bore the file number of a separate robbery with a dangerous weapon charge.[4] Although we agree that Defendant is correct in

4. Defendant also contends that the inclusion of the erroneous file number on the transcript of plea, "combined with the totality of the circumstances," including, among other things, his "background, inability to understand English, [and] the ineffective[ness] of his [trial] counsel, brings into question whether Defendant actually under-

noting that the transcript of plea in the false pretenses case bears the wrong file number, we conclude that the numbering mistake is a mere clerical error which should be corrected on remand rather than an error of law which entitles Defendant to relief from the trial court's judgment.

A "[c]lerical error has been defined . . . as 'an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.' " *State v. Taylor*, 156 N.C. App. 172, 177, 576 S.E.2d 114, 117-18 (2003) (quoting *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000), and citing *State v. Lineman*, 135 N.C. App. 734, 737-38, 522 S.E.2d 781, 784 (1999) (treating judgments that listed the incorrect class of the misdemeanor for which the defendant had been convicted and misstated the defendant's race as containing clerical errors); *State v. Hammond*, 307 N.C. 662, 669, 300 S.E.2d 361, 365 (1983) (treating a judgment and commitment form that listed robbery with a dangerous weapon as a Class C, rather than a Class D, felony as containing a clerical error). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (quoting *Linemann*, 135 N.C. App. at 738, 522 S.E.2d at 784); *see Taylor*, 156 N.C. App. at 177, 576 S.E.2d at 117-18.

As Defendant notes, the transcript of plea utilized in connection with Defendant's plea of guilty to obtaining property by false pretenses bore File No. 07 CRS 089148, which is the file number associated with the case in which Defendant was charged with committing robbery with a dangerous weapon on 29 April 2007, rather than File No. 07 CRS 088318, which is the file number associated with the case in which he was charged with obtaining property by false pretenses on 14 May 2007. Although Defendant argues that the fact that an erroneous file number appears on the transcript of plea "brings into question whether [he] actually understood his plea and the voluntariness thereof," the record clearly reflects that Defendant was apprised of the nature of the charge to which he was pleading guilty

---

stood his plea and the voluntariness thereof." However, since the "totality of the circumstances" test only comes into play in the event that the trial court fails to strictly comply with N.C. Gen. Stat. § 15A-1022, *State v. Hendricks*, 138 N.C. App. 668, 670, 531 S.E.2d 896, 898 (2000), and since Defendant has not established the existence of any noncompliance in this case, we need not examine the "totality of the circumstances" surrounding the entry of Defendant's plea.

and voluntarily entered a guilty plea to obtaining property by false pretenses in File No. 07 CRS 088318.[5] Prior to the beginning of the trial, the following exchange took place between Defendant and the trial court:

> THE COURT: All right. Mr. Mohamed, you understand, sir, that your attorney is, on your behalf, admitting to guilt of the offense of obtaining property by false pretense. Do you authorize your attorney to do so?
>
> (The defendant confers with [Defendant's Trial Counsel], off the record.)
>
> DEFENDANT: I did use the credit card, but—
>
> THE COURT: That's all—I just need to know if you're authorizing your attorney to admit your guilt to the obtaining property by false pretense—
>
> DEFENDANT: Yes.
>
> THE COURT: if you're doing so, because he's going to address that issue with the jury, and they will hear evidence of the whole transaction, which includes the obtaining property by false pretense. The jury will know that you're charged with that offense and admitting guilt to that offense, and that authorization has to be made by you, because the jury hears that information. So you're authorizing—are you authorizing your attorney to admit your guilt to the offense of obtaining property by false pretense?
>
> DEFENDANT: Yes.

---

5. Defendant also notes that the transcript of plea mentions the robbery with a dangerous weapon charge in File No. 07 CRS 089148 with an offense date of 29 April 2007 and the robbery with a dangerous weapon charge in File No. 07 CRS 088319 with an offense date of 14 May 2007. Although Defendant contends that the fact that these two charges are listed on the transcript of plea provides further indication that the validity of Defendant's plea should be deemed suspect, the fact that both charges are stricken through on the plea transcript and the fact that the record contains no indication that Defendant attempted to enter a plea of guilty to any charge other than obtaining property by false pretenses convinces us that the presence of these two robbery with a dangerous weapon charges on the plea transcript had no effect on Defendant's decision to enter a plea of guilty to obtaining property by false pretenses.

THE COURT: All right, and you're obviously entering a plea of not guilty to the offense of robbery with a dangerous weapon, is that correct?

DEFENDANT: Yes.

After the presentation of the evidence, but prior to the submission of the case to the jury, Defendant entered a plea of guilty to obtaining property by false pretenses in a proceeding that was conducted in full compliance with the procedures specified in N.C. Gen. Stat. § 15A-1022. After accepting the jury's verdict convicting Defendant of robbery with a dangerous weapon, the trial court found that "the defendant [had] pled guilty to the offense of obtaining property by false pretense, a Class H felony, in 07 CRS 88318 . . . ." Furthermore, the "pleas" section of the "transcript of plea" strikes through the "robbery with a dangerous weapon" offense in File No. 07 CRS 089148 and designates the "obtaining property by false pretense" offense using the correct file number, 07 CRS 88318 as the offense to which Defendant pled guilty. A careful study of the record clearly reveals that the fact that the caption on the transcript of plea bears File No. 07 CRS 089148 is a simple inadvertence rather than a mistake resulting "from judicial reasoning or determination." *Taylor*, 156 N.C. App. at 177, 576 S.E.2d at 117-18. As such, we remand this case to the trial court for the limited purpose of correcting the clerical error that appears on the transcript of plea utilized in connection with Defendant's plea of guilty to obtaining property by false pretenses in File No. 07 CRS 088318.

E. Evidence Concerning Unrelated Robbery

[5] Fifth, Defendant contends that the trial court erred by allowing the admission of testimony concerning a separate robbery on the grounds that the trial court's ruling subjected him to "unfair prejudice which substantially outweighed the probative value of [such] evidence." We disagree.

The admissibility of "other bad acts" evidence is governed by N.C. Gen. Stat. § 8C-1, Rule 404(b).

> Rule 404 (b) is a rule of inclusion, subject to the single exception that such evidence must be excluded if its *only* probative value is to show that defendant has the propensity or disposition to commit an offense of the nature of the crime charged. *State v. Berry*, 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002). In order for evidence to be admissible under Rule 404(b), it "must be offered for

> a proper purpose, must be relevant, must have probative value that is not substantially outweighed by the danger of unfair prejudice to the defendant, and, if requested, must be coupled with a limiting instruction." *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992).

State v. Corum, 176 N.C. App. 150, 156, 625 S.E.2d 889, 893 (2006). "[E]vidence that [a] defendant committed similar acts which are not too remote in time may be admitted to show that these acts and those for which the defendant is being tried all arose out of a common scheme or plan on the part of the defendant." *State v. Rosier*, 322 N.C. 826, 828, 370 S.E.2d 359, 360-61 (1988). In addition, evidence of a prior bad act is admissible to establish the defendant's identity. N.C. Gen. Stat. § 8C-1, Rule 404(b); *Corum*, 176 N.C. App. at 156, 625 S.E.2d at 893. "[T]he ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of [N.C. Gen. Stat.] § 8C-1, Rule 403." *State v. Davis*, 340 N.C. 1, 14, 455 S.E.2d 627, 634)1995) (quoting *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988)).

At trial, the State offered evidence that one or more black males with African accents robbed John Rock with a handgun in Greensboro on the evening of 29 April 2007. The perpetrators fled the scene on foot after taking Mr. Rock's wallet and iPod. Mr. Rock identified Defendant as one of the robbers from a photographic lineup. Within thirty minutes of the robbery, Defendant used Mr. Rock's debit card to purchase items at the same Shell station at which the purchase at issue in this case was made. After deciding to admit evidence of the robbery of Mr. Rock, the trial court gave a limiting instruction in which it informed the members of the jury that:

> this evidence is being presented by the State which may indicate that the defendant may have committed some similar offense at an earlier time. Now whether the incident is so similar is for you to determine and the weight to be given to that. Please remember that this is not evidence of the defendant's guilt in this case. You may not convict the defendant on the present charges because of something that the defendant may or may not have done in the past.

Subsequently, in its final instructions to the jury, the trial court instructed the jury that "[e]vidence has been received tending to

show that the defendant may have committed a similar offense;" that "[t]his evidence was received solely for the purpose of showing that there existed in the mind of the defendant a plan, scheme, system, or design involving the crime charged in this case;" and that, "[i]f you believe this evidence, you may consider it, but only for the limited purpose for which it was received."

The similarities between the two robberies are striking, including the fact that the victims were robbed of their credit or debit cards by one or more handgun-wielding individuals with African accents, which were then used by Defendant to purchase gas at the same Shell station within a very short period of time. The evidence in question was, for that reason, admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b), since it tends to prove both a common plan or scheme on the part of Defendant involving both robberies and the Defendant's identity as the perpetrator of the robbery for which he was being tried. In addition, the trial court did not abuse its discretion by failing to exclude the evidence relating to the other robbery pursuant to N.C. Gen. Stat. § 8C-1, Rule 403. As a result, the trial court did not err by admitting evidence of the prior robbery.

F. Motion to Dismiss

[6] Finally, Defendant argues that the trial court erred by denying his motion to dismiss the charge of robbery with a dangerous weapon at the close of all evidence on the grounds that the evidence was insufficient to justify a guilty verdict. We disagree.

> When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Whether evidence presented constitutes substantial evidence is a question of law for the court. *Id.* at 66, 296 S.E.2d at 652. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The term "substantial evidence" simply means "that the evidence must be existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

State v. Vause, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). The trial court must consider the record evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference

that may be drawn from it. *Id.* at 237, 400 S.E.2d at 61. "The test of the sufficiency of the evidence to withstand the defendant's motion to dismiss is the same whether the evidence is direct, circumstantial, or both." *Id.*

The elements of robbery with a dangerous weapon are "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998), *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001); see N.C. Gen. Stat. § 14-87(a). According to Defendant, with the exception of the victim's testimony that the perpetrator had an African accent and that Defendant resembled the gunman from the nose down, there is no evidence that links him to the actual robbery once his statements to investigating officers are disregarded. On the other hand, according to Defendant, Mr. Whitlock estimated that the robber was 5'11" tall, while Defendant is only 5'8". Based on a careful review of the record, however, we conclude that there is substantial evidence that Defendant perpetrated the crime of which he was convicted under the doctrine of recent possession.

The doctrine of recent possession allows the jury to infer that the possessor of recently stolen property is guilty of taking it. *State v. Reid*, 151 N.C. App. 379, 382, 565 S.E.2d 747, 750, *appeal dismissed*, 356 N.C. 622, 575 S.E.2d 522 (2002) (citing *State v. Pickard*, 143 N.C. App. 485, 487, 547 S.E.2d 102, 104, *disc. review denied*, 354 N.C. 73, 553 S.E.2d 210 (2001)). The doctrine of recent possession applies where the State proves (1) that the property was stolen; (2) that the defendant had possession of the stolen property, which means that he was aware of its presence and, either by himself or collectively with others, had both the power and intent to control its disposition or use; and (3) that defendant's possession of the stolen property occurred so soon after it was stolen and under such circumstances that it is unlikely he obtained possession honestly. *Id.*

In this case, Mr. Whitlock testified that he reported his credit card stolen on 14 May 2007. The testimony of Mr. Tessma, the surveillance video, and the credit card receipt establish that Defendant possessed and used the stolen property. In addition, Officer McSweeney testified that "the robbery occurred [at] 8:50" p.m., while the receipt relating to Defendant's transaction at the Shell station was time-stamped 8:56 p.m., indicating that Defendant possessed Mr. Whitlock's credit card within six minutes of the robbery. Finally, the evidence concern-

ing Defendant's involvement in the robbery of Mr. Rock provides further support for an inference that Defendant was the perpetrator of the robbery of Mr. Whitlock. Thus, when viewed in the light most favorable to the State, the record contains more than sufficient evidence to support Defendant's conviction for robbery with a dangerous weapon even if Defendant's statements to Officer Miller are disregarded.[6] For that reason, the trial court properly denied Defendant's dismissal motion.

Conclusion

As a result, for the reasons set out above, we conclude that Defendant received a fair trial, free from prejudicial error. Thus, the trial court's judgment should remain undisturbed. However, we remand this case to the trial court for correction of the clerical error on the transcript of plea utilized in connection with Defendant's plea of guilty to obtaining property by false pretenses in File No. 07 CRS 088318.[7]

NO ERROR; REMAND TO CORRECT CLERICAL ERROR.

Chief Judge MARTIN and Judge ROBERT C. HUNTER concur.

STATE OF NORTH CAROLINA v. GERALD T. PINKERTON

No. COA09-654

(Filed 20 July 2010)

Sentencing— improper consideration of defendant's decision to go to trial—not harmless error

The trial court improperly considered defendant's decision to exercise his right to trial by jury rather than entering a guilty plea in its sentencing decision in a rape and sexual offense case. The

6. Needless to say, there is no reason to disregard Defendant's statements to Officer Miller in determining the sufficiency of the evidence to support Defendant's conviction for robbery with a dangerous weapon.

7. The result which we have reached in this opinion renders the State's Motion to Strike Material Outside the Record from the Filed Record on Appeal and from Defendant-Appellant's Brief moot, since the materials which were the subject of the State's motion did not affect our disposition of Defendant's challenge to the trial court's judgment. Similarly, it is also unnecessary for us to consider Defendant's Motion to Supplement Record on Appeal and Motion for Judicial Notice, since the issuance of this opinion renders that motion moot for the same reason.

error was not harmless beyond a reasonable doubt, even where evidence of defendant's guilt was overwhelming and defendant was sentenced in the presumptive range, because the extent to which particular sentences are treated as consecutive or concurrent is committed to the trial court's discretion. Defendant was awarded a new sentencing hearing.

Judge ROBERT C. HUNTER dissents by separate opinion.

Appeal by defendant from judgments entered 22 August 2008 by Judge James F. Ammons in Johnston County Superior Court. Heard in the Court of Appeals 11 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for Defendant.

ERVIN, Judge.

Defendant Gerald T. Pinkerton appeals from judgments imposed by the trial court sentencing him to six consecutive sentences of 336 to 413 months imprisonment in the custody of the North Carolina Department of Correction based upon jury verdicts convicting him of one count of first degree rape of a child and five counts of first degree sexual offense and to a concurrent sentence of 21 to 26 months imprisonment in the custody of the North Carolina Department of Correction based upon jury verdicts convicting Defendant of five counts of taking indecent liberties with a child, all of which were consolidated for judgment. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we remand for resentencing.

Factual Background

The State's evidence tended to show that, in late April 2007, Jeanne Rogers, a guidance counselor at West Clayton Elementary School, made a presentation about "Body Safety" to Amanda Sbarra's kindergarten class. After the class, a six-year-old student named Carrie[1] informed Ms. Sbarra that she had been touched inappropriately and that her "bottom hurt[] on the inside." During the weeks prior to Ms. Rogers' presentation, Carrie had been wetting her pants

1. The pseudonym "Carrie" will be used throughout the remainder of this opinion in order to protect the child's identity and for ease of reading.

and crying frequently at school. Ms. Sbarra took Carrie to the guidance counselor's office, where Carrie reported to Ms. Rogers that "Pops put his weenie there" while pointing to her vaginal area.[2] In addition, Carrie told Ms. Rogers that "[Pops] also blows in my tush" and that "sometimes he touches me where my poop comes out." After Carrie returned to the classroom, Ms. Rogers immediately contacted the Johnston County Department of Social Services in order to report Carrie's allegations.

On 27 April 2007, Carrie repeated the allegations that she had made against Defendant to Ms. Rogers in an interview with Dee Etheridge, a social worker with the Johnston County Department of Social Services. In that conversation, Carrie told Ms. Etheridge that "Pops" had "put his weenie into my twat by accident.[3]"

During interviews conducted in mid-August 2007 by Melanie Crumpler, a child forensic evaluator, Carrie reiterated the information that she had shared with Ms. Etheridge and identified "Pops" as an older person who played with Carrie and her younger sister. Carrie also stated that Defendant had only touched her inappropriately when she visited his home, which was located in the same trailer park where Carrie and her family lived.[4] Carrie noted that Defendant instructed her not to tell anyone about the touching because she would be prohibited from visiting him again. According to Carrie, Defendant performed various sexual acts upon her, including touching her "twat" with his "weenie," rubbing her with his "weenie," touching her where she "poops," and blowing on her "tush."

On 8 May 2007, Detective Chris Otto of the Johnston County Sheriff's Department interviewed Defendant at the Johnston County Sheriff's Office as part of his investigation into Carrie's allegations. During his interview with Detective Otto, Defendant said that Carrie had slept overnight at his home on numerous occasions, which mostly occurred on weekends, during a two-year period and that she typically slept in his bed and watched television when she was scared. According to Defendant, Carrie witnessed him ejaculate only once, explaining that he was "choking the chicken," or masturbating,

2. Ms. Sbarra testified that Carrie referred to Defendant as "Pops" and that she could identify Defendant because he frequently visited Carrie at school.

3. Carrie later explained to Ms. Etheridge that her "twat" was her vagina.

4. According to Carrie's mother, the family initially had a good relationship with Defendant, allowed Carrie and her sister to spend the night at Defendant's residence because Carrie's mother had to work the third shift at a convenience store, and treated Defendant like the children's grandfather.

when semen escaped and hit Carrie on "her butt and leg." According to Defendant, Carrie, who was only six years old at the time, then turned over to face him and grabbed his penis with her hand. At that point, Detective Otto terminated the interview and permitted Defendant to leave the Sheriff's Office.

On 9 May 2007, Detective Otto secured a warrant for Defendant's arrest and went to Defendant's home for the purpose of taking him into custody. After orally waiving his *Miranda* rights, Defendant stated that he would allow Carrie and her younger sister to bathe together and "run around naked" and that he would "blow on [the girls'] stomachs." Defendant later admitted that he had placed his mouth on each girl's vagina "maybe five times," though he claimed that he "never really opened their legs" and that he "did not stick [his] tongue in their vagina." While being taken to jail, Defendant also admitted, "Yes, I have stuck my penis between [Carrie's] legs. It happened in my bedroom." When asked whether Carrie was asleep or not, Defendant responded that he was unsure but that he would stick his penis between her buttocks in such a manner that did not result in penetration and "get excited that way."

On 10 September 2007, the Johnston County grand jury returned bills of indictment charging Defendant with ten counts of taking indecent liberties with a child; ten counts of first degree rape of a child under the age of 13; and ten counts of first degree sexual offense with a child under the age of 13. On 4 February 2008, the Johnston County grand jury returned superseding indictments on the first degree sexual offense cases.

The cases against Defendant came on for trial before the trial court and a jury at the 18 August 2008 criminal session of the Johnston County Superior Court. At the beginning of Defendant's trial, the State voluntarily dismissed five counts of taking indecent liberties with a child, nine counts of first degree rape of a minor child, and five counts of first degree sexual offense. On 22 August 2008, the jury found Defendant guilty of the remaining charges. After finding Defendant to be a Level III offender, the trial court sentenced Defendant to consecutive terms of 336 to 413 months imprisonment in the custody of the North Carolina Department of Correction for Defendant's single first degree rape of a minor child conviction and each first degree sexual offense conviction and to a concurrent sentence of 21 to 26 months imprisonment in the custody of the North Carolina Department of Correction for each of Defendant's convictions for taking indecent liberties with a child, all of which were con-

solidated for judgment. Defendant noted an appeal to this Court from the trial court's judgments.

Analysis

Defendant's sole challenge to the validity of the trial court's judgments rests on a contention that the trial court improperly considered his decision to exercise his right to trial by jury rather than entering a guilty plea in its sentencing decision. After careful consideration of the record in light of the applicable law, we conclude that Defendant's contention has merit and that he is entitled to a new sentencing hearing.

Although "[a] sentence within the statutory limit will be presumed regular and valid[,] . . . such a presumption is not conclusive." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). "If the record discloses that the [trial] court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of [the] defendant's rights." *Id.* (citing *State v. Swinney*, 271 N.C. 130, 133, 155 S.E.2d 545, 548 (1967)). The extent to which a trial court imposed a sentence based upon an improper consideration is a question of law subject to *de novo* review. *Swinney*, 271 N.C. at 133, 155 S.E.2d at 548.

Prior to the beginning of Defendant's trial, the State offered Defendant the opportunity to enter into a negotiated plea, under which he would plead guilty to the offenses with which he had been charged and that all of these offenses would be consolidated for judgment into a single Class B1 offense on the understanding that the State would not seek to have Defendant sentenced in the aggravated range. During a colloquy between the trial court and Defendant concerning this plea offer, which was conducted at the request of Defendant's trial counsel for the purpose of ensuring that Defendant and his trial counsel "had discussed [the plea offer] and he is in fact not accepting that offer," the following proceedings occurred:

THE COURT: If you are convicted, sir, of any rape or sex offenses, according to what your attorney and the DA tells me, you're a Class III, and so you would be sentenced to a maximum minimum term of 336 months, which is 28 years, to 413 months, which is 34-and-almost-a-half years.

If you're convicted of any of the Class F taking indecent liberties with a child, you're going to

be sentenced to 21 months at the maximum minimum and a 26 months as a maximum. If you're convicted of all the crimes, you could be sentenced to a maximum minimum of 178-and-a-half years with a maximum of 219-and-a-half years. I think it's safe to say none of us are going to live that long.

As I understand it from talking to the attorneys during the pre-trial, an offer was made to you that you could plead guilty to all of these, they'd be consolidated into one Class B1 felony, and you would be facing somewhere between 269 months minimum and 336 minimum. It would be up to me to determine what the appropriate sentence was, and the corresponding maximums would be up to 413 months.

. . . .

THE COURT: As I understand it, your attorney communicated this offer to you. Is that correct?

[DEFENDANT]: Yes, sir.

THE COURT: Did you have an opportunity to discuss that offer with him?

[DEFENDANT]: Yes, I did.

THE COURT: Were you completely satisfied with the amount of time that you spent discussing the offer with him?

[DEFENDANT]: Well—

THE COURT: I'm not talking about the offer, but were you satisfied with the amount of time you spent going over it with him?

[DEFENDANT]: Oh, yes. Yes, sir.

. . . .

THE COURT: . . . He tells me that you have rejected that offer—that you have, prior to today, rejected that offer. Is that correct?

[DEFENDANT]: Yes, sir.

THE COURT: Do you fully understand what the offer was and what your exposure to prison would have been had you pled guilty?

[DEFENDANT]: Yes.

THE COURT: Do you fully understand what your exposure to prison is if you're found guilty of all of these charges?

[DEFENDANT]: Yes, sir. I do.

THE COURT: Do you think you need any additional time to discuss this offer with your attorney?

[DEFENDANT]: No, sir, because I'm 68, and so whichever one is a life sentence. So it makes no difference, if that makes any sense.

THE COURT: Well, yeah. It makes sense that you would see it like that.

[Pause.]

THE COURT: And, according to the law, you're supposed to serve the minimum. I don't know if that would continue to be true in 10 years or 20 years from now, whether you would continue to have to serve the minimum. I do know that having a minimum of 28 years is a whole lot different than having a minimum of 168 years. You would never get out, no matter what happens, no matter how crowded the prison systems get, no matter who the governor is. If you've got 168-year sentence, they're never going to let you out.

You do have some prayer, I assume, of getting out with a minimum in the range of 25 to 28 years, but it's your life. It's not mine, and I—the only thing I want to be clear upon is that—for your sake, your attorney's sake, and the justice system's sake is that what your attorney has told me is what your understanding is, that this offer was made to you; that you, of your own free will,

rejected the offer; and that you did not want to avail yourself of this offer.

[DEFENDANT]: Yes, sir.

THE COURT: Okay.

After the jury convicted Defendant of one count of first degree rape, five counts of first degree sex offense, and five counts of taking indecent liberties with a child and prior to the imposition of sentence, the trial court permitted Defendant to address the court in accordance with N.C. Gen. Stat. § 15A-1334(b). At that point, the trial court had the following exchange with Defendant:

THE COURT: All right. Mr. Pinkerton, you've been convicted on all counts. This is your opportunity to say anything that you'd like. I'm glad to hear anything you have to say to the Court, to the victim, to your family, to the public at large.

You're not required to say anything, but, if you'd like to say something, I'll be glad to listen to it.

[DEFENDANT]: [Stood.] Yes, sir. I would. I'd like to apologize. I loved you all. I really did. That's all I have to say.

THE COURT: All right. You can have a seat, sir. This is going to take a while.

After a pause, the trial court made the following comments before actually pronouncing sentence upon Defendant:

THE COURT: Now, Mr. Pinkerton, prior to calling the jury in, you had an opportunity to plead guilty in a plea bargain where the Court offered you the minimum sentence for one crime which would have been about 22 years, and you explained to me that you thought 22 years or 200 years was the same, that it was a life sentence for you.

[DEFENDANT]: Yes, sir.

THE COURT: But, if you truly cared—if you had one ounce of care in your heart about that child—you wouldn't have put that child through this. You would have pled guilty, and you didn't. That's your choice.

[DEFENDANT]: That was my choice. Yes, sir. I realize that.

THE COURT: I'm not punishing you for not pleading guilty. I am not going to punish you for not pleading guilty. I would have rewarded you for pleading guilty.

[Pause.]

THE COURT: Your sentence is not in any way because you didn't plead guilty. I'm sentencing you to what I think is appropriate.

At that point, the trial court imposed the combination of consecutive and concurrent sentences outlined above.

Although "[a] sentence within the statutory limit will be presumed regular and valid[,] . . . such a presumption is not conclusive." *Boone*, 293 N.C. at 712, 239 S.E.2d at 465. "If the record discloses that the [trial] court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of [the] defendant's rights." *Id.* (citing *Swinney*, 271 N.C. at 133, 155 S.E.2d at 548). A "criminal defendant may not be punished at sentencing for exercising [his] constitutional right to a trial by jury." *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990) (citing *Boone*, 293 N.C. at 712, 239 S.E.2d at 465). Put another way, a defendant's decision to exercise his right to proceed to trial rather than enter a plea of guilty may not be a factor in the trial court's sentencing determination. *State v. Gantt*, 161 N.C. App. 265, 271, 588 S.E.2d 893, 897 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004). Where it can be "reasonably inferred" from the trial court's comments that the sentence was imposed, even in part, because of the defendant's demand for a jury trial, the "defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result." *Id.* (quoting *Cannon*, 326 N.C. at 39, 387 S.E.2d at 451). As a general proposition, however, there must be an " 'express indication of improper motivation.' " *Gantt*, 161 N.C. App. at 272, 588 S.E.2d at 898 (quoting *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987)). The extent to which a trial court imposed a sentence based upon an improper consideration is a question of law subject to *de novo* review. *Swinney*, 271 N.C. at 133, 155 S.E.2d at 548.

According to well-established principles of North Carolina law, a trial judge does not err by simply engaging in a colloquy with a criminal defendant for the purpose of ensuring that the defendant under-

stands and fully appreciates the nature and scope of the available options. *State v. Tice*, 191 N.C. App. 506, 513, 664 S.E.2d 368, 373 (2008) (stating that a pretrial colloquy between the trial court and the defendant was merely intended to "ensur[e] that defendant was fully informed of [the] risk he was taking given that he had previously rejected a plea that would have resulted in a misdemeanor sentence"); *State v. Crawford*, 179 N.C. App. 613, 619-20, 634 S.E.2d 909, 914 (2006), *disc. review denied*, 361 N.C. 360, 644 S.E.2d 363 (2007) (stating that "the trial court's remarks prior to trial [that] served to clarify the terms of the offered plea bargain and eliminate questions regarding a subsequent sentence" did "not allow a reasonable inference that the trial court imposed a presumptive sentence as a result of defendant's decision to exercise his right to a jury trial"); *State v. Poag*, 159 N.C. App. 312, 324, 583 S.E.2d 661, 670, (2003), *appeal dismissed and disc. review denied*, 357 N.C. 661, 590 S.E.2d 857 (stating that "[t]he trial court's decision to state that it would impose a concurrent sentence as part of an accepted plea bargain was an effort to make the plea bargain more definitive and eliminate any question that defendant might have about the resulting sentence" and does not, given the absence of any indication "that the trial court threatened to impose a harsher sentence if defendant rejected the plea offer" or "indicated it was imposing a harsher sentence as a result of defendant's rejection of the plea offer," permit "a reasonable inference that the trial court imposed a consecutive sentence as a result of defendant's decision to exercise his right to a jury trial"). Furthermore, a mere reference to a defendant's decision to reject a negotiated plea, without any specific indication that the trial court utilized the defendant's refusal to enter a guilty plea as the basis for determining the defendant's sentence, does not necessitate an award of appellate relief. *Gantt*, 161 N.C. App. at 272-73, 588 S.E.2d at 898 (stating that trial court's statement prior to the imposition of sentence that the defendant had been given " 'one opportunity where you could have exposed yourself probably to about 70 months but you chose not to take advantage of that" did not "rise to the level of the statements our Courts have held to be improper consideration of a defendant's exercise of his right to a jury trial"). Finally, adverse comments on the strength of the defendant's evidence at trial or on the credibility of specific comments made by the defendant during the sentencing hearing do not amount to an impermissible consideration of the defendant's decision to exercise his or her right to a trial by jury, even if those comments include incidental references to the defendant's failure to accept a proffered guilty plea. *Tice*, 191 N.C. App. at 513-16,

664 S.E.2d at 373-75 (stating that, taken in context, the trial court's comments that the defendant had " 'to be feeling awfully dumb [] right now" since he had had " 'ample opportunities to dispose of this case' " " 'in a more favorable fashion and you chose not to do it' " were, taken in context, an indication that the trial court sentenced the defendant based on its "conclusion that defendant had submitted false testimony and 'fabricated' testimony from other witnesses"); *State v. Person*, 187 N.C. App. 512, 528, 653 S.E.2d 560, 570 (2007), *rev'd in part on other grounds*, 362 N.C. 340, 663 S.E.2d 311 (2008) (stating that the trial court's comment that the defendant had declined to enter a negotiated plea was a comment "on defendant's lack of credibility when claiming he wanted 'another opportunity to prove' himself as an 'honorable law abiding, caring loving man [and] citizen' and that he had been misled by 'the wrong crowd' "). On the other hand, explicit comments by trial judges that a defendant will receive a more severe sentence if he or she goes to trial and is convicted than he or she will receive if a proposed negotiated plea is accepted will result in reversible error. *State v. Haymond*, —— N.C. App. ——, ——, 691 S.E.2d 108, 123-24 (2010) (holding that the trial court impermissibly sentenced defendant on the basis of his refusal to enter a negotiated guilty plea based on its comments both before and after trial that " 'the best offer you're gonna get [is] that ten-year thing' "); *State v. Hueto*, —— N.C. App. ——, ——, 671 S.E.2d 62, 67-68 (2009) (holding that the trial court impermissibly sentenced defendant on the basis of his refusal to enter a negotiated guilty plea based on its comments that, " 'if you say no, I want to have my jury trial,' " " 'then I will not be able to give you the help that I can probably give you at this point' " and that, " 'if they find you guilty of the charges against both of these young girls, it will compel me to give you more than a single B-1 sentence, and I would have to give you at least two . . . and maybe more' "); *State v. Young*, 166 N.C. App. 401, 411-13, 602 S.E.2d 374, 380-81 (2004), *disc. review denied*, 359 N.C. 326, 611 S.E.2d 851 (2005) (holding that the trial court impermissibly sentenced defendant on the basis of his refusal to enter a guilty plea on the basis of its comments that, " 'if you pled straight up I'd sentence you at the bottom of the mitigated range,' " but that " 'if you go to trial and [are] convicted,' " the defendant "would definitely get a sentence in the presumptive range' "); *State v. Pavone*, 104 N.C. App. 442, 445-46, 410 S.E.2d 1, 3 (1991) (holding that the trial court impermissibly sentenced defendant on the basis of her refusal to enter a negotiated guilty plea on the basis of its comments following the return of the jury's verdict that " 'I understand that there were nego-

tiations with a view toward reaching an agreement with respect to your verdict and sentencing before the trial that were not productive;' " that, " 'having moved though the jury process and having been convicted, it is a matter in which you are in a different posture;' " and that " '[y]ou tried the case out; this is the result' "). In addition, this Court has also held that comments that defendant " 'tried to be a con artist with the jury,' " that he " 'rolled the dice in a high stakes game with the jury' " and " 'lost that gamble,' " and that no " 'rational person would [e]ver have rolled the dice and asked for a jury trial with such overwhelming evidence' " not made in the context of a response to comments made by the defendant or the defendant's credibility, *State v. Peterson*, 154 N.C. App. 515, 518, 571 S.E.2d 883, 885 (2002), or repeated statements that defendant, unlike his codefendant, "had not come forward and admitted what he had done," so as to "force[] his son to take the witness stand and be subjected to 'painful and embarrassing questions' " and "multiple references to defendant's trying to manipulate the jury and the court," *State v. Fuller*, 179 N.C. App. 61, 71, 632 S.E.2d 509, 516 (2006), *appeal dismissed*, 360 N.C. 651, 637 S.E.2d 180 (2008), evidenced impermissible use of a Defendant's failure to plead guilty as a factor in the imposition of sentence. Although the facts revealed by the present record are not identical to those found in any of the cases that we have previously decided, we conclude that, on balance, the trial court's comments disclose that it inappropriately considered Defendant's failure to enter a guilty plea in imposing sentence.[5]

The trial court's initial colloquy with Defendant prior to the beginning of the trial does not contain any impermissible statements. Instead, the trial court appears to have simply explained the options available to Defendant pursuant to a request made by his trial counsel. Had the trial court stopped there, this case would have been controlled by *Tice*, *Crawford*, and *Poag*. However, the trial court's additional comments following the return of the jury's verdict lead us to

5. Our dissenting colleague contends that the facts of this case most closely resemble those at issue in *Tice* and that we should find no error here for that reason, among others. A careful examination of the trial court's comments in *Tice* indicates that they were, as this Court stated, "focus[ed] on [the trial court's] conclusion that defendant had submitted false testimony and 'fabricated' testimony from other witnesses." *Tice*, 191 N.C. App. at 515, 664 S.E.2d at 374. The trial court's comments in this case were not, however, so singularly focused on the perceived weaknesses of Defendant's defense. In addition, the trial court's comment that "I am not going to punish you for not pleading guilty," but "I would have rewarded you for pleading guilty" in this case is unlike anything that was said in *Tice*. As a result, the trial court's statements in this case were much more than a "comment[] on the defendant['s] missed opportunity to 'dispose' of their cases in a more favorable manner."

reach an entirely different conclusion. After affording Defendant his statutory right to make an allocution, the trial court paused, and then stated that "if you truly cared—if you had one ounce of care in your heart about that child—you wouldn't have put that child through this." Instead, according to the trial court, Defendant "would have pled guilty, and you didn't." Although we might have been able to treat this comment as an expression of the trial court's failure to believe Defendant's claim that he would "like to apologize" and that he "loved you all" of the type held insufficient to require an award of appellate relief in *Tice* and *Person*, as compared to the repeated adverse comments on the harm done to the victim resulting from the necessity for the victim to testify at trial at issue in *Fuller*, the fact that the next thing that the trial court said was that "I'm not punishing you for not pleading guilty" and that "I would have rewarded you for pleading guilty" convinces us that the trial court did, in fact, base the sentence that was imposed upon Defendant at least in part on the fact that he chose to exercise his right to trial by jury. While the trial court disclaimed any intention of punishing Defendant for electing to go to trial rather than entering a negotiated plea and claimed that the sentence imposed upon Defendant was "appropriate," the trial court's statement that "I would have rewarded you for pleading guilty" is, taken in context, tantamount to the type of statement that led us to require resentencings in *Haymond*, *Hueto*, *Young*, and *Pavone*.[6] Put another way, it is difficult for us to read the trial court's comment that he would have rewarded Defendant for pleading guilty as anything other than an acknowledgment that Defendant's sentence was heavier than it otherwise would have been had Defendant not exercised his right to trial by jury. As a result, we conclude that the trial court erred by impermissibly considering Defendant's decision to decline to accept the negotiated plea that was offered to him prior to trial in imposing sentence.

The dissent argues that we should leave the judgments imposed by the trial court undisturbed on the grounds that there is "nothing improper about the trial court's acknowledgment that he would have 'rewarded' [Defendant] for pleading guilty," given that "every plea

6. Our dissenting colleague places considerable emphasis on his conclusion that there was no reason to disbelieve the trial court's statement "that he *was not* punishing defendant for going to trial." We do not, needless to say, wish to be understood as questioning the trial court's credibility. Instead, our concern arises from the fact that the trial court's statements, taken in their entirety, indicate that the fact that Defendant failed to enter a guilty plea was a factor in the trial court's sentencing determination. *Gantt*, 161 N.C. App. at 271, 588 S.E.2d at 897. Put another way, the issue is not the trial court's credibility; the issue is what the words that the trial court used meant.

bargain serves to reward the defendant for admitting his or her own guilt and saving the State the time and expense of trial."[7] The fundamental problem with this logic is that it would, if adopted, eviscerate the rule against punishing convicted criminal defendants for exercising their federal and state constitutional right to trial by jury by allowing a prohibited end to be achieved indirectly. Although a trial judge does, of course, have an obligation to consider all of the information that is gained during the course of a contested jury trial in sentencing a convicted defendant, he or she cannot, under well-established principles of federal and state constitutional jurisprudence, take the fact that the defendant rejected a negotiated plea into account in his or her sentencing decision. In context, the trial court's comments in this case indicate that Defendant's refusal to accept the "reward" inherent in the plea offer that was extended to him was a factor in the trial court's sentencing decision. Upholding the sentencing decision in this case on the basis that it would have been appropriate to "reward" Defendant for entering negotiated pleas is tantamount to sentencing him more harshly for pleading not guilty and is simply inconsistent with decisions such as *Hueto*, —— N.C. App. at ——, 671 S.E.2d at 67 (2009) (in which the trial court was reversed for telling the defendant that, if he rejected a proffered guilty plea, " 'then I will not be able to give you the help that I can probably give you at this point' " and that, " 'if they find you guilty of the charges against both of these young girls, it will compel me to give you more than a single B-1 sentence, and I would have to give you at least two . . . and maybe more' "), and *Haymond*, —— N.C. App. at ——, 691 S.E.2d at 123 (in which the trial court was reversed for telling the defendant both before and after trial that " 'the best offer you're gonna get [is] that ten-year thing' "), since the trial judges in those cases offered to "reward" the defendants with negotiated pleas and then imposed more severe sentences upon them when the proffered rewards were rejected. As a result, we are simply not persuaded by the logic advanced by our dissenting colleague.

---

7. Our dissenting colleague states that "[t]he reward is, in actuality, offered by the State, not the trial court." Although this assertion may accurately describe many negotiated pleas, that does not appear to be the case with respect to the negotiated plea offered to Defendant, which provided that all of the charges that were pending against him would be consolidated into a single Class B1 felony for judgment and that Defendant would receive a minimum of between 269 and 336 months imprisonment. Pursuant to N.C. Gen. Stat. § 15A-1023(b), the proposed negotiated plea offered to Defendant was subject to approval by the trial court. As a result, at least in this case, the "reward" offered to Defendant would have been provided by both the State and the trial court, assuming that the trial court was willing to approve the plea arrangement offered by the State.

Finally, the State contends that, even if the trial court did err by considering Defendant's decision to exercise his right to trial by jury in imposing sentence, any such error was harmless because the evidence against him was overwhelming and because the trial court sentenced Defendant in the presumptive range. Although an error of constitutional magnitude, such as this one, can be deemed harmless in the event that the State demonstrates that it is harmless beyond a reasonable doubt, N.C. Gen. Stat. § 15A-1443(b), no such demonstration has been made in this instance. The fact that the evidence of Defendant's guilt was overwhelming and that Defendant was sentenced in the presumptive range does not suffice to demonstrate the absence of prejudice given the fact that the extent to which particular sentences are treated as consecutive or concurrent is committed to the trial court's discretion. N.C. Gen. Stat. § 15A-1340.15(a). As a result, we conclude that Defendant is entitled to a new sentencing hearing.

REMANDED FOR RESENTENCING.

Chief Judge MARTIN concurs.

Judge ROBERT C. HUNTER dissents by separate opinion.

HUNTER, Robert C., Judge, dissenting.

After careful review of the colloquy between defendant and the trial court during sentencing, I detect no indication of improper motivation by the trial court judge in imposing defendant's sentence. Accordingly, I respectfully dissent from the majority's holding in this case.

The majority aptly states that, according to well-established principles of North Carolina law: (1) "a trial judge does not err by simply engaging in a colloquy with a criminal defendant for the purpose of ensuring that the defendant understands and fully appreciates the nature and scope of the available options"; (2) "a mere reference to a defendant's refusal to enter a guilty plea as the basis for determining the defendant's sentence, does not necessitate an award of appellate relief"; and (3) "adverse comments on the strength of the defendant's evidence at trial or on the credibility of specific comments made by the defendant during the sentencing hearing do not amount to an impermissible consideration of the defendant's decision to exercise his or her right to a trial by jury, even if those comments include incidental references to the defendant's failure to accept a proffered

guilty plea." However, "explicit comments by trial judges that a defendant will receive a more severe sentence if he or she goes to trial and is convicted than he or she will receive if a proposed negotiated plea is accepted" will result in reversible error.

The majority and I agree that there was nothing improper about the trial court's statements to defendant during a pre-trial hearing, which was requested by defense counsel. During the hearing, the trial court sought to ensure that defendant understood the plea offered and the potential term of imprisonment should he reject that offer. The State proposed that if defendant, a Class III offender, pled guilty to all charges, the State would request that the trial court consolidate the convictions and sentence defendant to one Class B1 felony, which would have resulted in a sentence of 269 to 413 months imprisonment. If defendant was convicted by a jury of any one of the felonies charged, he would have faced a prison sentence of 336 months to 413 months. The trial court informed defendant that if he proceeded to trial and was convicted of all charges, he could face 178-and-a-half years to 219-and-a-half years imprisonment. The trial court asked defendant: "Do you fully understand what the offer was and what your exposure to prison would have been had you pled guilty?" Defendant responded: "Yes." The trial court then asked defendant: "Do you fully understand what your exposure to prison is if you're found guilty of all of these charges?" Again, defendant answered affirmatively. Defendant made it clear that he was knowingly rejecting the plea offer.[8]

It appears that the majority and I also agree that the trial court judge did not err when he commented upon defendant's allocution, during which defendant apologized to the victim's family and stated that he "loved [them] all." The trial judge responded: "[I]f you had truly cared—if you had one ounce of care in your heart about that child—you wouldn't have put that child through this." As the majority correctly states, this reflexive comment by the trial judge should be treated as a mere expression of the trial court's reticence to trust the sincerity of defendant's allocution, as similarly seen in *State v. Tice*, 191 N.C. App. 506, 513-15, 664 S.E.2d 368, 373-74 (2008), and *State v. Person*, 187 N.C. App. 512, 527-28, 653 S.E.2d 560, 570 (2007), *rev'd in part on other grounds*, 362 N.C. 340, 663 S.E.2d 311 (2008).

However, the majority specifically takes issue with the trial judge's subsequent statement that "I'm not punishing you for not

8. We note that defendant was 68-years-old at the time of trial.

pleading guilty" and that "I would have rewarded you for pleading guilty." The majority states: "[I]t is difficult for us to read the trial court's comment that he would have rewarded Defendant for pleading guilty as anything other than an acknowledgment that Defendant's sentence was heavier than it otherwise would have been had Defendant not exercised his right to trial by jury." The majority goes on to conclude "that the trial court erred by impermissibly considering Defendant's decision to decline to accept the negotiated plea that was offered to him prior to trial in imposing sentence." I disagree with this holding, in part, because I see nothing improper about the trial judge's acknowledgment that he would have "rewarded" defendant for pleading guilty. Clearly, every plea bargain serves to reward the defendant for admitting his or her guilt and saving the State the time and expense of trial. The reward is, in actuality, offered by the State, not the trial court. In approving the bargain reached between the State and the defendant, the trial court is then, in effect, rewarding the defendant with a sentence that is presumably less than it would have been had the defendant been convicted by a jury. Once the State has proceeded to try the defendant and he is convicted of the crimes charged, the State no longer seeks to reward the defendant. At that point, the trial court has heard all of the evidence presented, which resulted in a conviction by the jury, and is responsible for sentencing defendant for the crimes he committed; in this case, ten counts of sexual crimes against a child. At this stage in the trial process, it would be illogical to expect the trial judge to reward defendant and I see no impropriety in the trial judge making the truthful assertion that defendant would have been rewarded had he agreed to the State's bargain.

Certainly a trial judge is not permitted to threaten a defendant with a harsher penalty if he or she does not accept the plea bargain offered by the State; however, I see no error in the trial court's comment, which took place after trial, that had defendant accepted the plea bargain, he would have been rewarded. If the scenario were reversed, and defendant had accepted the plea bargain prior to trial, there would have been no objection to a statement by the trial court that it was rewarding defendant for pleading guilty.

Furthermore, the fact that a defendant would have received a *reward* for pleading guilty does not automatically mean that a defendant is *punished* for going to trial. The majority seems to reach the opposite conclusion. The majority states that if my "logic" is adopted, "it would . . . eviscerate the rule against punishing convicted

criminal defendants for exercising their federal and state constitutional right to trial by jury by allowing a prohibited end to be achieved indirectly." That is simply not the case. As seen here, a criminal defendant is usually informed by the trial court that he will be exposing himself to a longer term of imprisonment if he goes to trial and is convicted. A harsher penalty is a risk that the defendant bears when he elects to reject a plea bargain and proceeds to trial. That harsher penalty is *not* a punishment for rejecting the plea. The trial judge is entitled to sentence the defendant to a term of imprisonment for each crime he is convicted of, and, in his discretion, to run those sentences concurrently or consecutively. N.C. Gen. Stat. § 15A-1340.15(a) (2009). I support reversal of a sentence where the trial judge makes explicit statements prior to trial that he will give defendant a harsher penalty if he does not accept the plea bargain, or the trial judge's statements at the sentencing hearing clearly establish that he is punishing the defendant for not accepting the plea bargain offered by the State. Neither of these situations are present here.

With regard to this case, I see nothing in the trial judge's comments that would lead me to believe that he was punishing defendant for going to trial. To the contrary, the trial judge specifically stated that he was *not* punishing defendant for going to trial, and I see no reason to disbelieve him. The trial court proceeded to sentence defendant within the presumptive range to five consecutive sentences for the five counts of first degree sex offense. The trial court then consolidated defendant's convictions for five counts of taking indecent liberties with a child. The trial court was statutorily permitted to impose this sentence, it is "presumed regular and valid," *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977), and I see no improper basis for the sentence.

The majority finds the trial judge's comments in the case *sub judice* to be similar to the comments made in *State v. Haymond*, ___ N.C. App. ___, ___, 691 S.E.2d 108, 123 (2010); *State v. Hueto*, 195 N.C. App. 67, 77-78, 671 S.E.2d 62, 68 (2009); *State v. Young*, 166 N.C. App. 401, 411-13, 602 S.E.2d 374, 380-81 (2004), *disc. review denied*, 359 N.C. 326, 611 S.E.2d 851 (2005); and *State v. Pavone*, 104 N.C. App. 442, 445-46, 410 S.E.2d 1, 3 (1991). I disagree and find the trial court's comments to be, in substance, most similar to those seen in *Tice*. As in the present case, the trial judge in *Tice* informed the defendant at a pre-trial hearing that the defendant ran the risk of a "significant increase" in his sentence if he were to be convicted at trial. 191 N.C. App. at 512, 664 S.E.2d

at 373. Once the defendant was convicted by a jury, the trial court made the following statement at sentencing:

> Mr. Tice, I imagine you've got to be feeling awfully dumb along right now. You've had ample opportunities to dispose of this case. *The State has given you ample opportunity to dispose of it in a more favorable fashion and you chose not to do so*. And I'm not sure if you thought that you were smarter than everybody else or that everybody else was just dumb.

Id. at 513, 664 S.E.2d at 373 (emphasis added). In *Tice*, this Court rejected the defendant's argument "that the trial judge's language during sentencing indicate[d] that defendant received the sentences that he did because he chose to exercise his right to a jury trial rather than, in the words of the judge, 'dispose [of the case] in a more favorable fashion.' " *Id.* at 514, 664 S.E.2d at 374. Though the judge's comments in *Tice* do not mirror the comments made in the case at bar, it is clear that the trial judges in both situations were commenting on the defendants' missed opportunity to "dispose" of their cases in a "more favorable fashion." *Id.*; *see also State v. Crawford*, 179 N.C. App. 613, 618, 634 S.E.2d 909, 913 (2006) (holding that trial court did not err in stating "I just want to make sure you understand that so in the event you are convicted, I don't want you to think that no one gave you an opportunity to mitigate your losses"), *disc. review denied*, 361 N.C. 360, 644 S.E.2d 363 (2007). The trial judge in this case characterized that missed opportunity as a reward that defendant did not act upon. Again, I see no impropriety in that characterization.[9]

In sum, I would hold that the trial court's sentencing was free from error and affirm the judgment entered because the trial court's remarks did not overcome the presumption that the trial court's sentence was valid. The fact that the trial judge stated that he would have rewarded defendant for pleading guilty is an accurate statement of fact given the inherent nature of our plea bargaining system which, in effect, rewards criminal defendants for admitting guilt, thereby avoiding a lengthy and expensive trial by jury. After trial, there was noth-

9. The majority points out that the analysis in *Tice* focused heavily on the fact that the trial judge was commenting on the defendant's presentation of false testimony. That is true; however, the trial court's statements, as quoted *supra*, directly relate to the defendant's decision to reject the more favorable plea offer. The defendant specifically objected to that statement, and this Court did not find any impropriety. Naturally, every colloquy between a defendant and the trial judge is going to be unique; however, I contend that the statements made in *Tice* are most similar to those made in the case at bar, and this Court found no error.

ing for which to reward defendant. Defendant was found guilty by a jury of all ten charges and the trial judge, after hearing the evidence regarding the horrible crimes perpetrated by defendant, sentenced defendant to a term of imprisonment that he determined was appropriate. I find no reason to disbelieve the trial judge's assertion that he was not punishing defendant with the sentence he imposed.

STATE OF NORTH CAROLINA v. JAMES EDWARD SIMMONS, V

No. COA09-862

(Filed 20 July 2010)

1. Criminal Law— prosecutor's closing argument—prejudicial error

The trial court erred in a driving while impaired case in allowing the State in its closing argument, over defendant's objection, to compare the case *sub judice* to a previous Pitt County case, *State v. Narron*. The prosecutor impermissibly injected his personal experiences from his prosecution of John Narron and the facts of *Narron*, in violation of N.C.G.S. § 15A-1230(a), and improperly read the facts contained in the published opinion together with the result to imply that the jury should return a favorable verdict for his client. Furthermore, the error so prejudiced the case against defendant that he was entitled to a new trial on the charge.

2. Jury— selection—challenge for cause—no error

The trial court did not err in a driving while impaired and possession of an open container of alcohol in the passenger area of a motor vehicle case by allowing the State's challenge for cause during jury selection while denying defendant's challenge for cause. The trial court must assess independently each potential juror's ability to perform his duties as a juror and by granting one party's challenge for cause, the trial court did not become obligated to grant the opposing party the same.

3. Criminal Law— defendant's closing argument—right to make final argument denied—argument dismissed

Defendant's argument that he was denied his right to make the final closing argument to the jury based on the trial court's

requirement that defense counsel provide the State a copy of the PowerPoint presentation he intended to use during his closing argument in advance of his closing argument was dismissed. The record was devoid of any conclusive evidence that the trial court ordered defense counsel to provide a copy of his presentation to the State.

4. Search and Seizure— investigatory stop—reasonable suspicion—driving while impaired—motion to suppress properly denied

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress evidence seized as a result of an investigatory traffic stop. The police officer had reasonable suspicion to stop defendant based on the officer's observance of defendant weaving within his lane and across other lanes of travel.

5. Search and Seizure— probable cause—possession of an open container of alcohol—motion to suppress properly denied

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress evidence seized in connection with his arrest. The police officer's discovery of a half-full container of alcohol on the passenger's seat of defendant's vehicle was sufficient probable cause to arrest defendant for violation of N.C.G.S. § 20-138.7.

6. Motor Vehicles— driving while impaired—chemical analysis of breath—Intoxilyzer 5000—preventative maintenance properly performed—motion to suppress properly denied

The trial court did not err in a driving while impaired case in denying defendant's motion to suppress the results of a chemical analysis performed on defendant's breath with the Intoxilyzer 5000. Contrary to defendant's argument, preventative maintenance had been performed within the time limits prescribed by the Department of Health and Human Services.

7. Penalties, Fines, and Forfeitures— possession of open alcoholic beverage container in automobile—fine excessive

The trial court erred in fining defendant $500 for possession of an open alcoholic beverage container in the passenger area of a vehicle while on the highway because, pursuant to N.C.G.S. §§ 14-3.1, 15A-1361, and 20-138.7(a1) and (e), the sanction for this offense is a fine not in excess of $100.

Appeal by Defendant from judgments entered 17 December 2008 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 9 December 2009.

Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for Defendant.

STEPHENS, Judge.

I. Procedural History

A. District Court

On 28 December 2006, Defendant James Edward Simmons, V was arrested and charged with driving while impaired ("DWI"), in violation of N.C. Gen. Stat. § 20-138.1, and possession of an open container of alcohol in the passenger area of a motor vehicle, in violation of N.C. Gen. Stat. § 20-138.7. On 13 December 2007, Defendant was found guilty of both charges. The district court imposed court costs for the open container offense, and sentenced Defendant to a maximum of 45 days in the custody of the Pitt County Sheriff for the DWI offense. The jail sentence was suspended, and Defendant was placed on 12 months unsupervised probation. Defendant gave notice of appeal in open court.

B. Superior Court

On 28 April 2008, Defendant filed a Motion to Suppress Breath Results and a Motion to Suppress Evidence obtained as a result of the stop of his motor vehicle and his subsequent arrest for the DWI and open container violations. On 10 July 2008, Defendant filed a second Motion to Suppress Evidence.

Defendant's case came on for trial before a jury during the 15 December 2008 criminal session of Pitt County Superior Court, the Honorable W. Russell Duke, Jr. presiding. Judge Duke summarily denied Defendant's pre-trial motions to suppress during the course of the trial proceedings. Defendant's motions to dismiss at the close of the State's evidence and at the close of all the evidence were also denied. On 17 December 2008, the jury returned verdicts finding Defendant guilty of DWI and an open container offense, and the trial court entered judgment on the verdicts. For the DWI offense, Defendant was sentenced to a 60-day prison term. The prison term

was suspended, and Defendant was placed on 12 months supervised probation. As conditions of Defendant's probation, Defendant was required to serve seven days in the Pitt County Detention Center, ordered to pay court costs and a fine, and prohibited from driving a vehicle unless it was equipped with an interlock device. For the open container offense, Defendant was ordered to pay court costs and a fine.

Defendant appeals.

II. Factual Background and Evidence

On 28 December 2006, Trooper Michael Potter of the North Carolina Highway Patrol was on duty at approximately 9:40 p.m. on N.C. 11, a four-lane highway with two lanes of travel in each direction, separated by a median, near Bethel, North Carolina. Trooper Potter was traveling north when he noticed a pickup truck in front of him also traveling north in the left lane. He observed the truck weaving so he increased his speed to catch up to the truck. Trooper Potter testified that he observed Defendant's truck

> travel left in the left lane and he crossed the center line. He traveled back right again to the middle of the left lane. Then he traveled back left again and, and—to the line, which is the—it's a yellow line in that location. And he traveled back over the line. Then he traveled back all the way across the dotted line. He did not signal the vehicle. He then traveled right, crossing the white line, which line on that side is white, and then he traveled back to the center of the right lane.

At that time, Trooper Potter activated his blue lights and pulled the truck over to the side of the road.

Trooper Potter walked to the driver's side of the truck. Defendant rolled down his window and produced his driver's license. Trooper Potter detected a strong odor of alcohol emanating from Defendant's breath, and asked Defendant if he had been drinking. Defendant told Trooper Potter that he had had "a couple of beers." Potter asked Defendant to step out of his truck, whereupon Potter observed several beer bottles in the passenger area, one of which appeared to be half full.

Potter did not observe any problems with how Defendant exited his truck or how he walked to the patrol vehicle. Potter did observe, however, that (1) Defendant's eyes were red and glassy, (2)

Defendant had an odor of alcohol emanating from his breath, and (3) Defendant's speech was slightly slurred. Once Defendant was inside Potter's patrol car, Potter administered two alco-sensor tests, both of which were positive for alcohol.

Potter placed Defendant under arrest for driving while impaired and transported Defendant to the Pitt County Detention Center to conduct a chemical analysis of his breath. Potter read Defendant his chemical analysis rights at 10:03 p.m. and administered two separate breath-alcohol tests using the Intoxilyzer 5000 at 10:25 p.m. and 10:26 p.m. The tests revealed an alcohol concentration of .11. Potter then asked Defendant to perform four field sobriety tests. Defendant satisfactorily performed all four tests. Potter then asked Defendant the questions on the driving while impaired report, and Defendant admitted to having consumed four beers between 7:30 p.m. and 8:45 p.m.

Defendant did not offer any evidence.

III. Discussion

A. State's Closing Argument

[1] Defendant contends that the trial court erred in allowing the State in its closing argument, over Defendant's objection, to compare the case *sub judice* to a previous Pitt County case, *State v. Narron*. For the reasons which follow, we conclude that the trial court erred and that such error so prejudiced the case against Defendant that he is entitled to a new trial on the DWI charge.[1]

"[T]he scope of jury arguments is left largely to the control and discretion of the trial court." *State v. Taylor*, 362 N.C. 514, 545, 669 S.E.2d 239, 265 (2008) (citations and quotation marks omitted), *cert. denied*, —— U.S. ——, 175 L. Ed. 2d 84 (2009). On appeal, "[t]he standard of review for improper closing arguments that provoke timely objection from opposing counsel 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). The trial court abuses its discretion when its ruling "could not have been the result of a reasoned decision." *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996). Moreover, even if the trial court abused its discretion in failing to sustain an objection to an improper closing argument, "[a] prosecutor's improper remark during closing arguments does not justify a new trial unless it is so grave that it prejudiced the result of the trial." *State v. Rashidi*, 172 N.C. App. 628, 642, 617 S.E.2d 68, 77-78 (cita-

1. The prosecutor's argument only pertained to Defendant's DWI charge.

tions and quotation marks omitted), *aff'd per curiam*, 360 N.C. 166, 622 S.E.2d 493 (2005).

"Trial counsel is allowed wide latitude in argument to the jury and may argue all of the evidence which has been presented as well as reasonable inferences which arise therefrom." *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999). Counsel may not, however, "inject his personal experiences . . . or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice." N.C. Gen. Stat. § 15A-1230(a) (2007). Furthermore, while N.C. Gen. Stat. § 7A-97 grants counsel the right to argue the law to the jury, which includes the authority to read and comment on reported cases and statutes, *State v. Gardner*, 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986),

> [i]t is not permissible argument for counsel to read, or otherwise state, the facts of another case, together with the decision therein, as premises leading to the conclusion that the jury should return a verdict favorable to his client in the case on trial. That is, counsel may not properly argue: The facts in the reported case were thus and so; in that case the decision was that there was no negligence (or was negligence); the facts in the present case are the same or stronger; therefore, the verdict in this case should be the same as the decision there.

Wilcox v. Glover Motors, Inc., 269 N.C. 473, 479, 153 S.E.2d 76, 81 (1967); *see also State v. Braxton*, 352 N.C. 158, 222, 531 S.E.2d 428, 465 (2000) ("The facts of . . . other cases are not pertinent to any evidence presented in this case and are, thus, improper for jury consideration."), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001).

In this case, the prosecutor concluded his closing argument by stating the following:

> [PROSECUTOR]: . . . I'm going to close by reading a case to you. This is a case that I tried in Superior Court probably six months ago . . . .
>
> In that case [the defendant] was a John Narron. He was a medical student here at ECU. He was driving around in the downtown area—
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

[PROSECUTOR]: —and he was stopped. And in that case his alcohol concentration was .08 or greater. A lot of the same factors in that, you know, there wasn't a whole, whole lot of evidence of impairment. I mean, he did a lot—

[DEFENSE COUNSEL]: Objection. Approach the bench, Judge.

THE COURT: Overruled.

[PROSECUTOR]: In that case it was not a whole, whole lot of evidence that he was under the influence of an impaired [sic] substance. It was an alcohol concentration of .08, right on the legal limit, and that defendant, just as this defendant, did really well on a lot of different field sobriety tests that were administered.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled. [Defense Counsel], given his argument, you were told that this was what he was going to argue. He's staying within the bounds of that decision. He's correctly stating it thus far.

The objection's overruled.

[PROSECUTOR]: And in that case, and, again, a Pitt County jury just as yourself found that defendant guilty with a .08.

The prosecutor then quoted passages from *State v. Narron*, 193 N.C. App. 76, 666 S.E.2d 860 (2008), *disc. review denied*, 363 N.C. 135, 674 S.E.2d 140, *cert. denied*, —— U.S. ——, 175 L. Ed. 2d 26 (2009), in which this Court concluded that there had been no reversible error in John Narron's trial.

That the prosecutor "inject[ed] his personal experiences" from his prosecution of John Narron and that the facts of *Narron* are "matters outside the record" upon which the prosecutor could not base his argument, each in violation of N.C. Gen. Stat. § 15A-1230(a), cannot be reasonably assailed. Furthermore, the facts in *Narron* "are not pertinent to any evidence presented in this case and [were], thus, improper for jury consideration." *Braxton*, 352 N.C. at 222, 531 S.E.2d at 465. Moreover, it is unquestionable that the prosecutor "read the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client." *State v. Anthony*, 354 N.C. 372, 430, 555 S.E.2d 557, 594, *cert. denied*, 354 N.C. 575, 559 S.E.2d 184 (2001). This is undeniably improper. Accordingly, the trial court's denial of defense counsel's

objection to the argument "could not have been the result of a reasoned decision[,]" *Burrus*, 344 N.C. at 90, 472 S.E.2d at 875, and was an abuse of discretion.

The State argues, however, that the trial court did not err in allowing the prosecutor's argument because defense counsel did not object when the prosecutor informed defense counsel and the trial court prior to closing arguments, "I do plan to cite one case, which is [*State v. Narron*]. . . . I do plan on reading some language from that case, Judge, and then I would just argue as to the basic facts in my closing argument." We need not address whether the failure to object to notice of an impermissible closing statement waives any later argument that the statement was improper as the notice given by the prosecutor here implies that the prosecutor planned to cite the law as stated in *Narron*, and apply that law to the basic facts in this case, which would have been permissible.

Having determined that the prosecutor's remarks during his closing argument were improper, we further conclude that the remarks prejudiced the result of the trial.

The driving while impaired statute, N.C. Gen. Stat. § 20-138.1, provides:

> A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration . . . .

N.C. Gen. Stat. § 20-138.1(a). Under N.C. Gen. Stat. § 20-138.1(a)(2), "the meaning of the phrase 'shall be deemed sufficient evidence to prove' is that properly admitted results of a chemical analysis 'must be treated as *prima facie* evidence of' a defendant's alcohol concentration." *Narron*, 193 N.C. App. at 83, 666 S.E.2d at 865.

In this case, the results of the chemical analysis admitted into evidence were " '*prima facie* evidence' " that Defendant's alcohol concentration was .11. *Id.* However, the results did not create a "legal presumption[,]" *id.* at 84, 666 S.E.2d at 865, that Defendant "ha[d], at any relevant time after the driving, an alcohol concentration of 0.08

or more." N.C. Gen. Stat. § 20-138.1(a)(2). A true presumption exists where "proof of a basic fact permits or requires the fact finder to find a different, elemental, fact." *Narron*, 193 N.C. App. at 84, 666 S.E.2d at 865. N.C. Gen. Stat. § 20-138.1 "does not state that 'results of a chemical analysis shall be deemed sufficient evidence to prove' e.g., a person's degree of intoxication, or his operation of a vehicle on a state highway." *Id.* at 84, 666 S.E.2d at 866. Instead,

> the statute simply authorizes the jury to find that the report is what it purports to be—the results of a chemical analysis showing the defendant's alcohol concentration. This is the definition of *prima facie* evidence of an element of any criminal offense or civil cause of action—that the jury may find it adequate proof of a fact at issue.

Id. Accordingly, although the results of the chemical analyses in this case were sufficient evidence from which the jury could have found that Defendant had an alcohol concentration of 0.11 and, thus, could have convicted Defendant of DWI under N.C. Gen. Stat. § 20-138.1(a)(2),[2] the results did not *compel* the jury to do so.

However, given the similarity of the *Narron* facts recited by the prosecutor to the facts of this case, the guilty verdict returned by the jury in *Narron*, and the prosecutor's first-hand knowledge of both cases, there is a substantial likelihood that the prosecutor's improper argument led the jury to believe that it *was compelled* to return a verdict of guilty in this case based on the results of the chemical analysis.[3] Accordingly, we conclude that the erroneous admission of the prosecutor's improper closing argument was "so grave that it prejudiced the result of the trial." *Rashidi*, 172 N.C. App. at 642, 617 S.E.2d at 77-78 (citations and quotation marks omitted). For this error, Defendant is entitled to a new trial on the charge of DWI.

B. Challenge for Cause

[2] Defendant next argues that he is entitled to a new trial on both charges because the trial court erred during jury selection in allowing the State's challenge for cause while denying Defendant's challenge for cause.

---

2. Whether there was sufficient evidence from which the jury could also find that Defendant drove "any vehicle upon any highway, any street, or any public vehicular area within this State . . . [,]" N.C. Gen. Stat. § 20-138.1(a), is not an issue on appeal.

3. The State, in the very argument to the jury that we find improper, conceded that there was minimal evidence to convict Defendant on the basis that he was "under the influence" of alcohol pursuant to N.C. Gen. Stat. § 20-138.1(a)(1).

> We review a trial court's ruling on a challenge for cause for abuse of discretion. A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision. In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record.

State v. Lasiter, 361 N.C. 299, 301-02, 643 S.E.2d 909, 911 (2007) (internal citations and quotation marks omitted).

N.C. Gen. Stat. § 15A-1212 sets forth nine bases for a challenge for cause. A trial judge "is not required to remove from the panel every potential juror" whose initial *voir dire* testimony supports a challenge for cause pursuant to N.C. Gen. Stat. § 15A-1212. *State v. Cummings*, 326 N.C. 298, 308, 389 S.E.2d 66, 71 (1990). Once a challenge for cause has been made based upon the juror's *voir dire*, it is the trial judge's responsibility to determine whether, in his or her opinion, the juror would be able to exercise properly his duties as a juror. *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991). The trial judge has the opportunity to hear the potential juror's responses and to observe the demeanor of the juror during *voir dire* examination and, thus, is in the superior position to determine what weight and credibility should be given to the potential juror's *voir dire* responses. If, in the trial judge's opinion, the prospective juror "credibly maintains" that he will be able to set aside any bias he may have and render a fair and impartial verdict based on the evidence presented at trial, "then it is not error for the court to deny defendant's motion to remove [the] juror for cause." *Cummings*, 326 N.C. at 308, 389 S.E.2d at 71. "The question the trial court must answer in determining whether to excuse a prospective juror for cause is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (citation and quotation marks omitted).

In this case, Justin Young was seated as juror number two during jury *voir dire*. Mr. Young stated that he had a pending DWI charge against him in Pitt County and admitted to consuming alcohol at least three times a week. Mr. Young indicated that despite the pending charge against him, he could be fair and impartial. The State challenged Mr. Young for cause and, over Defendant's objection, the trial court allowed the State's challenge and excused Mr. Young.

Brian Richardson was seated as juror number nine during jury *voir dire*. Mr. Richardson stated that he was employed with the East Carolina University Police Department. In his capacity as a traffic officer, he has issued many traffic citations, worked closely with the District Attorney's office in the prosecution of those cases and other traffic cases, including driving while impaired cases, and had never testified on behalf of a defendant. Mr. Richardson indicated that despite his law enforcement experience, he could be fair and impartial. Defendant challenged Mr. Richardson for cause, but the trial court denied Defendant's challenge and Mr. Richardson remained on the jury.

Defendant exhausted his preemptive challenges and then moved the trial court to reconsider its ruling to allow the State's challenge to Mr. Young while denying Defendant's challenge to Mr. Richardson. The trial court denied Defendant's motion. Thereafter, Defendant requested one additional preemptive challenge to remove Mr. Richardson. The trial court denied Defendant's request.

Citing *State v. Lee*, 292 N.C. 617, 234 S.E.2d 574 (1977), Defendant argues that because of Mr. Richardson's employment as a law enforcement officer, "it is difficult to accept, as the court noted in *Lee*, that Officer Richardson could be fair and impartial because it runs counter to human nature." In *Lee*, the defendant was on trial in Wilson County Superior Court for first-degree murder. During jury selection, the defendant's challenge for cause of juror Frances Norvell was denied by the trial court.

> The *voir dire* examination of prospective juror Norvell disclosed that her husband was a police officer employed by the City of Wilson. He had been a police officer for a period of ten or eleven years and she had been married to him during that entire period. Mrs. Norvell knew most of the Wilson police officers and was acquainted with police officer Johnny Moore, the chief investigating officer in this case who testified in corroboration of the State's principal witness, Dennis Barnes. She was also acquainted with Captain Tom Smith and Captain Hayes, the Chief of Police of Wilson. Mrs. Norvell and her husband had visited in Captain Hayes' home and Mrs. Hayes had visited in their home. She was friendly with numerous members of the Wilson Police Department. Her brother-in-law was a detective on the Wilmington police force. Prospective juror Norvell stated that she was a member of the Wilson Police Auxiliary and was acquainted with Officer Johnny Moore's wife who was also a member of that orga-

> nization. The Auxiliary occasionally gave parties which were attended by police officers and their spouses. Her husband on rare occasions discussed with her the cases in which he was involved and they had discussed his view on capital punishment.

Id. at 619-20, 234 S.E.2d at 576. Additionally, the following exchange occurred between defense counsel and Mrs. Norvell:

> Q. I ask you, Mrs. Norvell, since you know Mr. Moore and Tom Smith and your husband is on the Wilson Police Department, if they should testify in this case, would you tend to put more weight on what they said about the case than some witness you had never seen before?
>
> A. I don't think so.
>
> Q. But, you are not sure about that?
>
> A. No, sir.
>
> Q. It is possible that you might believe what they said more than somebody you didn't know?
>
> A. I would have a tendency to.

Id. at 620, 234 S.E.2d at 576.

In holding that the trial judge erred by refusing to grant the defendant's challenge for cause as to juror Norvell, this Court explained that, "[u]nder the particular circumstances of this case, we do not believe that juror Norvell could qualify as a disinterested and impartial juror. However, we hasten to add that a juror's close relationship with a police officer, standing alone, is not grounds for a challenge for cause." *Id.* at 625, 234 S.E.2d at 579.

The facts in this case are easily distinguishable from the facts in *Lee*. Unlike in *Lee*, the record before us does not indicate that Mr. Richardson had any personal relationship with any law enforcement officers involved in this case. Furthermore, unlike in *Lee*, the record does not disclose that Mr. Richardson indicated he might not be able to be a fair and impartial juror. Indeed, Defendant argues that Mr. Richardson should have been excused solely on the grounds of his close relationship with law enforcement—a basis which this Court explicitly rejected in *Lee*.

Defendant further argues that in order to "hold the scales evenly[,]" the trial court should have excused Mr. Richardson be-

cause the trial court excused Mr. Young. However, the trial court must assess independently each potential juror's ability to perform his duties as a juror. By granting one party's challenge for cause, the trial court does not become obligated to grant the opposing party the same.

Accordingly, we conclude that the trial court did not abuse its discretion in allowing the State's challenge for cause of juror number two while denying Defendant's challenge for cause of juror number nine. The assignment of error upon which this argument is based is overruled.

C. Defendant's Closing Argument

[3] Defendant also contends that the trial court erred in requiring defense counsel to provide the State a copy of the Power Point presentation he intended to use during his closing argument in advance of his closing argument. Defendant argues that by doing so, the trial court denied Defendant his right to make the final closing argument to the jury and, thus, Defendant is entitled to a new trial on both charges.

Rule 10 of the General Rules of Practice for the Superior and District Courts confers upon the defendant in a criminal trial the right to both open and close the final arguments to the jury, provided that "no evidence is introduced by the defendant[.]" N.C. Super. and Dist. Ct. R. 10 (2007). "This right has been deemed to be critically important and the improper deprivation of this right entitles a defendant to a new trial." *State v. English*, 194 N.C. App. 314, 317, 669 S.E.2d 869, 871 (2008).

"In appeals from the trial division . . . review is solely upon the record on appeal, the verbatim transcript of proceedings . . . and any items filed with the record on appeal pursuant to Rule 9(c) and 9(d)." N.C. R. App. P. 9(a). "[I]t is the responsibility of each party to ensure the record on appeal clearly sets forth evidence favorable to that party's position." *Ronald G. Hinson Elec., Inc. v. Union County Bd. of Educ.*, 125 N.C. App. 373, 375, 481 S.E.2d 326, 328 (1997); *see also State v. Cummings*, 346 N.C. 291, 322, 488 S.E.2d 550, 568 (1997) ("The defendant has the responsibility to provide a complete record."), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

In this case, after the close of all the evidence, the following exchange took place between the trial court and defense counsel regarding defense counsel's closing argument:

THE COURT: All right. You're going to give a slide show?

[DEFENSE COUNSEL]: Yes, Judge, that's correct, and Judge, I have a printout for the Court and also for Mr. DA.

Judge, [Defendant] would lodge his objection. In essence, one of the benefits defendant has by not offering evidence is being able to argue last without the State's having any purview of what the defendant says, and by giving him this handout, it, in essence, eliminates that defendant's right to give the last argument by not letting the DA know what he's going to argue.

So I do have copies, Judge, for the Court. May I approach, Your Honor?

THE COURT: Well, as was talked about yesterday afternoon when you were setting up your trial—slide show, the Court told you that the Court would require a copy of the slide show to see that it is within the evidence presented in this case.

[DEFENSE COUNSEL]: Yes, sir, Judge, and the way I view this, my intent of the slide show is just a more modern version of simply a flip chart or writing on a chalk board, which I feel is no different. It's just a modern version of doing the same thing. And certainly Mr. DA. . . . can lodge objections as we go.

In any event, Judge, I've provided the Court with everything. . . .

Although the record indicates that the trial court required defense counsel to provide the court with a copy of defense counsel's slide show in advance of his closing argument, the record is devoid of any conclusive evidence[4] that the trial court ordered defense counsel to provide a copy of his presentation to the State. It is therefore impossible for this Court to conclude that the trial court erred in requiring defense counsel to provide the State a copy of his Power Point presentation. Defendant's argument is dismissed.

D. Motions to Suppress

Although we grant Defendant a new trial on his DWI charge, we must determine whether the trial court erred in denying Defendant's

4. The comments of the court and defense counsel suggest that the contents of defense counsel's intended slide show presentation had been discussed the day before and contained directives which had been given by the court. Those proceedings, however, are not included in the record on appeal and it is therefore unknown to this Court whether the judge ordered defense counsel to provide a copy of his slide show to the prosecutor before closing argument.

motions to suppress such that Defendant's convictions should be vacated. For the following reasons, we conclude that the trial court did not err.

1. Reasonable Suspicion

[4] Defendant argues that the trial court erred in denying his motion to suppress evidence because Trooper Potter lacked reasonable suspicion for the investigatory stop of Defendant's vehicle.

Here, the trial court summarily denied Defendant's motion to suppress. N.C. Gen. Stat. § 15A-977 (2007). Thus, this Court will review the trial court's conclusions of law *de novo*. *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001).

"[R]easonable suspicion is the necessary standard for traffic stops[.]" *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008).

> Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. Only some minimal level of objective justification is required. This Court has determined that the reasonable suspicion standard requires that [t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Moreover, [a] court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists.

State v. Barnard, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (internal citations and quotation marks omitted), *cert. denied*, —— U.S. ——, 172 L. Ed. 2d 198 (2008).

Trooper Potter stated in the Affidavit and Revocation Report of Charging Officer[5] that Defendant was "weaving in his lane." At trial, Trooper Potter testified as follows:

> I was traveling north and I observed a gray pickup that was traveling north also in the left lane.
>
> . . . .

5. An Affidavit and Revocation Report of Charging Officer is a sworn statement by a law enforcement officer and a chemical analyst containing facts indicating that a person who has refused chemical analysis or who has been charged with an implied-consent offense has met certain conditions and, thus, is subject to having his or her driver's license immediately revoked. N.C. Gen. Stat. § 20-16.5 (2007).

I observed the vehicle travel left in the left lane and he crossed the center line.

He traveled back right again to the middle of the left lane.

Then he traveled back left again and, and—to the line, which is the—it's a yellow line in that location. And he traveled back over the line.

Then he traveled back all the way across the dotted line. He did not signal the vehicle.

He then traveled right, crossing the white line, which line on that side is white, and then he traveled back to the center of the right lane.

At that time I activated my blue lights and pulled the vehicle over to the side of the road.

Trooper Potter was then asked to step down from the witness stand to illustrate his testimony on the chalkboard. Trooper Potter further testified:

I observed [Defendant] run over the line . . . . There's a line and then a small portion of the shoulder there, but he crossed the line.

. . . .

. . . Like I said, he crossed it twice, then moved back into the middle, went for awhile [sic], and then he went all the way across. Did not signal.

Then he went over on that side and ran off the road on that side. Then he went back to the middle of that line.

Defendant first argues that evidence supporting the officer's reasonable suspicion should be limited to his statement in the Affidavit and Revocation Report. However, Defendant cites no authority for this proposition, and our research reveals none.

Citing *State v. Fields*, —— N.C. App. ——, 673 S.E.2d 765, *disc. review denied*, 363 N.C. 376, 679 S.E.2d 390 (2009), Defendant further argues that "[w]eaving in one's lane has never been the basis for an investigatory stop of a defendant's vehicle." In *Fields*, a police detective observed defendant's car swerve to the white line on the right side of the traffic lane in which defendant was traveling on three sep-

arate occasions. Due to defendant's weaving, the detective stopped the car under suspicion that defendant was driving while impaired. This Court held that "defendant's weaving within his lane, standing alone, [was] insufficient to support a reasonable suspicion that defendant was driving under the influence of alcohol." *Id.* at ——, 673 S.E.2d at 769.

Unlike in *Fields*, the evidence before this Court indicates that Defendant was not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road. We conclude that this evidence is sufficient to support a reasonable suspicion that Defendant was driving while impaired. As Trooper Potter's stop of Defendant's vehicle was supported by reasonable suspicion, the trial court did not err in denying Defendant's motion to suppress the breath alcohol concentration results obtained as a result of the stop. Defendant's argument is overruled.

2. Probable Cause

[5] Defendant next argues that the trial court erred in denying his motion to suppress evidence obtained in connection with his arrest because the arrest was not supported by probable cause.

"An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence." N.C. Gen. Stat. § 15A-401(b)(1) (2007).

> Probable cause requires only *a probability or substantial chance* of criminal activity, not an actual showing of such activity. Probable cause exists when there is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious [person] in believing the accused to be guilty.

State v. Chadwick, 149 N.C. App. 200, 202-03, 560 S.E.2d 207, 209 (internal citations and quotation marks omitted), *disc. review denied*, 355 N.C. 752, 565 S.E.2d 672 (2002).

In this case, Trooper Potter observed Defendant weaving within, across, and outside of his lane of travel, and running off the road at one point. When Trooper Potter pulled Defendant's vehicle over to the side of the road and approached Defendant to ask for his license, Trooper Potter "noticed [Defendant] had a strong odor of alcohol that was coming from his breath." Trooper Potter asked

Defendant if he had been drinking, and Defendant stated "that he had had a couple of beers."

When Defendant opened the door to exit his vehicle at Potter's request, Potter observed several beer bottles in the passenger area, one of which was half-full on the passenger's seat. As Defendant walked back to Potter's car to sit in it, Potter observed that Defendant's "eyes were red and glassy[,]" and again noticed that Defendant "had the odor of alcohol coming from his breath." Potter also testified that Defendant's "speech was slightly slurred."

When Defendant sat in Potter's vehicle, Potter administered two alco-sensor tests to Defendant, "one at 9:42 [p.m.] and one at 9:47 [p.m.]." Potter did not testify as to the specific results of the tests, but did testify, over objection, that the tests were positive for alcohol. At that point Potter placed Defendant under arrest.

Defendant asserts that the results of the alco-sensor tests were not admissible and, thus, there was insufficient evidence of probable cause to support Potter's arrest of Defendant. However, we need not address the propriety of the admission of the alco-sensor results here as Potter's discovery of the half-full container of alcohol on the passenger's seat of Defendant's vehicle was sufficient to show "*a probability or substantial chance*[,]" *id.* at 202, 560 S.E.2d at 209 (citation and quotation marks omitted), that Defendant was in possession of an open container of alcohol, in violation of N.C. Gen. Stat. § 20-138.7. Accordingly, Trooper Potter's warrantless arrest of Defendant was supported by probable cause. Defendant's argument is overruled.

3. Motion to Suppress Chemical Test Results

[6] Defendant next argues that the trial court erred in denying his motion to suppress the results of the chemical analysis performed on Defendant's breath with the Intoxilyzer 5000 as "preventative maintenance was not performed within the time limits prescribed by the Department of Health and Human Services."

Pursuant to N.C. Gen. Stat. § 20-139.1(a), "a person's alcohol concentration or the presence of any other impairing substance in the person's body as shown by a chemical analysis is admissible in evidence." N.C. Gen. Stat. § 20-139.1(a) (2007). "The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration." N.C. Gen. Stat. § 20-139.1(a)(2) (2007). However, the results of a chemical analysis of a defendant's breath are not admissible in evidence if

> [t]he defendant demonstrates that, with respect to the instrument used to analyze the defendant's breath, preventive maintenance procedures required by the regulations of the Department of Health and Human Services had not been performed within the time limits prescribed by those regulations.

N.C. Gen. Stat. § 20-139.1(b2)(2) (2007).

According to Department of Health and Human Services ("DHHS") preventive maintenance procedures for the Intoxilyzer 5000 used to test Defendant, preventive maintenance was to be performed at least every four months, and such maintenance was to include verifying that the "alcohol breath simulator solution is being changed every four months or after 125 Alcoholic Breath Simulator tests, whichever occurs first." 10A N.C. Admin. Code 41B.0321(10) (2007). The solution is changed on this time schedule because the solution is only "good for four months or 125 tests[,]" according to Linda Keller, a certified chemical analyst and employee of the Forensic Tests for Alcohol Branch of DHHS.

In this case, preventive maintenance of the simulator, including changing the simulator solution, was performed on 14 July 2006 and then again on 5 December 2006. The chemical analysis of Defendant's breath was conducted on 28 December 2006, 23 days after the most recent preventive maintenance.

Defendant argues that since more than four months had passed between the 14 July and 5 December 2006 maintenance checks, "the simulator solution was not timely changed as mandated by the regulations" and, thus, Defendant's motion to suppress should have been allowed. We disagree.

While Defendant's argument might have had merit if the chemical analysis of Defendant's breath had occurred after 14 November 2006, when four months had passed since the simulator solution had been changed, and before 5 December 2006, when the simulator solution was changed, the chemical analysis of Defendant's breath on 28 December 2006 was performed only 23 days after the simulator solution was changed, well within the four-month window.

Accordingly, as Defendant failed to demonstrate that applicable preventive maintenance procedures had not been performed within the time limits prescribed by DHHS, the results of the chemical analysis were admissible and the trial court did not err in deny-

ing Defendant's motion to suppress.[6] Defendant's argument is without merit.

E. Open Container Fine

[7] By Defendant's final argument, Defendant contends the trial court erred in imposing a $500 fine for his open container violation.

We note that although Defendant did not object at sentencing to the amount of fine imposed, an error at sentencing is not considered an error at trial for the purposes of N.C. R. App. P. Rule 10(b)(1). *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991). Accordingly, we address the merits of Defendant's argument.

The State concedes that, pursuant to N.C. Gen. Stat. §§ 14-3.1, 15A-1361, and 20-138.7(a1) and (e), the sanction for an individual found with an open alcoholic beverage container in the passenger area of a vehicle while on the highway is a fine not in excess of $100. Accordingly, the trial court erred in fining Defendant $500. We thus remand this matter to the trial court for resentencing in accordance with statute.

E. Conclusion

For the reasons stated, Defendant is entitled to a new trial on the charge of DWI. We find no error in Defendant's conviction for possession of an open container of alcohol in the passenger area of a motor vehicle, but the matter is remanded to the trial court for resentencing.

NEW TRIAL in part, NO ERROR in part, REMANDED FOR RESENTENCING in part.

Judges McGEE and STEELMAN concur.

---

6. Defendant further argues that the trial court erred in denying his motion to dismiss the DWI charge for insufficient evidence because without the results from the chemical analysis performed on Defendant's breath, there was insufficient evidence of Defendant's impairment. However, in light of our conclusion that the trial court did not err in denying Defendant's motion to suppress the chemical test results, we need not address this assignment of error.

PARKWAY UROLOGY, P.A. D/B/A CARY UROLOGY, P.A., PETITIONER V. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT AND RALEIGH HEMATOLOGY ONCOLOGY ASSOCIATES, PC D/B/A CANCER CENTERS OF NORTH CAROLINA, AOR MANAGEMENT COMPANY OF VIRGINIA, LLC, REX HOSPITAL, INC., AND WAKE RADIOLOGY ONCOLOGY SERVICES, PLLC, RESPONDENT-INTERVENORS

WAKE RADIOLOGY ONCOLOGY SERVICES, PLLC, PETITIONER V. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT AND RALEIGH HEMATOLOGY ONCOLOGY ASSOCIATES, PC D/B/A CANCER CENTERS OF NORTH CAROLINA, AOR MANAGEMENT COMPANY OF VIRGINIA, LLC, REX HOSPITAL, INC. AND PARKWAY UROLOGY, P.A., D/B/A CARY UROLOGY, P.A., RESPONDENT-INTERVENORS

REX HOSPITAL, INC., PETITIONER V. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT AND RALEIGH HEMATOLOGY ONCOLOGY ASSOCIATES, PC D/B/A CANCER CENTERS OF NORTH CAROLINA, AOR MANAGEMENT COMPANY OF VIRGINIA, LLC, PARKWAY UROLOGY, P.A. D/B/A CARY UROLOGY, P.A., AND WAKE RADIOLOGY ONCOLOGY SERVICES, PLLC, RESPONDENT-INTERVENORS

No. COA09-1490

(Filed 20 July 2010)

1. **Hospitals and Other Medical Facilities— certificate of need—contested case hearing—showing of prejudice required**

The North Carolina Department of Health and Human Services did not err by requiring that a hospital show that it was substantially prejudiced by the award of a certificate of need to a competitor in order to file a contested case hearing.

2. **Hospitals and other Medical Facilities— certificate of need—complete review of statutory criteria—findings**

There was no merit to a hospital's contention that it was substantially prejudiced in the award of a certificate of need to a competitor by the North Carolina Department of Health and Human Services's (DHHS) failure to conduct a complete review of the statutory criteria. The findings in the final agency decision indicate that DHHS satisfied its obligation to conduct an independent analysis of the challenged criterion.

3. Hospitals and Other Medical Facilities— certificate of need—affected person—substantial prejudice not shown

The North Carolina Department of Health and Human Services properly denied a hospital relief from a certificate of need awarded to a competitor due to the hospital's failure to establish substantial prejudice. Obtaining the status of an affected person does not satisfy the *prima facie* requirement of a showing of substantial prejudice.

4. Hospitals and Other Medical Facilities— certificate of need—application—purchase of equipment—funding by nonapplicant

A certificate of need (CON) application by Cancer Centers of North Carolina was not fatally flawed because it did not list the company providing the funding for the desired equipment and holding the title as a co-applicant. The application clearly indicated how the equipment would be purchased and transferred; the CON law allows applicants to rely upon other non-applicant entities for funding the proposed project.

5. Hospitals and Other Medical Facilities— certificate of need—application—Equivalent Simple Treatment level—findings

The North Carolina Department of Health and Human Services did not err by determining that a certificate of need application did not comply with a statutory criterion for a linear accelerator involving the minimum Equivalent Simple Treatment (ESTV) level. The final agency decision included a finding that a weekly radiation therapy management (WRTM) does not involve the use of the linear accelerator and does not fall within the definition of an ESTV; without the WRTM, the application fell below the required threshold.

6. Hospitals and Other Medical Facilities— certificate of need—application—population to be served—substantial evidence

The North Carolina Department of Health and Human Services did not err by finding that a certificate of need application satisfied criterion 3 of N.C.G.S. § 131E-183(a)(3) (identification of population to be served). There was substantial evidence under the whole record test; the appellate court will not substitute its judgment for that of the agency in certificate of need cases if substantial evidence exists.

7. Hospitals and Other Medical Facilities— certificate of need—application—financial projections

There was substantial evidence in the whole record to support the North Carolina Department of Health and Human Services' finding that a certificate of need complied with the statutory criterion regarding financial projections.

8. Hospitals and Other Medical Facilities— certificate of need—application—linear accelerator

A certificate of need application for a linear accelerator complied with the statutory criterion for showing availability of the resources, including manpower, needed for provision of the proposed services. Although there was testimony that the medical standard of care included a physician team with a neurosurgeon and a radiologist, the administrative code did not include that requirement.

9. Hospitals and Other Medical Facilities— certificate of need—application—effects on competition—independent analysis

Findings in the final agency decision in a certificate of need case indicated that the North Carolina Department of Health and Human Services satisfied its obligation to conduct an independent analysis of the statutory criterion concerning the effects of the proposed services on competition in the proposed service area.

10. Hospitals and Other Medical Facilities— certificate of need—application—duplication of services

A medical provider was not entitled to a certificate of need where its application did not conform to the statutory criteria concerning unnecessary duplication of health service capabilities.

11. Hospitals and Other Medical Facilities— certificate of need—comparative analysis—not addressed

An argument in a certificate of need case concerning the comparative analysis of competing applications was not addressed where neither of the applications competing with the winner conformed to all of the applicable statutory review criteria.

Appeal by petitioners/respondent-intervenors and cross-appeal by respondent-intervenor from Final Agency Decision entered 3 Au-

gust 2009 by the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 11 May 2010.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Forrest W. Campbell, Jr. and James C. Adams, II for petitioner/respondent-intervenor-appellant Parkway Urology, P.A., d/b/a Cary Urology, P.A.

Kirschbaum, Nanney, Keenan & Griffin, P.A., by Frank S. Kirschbaum and Chad Lorenz Halliday for petitioner/respondent-intervenor-appellant Wake Radiology Oncology Services, PLLC.

K & L Gates LLP, by Gary S. Qualls and William W. Stewart, Jr., for petitioner/respondent-intervenor-appellant Rex Hospital, Inc.

Attorney General Roy Cooper, by Assistant Attorney General June S. Ferrell, for respondent-appellee North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section.

Poyner Spruill LLP, by William R. Shenton and Pamela A. Scott for respondent-intervenor-appellees Cancer Centers of North Carolina, P.C. and AOR Management Company of Virginia, LLC.

CALABRIA, Judge.

Parkway Urology, P.A. d/b/a Cary Urology, P.A. ("Cary"), Wake Radiology Oncology Services ("WROS") and Rex Hospital, Inc. ("Rex") (collectively "petitioners") appeal the Final Agency Decision of the North Carolina Department of Health and Human Services, Division of Health Service Regulation ("NCDHHS"), awarding a certificate of need ("CON") to Cancer Centers of North Carolina, P.C.[1] ("CCNC") and AOR Management Company of Virginia, LLC ("AOR") to purchase a new linear accelerator ("LINAC"). We affirm.

I. Background

Governor Michael F. Easley inserted into the 2007 North Carolina State Medical Facilities Plan ("SMFP") a need for one additional LINAC in Service Area 20 ("Area 20"), which includes Wake, Harnett and Franklin Counties, to be awarded to "an existing provider of radi-

1. Cancer Centers of North Carolina, P.C. was formerly known as Raleigh Hematology Oncology Associates, P.C.

ation oncology services in Service Area 20[.]" CCNC, WROS, Cary and Duke University Health System d/b/a Duke Raleigh Hospital ("Duke") each applied for the CON to operate a LINAC in Wake County. At the time the applications were filed, CCNC and WROS were each currently operating one LINAC, while Cary had none. In addition, Rex, which was located three-tenths of a mile away from CCNC, was operating four LINACs.

CCNC submitted two applications for the CON, including an application for a LINAC that could provide stereotactic radiosurgery ("SRS") services. At the time of CCNC's application, there were no existing LINACs that could provide SRS services in Area 20. Cary submitted an application for a LINAC that would exclusively treat prostate cancer patients. WROS submitted an application for a second LINAC to provide the same services as their existing LINAC. WROS did not apply for a LINAC that could provide SRS services.

The CON section of NCDHHS conducted a competitive review of each of the applications. On 1 February 2008, the CON section issued findings as a result of this review. The CON section approved the application of CCNC for the LINAC with SRS services, but the applications of WROS and Cary were disapproved.[2] The CON section determined that both the WROS application and the Cary application failed to comply with various statutory and regulatory criteria. In addition, the CON section determined that the CCNC application would be the most effective under its comparative analysis methodology.

WROS, Cary and Rex each filed a Petition for Contested Case Hearing in the Office of Administrative Hearings. CCNC intervened in all three of these cases, and each petitioner intervened in the cases of the other two petitioners. The cases were all consolidated for hearing. A contested case hearing was conducted 10-21 November 2008 and 10-19 February 2009 before Administrative Law Judge Selina M. Brooks ("the ALJ"). On 27 April 2009, the ALJ issued a Recommended Decision that NCDHHS should uphold the CON section's determinations.

Petitioners appealed the ALJ's decision to NCDHHS. On 3 August 2009, NCDHHS issued its Final Agency Decision ("the FAD"), approving CCNC's application, disapproving the WROS application and the

2. Duke's application was also disapproved, but Duke did not appeal the denial of its application and was never a party in any contested case in the Office of Administrative Hearings.

Cary application and directing issuance of a CON to CCNC. In addition, the FAD determined that Rex was not substantially prejudiced by the entry of CCNC's new LINAC into Area 20. Petitioners separately appeal.[3]

II. Standard of Review

> N.C. Gen. Stat. § 131E-183(a) charges the Agency with reviewing all CON applications utilizing a series of criteria set forth in the statute. The application must either be consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued. A certificate of need may not be granted which would allow more medical facilities or equipment than are needed to serve the public. Each CON application must conform to all applicable review criteria or the CON will not be granted. The burden rests with the applicant to demonstrate that the CON review criteria are met.

Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health & Human Servs., 189 N.C. App. 534, 549, 659 S.E.2d 456, 466 (2008) (internal quotations and citations omitted).

> In reviewing a CON determination,
>
> [m]odification or reversal of the Agency decision is controlled by the grounds enumerated in section 150B-51(b); the decision, findings, or conclusions must be:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Human Servs., 171 N.C. App. 734, 739, 615 S.E.2d 81, 84 (2005) (quoting N.C. Gen. Stat. § 150B-51(b) (1999).

---

3. WROS also appeals and CCNC cross-appeals the FAD's determination that Cary was an existing provider of radiation oncology services.

> The first four grounds for reversing or modifying an agency's decision . . . are law-based inquiries. On the other hand, [t]he final two grounds . . . involve fact-based inquiries. In cases appealed from administrative agencies, [q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test.

N.C. Dep't of Revenue v. Bill Davis Racing, —— N.C. App. ——, ——, 684 S.E.2d 914, 920 (2009) (internal quotations and citations omitted).

> In applying the whole record test, the reviewing court is required to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We should not replace the agency's judgment as between two reasonably conflicting views, even if we might have reached a different result if the matter were before us *de novo*. While the record may contain evidence contrary to the findings of the agency, this Court may not substitute its judgment for that of the agency.

Dialysis Care of N.C., LLC v. N.C. Dep't of Health & Human Servs., 137 N.C. App. 638, 646, 529 S.E.2d 257, 261 (2000) (internal quotations and citations omitted).

III. Rex Hospital

Rex argues that NCDHHS committed an error of law by requiring Rex to show that it was substantially prejudiced by the awarding of the CON to CCNC. In the alternative, Rex argues that NCDHHS erred by determining that Rex failed to demonstrate that it was substantially prejudiced by the awarding of the CON. We disagree with both contentions.

[1] A. Requirement of Substantial Prejudice

> After a decision of the Department to issue, deny or withdraw a certificate of need or exemption or to issue a certificate of need pursuant to a settlement agreement with an applicant to the extent permitted by law, *any affected person, as defined in subsection (c) of this section, shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes.*

N.C. Gen. Stat. § 131E-188(a) (2009) (emphasis added). Under N.C. Gen. Stat. § 131-188(c), an "affected person" includes, *inter alios*,

"any person who provides services, similar to the services under review, to individuals residing within the service area or the geographic area proposed to be served by the applicant[.]" N.C. Gen. Stat. § 131-188 (c) (2009). The FAD correctly concluded that Rex qualified as an affected person under this definition and was thus entitled to file a petition for a contested case hearing. Consequently, Rex reasons, it was also entitled to relief at such a hearing without any showing of substantial prejudice.

However, N.C. Gen. Stat. § 131E-188 provides only the statutory grounds for and prerequisites to filing a petition for a contested case hearing regarding CONs. It does not alter the statutory requirements that must be met in order for a petitioner to be entitled to relief. The actual framework for *deciding* the contested case is governed by Article 3 of Chapter 150B of the General Statutes. N.C. Gen. Stat. § 131E-188(a) (2009). N.C. Gen. Stat. § 150B-23(a) states, in relevant part:

> A petition shall be signed by a party or a representative of the party and, if filed by a party other than an agency, shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or *has otherwise substantially prejudiced the petitioner's rights*[.]

N.C. Gen. Stat. § 150B-23(a) (2009) (emphasis added). This Court has previously addressed the burden of a petitioner in a CON contested case hearing pursuant to this statute.

> Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine *whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights*, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.

Britthaven, Inc. v. N.C. Dep't of Human Res., 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995) (emphasis added). In addition, in *Presbyterian Hosp. v. N.C. Dep't of Health & Human Servs.*, this Court affirmed a grant of summary judgment against a non-applicant CON challenger specifically because it had failed to demonstrate any genuine issue of material fact as to whether it had been substantially prejudiced by the award of a CON to a nearby competitor. 177 N.C. App. 780, 785, 630 S.E.2d 213, 216 (2006). Rex's contention that it was

unnecessary for it to show substantial prejudice to be entitled to relief is contrary to our case law and is without merit.

B. Evidence of Substantial Prejudice

[2] Rex still contends that the evidence presented at the contested case hearing was sufficient to show that it was substantially prejudiced by the award of the CON to CCNC. Rex argues first that it was entitled to a finding of substantial prejudice as a matter of law because NCDHHS failed to conduct a complete review of all of the statutory criteria in N.C. Gen. Stat. § 131E-183(a). Specifically, Rex argues that the FAD indicates that NCDHHS failed to independently review N.C. Gen. Stat. § 131E-183(a)(6) (2009) ("Criterion 6").[4]

Rex cites *Hospice at Greensboro, Inc. v. N.C. Dep't of Health & Human Servs.*, 185 N.C. App. 1, 647 S.E.2d 651 (2007) in support of this argument. The *Hospice* Court held that "the issuance of a 'No Review' letter, which results in the establishment of 'a new institutional health service' without a prior determination of need, substantially prejudices a licensed, pre-existing competing health service provider as a matter of law." *Id.* at 18, 647 S.E.2d at 662. Rex argues that the failure of NCDHHS to adequately review Criterion 6 is equally prejudicial to a competitor as a matter of law.

Criterion 6 states that "[t]he applicant shall demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities." N.C. Gen. Stat. § 131E-183(a)(6) (2009). Rex argues that NCDHHS failed to independently analyze Criterion 6 and instead determined that compliance with Criteria 1 and 3 required a determination that Criterion 6 was met. The basis of this argument is finding of fact 174 of the FAD, which stated:

> The Agency has determined that Criteria 1, 3 and 6 address need-related issues which overlap and which should be analyzed together and consistently. Consequently, the Agency analyzes Criteria 1, 3 and 6 together and if the Agency determines that a need is identified in the SMFP for the service of equipment proposed in the application, and that an application is consistent with the need determination in the SMFP and demonstrates that the population it proposes to serve needs the services it proposes to provide, then to be consistent, *the Agency also will determine*

4. Each of the criteria listed in N.C. Gen. Stat. § 131-183(a) will henceforth be referred to as "Criterion [number]."

> *that the application does not unnecessarily duplicate existing or approved services.*

(Emphasis added). Standing alone, this finding by NCDHHS is problematic. Each criterion contained in N.C. Gen. Stat. § 131-183(a) must be separately analyzed by NCDHHS. *See HCA Crossroads Residential Ctrs. v. N.C. Dep't of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990) ("[A] statute must be construed, if possible, to give meaning and effect to all of its provisions.").

However, while finding of fact 174 seems to indicate that NCDHHS felt that review of Criterion 6 may have been unnecessary after it had determined CCNC's compliance with Criteria 1 and 3, there are additional findings contained in the FAD that indicate that NCDHHS did, in actuality, separately consider whether CCNC's new LINAC would result in unnecessary duplication under Criterion 6. For instance, finding of fact 202 stated:

> The need for any such duplication is supported by the following factors: (1) Service Area 20 population to linear accelerator ratio of at least 132,664 residents per machine; (2) the large and rapidly growing population and urban nature of Wake County and surrounding communities; (3) strong historical utilization of [CCNC's] existing linear accelerator; (4) continued growth in utilization of [CCNC's] existing linear accelerator; (5) continued substantial decline in utilization of Rex's linear accelerators from 2001 through 2006; and (6) the declining utilization of WROS' linear accelerator from 2004 through 2006.

This and other findings contained in the FAD indicate that NCDHHS satisfied its obligation to conduct an independent analysis of Criterion 6. Therefore, Rex's argument that it was substantially prejudiced as a matter of law because NCDHHS failed to review all required statutory criteria is without merit.[5]

[3] Finally, Rex contends that the whole record contained sufficient evidence that it would be substantially prejudiced by the awarding of a CON to CCNC. The FAD found that "[t]here is no credible evidence of any substantial harm Rex would suffer as a direct result of the

---

5. We therefore do not decide whether a pre-existing, non-applicant competing health service provider is substantially prejudiced as a matter of law if a Final Agency Decision of NCDHHS fails to analyze all required statutory criteria for the grant of a CON.

operation of [CCNC's] linear accelerator." Specifically, the FAD noted, *inter alia*, (1) that Rex presented "[n]o data, analysis or other support . . . to show that an increase in the number of patients referred to [CCNC] . . . would necessarily translate into lost patients for Rex[;]" (2) that there was "no evidence . . . that [CCNC's] competitive impact would necessarily translate into any substantial loss of patients, reduced revenues or lost opportunities for Rex[;]" and (3) that Rex failed to present credible evidence that "[CCNC's] second linear accelerator would have an additional negative impact on Rex that would not occur if that linear accelerator were not in operation."

Rex presented evidence that the current utilization of its LINACs had been declining for a number of years. Rex also refers to testimony presented to NCDHHS that Rex and CCNC operate in close physical proximity to each other and that Rex receives most of its LINAC referrals from "community physicians." Thus, Rex reasons, any additional LINAC capacity at CCNC would necessarily lower the number of LINAC treatments performed at Rex and, as a result, have a substantial impact on Rex's revenues. Rex did not, however, quantify this financial harm in any specific way, other than testimony regarding the amount of revenue Rex receives from its LINAC treatments.

Rex's argument, in essence, would have us treat any increase in competition resulting from the award of a CON as inherently and substantially prejudicial to any pre-existing competing health service provider in the same geographic area. This argument would eviscerate the substantial prejudice requirement contained in N.C. Gen. Stat. § 150B-23(a). As previously noted, Rex qualified as an affected person because it provided similar services to individuals residing within the service area of CCNC's proposed LINAC. Obtaining the status of an affected person does not satisfy the *prima facie* requirement of a showing of substantial prejudice. Rex was required to provide specific evidence of harm resulting from the award of the CON to CCNC that went beyond any harm that necessarily resulted from additional LINAC competition in Area 20, and NCDHHS concluded that it failed to do so. After a review of the whole record, we determine that NCDHHS properly denied Rex relief due to its failure to establish substantial prejudice. This assignment of error is overruled.

Since Rex failed to establish that it was substantially prejudiced by the awarding of the CON to CCNC, it cannot be entitled to relief under N.C. Gen. Stat. § 150B-23(a). As a result, we decline to address Rex's additional challenges to the FAD.

IV. Wake Radiology Oncology Services

WROS argues that NCDHHS erred by awarding the CON to CCNC and by determining that the WROS application failed to conform to all of the required statutory criteria. We disagree.

A. CCNC's Acquisition of the LINAC

[4] WROS first contends that CCNC's application was fatally flawed because U.S. Oncology, Inc. ("USO"), the parent company of AOR, should have been listed as a co-applicant, as it would "acquire" the LINAC under our statutes. "No person shall offer or develop a new institutional health service without first obtaining a certificate of need from [NCDHHS.]" N.C. Gen. Stat. § 131E-178 (2009).

"New institutional health services" means any of the following:

> f1. The acquisition by purchase, donation, lease, transfer, or comparable arrangement of any of the following equipment by or on behalf of any person:
>
> 5a. Linear accelerator.

N.C. Gen. Stat. § 131E-176(16)(f1)(5a) (2009). WROS argues that because the evidence presented to NCDHHS indicated that funding for the LINAC will be provided by USO and title to the LINAC will be held by USO, it is USO, and not CCNC, who has "acquired" the LINAC. Thus, WROS reasons, the failure of CCNC to list USO on its CON application constitutes a fatal flaw in its application, rendering it invalid.

In *Hope-A Women's Cancer Center, P.A. v. N.C. Dep't of Health & Human Servs.*, —— N.C. App. ——, 691 S.E.2d 421 (2010), this Court held that the determination of an acquisition of medical equipment under N.C. Gen. Stat. § 131E-176(16)(f1) is not controlled by who holds the legal title of medical equipment sought in a CON application. The *Hope-A* Court, after defining the meaning of "acquisition" for the purposes of N.C. Gen. Stat. § 131E-176(16)(f1), then conducted the following analysis of the acquisition at issue in that case:

> Although Hope's possession of the Equipment may not be permanent and the Equipment's title may not be in Hope's name, *the fact that the Equipment would be in Hope's possession and control to the extent that it were used to provide services to Hope's patients constitutes an "acquisition" in the plain meaning of the term.*

Id. at ——, 691 S.E.2d at —— (emphasis added).

In the instant case, CCNC's application clearly indicated that it was co-applicant AOR, using funds from its parent company USO, that would actually purchase the LINAC. The LINAC would then be transferred to CCNC's possession and control to be used to provide services to CCNC's patients. The fact that the funds used to purchase the LINAC would originate from USO is immaterial to our analysis, as the CON law allows applicants to rely upon other non-applicant entities for funding the proposed project. *See Retirement Villages, Inc. v. N.C. Dep't of Human Res.*, 124 N.C. App. 495, 499, 477 S.E.2d 697, 699 (1996) (holding that the CON statute allows a CON applicant to rely "on the financial resources of another entity for its funding."). Therefore, we hold that AOR and CCNC were correctly determined to be the parties acquiring the LINAC for purposes of the CON application. This assignment of error is overruled.

B. The WROS Application

[5] The WROS application was found nonconforming with Critera 3, 4, 5, 6 and 18a. Specifically, it was WROS' failure to comply with Criterion 3 that provided the basis for finding its application nonconforming with the remaining statutory criteria.

WROS argues that NCDHHS committed an error of law by analyzing its compliance with Criterion 3 without giving WROS credit for weekly radiation therapy management ("WRTM"), listed as procedure code 77427 in the 2007 SMFP. When WRTM was not included in the WROS application, the existing WROS LINAC fell below the minimum Equivalent Simple Treatment Visit ("ESTV") level necessary to satisfy Criterion 3 under the rules promulgated by NCDHHS.

N.C. Gen. Stat. § 131E-177 empowers NCDHHS to "adopt rules pursuant to Chapter 150B of the General Statutes, to carry out the purposes and provisions of [section 131E]." N.C. Gen. Stat. § 131E-177(1) (2009). For CON applications, NCDHHS is statutorily empowered "to adopt rules for the review of particular types of applications that will be used in addition to those criteria outlined in subsection (a) of this section and may vary according to the purpose for which a particular review is being conducted or the type of health service reviewed." N.C. Gen. Stat. § 131E-183 (b) (2009).

Pursuant to this statutory authority, NCDHHS requires that

> [a]n applicant proposing to acquire a linear accelerator shall demonstrate that each of the following standards will be met: (1) an applicant's existing linear accelerators located in the proposed

> service area performed at least 6,750 ESTV treatments per machine or served at least 250 patients per machine in the twelve months prior to the date the application was submitted[.]

10A NCAC 14C.1903(a) (2008). Prior to the 2007 SMFP, the definition of ESTV contained in the Administrative Code allowed an applicant to count WRTM as 1 ESTV per visit.

However, in 2006, NCDHHS amended the definition of ESTV. *See* 11 N.C. Reg. 977 (November 1, 2006). An ESTV is currently defined as "one basic unit of radiation therapy which normally requires up to fifteen (15) minutes for the uncomplicated set-up and treatment of a patient on a megavoltage teletherapy unit including the time necessary for portal filming." 10A NCAC 14C.1901(3) (2008).

The FAD included a finding of fact that WRTM entails a "patient meet[ing] with his or her radiation oncologist in a weekly office visit." The finding went on to state that "[t]he weekly radiation management consult does not involve the use of a linear accelerator." This finding, which is supported by substantial evidence in the record, supports NCDHHS' conclusion that WRTM does not fall within the definition of an ESTV pursuant to the Administrative Code.

Without WRTM, the WROS application could only demonstrate that its existing LINAC had performed 5,860 ESTVs in the twelve months prior to the application being submitted. Since this number fell well below the threshold of 6,750 ESTVs required by NCDHHS rules, NCDHHS did not err in determining that the WROS application failed to comply with Criterion 3. Therefore, WROS was not entitled to a CON. This assignment of error is overruled.

V. Cary Urology, P.A.

Cary argues that NCDHHS erred by awarding the CON to CCNC and by determining that the Cary application failed to conform to all of the required statutory criteria. We disagree.

A. The CCNC Application

[6] Cary contends that NCDHHS erred in finding that CCNC's application complied with Criteria 3, 5, 7 and 18a.

Criterion 3 states:

> The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all

> residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

N.C. Gen. Stat. § 131E-183(a)(3) (2009). CCNC's application purported to satisfy Criterion 3 by including, *inter alia*, projections derived from two utilization assumptions and one growth assumption. Cary argues that these assumptions used in CCNC's application were unreasonable and do not follow from the evidence presented in the application, such that the numbers in the application vastly overstate any potential need for a LINAC.

CCNC's application identified the patient population in and around Area 20 that would utilize the new LINAC. In addition, the CCNC application indicated that its existing LINAC was operating well above the minimum performance standard, nearing the machine's practical capacity. CCNC presented evidence that it based its increased utilization projections on the previous growth of its practice, as well as the experiences of other oncology practices affiliated with its parent company, USO. CCNC also provided over 100 letters from community physicians, expressing support for the project. Finally, CCNC presented growth projections for cancer incidence from the Solucient database, which bases its projections on Surveillance, Epidemiology and End Results ("SEER") incidence data from the National Cancer Institute.[6] Dan Sullivan, CCNC's health planning expert, testified at length about the reasonableness of the projections, noting that he had confirmed them by extrapolating from data provided by the Office of State Management and Budget.

We determine that the evidence presented by CCNC in its application and in subsequent hearings constitutes substantial evidence under the whole record test. While Cary may contend that some of the projections relied upon by NCDHHS are flawed, this Court has made clear that "in certificate of need cases, we cannot substitute our own judgment for that of the Agency if substantial evidence exists." *Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 171 N.C. App. 734, 739, 615 S.E.2d 81, 84 (2005). This assignment of error is overruled.

[7] Cary next argues that CCNC's application failed to comply with Criterion 5, which states:

---

6. CCNC's application erroneously attributed the growth projections to the SEER database itself.

> Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.

N.C. Gen. Stat. § 131E-183(a)(5) (2009). Cary argues that the projections contained in CCNC's application were unreasonable and that the results did not follow from the numbers provided in the application. Cary's arguments are again reviewed under the whole record test.

The FAD indicated that NCDHHS analyzed Criterion 5 by determining whether an application showed the existence of sufficient initial operating funds and whether the LINAC would be profitable within three years. CCNC provided evidence that all initial operating expenses would be provided to AOR from USO. Additionally, CCNC provided financial statements from previous years that showed that CCNC had operated under a significant budget surplus. CCNC's application also used LINAC utilization projections to create financial projections. These projections, which were supported by underlying evidence in CCNC's application, predicted that CCNC's new LINAC would be profitable within three years as required by NCDHHS.

The FAD acknowledged that CCNC's application contained a number of mathematical errors, but ultimately determined that these errors did not significantly affect the overall projections and were therefore harmless. Ultimately, NCDHHS found, "even taking these errors into account, the proposal set forth in the CCNC application is clearly financially feasible in each of the first three years the [LINAC] would be in operation." Under the applicable standard of review, we find that there was substantial evidence in the whole record to support NCDHHS' finding that CCNC's application complied with Criterion 5. This assignment of error is overruled.

[8] Cary next argues that CCNC's application failed to comply with Criterion 7, which states: "The applicant shall show evidence of the availability of resources, including health manpower and management personnel, for the provision of the services proposed to be provided." N.C. Gen. Stat. § 131E-183(a)(7) (2009). Cary argues that the CCNC application failed to demonstrate that there would be sufficient physicians, specifically neurosurgeons or radiologists, to support a LINAC that provides SRS services.

Cary's argument is based upon the testimony of Dr. Kulbir Sidhu, a CCNC radiation oncologist and an expert in SRS services. Specifically, Dr. Sidhu testified that the medical standard of care for SRS services requires that the physician team include a neurosurgeon, a radiologist and a radiation oncologist. CCNC's application did not demonstrate the availability of either a neurosurgeon or a radiologist.

As previously noted, NCDHHS is statutorily empowered to adopt rules for the review of CON applications. N.C. Gen. Stat. § 131E-183(b) (2009). The staffing requirements for "[a]n applicant proposing to acquire radiation therapy equipment," such as a LINAC, are contained in 10A NCAC 14C.1905(a) (2008). There are no requirements in this portion of the Administrative Code for a LINAC applicant to have either a neurologist or radiologist on staff in order to be awarded a CON. While it may be prudent for NCDHHS to add such requirements for a LINAC providing SRS services, this Court cannot superimpose additional requirements on CON applications above and beyond those that have been promulgated by NCDHHS. Therefore, we determine that, despite Dr. Sidhu's testimony, CCNC was not required to demonstrate the availability of either a neurosurgeon or a radiologist in order to demonstrate compliance with Criterion 7. This assignment of error is overruled.

[9] Finally, Cary argues that CCNC's application failed to comply with Criterion 18a, which states:

> The applicant shall demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed; and in the case of applications for services where competition between providers will not have a favorable impact on cost effectiveness, quality, and access to the services proposed, the applicant shall demonstrate that its application is for a service on which competition will not have a favorable impact.

N.C. Gen. Stat. § 131E-183(a)(18a) (2009). Cary's argument regarding this criterion parallels Rex's earlier argument regarding Criterion 6. Cary contends that NCDHHS failed to independently analyze this statutory factor. This contention is based upon finding of fact 206, which states, in relevant part:

> Consequently, if the Agency determines an application demonstrates that the proposed project will satisfy the requirements of Criteria 3, 5, 7, 8, 12 and 13, *then the Agency also will determine that the proposed project will enhance competition in terms of cost effectiveness, quality of services, and access to services.*

(Emphasis added). Once again, NCDHHS' choice of language in this finding is unfortunate. However, as with NCDHHS' analysis of Criterion 6, the FAD contains additional findings that indicate that NCDHHS did in actuality separately consider whether CCNC's new LINAC would enhance competition under Criterion 18a. The FAD contains findings of fact which note that (1) awarding an additional LINAC to CCNC would "enhance access to [CCNC's] radiation therapy services and thereby have a positive impact on quality and continuity of patient care[;]" (2) adding an additional LINAC at CCNC's facility would "positively impact cost effectiveness, quality and access to services[;]" and (3) CCNC's application demonstrated "that Medicare and Medicaid patients will have good access to services provided . . . at [CCNC's facility]." These and other findings contained in the FAD indicate that NCDHHS satisfied its obligation to conduct an independent analysis of Criterion 18a. This assignment of error is overruled.

B. Cary's Application

[10] Cary's application was determined to be nonconforming with Criteria 4 and 6. In the FAD, NCDHHS found that "[t]he Cary Application does not conform with Criterion 6 because it proposes a more limited range of services than a linear accelerator that can be used for more general treatment of radiation therapy patients." Cary argues that NCDHHS acted arbitrarily and capriciously in finding that Cary's application failed to comply with Criterion 6. Cary's argument is based upon finding of fact 174, reproduced above. Cary contends that this finding suggests that compliance with Criteria 1 and 3, which Cary's application satisfied, automatically should have resulted in a finding that Criterion 6 was also satisfied. Cary does not provide any additional arguments supporting its purported compliance with Criterion 6.

As previously discussed, there are numerous additional findings in the FAD that showed that NCDHHS actually conducted an independent analysis of Criterion 6 for CCNC's application. Likewise, the FAD indicates that NCDHHS conducted an independent analysis of Criterion 6 for Cary's application. Because the FAD indicates that

NCDHHS did not, in actuality, rely upon compliance with Criteria 1 and 3 as a proxy for compliance with Criterion 6, Cary's argument fails. Since Cary provided no additional arguments regarding Criterion 6, it has failed to demonstrate that its application complied with this criterion. This assignment of error is overruled.

"Each CON application must conform to all applicable review criteria or the CON will not be granted." *Good Hope*, 189 N.C. App. at 549, 659 S.E.2d at 466. Because we have decided that NCDHHS properly determined that Cary's application failed to conform to Criterion 6, Cary is not entitled to a CON. Consequently, we do not address Cary's arguments regarding Criterion 4. In addition, we need not address the argument of WROS and CCNC that Cary failed to comply with Criterion 1.

VI. Comparative Analysis

[11] Cary argues that NCDHHS erred by upholding the CON section's use of two factors in conducting a comparative analysis of all of the competing applications. Specifically, Cary takes issue with the use of "Demand for Applicant's Existing Services" and "Availability of SRS Capability" as applicable factors in the comparative analysis.

> In a competitive review, where the Agency finds more than one applicant conforming to the applicable review criteria, it may conduct a comparison of the conforming applications to determine which applicant should be awarded the CON. There is no statute or rule which requires the Agency to utilize certain comparative factors.

Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs., 176 N.C. App. 46, 58, 625 S.E.2d 837, 845 (2006) (internal citations omitted).

In the instant case, it has been determined that neither the WROS application nor the Cary application conformed to all of the applicable statutory review criteria, and as a result, neither WROS nor Cary were entitled to a comparative analysis of their respective applications. Therefore, we decline to address Cary's arguments regarding how the comparative analysis was conducted. This assignment of error is overruled.

VII. Conclusion

After reviewing the FAD, we determine that all challenged findings of fact are supported by substantial evidence in the whole

record. In addition, NCDHHS committed no errors of law when (1) it determined that Rex was not substantially prejudiced by the award of a CON to CCNC; (2) it determined that the WROS application and the Cary application failed to conform with all required statutory criteria in N.C. Gen. Stat. § 131E-183(a); and (3) it determined that CCNC's application conformed with all applicable statutory criteria. Therefore, we affirm the FAD awarding a CON to CCNC for a LINAC in Area 20.

Affirmed.

Judges WYNN and STEELMAN concur.

STATE OF NORTH CAROLINA v. JOSEPH MICHAEL GUARASCIO

No. COA09-883

(Filed 20 July 2010)

1. Criminal Law— joinder of offenses—circumstances not so unique—no error

The trial court did not err in joining two misdemeanor charges of impersonating a law enforcement officer, five counts of felony forgery, and five more counts of misdemeanor impersonating a law enforcement because the circumstances on each occasion were not so distinct as to render consolidation unjust.

2. Forgery— no fatal variance in indictment—sufficient evidence

The trial court did not err in denying defendant's motion to dismiss charges of forgery at the close of the evidence because there was no fatal variance between the indictments on the forgery charges and the proof adduced at trial and there was sufficient evidence of all the elements of forgery.

3. Crimes, Other— impersonating a law enforcement officer—sufficient evidence

The trial court did not err by failing to dismiss charges of impersonating a law enforcement officer because the evidence was sufficient to prove each element of the offenses, including that defendant made false representations that he was a police officer.

4. Criminal Law— jury instructions—impersonating a law enforcement officer—erroneous—harmless error

The trial court did not commit prejudicial error in its instructions to the jury on the charge of impersonating a law enforcement officer. Although the trial court failed to instruct the jury on the precise statutory ways in which an individual can impersonate a law enforcement officer, the error was harmless, given the substantial evidence that defendant falsely represented to another that he was a sworn law enforcement officer by means described in N.C.G.S. § 14-277(a)(1) and (2).

5. Forgery— jury instructions—answer to jury question—no error

The trial court did not err in a forgery case in its response to the jury's question regarding whether an officer could authorize another to sign his name to a citation. The trial court's additional instructions were correct statements of the law and were given in conformity with defendant's assent.

Appeal by Defendant from judgments entered 8 July 2008 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 28 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Thomas Hicks & Associates, PLLC, by Thomas S. Hicks and Lonnie P. Merritt, for Defendant.

STEPHENS, Judge.

I. Procedural History

On 4 June 2007, Defendant Joseph Michael Guarascio was indicted on five counts of impersonating a law enforcement officer and five counts of forgery of an instrument for alleged offenses occurring on 21 March 2006. On 8 October 2007, Defendant was indicted on two additional counts of impersonating a law enforcement officer for alleged offenses occurring on 20 April 2006.

The charges were joined and the matter came on for trial before a jury at the 30 June 2008 criminal session of New Hanover County Superior Court. On 8 July 2008, the jury returned verdicts of guilty on all charges except one count of impersonating a law enforcement

officer. The trial court entered judgments upon the verdicts imposing suspended sentences and supervised probation. Defendant gave notice of appeal in open court.

II. Factual Background

Defendant was a police officer in New York City from 1985 until he retired on disability in 1992. In 2004, Defendant established a private police agency called Interpol Special Police. The State of North Carolina permits private police agencies, whether individually or corporately owned, to employ individuals to exercise law enforcement authority and arrest powers on property where the agencies have contracts for such services, such as apartment complexes and bars. The officers must meet the same minimum standards of training and proficiency as those officers employed by governmental agencies. One of the requirements to maintain certification as a sworn law enforcement officer is firearms qualification.

In January of 2006, Defendant reported to Vickie Huskey, the administrator for company and campus police agencies in the State of North Carolina administered under the Office of the Attorney General, that he had not complied with the firearms qualification in 2005. On 18 January 2006, Ms. Huskey contacted Defendant and told him to cease and desist from acting in any capacity as a law enforcement officer. She instructed him that he had no authority to wear a badge or uniform, carry a service weapon, or exercise any authority as a police officer.

A certified letter from Ms. Husky delivered to Defendant on 30 January 2006 notified him of the suspension of his company police officer commission. Additionally, Defendant was notified in March of 2006 by the Criminal Justice Education Training and Standards Commission[1] that his law enforcement certification was suspended. During the period of suspension, Defendant was legally permitted to run his business administratively, but not permitted to supervise the police officers he employed. Defendant did not regain his law enforcement certification until October of 2006.

On 21 March 2006, Defendant received a telephone call reporting loud noise at the Quad Apartments in Wilmington, North Carolina, which contracted with Interpol for police services. Defendant called Scott Monzon ("Monzon"), the acting Police Chief of Interpol, and

1. The North Carolina Criminal Justice Education and Training Standards Commission is established in the Department of Justice and is in charge of an officer's law enforcement certification. *See* 12 N.C. Admin. Code 09A.0101 and 09A.0102 (2007).

notified him of the report. Both Monzon and Defendant arrived at the Quad Apartments and walked up the stairs of the apartment complex together.

A group of approximately ten college-aged friends had gathered at the apartment of William Sconyers-Snow, known as "French," in the Quad Apartments. Those present at French's apartment included Brandon Aber, Steven Ross, Marilyn Faircloth, David Grantham, Michael Collins, Matt Collins, Neve McIntosh, and Joseph Blackshirt. Brandon Aber testified that they were playing loud music and drinking beer after midnight when they heard a knock on the door. French went to the door and said that he did not have to let anyone in. However, either Defendant or Monzon told French that he had to open the door or they would break it down.

When French opened the door, Defendant and Monzon walked into the apartment. Monzon was wearing a uniform and Defendant was in plain clothes. French recalled seeing a badge on Defendant's leather jacket, although none of the others recalled seeing one. Defendant and Monzon demanded identification from everyone in the apartment and began writing citations for underage drinking for those individuals who were not yet 21.

Monzon asked Defendant to help fill out the citations. Monzon testified that he expected Defendant to give the ticket book back to him so that he could sign the citations. Instead, Defendant signed Monzon's name to the citations for David Grantham, Brandon Aber, Marilyn Faircloth, Michael Collins, and Steven Ross. Monzon did not give Defendant permission to sign his name to the citations and confronted Defendant about his actions when the two were alone. Monzon told Defendant not to sign his name to charging citations or arrest warrants.

Defendant called French's father, Jerry Snow, sometime between 2:00 a.m. and 3:00 a.m. on 21 March 2006 and identified himself as Officer Joe Guarascio. He informed Mr. Snow that although his son had not learned his lesson, Defendant was not going to charge French at this time and was going to let him go. Based on Defendant's representations, Mr. Snow understood that Defendant was a law enforcement officer.

Steven Ross testified that Defendant identified himself as "the law" or a "police officer." At one point during the incident, Defendant took French outside in handcuffs. Defendant threatened to arrest

French for marijuana residue that Defendant had confiscated in a prior visit to French's apartment.

On 20 April 2006, roommates Bryanna Fazio ("Fazio") and Jessica Siragusa ("Siragusa") accompanied some friends to a downtown Wilmington club. Both women were 20 years old and used fake identifications to get into the club. Once inside, they were approached by Defendant, who asked to see their identification. Defendant identified himself as "the police" and showed them his badge. Defendant was dressed in plain clothes. Monzon was present as well.

Defendant told Fazio that he didn't believe the identification she gave him was hers and asked Fazio and Siragusa to step outside. Defendant searched Fazio's purse without her consent and found her real identification. Defendant threatened to arrest Fazio and have her expelled from school. Fazio was handcuffed and placed in Defendant's car.

After Fazio spent about 15 minutes in Defendant's car, Monzon removed the handcuffs from her wrists and told Fazio that she would not be arrested. Using Fazio's cell phone, Defendant called Fazio's aunt, Susan Chambers ("Chambers"), in New York at approximately 2:00 a.m. Defendant identified himself as Chief Guarascio with the Wilmington Police Department. Defendant told Chambers that he had detained Fazio for underage drinking, that he was going to have her expelled from school, that he was also from New York, and that things weren't the same in North Carolina as they were in New York. Defendant threatened to take Fazio before a judge and have her spend the night in jail.

Defendant told Siragusa that she was a disgrace to her father and that she was going to get expelled from school. Defendant filled out her citation and took it to Monzon to be signed. Using Siragusa's cell phone, Defendant telephoned Siragusa's father, Steve Siragusa, in New York at approximately 2:00 a.m. Defendant identified himself as "an officer with Wilmington" and said that he had detained Siragusa for underage drinking. Defendant warned Mr. Siragusa that the school Siragusa attended would expel her if Defendant told them about her underage drinking.

III. Discussion

A. Joinder

[1] By Defendant's first argument, Defendant contends that the trial court erred in joining the two misdemeanor charges of impersonating

a law enforcement officer resulting from events which occurred on 20 April 2006 with the five counts of felony forgery and five counts of misdemeanor impersonating a law enforcement officer resulting from events that occurred on 21 March 2006. We disagree.

Joinder is governed by N.C. Gen. Stat. § 15A-926 which provides that "[t]wo or more offenses may be joined . . . for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2007). In determining whether two or more offenses may be joined for trial, the test is "whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant." *State v. Fultz*, 92 N.C. App. 80, 83, 373 S.E.2d 445, 447 (1988) (citation and quotation omitted). "[T]he determination of whether a group of offenses are transactionally related so that they may be joined for trial is a question of law fully reviewable on appeal." *State v. Williams*, 74 N.C. App. 695, 696-97, 329 S.E.2d 705, 707 (1985). "Public policy strongly favors joinder because it expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden on citizens who must sacrifice both time and money to serve on juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once." *State v. Jenkins*, 83 N.C. App. 616, 351 S.E.2d 299 (1986), *cert. denied*, 319 N.C. 675, 356 S.E.2d 791 (1987). "When joinder is permissible under the statute, whether to allow joinder is a determination within the discretion of the trial judge, whose ruling will not be disturbed on appeal unless it is demonstrated that joinder deprived the defendant of a fair trial." *State v. Ruffin*, 90 N.C. App. 712, 370 S.E.2d 279 (1988).

In the present case, the joined offenses occurred on 21 March and 20 April 2006, approximately one month apart. Furthermore, on both occasions, Defendant comported himself as a law enforcement officer by interrogating individuals and writing out citations for underage drinking, notified the minors' parents or family members that they were in his custody for underage drinking, and identified himself as a law enforcement officer to the parents and family members. These actions evidence a scheme or plan in which Defendant, despite verbal and written cease and desist notices that his certifications were suspended, acted under the guise of apparent authority as a law enforcement officer to interrogate, belittle, and intimidate minors. *See*, *e.g.*, *Fultz*, 92 N.C. App. at 83, 373 S.E.2d at 447 ("[T]he evidence demon-

strates a scheme or plan in which the defendant used his position as troop leader to commit these acts."). We conclude that the circumstances on each occasion are not so distinct as to render consolidation unjust. On the contrary, the circumstances are strikingly similar. Accordingly, the trial court did not err in joining the offenses.

Moreover, assuming *arguendo* that the trial court erred in allowing joinder here, Defendant has failed to show prejudice. Defendant argues that "[b]y joining the issues in these cases . . . [Defendant] was unjustly portrayed to the jury as an outlaw and a villain." However, Defendant has offered no evidence tending to show that he was unable to present his defense because of the joinder.

The assignments of error upon which Defendant's argument is based are overruled.

B. Motion to Dismiss

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the charges of forgery at the close of the evidence. Specifically, Defendant contends that there is a fatal variance between the indictments on the forgery charges and the proof adduced at trial and that there was insufficient evidence of all the elements of forgery. 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). " '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, "the trial court must consider the evidence in the light most favorable to the State, with the State entitled to every reasonable inference to be drawn therefrom, and discrepancies and contradictions resolved in favor of the State." *State v. Tirado*, 358 N.C. 551, 594, 599 S.E.2d 515, 543-44 (2004) (citation and quotation marks omitted), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). 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).

Defendant first argues that there is a fatal variance between the indictments on the forgery charges and the proof adduced at trial.

> A motion to dismiss [for a variance] is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.

State v. Waddell, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971). In order to prevail on such a motion, the defendant must show a variance regarding an essential element of the offense. *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997).

N.C. Gen. Stat. § 14-119 makes it "unlawful for any person to forge . . . any instrument . . . with the intent to injure or defraud any person, financial institution, or governmental unit." N.C. Gen. Stat. § 14-119(a) (2007). An "instrument" is "any currency, bill, note, warrant, check, *order*, or similar instrument of or on any financial institution or governmental unit, or any cashier or officer of the institution or unit[.]" N.C. Gen. Stat. § 14-119(c)(4) (2007) (emphasis added). " 'Governmental unit' means . . . *any state* of the United States, any political subdivision, agency, or instrumentality of any state, or any foreign jurisdiction." N.C. Gen. Stat. § 14-119(c)(3) (2007) (emphasis added).

In each count of forgery, Defendant was charged with the offense of forgery of "an order drawn on a government unit, STATE OF NORTH CAROLINA, which is described as follows: NORTH CAROLINA UNIFORM CITATION" in violation of N.C. Gen. Stat. § 14-119.

Defendant contends that a "citation" is not "an order[.]" Defendant's argument fails. A citation is "[a] police-issued *order* to appear before a judge on a given date to defend against a stated charge . . . ." *Black's Law Dictionary* 277 (9th ed. 2009) (emphasis added); *see* N.C. Gen. Stat. § 15A-302 (2007) ("A citation is a *directive*, issued by a law enforcement officer or other person authorized by statute, that a person appear in court and answer a misdemeanor or infraction charge or charges." (emphasis added)). Defendant further argues that the citation is not "drawn on a government unit" as Interpol is not a government unit. We disagree. Interpol is a private police agency with "law enforcement authority and arrest powers"

and is authorized by statute to issue North Carolina Uniform Citations. N.C. Gen. Stat. § 74E-6(c) (2007).

At trial, the State offered evidence that Defendant wrote David Grantham, Brandon Aber, Marilyn Faircloth, Michael Collins, and Steven Ross North Carolina Uniform Citations, signing Monzon's name to the citations. Accordingly, we conclude there was no variance, much less a fatal variance, between the allegations contained in the indictments for forgery and the evidence adduced at trial. Defendant's argument is wholly without merit.

Defendant also argues that there was insufficient evidence of all the elements of forgery and, therefore, the trial court erred in submitting the forgery charges to the jury. Again, we disagree. "To send a charge of forgery to the jury, the State must offer sufficient evidence of (1) a false making of some instrument in writing; (2) a fraudulent intent; and (3) the instrument must apparently [be] capable of effecting fraud." *State v. Seraphem*, 90 N.C. App. 368, 373, 368 S.E.2d 643, 646 (1988).

In this case, the evidence is uncontradicted that Defendant signed Monzon's name on five North Carolina Uniform Citations. As discussed *supra*, these citations are "instruments" within the meaning of N.C. Gen. Stat. § 14-119. Furthermore, it is uncontested that Defendant intended that his signature be received as Monzon's and that Monzon's signature made the citations valid and effectual. *See Peoples Bank & Trust Co. v. Fidelity & Casualty Co.*, 231 N.C. 510, 519, 57 S.E.2d 809, 814 (1950) ("[T]he falsity of the paper consists in the falseness of its purported authority, the fraudulent intent that the signature shall pass or be received as the genuine *act* of the person whose signing, only, could make the paper valid and effectual."). Moreover, taken in the light most favorable to the State, the evidence indicates that Defendant did not have Monzon's authority to sign the instruments on Monzon's behalf. Monzon testified that he asked Defendant to help him fill out the citations on 21 March 2006. Defendant filled out the required information on the citations and then signed Monzon's name to them. When Monzon received the completed citations from Defendant, Monzon was upset that Defendant had signed Monzon's name to them. After they left the apartment, Monzon told Defendant, " 'You don't need to be signing my name[.]' " Accordingly, as the State presented sufficient evidence of the elements of forgery, the trial court did not err in denying Defendant's motion to dismiss the forgery charges for insufficient evidence.

The assignments of error upon which Defendant's argument is based are overruled.

C. Motion to Dismiss Charges of Impersonating a Law Enforcement Officer

[3] Defendant next argues that the trial court erred in failing to dismiss the charges of impersonating a law enforcement officer because the evidence was insufficient to prove each element of this offense. Specifically, Defendant contends that there was insufficient evidence that Defendant made a false representation that he was a police officer. We disagree.

As charged in this case, the offense of impersonating a law enforcement officer consists of two material elements: (1) defendant must have made a false representation that he is a duly authorized peace officer; and (2) acting upon such representation, defendant must have arrested some person, searched a building, or done some act in accordance with the authority delegated to duly authorized officers. *State v. Church*, 242 N.C. 230, 232, 87 S.E.2d 256, 257 (1955).

Pursuant to N.C. Gen. Stat. § 14-277, a person makes a false representation that he is a sworn law enforcement officer if he:

> (1) Verbally informs another that he is a sworn law[]enforcement officer, whether or not the representation refers to a particular agency;
>
> (2) Displays any badge or identification signifying to a reasonable individual that the person is a sworn law[]enforcement officer, whether or not the badge or other identification refers to a particular law[]enforcement agency;
>
> (3) Unlawfully operates a vehicle on a public street, highway or public vehicular area with an operating red light as defined in G.S. 20-130.1(a); or
>
> (4) Unlawfully operates a vehicle on a public street, highway, or public vehicular area with an operating blue light as defined in G.S. 20-130.1(c).
>
> N.C. Gen. Stat. § 14-277(a) (2007).

In this case, French testified that Defendant "had on a leather jacket and he had on a badge on his leather jacket on his belt" when he came into French's apartment. French also testified that Defendant identified himself to French's father as "Officer Joe Guarascio[.]"

Mr. Snow testified that Defendant identified himself as an officer. Steven Ross testified that he recalled Defendant saying, " 'I'm the law, police officer,' something like that."

Monzon testified that on 20 April 2006, Defendant approached the two females who were sitting at the bar and asked to see their identification. When they asked, " 'Well, who are you?[,]' " Defendant replied, " 'I'm the police[,]' and showed them his badge."[2]

Especially when viewed in the light most favorable to the State, as it must be, *Tirado*, 358 N.C. at 594, 599 S.E.2d at 544, this evidence is sufficient to show that Defendant made false representations that he was a sworn law enforcement officer, within the meaning of N.C. Gen. Stat. § 14-277, on 21 March and 20 April 2006. The assignment of error upon which this argument is based is overruled.

D. Jury Instruction

[4] Next, Defendant argues that the trial court erred in its instructions to the jury on the charge of impersonating a law enforcement officer. Specifically, Defendant argues that the trial court was required to instruct the jury on the precise statutory ways in which an individual can impersonate a law enforcement officer. While we agree that the challenged jury instructions were erroneous, we conclude that the error was harmless.

"When instructing the jury, the trial court has the duty to declare and explain the law arising on the evidence." *State v. Corn*, 307 N.C. 79, 86, 296 S.E.2d 261, 266 (1982) (citations and quotation marks omitted). However, "the trial court's omission of elements of a crime in its recitation of jury instructions is reviewed under the harmless error test." *State v. Bunch*, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010). "On a general level, '[a]n error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction.' " *Id.* (quoting *State v. Nelson*, 341 N.C. 695, 701, 462 S.E.2d 225, 228 (1995)).

Pursuant to N.C. Gen. Stat. § 14-277,

> (a) No person shall falsely represent to another that he is a sworn law[]enforcement officer. As used in this section, a person represents that he is a sworn law[]enforcement officer if he:

2. Although Defendant argues that "neither of the two young ladies testified that [Defendant] either displayed a badge or represented himself to be a law enforcement officer[,]" Monzon's testimony is sufficient evidence of a false representation.

(1) Verbally informs another that he is a sworn law[]enforcement officer, whether or not the representation refers to a particular agency;

(2) Displays any badge or identification signifying to a reasonable individual that the person is a sworn law[]enforcement officer, whether or not the badge or other identification refers to a particular law[]enforcement agency;

(3) Unlawfully operates a vehicle on a public street, highway or public vehicular area with an operating red light as defined in G.S. 20-130.1(a); or

(4) Unlawfully operates a vehicle on a public street, highway, or public vehicular area with an operating blue light as defined in G.S. 20-130.1(c).

(b) No person shall, while falsely representing to another that he is a sworn law[]enforcement officer, carry out any act in accordance with the authority granted to a law[]enforcement officer. For purposes of this section, an act in accordance with the authority granted to a law[]enforcement officer includes:

(1) Ordering any person to remain at or leave from a particular place or area;

(2) Detaining or arresting any person;

(3) Searching any vehicle, building, or premises, whether public or private, with or without a search warrant or administrative inspection warrant;

(4) Unlawfully operating a vehicle on a public street or highway or public vehicular area equipped with an operating red light or siren in such a manner as to cause a reasonable person to yield the right-of-way or to stop his vehicle in obedience to such red light or siren;

(5) Unlawfully operating a vehicle on a public street or highway or public vehicular area equipped with an operating blue light in such a manner as to cause a reasonable person to yield the right-of-way or to stop his vehicle in obedience to such blue light.

N.C. Gen. Stat. § 14-277 (2007).

While N.C. Gen. Stat. § 14-277(a) makes it a criminal offense for an individual to make a false representation to another person that he

is a sworn law enforcement officer, N.C. Gen. Stat. § 14-277(b) "makes it a criminal offense for an individual, *while falsely representing to another that he is a sworn law[]enforcement officer*, to carry out any act in accordance with the authority granted to a law[]enforcement officer." *State v. Chisholm*, 90 N.C. App. 526, 530, 369 S.E.2d 375, 377 (1988). Accordingly, a charge under N.C. Gen. Stat. § 14-277(b) *necessarily* includes all of the elements of a charge under N.C. Gen. Stat. § 14-277(a).

N.C. Gen. Stat. § 14-277(a), which codifies the offense of "impersonating a law[]enforcement officer," lists the four ways by which an individual may falsely represent to another that he is a sworn law enforcement officer. *See* N.C. Gen. Stat. § 14-277(a)(1)-(4). Furthermore, North Carolina Pattern Jury Instruction 230.70 states:

> For you to find the defendant guilty of [impersonating a law enforcement officer], the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant made a false representation to another person that he was a sworn law[]enforcement officer.
>
> And second, that the defendant made this false representation by
>
> a. [verbally informing another that he is a sworn law enforcement officer] (footnote omitted);
>
> b. [displays any badge or identification signifying to a reasonable individual that the person is a sworn law[]enforcement officer] (footnote omitted);
>
> c. [unlawfully operates a vehicle on a [public street] [highway] [public vehicular area] with an operating red light (as defined in G.S. 20-130.1(a))] (footnote omitted); or
>
> d. [unlawfully operates a vehicle on a [public street] [highway] [public vehicular area] with an operating blue light (as defined in G.S. 20-130.1(c))] (footnote omitted).

N.C.P.I.—Crim. 230-70. This pattern jury instruction correctly guides the trial court in charging a jury on the law contained in N.C. Gen. Stat. § 14-277(a).

N.C. Gen. Stat. § 14-277(b), which codifies the offense of "impersonating a law[]enforcement officer and carrying out an act in accordance with the authority granted to a law[]enforcement officer," and,

as stated *supra*, includes the elements of N.C. Gen. Stat. § 14-277(a), lists the four ways by which an individual may carry out an act in accordance with the authority granted to a law enforcement officer. *See* N.C. Gen. Stat. § 14-277(b)(1)-(4). However, North Carolina Pattern Jury Instruction 230.75 states:

> For you to find the defendant guilty of [impersonating a law enforcement officer and carrying out an act in accordance with the authority granted to a law[]enforcement officer], the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant falsely represented to another that he was a sworn law[]enforcement officer.
>
> And Second, that the defendant, while making this false representation, carried out an act in accordance with the authority granted to a law[]enforcement officer by
>
> a. [ordering any person to remain at or leave from a particular place or area];
>
> b. [detaining or arresting any person];
>
> c. [searching any vehicle, building, or premises, whether public or private, with or without a search warrant or administrative inspection warrant];
>
> d. [unlawfully operating a vehicle on a [public street] [highway] [public vehicular area] equipped with an operating red light or siren in such a manner as to cause a reasonable person to yield the right-of-way or to stop his vehicle in obedience to such red light or siren] (footnote omitted);
>
> e. [unlawfully operating a vehicle on a [public street] [highway] [public vehicular area] equipped with an operating blue light in such a manner as to cause a reasonable person to yield the right-of-way or to stop his vehicle in obedience to such blue light] (footnote omitted).

N.C.P.I.—Crim. 230.75. This instruction inadequately guides the trial court regarding the elements of "impersonating a law[]enforcement officer and carrying out an act in accordance with the authority granted to a law[]enforcement officer" by omitting from the instruction the ways enumerated in N.C. Gen. Stat. § 14-277(a)(1)-(4) and N.C.P.I.—Crim. 230-70 by which an individual may falsely represent to another that he is a sworn law enforcement officer.

In this case, the trial court instructed the jury that "Defendant has been charged with . . . impersonating a law enforcement officer and carrying out an act in accordance with the authority granted to a law enforcement officer . . . ." The trial court then instructed the jury:

> For you to find the Defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that the Defendant falsely represented to another that he was a law enforcement officer.
>
> And second, that the Defendant, while making this false representation, carried out an act in accordance with the authority granted to a law enforcement officer by ordering any person to remain at or leave from a particular place or area or detaining or arresting a person.

As the trial court's jury instruction for "impersonating a law[]enforcement officer and carrying out an act in accordance with the authority granted to a law[]enforcement officer" omitted from the instruction the ways by which an individual may falsely represent to another that he is a sworn law enforcement officer, the trial court's instruction was insufficient to correctly charge the jury on the necessary elements of the offense.

Evidence was presented that Defendant verbally informed individuals that he was a sworn law enforcement officer and displayed a badge. Accordingly, the trial court's instruction for "impersonating a law[]enforcement officer and carrying out an act in accordance with the authority granted to a law[]enforcement officer" should have been as follows:

> For you to find Defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that the Defendant falsely represented to another that he was a sworn law enforcement officer *by verbally informing another that he was a sworn law enforcement officer or displaying any badge or identification signifying to a reasonable individual that the person is a sworn law enforcement officer.*
>
> And second, that the Defendant, while making this false representation, carried out an act in accordance with the authority granted to a law enforcement officer by ordering any person to remain at or leave from a particular place or area or detaining or arresting any person.

(Emphasis added). This instruction would have adequately "declare[d] and explain[ed] the law arising on the evidence." *Corn*, 307 N.C. at 86, 296 S.E.2d at 266 (citations and quotation marks omitted).

However, even though we conclude that the trial court's instruction was erroneous, we also conclude that the error was harmless. As explained *supra*, French testified that Defendant "had on a leather jacket and he had on a badge on his leather jacket on his belt" when he came into French's apartment. French also testified that Defendant identified himself to French's father as "Officer Joe Guarascio[.]" Mr. Snow testified that Defendant identified himself as an officer. Steven Ross testified that he recalled Defendant saying, " 'I'm the law, police officer,' something like that."

Monzon testified that on 20 April 2006, Defendant approached the two females who were sitting at the bar and asked to see their identification. When they asked, "'Well, who are you?[,]' " Defendant replied, " 'I'm the police[,]' and showed them his badge."

Given this substantial evidence that Defendant falsely represented to another that he was a sworn law enforcement officer by means described in N.C. Gen. Stat. § 14-277(a)(1) and (2), we conclude that the trial court's instructional error did not contribute to Defendant's conviction and, thus, was harmless beyond a reasonable doubt. *Nelson*, 341 N.C. at 701, 462 S.E.2d at 228. Defendant's argument is overruled.

E. Jury Request

[5] By Defendant's final argument, he contends that the trial court erred in its response to the jury's question regarding whether an officer could authorize another to sign his name to a citation. We disagree.

"After the jury retires for deliberation, the judge may give appropriate additional instructions to . . . [r]espond to an inquiry of the jury made in open court . . . ." N.C. Gen. Stat. § 15A-1234 (a)(1) (2007). "[T]he trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions." *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986). Thus, a trial court's decision to grant or deny the jury's request for additional instruction is reviewed by this Court only for an abuse of

discretion. *See id.* (holding that the trial court did not abuse its discretion in refusing to reinstruct the jury on second-degree murder pursuant to defendant's request).

In this case, after the jury retired for deliberations, the jury sent a question to the court that read:

> "Could Officer Monzon direct [Defendant] to sign B.S. Monzon? Is that a legal request to produce a legal citation? Is authority referencing a legal standard [(] that allows him to sign, [)] or verbal authority by Monzon to sign?"

The following exchange occurred between counsel and the trial court regarding the question:

> THE COURT: . . . My intention is just to direct them that all the evidence has been presented and that it is their duty to remember the evidence, whether called to their attention or not. . . .
>
> [DEFENSE COUNSEL]: I'm not sure—I'm not sure what the question asks.
>
> THE COURT: I'm not either.
>
> [THE STATE]: I'm not either. I'm not—I'm not sure if they're asking—well, I don't know, Judge. I don't think you can answer. I think they're basically asking about whether verbal authority is okay, whether written authority is okay and then whether any of those authorities even if they're given by Monzon is okay.
>
> THE COURT: Uh-huh.
>
> [THE STATE]: And I'm not sure you can answer that for them.
>
> THE COURT: [Defense counsel]?
>
> [DEFENSE COUNSEL]: I would ask that the Court instruct [the jury] that any person can authorize almost any person to sign their signature to a document.
>
> THE COURT: I can't—how—how on Earth can I—
>
> [DEFENSE COUNSEL]: Because I think that's the case.
>
> THE COURT: —instruct the jury to do that?
>
> [DEFENSE COUNSEL]: Well, I'm just asking.
>
> THE COURT: Okay.

[DEFENSE COUNSEL]: You know, if they're asking, you know, whether—you see the problem we have is we don't know what they're asking.

THE COURT: Yeah.

[DEFENSE COUNSEL]: I think what they're getting at is, what—what is authorization and how does authorization have to be expressed?

. . . .

[DEFENSE COUNSEL]: And I think that there can be an instruction. I can probably given some time to do some additional research craft, but I think at this point I don't know that it needs to be responded [to]. You've heard the evidence. I've instructed you on the law, you know, it's up to you to make a determination.

THE COURT: All right. This is what I intend to instruct to the jury . . . .

The trial court ultimately instructed the jury as follows:

> Now, members of the jury, all of the evidence had [sic] been presented. It is your duty to decide from the evidence what the facts are. You must apply the law as I have given it to you to the facts—to those facts. You have heard the evidence and the arguments of counsel. If your recollection of the evidence differs from that of the prosecuting attorney or of the defense attorney, you rely solely upon your recollection.
>
> Your duty is to remember the evidence whether called to your attention or not. You should consider all the evidence, arguments, contentions, and positions urged by the attorneys, and other contention[s] that arise from the evidence and using your common sense you must determine the truth in this case.

After sending the jury back to the jury room to continue its deliberations, the trial court asked counsel for the State and Defendant if they had "[a]nything . . . as it regards those instructions?" Counsel for both parties indicated that they did not.

Defendant now argues that "[t]he question posed, whether the individual whose name is written upon the instrument can give authorization to another to sign his name, addresses the penultimate defense to the offense charged." However, it was readily apparent at trial that neither the parties nor the trial judge could discern exactly

"[t]he question posed[.]" Furthermore, the trial court's additional instructions were correct statements of the law and were given in conformity with Defendant's assent. *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991). "The [D]efendant will not be heard to complain on appeal when the trial court has instructed adequately on the law and in a manner requested by the [D]efendant." *Id.* Accordingly, we find no abuse of discretion in the trial court's response to the jury's question. The assignment of error upon which Defendant's argument is based in overruled.

Defendant received a fair trial, free of prejudicial error.

NO PREJUDICIAL ERROR.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA v. ROBERT LEE PASTUER, DEFENDANT

No. COA09-1432

(Filed 20 July 2010)

Homicide— first-degree murder—sufficiency of evidence—circumstantial evidence—suspicion only

In a first-degree murder prosecution, the State did not present evidence sufficient to overcome a motion to dismiss where the State's evidence of defendant's opportunity and ability to commit the murder may have raised a strong suspicion of guilt but fell well short of substantial evidence that defendant committed the murder.

Appeal by defendant from judgment entered 13 April 2009 by Judge Henry W. Hight, Jr. in Franklin County Superior Court. Heard in the Court of Appeals 26 April 2010.

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

Staples Hughes, Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged in a bill of indictment with the first-degree murder of his estranged wife, Narskelsky Pastuer. He entered a plea of not guilty, was convicted by a jury, and was sentenced as a Class A felon to life imprisonment without parole. Defendant appeals.

The State's evidence at trial tended to show that defendant and Mrs. Pastuer separated in April 2006 after eleven or twelve years of marriage. According to the testimony of Mrs. Pastuer's daughter, Melissa Battle, defendant had been abusive to Mrs. Pastuer, and she was afraid of him. As a result, Mrs. Pastuer sought assistance from the domestic violence support agency, Safe Space, and met with Karen Branch, an advocate with that agency, on 11 April 2006. During the meeting, Mrs. Pastuer was visibly upset and expressed fear that defendant was going to hurt her. Ms. Branch continued to have telephone conversations with Mrs. Pastuer, offering her support and resources, and on 19 April 2006 she assisted Mrs. Pastuer in obtaining an *ex parte* domestic violence order prohibiting defendant from having any further contact with Mrs. Pastuer. On 8 June 2006, a district court judge entered a final domestic violence protection order, effective until 8 June 2007, providing that defendant was not allowed to "assault, threaten, abuse, follow, harass by telephone, visit[] the home, or work place, or other means, or interfere with [Mrs. Pastuer]." The order gave Mrs. Pastuer possession of the marital residence, located at 49 Lynyrd Lane in Franklin County, and specifically excluded defendant from the premises. Defendant was also ordered to surrender his keys for Mrs. Pastuer's 1998 Camry automobile.

Ms. Branch last spoke with Mrs. Pastuer on 30 October 2006, and Ms. Battle last spoke with her mother on 31 October 2006. When Ms. Battle tried to call again on 1 November 2006, Mrs. Pastuer did not answer. Having been unable to contact her mother for a few days, Ms. Battle filed a missing person report on 8 November 2006. In the early afternoon of the same day, Ms. Battle, accompanied by her husband and two police officers, went to Mrs. Pastuer's house to see if they could discover anything as to her whereabouts. When they arrived, it appeared that no one was home. None of the windows were broken, and the only thing unusual about the front door was damage from a previous altercation with defendant. The officers pried open the front door with a screwdriver and they, along with Ms. Battle, began to search the entire house. They discovered that Mrs. Pastuer's clothes, some jewelry, and her Camry automobile were missing; however other items, such as her undergarments, her shoes, her sleep apnea

breathing machine, the television, and other electronics, remained in the house.

Ronnie Burt, a masonry contractor and acquaintance of defendant, testified that in the late afternoon of a day during the first week of November 2006, he and his masonry crew were on the side of U.S. Highway 1 in Franklin County at a point about a quarter of a mile south of the intersection of that highway with N.C. Highway 96. Mr. Burt had a problem with his truck, and while he was repairing it, he saw defendant walking south along the highway in the direction of Raleigh. Mr. Burt testified that he did not notice anything unusual about defendant's appearance or his demeanor. After he fixed his truck, Mr. Burt gave defendant a ride to New Bern Avenue in Raleigh.

On 4 November 2006, at 4:54 a.m., a man wearing a ski mask, sunglasses, gloves, and a sweatshirt withdrew $400 from Mrs. Pastuer's checking account at the State Employees' Credit Union Cash Point located at 7617 Poole Road in the Raleigh/Knightdale area. In order to make this withdrawal, it was necessary for the person to have both Mrs. Pastuer's ATM card and her personal identification number. The card was not used after this transaction.

On 7 December 2006, Mrs. Pastuer's body was found, wrapped and tied with rope and a blue tarp, in the trunk of her Camry automobile, which was parked behind an abandoned house about one hundred yards from U.S. Highway 1 just south of the town limits of Franklinton. The body was clad only in socks and underwear. The body, tarp, and rope were transported to the Office of the Chief Medical Examiner in Chapel Hill, North Carolina. Dr. Deborah Radisch, Associate Chief Medical Examiner for the State of North Carolina, performed an autopsy on 8 December 2006. Dr. Radisch examined the exterior of the body and, despite the level of decomposition, was able to identify eleven stab wounds. One of the wounds, located on the right side of Mrs. Pastuer's neck, contained a yellow metallic looking material. Mrs. Pastuer died as a result of a stab wound to her abdomen, which traveled "an approximate distance or length in the body of about seven inches." The object that caused this wound "cut a portion of the left lobe of her liver, made a hole in [her] stomach, cut across part of the pancreas and then entered the aorta," causing death in approximately five to ten minutes. Dr. Radisch was unable to determine the exact time of death due to the varying environmental factors to which Mrs. Pastuer's body had been exposed.

While conducting the autopsy, Dr. Radisch prepared a rape kit. She likewise collected the yellow material found in the wound in Mrs. Pastuer's neck, a blood sample from Mrs. Pastuer, substances from underneath the nails of Mrs. Pastuer's fifth finger on her right hand and her second finger on her left hand, and jewelry from her hands. She submitted all of these items, along with the blue tarp found around Mrs. Pastuer's body, to the Franklin County Sheriff's Department. The rape kit, blood sample from Mrs. Pastuer, the blue tarp, and samples from underneath Mrs. Pastuer's fingernails were submitted to the State Bureau of Investigation Crime Laboratory ("SBI crime lab") for analysis. There was no presence of semen on any items submitted in the rape kit. There was likewise no evidence of blood found in the sample collected from underneath Mrs. Pastuer's fifth finger on her right hand. The substance found under Mrs. Pastuer's second finger on her left hand preliminarily tested positive for blood, but ultimately "no profile was obtained." The blue tarp found around Mrs. Pastuer's body was compared to two blue tarps found at her house. However, neither of these tarps were a match. No fingerprints were found on the blue tarp, primarily due to the biological material that remained on the tarp from Mrs. Pastuer's body.

On 11 December 2006, Special Agent Rachel Winn, a serologist with the SBI crime lab, performed luminol and phenolpthalein tests at Mrs. Pastuer's residence to search for the presence of blood. These tests gave a positive indication for blood in the utility room, kitchen, and living room. The pattern of the blood in these areas appeared to be "consistent with the outline of a shoe." The trail went through the utility room, into the kitchen where it made a circular pattern, and then continued through the living room to the front door. There was no indication that the blood pattern continued outside of either the utility room door or the front door. The bedrooms, the office, and the bathroom yielded negative luminol results. Special Agent Winn took swabbings from the utility room and the kitchen to submit for DNA testing. Special Agent Michelle Hannon, a forensic biologist with the SBI crime lab, performed DNA testing on these samples and was able to determine that they were a genetic match to Mrs. Pastuer's DNA.

On 21 December 2006, Detective Ralph Almquist, a crime scene investigator with the Franklin County Sheriff's Office, conducted a search of defendant's residence in Zebulon pursuant to a search warrant obtained by SBI Agent Kathryn Anderson. During this search, Detective Almquist seized, *inter alia*, "a pair of . . . [Menz], leather shoes, a pair of white Converse All Star shoes, a pair of Converse

MT75 shoes black in color, Red Wing black work boots, Nike Air Alpha Force . . . shoes, . . . Nike Flight tennis shoes," "an express payment money order[,] . . . black generic wrap-around sun glasses[,] . . . a two-tone gray Boost Motorola cell phone[,] . . . two keys with one rubber surround[,] . . . Kurtz and Blum legal services paperwork[,] . . . [and] a gray Ford Ranger, 2004." From inside the Ford Ranger, Detective Almquist seized a burgundy sweatshirt, three beanie hats, a gray tool box, generic wrap-around polarized sun glasses, a Stanley box cutter, paperwork, a motel receipt, cigarette paper, a Con-Agra Foods early-out request form, a moneygram receipt dated 10 November 2006, and a Raleigh *News and Observer* dated 22 October 2006. Photographs were made of knives found in defendant's home, but the knives were not seized or tested. The presence of blood was detected on the bottom of the right Converse All Star shoe, and Special Agent Hannon was able to obtain a partial DNA profile which matched the DNA profile of Mrs. Pastuer and did not match the DNA profile of defendant. Nothing of relevance was discovered as a result of the tests conducted on the other items.

Detective Almquist also obtained search warrants authorizing Mrs. Pastuer's home to be searched. He seized various items including a Gateway computer; documents from the master bedroom, the computer room, the small guest bedroom, and the kitchen; three disposable cameras; two Nokia cellular phones; two small rugs; various cleaning supplies; two blue tarps; and two vacuum cleaners. Of these items that were actually tested, nothing of significance was found.

Various tests were also performed on Mrs. Pastuer's Camry automobile. Special Agent Karen Morrow, a special agent with the SBI's latent evidence section, searched Mrs. Pastuer's Camry automobile for latent fingerprints and found one palm print and another area of ridge detail, both located on the hood of the car. The area of ridge detail was "non-identifiable" in that "inside the ridge detail there was just not enough there to make a complete comparison and an opinion based on the actual fingerprint." The palm print did not match defendant's known prints, and there was no comparison done between this print and Mrs. Pastuer's known prints because "no elimination prints were submitted." Additionally, swabs taken from the steering wheel of the Camry automobile revealed the presence of Mrs. Pastuer's DNA.

Defendant's motion, made at the close of the State's evidence, to dismiss for insufficiency of the evidence was denied. He did not

present any evidence and renewed his motion to dismiss, which was also denied.

The dispositive issue for decision is whether the State presented substantial evidence at trial to establish that defendant was the person who committed Mrs. Pastuer's murder so as to overcome his motion to dismiss the charge. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007), *appeal after a new trial*, —— N.C. App. ——, 677 S.E.2d 14 (2009). In conducting this review we 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." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). The evidence must be viewed "in the light most favorable to the state, giving the state the benefit of every reasonable inference that might be drawn therefrom." *State v. Etheridge*, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987).

"Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). "If the evidence presented is circumstantial, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (internal quotation marks omitted). However,

> [i]f 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 [to dismiss] should be allowed. . . . This is true even though the suspicion so aroused by the evidence is strong.

Powell, 299 N.C. at 98, 261 S.E.2d at 117 (citation omitted).

When the evidence establishing the defendant as the perpetrator of the crime is circumstantial, "courts often [look to] proof of motive, opportunity, capability and identity" to determine whether a reasonable inference of defendant's guilt may be inferred or whether there is merely a suspicion that the defendant is the perpetrator. *State v. Bell*, 65 N.C. App. 234, 238, 309 S.E.2d 464, 467 (1983), *cert. granted*, 310 N.C. 626, 313 S.E.2d 592, *aff'd per curiam*, 311 N.C. 299, 316 S.E.2d 72 (1984). In discussing this analysis, this Court has noted that,

"[w]hile the cases do not generally indicate what weight is to be given evidence of these various factors, . . . [i]t is clear, for instance, that evidence of *either* motive or opportunity alone is insufficient to carry a case to the jury." *Id.* at 238-39, 309 S.E.2d at 467. "When the question is whether evidence of *both* motive and opportunity will be sufficient to survive a motion to dismiss, the answer . . . [depends on] the strength of the evidence of motive and opportunity, as well as other available evidence, rather than an easily quantifiable 'bright line' test." *Id.* at 239, 309 S.E.2d at 468. More often, "[e]ach case turns on its own peculiar facts and a decision in one case is rarely controlling in another." *State v. White*, 293 N.C. 91, 95, 235 S.E.2d 55, 58 (1977).

In the present case, the State relied entirely on circumstantial evidence to establish that defendant was the perpetrator of Mrs. Pastuer's murder. Viewing this evidence in the light most favorable to the State, we believe there was arguably sufficient evidence of defendant's motive to murder Mrs. Pastuer; he had displayed hostility towards her, had a history of abusing her, and she was extremely afraid of him to the point of obtaining a domestic violence protective order against him several months prior to her death. *See State v. Lee*, 294 N.C. 299, 303, 240 S.E.2d 449, 451 (1978) (noting that evidence that the "defendant probably beat the victim on two occasions just before her death, and . . . threatened to kill the victim a day or two before her death" "perhaps [demonstrated the defendant's] mental state to have committed this murder"). However, "evidence of [motive] alone is insufficient to survive a defendant's motion to dismiss," *Bell*, 65 N.C. App. at 241, 309 S.E.2d at 469, and evidence of a defendant's opportunity and means to commit the crime must also be considered. *Id.* at 238-39, 309 S.E.2d at 467-68.

Even though the State may have shown a motive for the killing, we are constrained to conclude, after a thorough and careful review of the evidence the State actually offered at trial, that while the evidence of defendant's opportunity and ability to commit the murder may raise a strong suspicion that he is guilty, it falls well short of that required to be substantial evidence that he was the one who committed the murder. Thus, we must hold that the denial of his motion to dismiss was error.

In reaching this conclusion, we are guided by two decisions of our Supreme Court. In *State v. Lee*, 294 N.C. 299, 240 S.E.2d 449 (1978), the evidence presented by the State established that the defendant had beaten the victim a couple of times prior to her death, and, a few days before the murder, the defendant had told someone

he was going to kill the victim. 294 N.C. at 301, 240 S.E.2d at 450. The defendant was also seen in possession of a .25-caliber gun prior to the shooting. *Id.* However, it was never established that the bullet that killed the victim came from a .25-caliber gun, nor was it established that the .25-caliber gun introduced at trial belonged to the defendant. *Id.* There was no physical evidence found at the scene to link defendant to the murder. *Id.* From this, the Court concluded that the State had failed to offer substantial evidence that the defendant was the perpetrator. *Id.* at 303, 240 S.E.2d at 451. In *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977), the State's evidence showed that the victim and the defendant, the victim's estranged husband, had a hostile relationship. 292 N.C. at 715-16, 235 S.E.2d at 196. Before the victim's murder, the defendant was overheard threatening to kill her, and he even attempted to solicit people to perform the act. *Id.* at 715-17, 235 S.E.2d at 196-97. The victim was later found fatally shot in her home. *Id.* at 717, 235 S.E.2d at 197. Various guns found at both the victim's and the defendant's homes were determined to be unconnected to the crime. *Id.* The defendant possessed a remote control to the victim's garage door, which would explain the lack of evidence of forcible entry into the house, but there were no fingerprints in the house to establish the defendant's presence. *Id.* The defendant had been seen with a women who resembled, but was not positively identified as, the victim on the morning of the murder. *Id.* at 717-18, 235 S.E.2d at 197. After the murder, the defendant was heard saying that the victim "got what she deserved" and that he knew "who did it, but nobody else will ever know." *Id.* at 718, 235 S.E.2d at 198. Because there was a lack of evidence connecting the defendant to the scene of the crime, the Court determined that "the State failed to offer substantial evidence that defendant was the one who shot his wife." *Id.* at 719, 235 S.E.2d at 198 (internal quotation marks omitted).

As with these cases, the evidence offered by the State in the present case fails to connect defendant to the murder. Neither the box cutter or knives found at defendant's house was shown to be involved in the attack on Mrs. Pastuer; in fact, no murder weapon was ever presented to the jury. Moreover, the State offered no evidence in the present case to place defendant at the scene of the murder; while defendant, in the past, had access to Mrs. Pastuer's home and car, he was judicially ordered to stay away from her residence and to surrender the keys to her car, and there was no indication in the record that he had failed to comply with the order. Additionally, there was no evidence presented by the State at trial that defendant was seen

around Mrs. Pastuer's home or in her car any time between 31 October 2006 and 7 December 2006.[1] Defendant's fingerprints were likewise not found in either Mrs. Pastuer's home or in her car.

Furthermore, we do not find the DNA evidence presented in the present case sufficiently connects defendant to Mrs. Pastuer's murder. DNA evidence, like fingerprint and footprint evidence, can be a "certain and scientific method of identification." *Turner v. Commonwealth*, 235 S.E.2d 357, 360 (Va. 1977); *see also State v. Pennington*, 327 N.C. 89, 100, 393 S.E.2d 847, 854 (1990) (holding that DNA evidence was a sufficiently reliable method of proof and thus admissible). Our Supreme Court has held "that when the State relies on fingerprints found at the scene of the crime, in order to withstand motion for nonsuit, there must be substantial evidence of circumstances from which the jury can find that the fingerprints could have been impressed only at the time the crime was committed." *State v. Bass*, 303 N.C. 267, 272, 278 S.E.2d 209, 212 (1981); *see also State v. General*, 91 N.C. App. 375, 379-80, 371 S.E.2d 784, 787 (1988) (noting that "shoe print evidence ha[s] no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless . . . the shoeprints were found at or near the place of the crime[,] . . . the shoeprints were made at the time of the crime[,] and . . . the shoeprints correspond to shoes worn by the accused at the time of the crime"). "The soundness of the rule lies in the fact that such [circumstantial] evidence logically tends to show that the accused was present and participated in the commission of the crime." *State v. Miller*, 289 N.C. 1, 4, 220 S.E.2d 572, 574 (1975).

We believe these principles apply equally to DNA evidence used to identify a defendant as the perpetrator of the crime, and that when the State relies on such evidence for that purpose, it must also provide substantial evidence of circumstances from which the jury could conclude that the DNA evidence could only have been left at the time the crime was committed. In the present case, the State presented

1. The record on appeal contains an affidavit in support of an application for a search warrant in which the applicant, an SBI agent, asserted that a neighbor had seen defendant at Mrs. Pastuer's house two or three times after 31 October 2006, and that another neighbor told police that early in the morning of 2 November 2006 she heard a woman scream "Somebody please help me!" and had, about noon that same day, seen a dark gray truck with tinted windows coming from the direction of the house. The affidavit also asserts that Mrs. Pastuer's son-in-law, Talley Battle, told police that he saw defendant driving Mrs. Pastuer's Camry automobile on U.S. Highway 1 while he was on the way home either on Thursday, 2 November 2006 or Friday, 3 November 2006, and that defendant had been wearing a gray hoody and a black toboggan. However, none of this evidence was presented at trial.

evidence that a trail of footprints bearing Mrs. Pastuer's blood was discovered at her residence, giving rise to the inference that she was killed there. The State also presented evidence that Mrs. Pastuer's blood was found on the bottom of one of defendant's shoes. However, the State offered no evidence that defendant was anywhere near Mrs. Pastuer's home at the time she was killed, that the footprints found in the home were those of defendant, or other circumstances from which a jury could conclude that Mrs. Pastuer's blood, and hence her DNA, could only have gotten on defendant's shoe at the time of the murder. The evidence did show, however, that defendant and Mrs. Pastuer had lived together for approximately eleven years, only separating six months prior to her death. The SBI serologist testified that the blood sample from defendant's shoe was degraded, possibly due to the length of time it had been on the shoe, giving rise to the possibility that the blood could have transferred to his shoe during the time they were living together. Though the DNA evidence from defendant's shoe raises a suspicion that defendant killed Mrs. Pastuer, this suspicion alone is insufficient to be deemed substantial evidence that defendant was the perpetrator, *Powell*, 299 N.C. at 98, 261 S.E.2d at 117, especially considering the fact that the State's evidence indicated that the blood could have transferred to defendant's shoe prior to the murder and there was no other "evidence of circumstances from which the jury c[ould] find that the [DNA] could have been [acquired] *only* at the time the crime was committed." *Bass*, 303 N.C. at 272, 278 S.E.2d at 212 (emphasis added).

The additional evidence that defendant was seen walking down U.S. Highway 1 in Franklin County sometime around the time of Mrs. Pastuer's disappearance, and that her body was found sometime later at an abandoned house in the vicinity of the same highway, only adds to the suspicion surrounding defendant's guilt; it does not supply substantial evidence that he was the perpetrator. Likewise, the evidence surrounding the use of Mrs. Pastuer's ATM card does not definitively connect defendant to the crime; there was no evidence that the card was taken at the time of her murder or that defendant was the person who used the card.

In arguing that it presented substantial evidence of defendant's identity as the perpetrator, the State has cited *State v. Lowry*, —— N.C. App. ——, 679 S.E.2d 865, *cert. denied*, 363 N.C. 660, 686 S.E.2d 899 (2009), and *State v. Parker*, 113 N.C. App. 216, 438 S.E.2d 745 (1994). Understanding well the brutality of the crime of which defendant was convicted and the gravity of the decision which we must

reach in this case, we have carefully considered these cases and conclude they are distinguishable and offer no support for the State's position. In *Lowry*, the State presented evidence that

> (1) defendant . . . [was] in possession of the victim's car shortly after the probable time of her death, (2) defendant . . . ha[d] possession of other property (jewelry and an ATM card) belonging to the victim that would have likely been taken at the time of the victim's death, (3) defendant [had] familiarity with the victim's house and access to the house the days before the murder, and (4) defendant . . . [made an] effort to eliminate evidence by wiping down the car and [fled] when confronted by police.

—— N.C. App. at ——, 679 S.E.2d at 873. From this evidence, this Court concluded that there was sufficient evidence from which a jury could conclude that defendant was the perpetrator of the crime. *Id.* at ——, 679 S.E.2d at 873. In the present case, however, defendant was not found in possession of any of Mrs. Pastuer's property after her death. Though there was evidence that *a* man used Mrs. Pastuer's ATM card the first week of November 2006, there was no evidence identifying defendant as the person who used the card, that this transaction occurred after her death, or that the card was taken at the time of her murder. Likewise, there was no evidence presented that defendant had been in Mrs. Pastuer's car anytime after she went missing.

In *Parker*, the State presented evidence of

> defendant's constant surveillance of Ms. Welborn; defendant's possession of two firearms; defendant's target practice with his guns; defendant's threatened suicide because Ms. Welborn had ended the relationship; defendant's threats to kill Ms. Welborn; defendant's appearance around the area on the morning of Ms. Welborn's death; and defendant's brand of cigarette package found on the opposite side of the road where Ms. Welborn's vehicle came to rest.

113 N.C. App. at 223, 438 S.E.2d at 749-50. Thus, there was substantial circumstantial evidence linking defendant to the scene of the murder. *Id.* at 223, 438 S.E.2d at 749. The evidence presented at defendant's trial did not place him at the scene of the murder; there was no evidence presented to the jury that defendant had been seen around Mrs. Pastuer's house or in her car anytime around the time of her murder, and, as discussed, the DNA evidence provided no evidence of his presence there at the time of the crime.

Viewing the entirety of the evidence presented to the jury in the light most favorable to the State, we agree that it "excite[s] suspicion in the just mind that [defendant] is guilty," but it falls well short of the State's burden to provide substantial evidence that defendant was the perpetrator of this crime. *Lee*, 294 N.C. at 303, 240 S.E.2d at 451 (internal quotation marks omitted); *see also Powell*, 299 N.C. at 98, 261 S.E.2d at 117 (requiring substantial evidence of the defendant's identity as the perpetrator of the crime in order to survive a motion to dismiss).

Reversed.

Judges JACKSON and BEASLEY concur.

STATE OF NORTH CAROLINA v. COREY TERMAINE MILLS

No. COA09-1144

(Filed 20 July 2010)

1. Appeal and Error— preservation of issues—objection on different grounds

Defendant did not preserve for appellate review an argument concerning the court's refusal to allow defendant to refresh an officer's recollection where defendant was not trying to refresh the officer's recollection at the time of the court's ruling.

2. Criminal Law— prosecutor's argument—characterization of defendant's argument

The trial court did not abuse its discretion by not declaring a mistrial based upon the prosecutor's characterization of defense counsel's statement as a concession to murder. The prosecutor did not use abusive, vituperative, and opprobrious language or indulge in invectives, and the statement was within the wide latitude allowed counsel in closing arguments.

3. Constitutional Law— effective assistance of counsel—remanded for evidentiary hearing

A claim on direct appeal for relief from a first-degree murder conviction based on ineffective assistance of counsel was remanded for an evidentiary hearing where defendant contended

that his counsel made an unauthorized admission of guilt in his closing argument, but the context of the statement could not be determined because of an equipment malfunction.

4. Appeal and Error— motion for appropriate relief— remanded for taking of evidence

A motion for appropriate relief based on ineffective assistance of counsel was remanded for the taking of evidence where the materials before the appellate court were insufficient for a ruling.

Judge ERVIN concurring.

Appeal by defendant from judgment entered 11 December 2008 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 24 February 2010.

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

Marilyn G. Ozer for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Corey T. Mills ("defendant") was convicted of second-degree murder of Danny Richardson. Defendant appeals his conviction, contending that the trial court erred by (1) not allowing defense counsel to refresh the recollection of a State's witness during recross-examination, and (2) denying defendant's motion for a mistrial based on the prosecutor's closing argument that defendant conceded to murder. Defendant also argues that he is entitled to a new trial on the grounds of *per se* ineffective assistance of counsel because he contends that defense counsel admitted guilt to murder during his closing argument without defendant's knowledge or consent.

We note that due to an unknown error, the official court reporter was unable to transcribe defense counsel's closing argument, and that she was only able to transcribe the last half of the prosecutor's closing argument. However, the record contains an abbreviated statement, agreed to by counsel, of the exchange in question. Nevertheless, based on the record before us, we cannot resolve the issue of whether defendant should be entitled to a new trial based on his ineffective assistance of counsel claim. Therefore, we remand that assignment of error, along with defendant's motion for appropriate relief, wherein he also asserts a claim for ineffective assistance of

counsel to the trial court to conduct an evidentiary hearing and make a determination on that issue. However, as to defendant's contentions that the trial court erred by failing to allow defense counsel to refresh a State witness's recollection and by denying his motion for mistrial, for the reasons asserted below, we hold that the trial court committed no prejudicial error and did not abuse its discretion in so ruling.

I. FACTUAL BACKGROUND

At approximately 1:30 a.m. on 26 November 2006, defendant shot Danny Richardson ("Richardson") in the parking lot in front of Moore's Ball Field in Nash County, North Carolina. Richardson died as a result of a gunshot wound to the head. After the shooting, defendant waited in the parking lot until Nash County Sheriff's Deputies arrived, whereupon defendant was arrested and indicted for first-degree murder.

On 8 December 2008, defendant was tried before a jury in Nash County Superior Court. At trial, the State's evidence tended to show the following: On 25 November 2006, a group of friends went to "The Club," a night club located in a building in front of Moore's Ball Field on Hedgepeth Road in Nash County, North Carolina. At "The Club," Tiesha Snow ("Snow") went to use the bathroom. After noticing the long line, Snow got into an argument with an unnamed man as she attempted to use the men's restroom. After this argument, Snow and a fellow partygoer, Danny Richardson, exited "The Club" and went to Richardson's car where Snow retrieved a .22 caliber gun from her purse.

Richardson and Snow approached the unnamed man to discuss the confrontation between him and Snow in front of the men's restroom, whereupon the club management asked the debaters to leave. The argument continued outside "The Club," at which point Snow gave Richardson her gun and he began to fire shots into the air. After firing shots, Richardson brought his arm down and, in doing so, hit Tim Hendricks ("Hendricks") in the head with the handle of the gun. Hendricks was arguing with another man standing near Richardson at the time he was hit in the head. Hendricks thought he had been shot because his head was bleeding.

Snow, who was standing next to Richardson, persuaded Richardson to leave the parking lot and go to his car. Richardson got in the driver's seat of the vehicle and Snow entered the back seat. At trial, Snow testified that, at this time, she saw defendant "running up with the gun," saying "something like you shot my cousin, Tim."

Defendant subsequently fired a .45 caliber gun at Richardson. The bullet struck Richardson in the head. After being shot, Richardson was rushed to the hospital by Snow and some of their other friends. While en route to the hospital, Richardson was transferred to an ambulance that was responding to a 911 call about the incident at the ball field. There the emergency personnel pronounced Richardson dead, and police were called.

Officer Rugh, the first responding officer, found defendant at the crime scene and took a brief statement. In that statement, defendant admitted that he shot Richardson in self-defense. Defendant was then taken to the Nash County Sheriff's Office for further questioning while the other responding officers surveyed the area. Officers noticed a significant amount of blood on the driver's seat of Richardson's car, and found a .22 caliber semiautomatic gun under the car, along with .22 caliber and .45 caliber shell casings in close proximity to Richardson's car. The bullet fragments that were recovered from Richardson's body were confirmed by the State Bureau of Investigation to have been fired from the .45 caliber gun which was recovered at the scene. The .45 caliber gun was admittedly fired by defendant at Richardson that night.

Meanwhile, back at the sheriff's office, defendant was read, and waived, his *Miranda* rights. Investigator David Brake conducted an interview of defendant at the sheriff's office. Investigator Brake testified that defendant admitted shooting Richardson. When Investigator Brake asked defendant why he had shot Richardson, defendant told the investigator three different stories: first, defendant stated that the shooting was an accident; second, defendant stated that he shot Richardson because he thought Richardson shot his cousin, Hendricks; and third, defendant stated that he was scared and just wanted to scare Richardson the way Richardson had scared him.

During cross-examination, the following colloquy ensued between defense counsel and Investigator Brake:

> [Defense Counsel]: So, you're saying in that time that you interviewed [defendant] there was never any talk about [Richardson] pointing the gun at him?
>
> [Investigator Brake]: Never; no, sir. He never told me he pointed a gun at him. He told that he shot up in the air three times coming out of the club and he did indicate that [Richardson] shot up in the air again after getting in the car. He never told me in the interview that [Richardson] pointed a gun at him.

[Defense Counsel]: So it would be your testimony that he said that to the very first officer that he saw—

[Investigator Brake]: No—

[Defense Counsel]: —and he never said it again.

[Investigator Brake]: —I can't say what he said to the very first officer he saw. I can only say what he said to me. And he didn't say that to me.

[Defense Counsel]: But you do admit that he—you did later see that report right?

[Investigator Brake]: I saw in the report that [the first officer] took him into custody and I believe in the report that he said that it was self-defense; yes, sir.

[Defense Counsel]: And that he pointed a gun at me, do you remember anything about that?

[Investigator Brake]: I don't remember that. I do remember that [the first officer] indicated in his report that he stated self [-]defense.

During redirect examination, the investigator maintained that, during his interview of defendant, defendant never actually stated that he shot Richardson in self-defense.

During his recross-examination of Investigator Brake, defense counsel marked defendant's initial written statement to Officer Rugh as defendant's Exhibit 3 for the purpose of showing that the investigator was aware that defendant stated that he shot Richardson in self-defense prior to the interview. The State contends that defendant's original statement was initialed by Investigator Brake. After considering the State's objection to defense counsel's attempt to admit a portion of defendant's initial statement, the trial court sustained the objection and told defense counsel that he could admit the document in evidence during defendant's case. The trial court did, however, allow defense counsel to resume recross-examination limited only to the issue of self-defense. With regard to this issue, defense counsel engaged Investigator Brake in the following colloquy:

[Defense Counsel]: Are you sure that he never said the word self defense during the interview at the time that you were with him?

[Investigator Brake]: I cannot say for sure he didn't say the words self defense, but he never told us and urged another story where Danny Richardson pointed a gun at him and he shot him in self defense. We talked for four hours, and I can't honestly sit here and tell you he never said the words self defense, but he never told us or never told me that he shot Danny Richardson because Danny Richardson pointed a gun at him and he was shooting in self defense.

[Defense Counsel]: So you never heard the words I shot him in self defense?

[Investigator Brake]: I can't honestly tell you I did or didn't. I know he didn't tell me what he said earlier about Danny Richardson pointing a gun at him and him shooting him in self defense.

. . . .

[Defense Counsel]: Now, but it's possible that the words I shot him in self defense were said and you just don't remember them right? Are you absolutely sure they weren't said?

[Investigator Brake]: No, they—

[Prosecutor]: Objection, Your Honor. It's already been asked and answered.

THE COURT: Sustained.

The State rested its case after Investigator Brake's testimony, whereupon defense counsel made a motion to dismiss the charge of first-degree murder against defendant. The trial court denied defense counsel's motion.

The evidence for the defense tended to show the following: Defendant arrived at "The Club" at approximately 1:30 a.m. Upon his arrival, defendant witnessed an argument between Snow and his brother over Snow's use of the men's restroom. At trial, defendant testified that he was standing near Snow and Hendricks while Richardson was firing the gun in the air, and that he saw Richardson injure Hendricks. Defendant further testified that he was at his brother's car checking on Hendricks immediately before he shot Richardson. Defendant's brother was parked beside Richardson's car, and defendant testified that while he was checking on Hendricks, he saw Richardson pointing a gun in their direction, at which point he

grabbed the .45 caliber gun from Hendricks and fired it in Richardson's direction.

Defendant also testified that he stayed at the ball field until officers arrived, whereupon he told one of the officers about the events that transpired that night and that he shot Richardson in self-defense. During his testimony, defendant conceded that he did not tell the interviewing investigators that he shot Richardson in self-defense. Defense counsel did not attempt to introduce defendant's initial statement in evidence during defendant's case-in-chief; however, the State introduced defendant's complete statement as one of its exhibits while cross-examining defendant. The defense rested its case after Richardson's testimony. At the close of all the evidence, defense counsel renewed his motion to dismiss, which was denied by the trial court.

During closing arguments, defense counsel, without defendant's consent to concede his guilt of murder, stated that "a murder occurred out at the Castalia ball field."[1] The State then referred back to defense counsel's statement during its closing and told the jury that there is one thing that defense counsel said that he agreed with—a murder did occur out at the Castalia ball field that night. Defense counsel objected to the State's characterization of his statement; however, the trial court overruled defendant's objection. At the conclusion of the State's closing argument, defense counsel moved for a mistrial on the basis that the State characterized defense counsel's statement as a concession to murder. The trial court denied defendant's motion.

On 11 December 2008, after being instructed by the trial court, the jury found defendant guilty of second-degree murder. The trial court sentenced defendant to 157-198 months' imprisonment. Defendant gave notice of appeal in open court.

II. INVESTIGATOR BRAKE'S RECROSS-EXAMINATION

[1] Defendant challenges the trial court's refusal to permit him to refresh Investigator Brake's memory using Officer Rugh's report during recross-examination. We conclude that defendant's argument was not properly preserved and is without merit.

N.C.R. App. P. 10(a)(1) (2010) provides that, "[i]n order to preserve an issue for appellate review, a party must have presented to

1. This court is unsure of the context of defense counsel's statement, because the court reporter's equipment malfunctioned during closing arguments so that all of defense counsel's argument and a majority of the State's argument were not recorded.

the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make[.]" "[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008). However, where a party has failed to preserve an issue for appeal, this Court may review the assignment of error to correct fundamental errors. *Id.* In *Dogwood Dev. & Mgmt. Co., LLC*, our North Carolina Supreme Court provided the following:

> The imperative to correct fundamental error [] may necessitate appellate review of the merits despite the occurrence of default. For instance, plain error review is available in criminal appeals, for challenges to jury instructions and evidentiary issues. Our decisions have recognized plain error only "in truly exceptional cases" when "absent the error the jury probably would have reached a different verdict." . . .
>
> Aside from the possibility of plain error review in criminal appeals, Rule 2 permits the appellate courts to excuse a party's default in both civil and criminal appeals when necessary to "prevent manifest injustice to a party" or to "expedite decision in the public interest." Rule 2, however, must be invoked "cautiously," and we reaffirm our prior cases as to the "exceptional circumstances" which allow the appellate courts to take this "extraordinary step."

Id. at 196, 657 S.E.2d at 364 (citations omitted) (footnote omitted).

After reviewing the transcript and the record on appeal, we first note that defendant was not attempting to refresh Investigator Brake's recollection at the time of the trial court's ruling on the State's objection. During trial, the State did not object to any attempt by defense counsel to refresh Investigator Brake's recollection; instead, it objected to defense counsel's attempt to mark a portion of Officer Rugh's report containing defendant's initial statement as a defense exhibit during recross-examination. The State's objection was premised on its contention that, if any portion of the statement is admitted in evidence, the entire statement should also be admitted for completeness. Moreover, in response to the State's objection, defense counsel only argued that he wanted to show that defendant gave a statement asserting that he shot Richardson in self-defense. Defense counsel never argued that he was attempting to use de-

fendant's statement to refresh Investigator Brake's memory. Defendant does not assert nor argue plain error on appeal. Further, based on our review of the record and transcripts, we refrain from invoking Rule 2, as we do not find that reviewing defendant's assignment of error would prevent manifest injustice. Accordingly, defendant's assignment of error is without merit.

III. PROSECUTOR'S CLOSING ARGUMENT

[2] Defendant next argues that the trial court erred by denying his motion for mistrial based upon the prosecutor's characterization of defense counsel's statement as a concession to murder. We disagree.

"The standard of review for improper closing arguments that[, as in the present case,] provoke timely objection from opposing counsel 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). *See also*, *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984) ("The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury."). Abuse of discretion occurs when the trial court's decision "was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985).

Our North Carolina Supreme Court has held that "[g]enerally, counsel is allowed wide latitude in the scope of jury arguments." *State v. Hill*, 347 N.C. 275, 298, 493 S.E.2d 264, 277 (1997), *cert. denied*, 552 U.S. 1189, 170 L. Ed. 2d 75 (2008). However, "a trial attorney may not make uncomplimentary comments about opposing counsel, and should 'refrain from abusive vituperative, and opprobrious language, or from indulging, in invectives.' " *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994) (citation omitted).

In the case at bar, defendant's motion for mistrial was based upon the prosecutor's closing argument, wherein he stated that he agreed with defense counsel's statement that "a murder occurred out at the Castalia ball field." In responding to defendant's closing argument, the prosecutor did not use "abusive vituperative, and opprobrious language," nor did he indulge in "invectives." As such, we conclude that the prosecutor's statement was made within the wide latitude allowed counsel in closing arguments. Nonetheless, this argument and its effects on the jury are a proper source of investigation by the trial court in consideration of the motion for appropriate relief as discussed below.

On this issue, although we conclude that the trial court did not abuse its discretion by denying defendant's motion for mistrial, we must "remind the prosecutor that the State's interest 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' " *State v. Matthews*, 358 N.C. 102, 112, 591 S.E.2d 535, 542 (2004) (quoting *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321 (1935)).

IV. MOTION FOR APPROPRIATE RELIEF

[3] Generally, claims for ineffective assistance of counsel should be considered through a motion for appropriate relief filed in the trial court and not on direct appeal. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, a defendant's ineffective assistance of counsel claim "brought on direct review will be decided on the merits 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." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001).

Asserting a claim for ineffective assistance of counsel requires a defendant to prove that his counsel's conduct fell below an objective standard of reasonableness. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). To meet this burden defendant must satisfy the two-part test set out in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984).

> 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.

Id. at 687, 80 L. Ed. 2d at 693.

In his third assignment of error, defendant contends that he received ineffective assistance of counsel. Defendant's ineffective assistance of counsel claim is based upon his trial attorney's closing argument, wherein his counsel commented that "a murder occurred out at the Castalia ball field." Defendant argues that this comment was tantamount to an admission of guilt which he did not authorize his attorney to make.

In *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), our Supreme Court held that

> [w]hen counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Id. at 180, 337 S.E.2d at 507. Where a *Harbison* error occurs, "[an] admission of the defendant's guilt during the closing arguments to the jury is per se prejudicial error." *Id.* at 177, 337 S.E.2d at 505.

With regard to the *per se* prejudicial error standard set forth in *Harbison*, a defendant's counsel's statement must be viewed in context to determine whether the statement was, in fact, a concession of defendant's guilt of a crime, *State v. Hinson*, 341 N.C. 66, 78, 459 S.E.2d 261, 268 (1995) (stating that "nowhere in the record did defense counsel concede that defendant himself committed any crime whatsoever"), or amounted to a *lapsus linguae*. *State v. Goss*, 361 N.C. 610, 624-25, 651 S.E.2d 867, 876 (2007), *cert. denied* —— U.S. ——, 172 L. Ed. 2d 58 (2008) (stating that a reference which "was accidental and went unnoticed" did not constitute *Harbison* error). Here, due to an equipment malfunction, the record on appeal fails to reveal the context of defense counsel's statement. As such, this Court cannot conduct a meaningful review of the matter to determine whether the statement was actually an impermissible concession of guilt to criminal activity. There is no record of defense counsel's closing argument, and the record before us only contains a portion of the prosecutor's closing argument because the court reporter's equipment malfunctioned during the trial. This Court cannot properly evaluate defendant's remaining claim on direct appeal because we cannot determine the context of the statement upon which the assignment of error is premised. Accordingly, we remand defendant's third assignment of error to the trial court to conduct an evidentiary hearing to determine what, in context, defense counsel actually said during closing arguments.

[4] We further note that defendant also filed a motion for appropriate relief with this Court claiming that he received ineffective assistance of counsel. As the materials before the appellate court are

insufficient to justify a ruling, this motion must be remanded to the trial court for the taking of evidence and a determination of the motion within ninety days from the filing of this opinion. *See* N.C. Gen. Stat. § 15A-1418(b) (2009) (providing that "[w]hen a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it[] [or] whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings"); *see also Matthews*, 356 N.C. 666, 576 S.E.2d 109 (order of the North Carolina Supreme Court remanding defendant's motion for appropriate relief to the trial court where the evidence was insufficient to justify a ruling on defendant's claim of ineffective assistance of counsel). As is required by N.C. Gen. Stat. § 15A-1418(c) (2009), we further order the trial court, at the conclusion of the remand proceeding, to submit its order to this Court for the entry of an appropriate order.

V. CONCLUSION

For the reasons stated above, we remand defendant's ineffective assistance of counsel claim and find no prejudicial error.

No error.

Judge McGEE concurs.

Judge ERVIN concurs with a separate opinion.

ERVIN, Judge, concurring.

Although I concur in the Court's opinion, I do so in light of the positions expressed in my separate opinion in *State v. Maready* (No. COA09-171-2) (7 July 2010), which discusses the impact of the decision of the United States Supreme Court in *Florida v. Nixon*, 543 U.S. 175, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004), on the continued validity of *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 106 S. Ct. 1992, 90 L. Ed. 2d 672 (1986). Since *Maready* holds that *Harbison* remains binding on this Court, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court"), and since the State has not advanced any argu-

ment in this case in reliance on *Nixon*, I believe that I am required to apply *Harbison* in deciding this case. As a result, I concur in the Court's opinion.

CAPE FEAR PUBLIC UTILITY AUTHORITY, PLAINTIFF v. JONATHAN COSTA, DEFENDANT

No. COA09-798

(Filed 20 July 2010)

1. Evidence— expert witness—affidavit—usurped province of trial court—summary judgment correct

The trial court did not err in granting summary judgment in favor of plaintiff, a public utility authority, on its complaint concerning the installation of a sewer line and related sewer system components within an easement on defendant's property. Affidavits of defendant's tendered expert witnesses usurped the province of the trial court by drawing conclusions of law, and accordingly, were incompetent. Absent these affidavits, no genuine issue of material fact existed as to whether the disputed easement crossed defendant's property.

2. Eminent Domain— inverse condemnation—counterclaim—failed to comply with requirements

Defendant's counterclaim for inverse condemnation against a water and sewer authority failed to comply with the requirements of N.C.G.S. § 40A-51. Moreover, even if defendant was given the benefit of the allegations of plaintiff's complaint as providing some of the information required by N.C.G.S. § 40A-51, defendant's answer and counterclaim specifically denied the allegations which contained the required facts.

3. Trespass— easement—eminent domain—inverse condemnation—exclusive remedy

In an action concerning the installation of a sewer line and related sewer system components within an easement on defendant's property, defendant's counterclaim for trespass against a public utility with the power of eminent domain was dismissed because the exclusive remedy for failure to compensate for a taking is inverse condemnation under N.C.G.S. § 40A-51.

4. Declaratory Judgments— easement—inverse condemnation

In an action concerning the installation of a sewer line and related sewer system components within an easement on defendant's property, defendant's counterclaim for declaratory judgment that plaintiff had no easement upon defendant's property was governed by N.C.G.S. § 40A-51 and was dismissed.

BEASLEY, Judge dissenting by separate opinion.

Appeal by Defendant from Order entered 20 March 2009 by Judge Paul G. Gessner in Superior Court, New Hanover County. Heard in the Court of Appeals 5 November 2009.

Bruce Robinson, for defendant-appellant.

Ward and Smith, P.A., by Cheryl A. Marteney, for plaintiff-appellee.

STROUD, Judge.

I. Factual Background and Procedural History

Defendant Jonathan B. Costa ("Costa") is the owner of certain property in New Hanover County which is designated as "Tract 3" in the deed from James Henry Hobbs, Jr. and Evelyn Hobbs to Costa and his wife, Jessica A. Costa. The Recorded Plat (as shown by the map marked as Plaintiff's Exhibit 1; hereinafter referred to as "the Easement Map") shows a 30-foot wide sewer easement and a 30-foot wide access and utility easement that run along the northern side of Costa's property. The Easement Map reflects that "all sewer easements are public" and are dedicated for public use.

In November and December 2006, the New Hanover County Water and Sewer District authorized the installation of and installed a sewer line and related sewer system components within the 30-foot sewer easement. On 23 August 2007, Costa brought suit against Coastal Colorado Development, LLC, the developer of a nearby subdivision, and New Hanover County, alleging negligence and seeking declaratory judgment and monetary damages related to the installation of the sewer line and components. On 12 February 2008, Costa voluntarily dismissed, without prejudice, New Hanover County from the Coastal Colorado Development lawsuit. Thereafter, a handwritten document titled "Memo of Judgement" [sic] was filed stating that there was no utility, sewer, or access easement on Costa's property.

At the time the "Memo of Judgement" was filed, New Hanover County was no longer a party to the lawsuit. New Hanover County did not receive proper notice of the hearing at which the "Memo of Judgement" was entered, and New Hanover County did not participate in the hearing.

On 1 July 2008, through a merger of the New Hanover County Water and Sewer District, Plaintiff Cape Fear Public Utility Authority ("the Authority") became the owner of the easement rights over Costa's property. Because of the "Memo of Judgement," Costa contended that he had the right to remove the Authority's sewer line and sewer system components from the easement over his property. On 12 November 2008, the Authority filed a complaint alleging that a 30-foot wide sewer easement and a 30-foot wide access and utility easement run along the north side of Costa's property. The Authority also sought and was granted a temporary restraining order and preliminary injunction against Costa to prevent him from interfering with the Authority's easements.

In response to the Authority's complaint, Costa filed an answer and counterclaim alleging that he owns the land over which the Authority claims an easement; that the map upon which the Authority is relying does not pertain to his property; and that the Authority is without authority to install sewer lines on Costa's property. Costa counterclaimed for continuing trespass and inverse condemnation.

On 19 February 2009, Costa filed a motion for partial summary judgment alleging that no genuine issue of material fact existed as to whether an easement exists on his property. In support of his motion, Costa submitted affidavits from D. Robert Williams, Jr., a North Carolina real estate attorney, and Arnold Carson, a licensed North Carolina surveyor. In their identical affidavits, Costa's affiants stated that the map under which the Authority claims its easement does not pertain to the Costa property.

In opposition to Costa's motion for partial summary judgment, the Authority filed the affidavit of Mark A. Stocks, the surveyor who performed the original survey at issue in this case, along with copies of the relevant deeds and map. The Authority also filed an objection to the affidavits submitted by Costa because Costa's affidavits were "nothing more than a legal opinion of the legal effect of the map" at issue.

On 20 March 2009, the trial court entered an Order denying Costa's motion for summary judgment, entering summary judgment in

favor of the Authority, and striking the affidavits submitted by Costa because these constituted inadmissible "legal conclusions[.]" From this Order, Costa appeals.

II. Discussion

[1] In his sole argument on appeal, Costa contends "that the [trial] court erred in granting summary judgment in favor of the plaintiff because there are genuine issues of material fact with respect to whether the court should have considered the affidavits of Costa's tendered expert witnesses." We disagree.

Our Court reviews the trial court's ruling on the admissibility of affidavits for an abuse of discretion. *Blair Concrete Servs., Inc. v. Van-Allen Steel Co.*, 152 N.C. App. 215, 219, 566 S.E.2d 766, 768 (2002) ("We review the trial court's ruling on the motion to strike the affidavit for abuse of discretion."). "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.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

N.C. R. Evid. 702 permits expert witnesses to testify when such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" N.C. R. Evid. 704 provides that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." However, there are limitations to this principle. The official commentary following Rule 704 provides a helpful example of these limitations:

> [T]he question "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

N.C. R. Evid. 704 (Commentary).

Opinions of experts or other witnesses must not usurp the province of the court and jury by drawing conclusions of law or fact upon which the decision of the case depends, the test being

> whether additional light can be thrown on the question under investigation by a person of superior learning, knowledge or skill

> in the particular subject, one whose opinion as to the inferences to be drawn from the facts observed or assumed is deemed of assistance to the jury under the circumstances.

Patrick v. Treadwell, 222 N.C. 1, 4-5, 21 S.E.2d 818, 821-22 (1942). The intent of the parties to an easement agreement is a question of law for the court. *See Biggers v. Evangelist*, 71 N.C. App. 35, 40, 321 S.E.2d 524, 527-28 (1984) (intent of parties to a contract regarding the conveyance of an easement was question of law for the court to decide). Thus, we must decide if Costa's witnesses' testimony was helpful to the trial court or if it decided a question of law which could only be decided by the trial court. For the following reasons, we conclude that the affidavits of Defendant's witnesses usurped the province of the trial court and, accordingly, were incompetent.

In *Williams v. Sapp*, 83 N.C. App. 116, 349 S.E.2d 304 (1986), this Court held that it was reversible error to permit an attorney appearing as an expert witness to testify that an easement by implication existed under the circumstances of that case. *Id.* at 120, 349 S.E.2d at 306. The *Williams* Court explained that:

> [Plaintiff's expert's] opinion merely tells the jury the result that they should reach and, therefore, is not helpful to their determination of a fact in issue, as required by G.S. 8C-1, Rules 701 and 702. *See*, Commentary, G.S. 8C-1, Rule 704. The attorney's testimony regarding his opinion amounts to instructions to the jury on easements by implication. This testimony does not invade the province of the jury, which plaintiff argues is permissible, but invades the province of the court and should not have been admitted. *See*, *Board of Transportation v. Bryant*, 59 N.C. App. 256, 296 S.E.2d 814 (1982). This error was clearly prejudicial to defendants, because the jury was required to answer the same question asked of plaintiff's expert witness. We hold, therefore, that defendants are entitled to a new trial on the issue of easement by implication.

Id.

In the present matter, Costa's witnesses made the following pertinent statements in their identical affidavits:

> 4. . . . [T]here is a clearly defined 30 foot sewer easement, 30 foot access and utility easement that pertain to Tracts A, C, D, and E, and a 30 foot sewer easement that pertains to Tracts A, C, D, and E.

5. The James Henry Hobbs, Jr. parcel is an uplands parcel, also known in this case as a remnant parcel, with no tract letter and this parcel is explicitly excluded from the acreage definition of the Map.

6. The solid lines drawn on the map are drawn around Tracts A, B, C, D, and E, but not around the James Henry Hobbs, Jr. tract.

7. This map, by its own definition, is a map that pertains to Tracts A, B, C, D and E, all as shown with setback requirements and total acreage and specifically excludes the remainder tract or remnant tract known as the James Henry Hobbs, Jr. Tract, owned by the plaintiff.

8. My conclusion, based upon my training and experience, examination of the public records, and the documents referred to in the complaint and in this affidavit, is that there is no dedicated easement other than the 15 foot roadway easement on the James Henry Hobbs, Jr. parcel.

Of these statements, the first four are not helpful to the trier of fact, as they merely describe the obvious physical features of the map. Thus, these were properly excluded. *See* N.C. R. Evid. 702. The final statement reaches a conclusion and decides an issue reserved for the trial court. This statement clearly "invades the province of the court and should not have been admitted." *Williams*, 83 N.C. App. at 120, 349 S.E.2d at 306. Accordingly, the trial court did not abuse its discretion in striking the proposed affidavits.

Absent the affidavits of Costa's witnesses, no genuine issue of material fact exists as to whether the easement crosses Costa's property. Accordingly, on the sole issue raised by the appeal to this Court, the order of the trial court is affirmed. We find it necessary, however, to address other issues which should be dispositive of this action, but which the parties and the trial court failed to recognize.

[2] Defendant's counterclaim purported to state claims against Plaintiff for trespass, inverse condemnation, and a "declaratory judgment finding that Plaintiff has no easement upon Defendant's property[.]" We first note that Defendant was bringing a counterclaim for inverse condemnation against a water and sewer authority, "created under the provisions of Article 1 of Chapter 162A[,]" which is vested with the power of eminent domain as a public condemnor, pursuant to N.C. Gen. Stat. § 40A-3(c)(8) (2007). Chapter 40A of the General

Statutes contains the exclusive procedures used in this State by public condemnors. *New Hanover County Water & Sewer Dist. v. Thompson*, 193 N.C. App. 404, 408, 667 S.E.2d 501, 504 (2008). Defendant's counterclaim is thus governed by N.C. Gen. Stat. § 40A-51, which deals with situations in which "property has been taken by an act or omission of a condemnor listed in G.S. 40A-3(b) or (c) and no complaint containing a declaration of taking has been filed[.]" N.C. Gen. Stat. § 40A-51(a) (2007). Pursuant to N.C. Gen. Stat. § 40A-51(a), Defendant's counterclaim was required to include the following allegations:

> the names and places of residence of all persons who are, or claim to be, owners of the property, so far as the same can by reasonable diligence be ascertained; if any persons are under a legal disability, it must be so stated; a statement as to any encumbrances on the property; the particular facts which constitute the taking together with the dates that they allegedly occurred, and; a description of the property taken. Upon the filing of said complaint summons shall issue and together with a copy of the complaint be served on the condemnor . . . .

Defendant was also required to file a memorandum of action "with the register of deeds in all counties in which the property is located[,]" which includes the following information:

> (1) The names of those persons who the owner is informed and believes to be or claim to be owners of the property;
>
> (2) A description of the entire tract or tracts affected by the alleged taking sufficient for the identification thereof;
>
> (3) A statement of the property allegedly taken; and
>
> (4) The date on which owner alleges the taking occurred,[1] the date on which said action was instituted, the county in which it was instituted, and such other reference thereto as may be necessary for the identification of said action.

1. Although the counterclaim did not allege the date of the taking, the record contains a stipulation that the sewer line was completed within two years prior to the service and filing of Defendant's counterclaim "such that Plaintiff would not have a statute of limitations defense to such Inverse Condemnation claim." This stipulation also provided that Defendant Costa would dismiss with prejudice a pending "New Hanover County Superior Court civil action[,]" file No. 08-CVS-2228, filed against New Hanover County. Perhaps the other case which was dismissed also dealt with Defendant's inverse condemnation claim; however, our record contains no further information about the dismissed case.

N.C. Gen. Stat. § 40A-51(b). Although Defendant alleged in his counterclaim that he "specifically pleads the law of Inverse Condemnation[,]" he completely failed to comply with the requirements of N.C. Gen. Stat. § 40A-51, both in the allegations of the counterclaim and by his failure to file a memorandum of action. Even if we were to give Defendant the benefit of the allegations of Plaintiff's complaint as providing some of this required information, Defendant's answer and counterclaim specifically denied the allegations which contained these required facts. Defendant's counterclaim for inverse condemnation was thus subject to dismissal for its failure to comply with N.C. Gen. Stat. § 40A-51.

[3] Defendant also alleged a counterclaim for "trespass," but our courts have repeatedly held that

> '[t]he exclusive remedy for failure to compensate for a 'taking' is inverse condemnation under G.S. 40A-51 . . . . An owner has no common-law right to bring a trespass action against a city.' *McAdoo*, 91 N.C. App. at 573, 372 S.E.2d at 744. Plaintiff has no claim for trespass against [Moore Water and Sewer Authority] because it is a public utility with the power of eminent domain just as a municipality.

Cent. Carolina Developers, Inc. v. Moore Water & Sewer Auth., 148 N.C. App. 564, 567-68, 559 S.E.2d 230, 232 (2002). Although Chapter 40A "does not expressly state that [it] is the sole means for bringing inverse condemnation actions[,]" this Court has noted that

> G.S. 40A-51, which provides for actions by private property owners where their property has been taken by governmental action without compensation, is clearly the relevant statute. Inverse condemnation is simply a device to force a governmental body to exercise its power of condemnation, even though it may have no desire to do so. *Hoyle v. City of Charlotte*, 276 N.C. 292, 172 S.E.2d 1 (1970). It allows a property owner to obtain compensation for a taking in fact, even though no formal exercise of the taking power has occurred. *See City of Charlotte v. Spratt*, 263 N.C. 656, 140 S.E.2d 341 (1965). G.S. 40A-51 provides the private property owner with a means to compel government action. If Chapter 40A provides the sole means for the City to condemn aviation easements over plaintiffs' land, it follows that plaintiffs' sole inverse condemnation remedy would lie under G.S. 40A-51.

Smith v. City of Charlotte, 79 N.C. App. 517, 521, 339 S.E.2d 844, 847 (1986). Therefore, Defendant's counterclaim for trespass or

for any other sort of monetary damages for taking was also subject to dismissal.

[4] Defendant's counterclaim for a "declaratory judgment" that "plaintiff has no easement upon defendant's property" is likewise governed by N.C. Gen. Stat. § 40A-51. Whether Plaintiff had any interest in Defendant's property, including an easement, would properly be addressed at a hearing under N.C. Gen. Stat. § 40A-47 (2007), which requires the trial court to

> hear and determine any and all issues raised by the pleadings other than the issue of compensation, including, but not limited to, the condemnors' authority to take, questions of necessary and proper parties, title to the land, interest taken, and area taken.

Both Plaintiff's and Defendant's briefs seem to assume that there could be a jury question as to Plaintiff's "taking" of the property. This is incorrect, as there is no right to a trial by jury on the issue of the taking of a property interest under N.C. Gen. Stat. § 40A-51. This Court addressed this issue in regard to a taking by a local public condemnor in *Raleigh-Durham Airport Authority v. Howard*, 88 N.C. App. 207, 215-16, 363 S.E.2d 184, 188 (1987), *disc. review denied*, 322 N.C. 113, 367 S.E.2d 916 (1988), as follows:

> [T]he issue of ownership was not 'triable by a jury of right.' N.C. Gen. Stat. Sec. 40A-43 (1984) which controls special proceedings in condemnation of land for airports provides: *The judge*, upon motion and 10 days' notice by either the condemnor or the owner, shall, either in or out of session, *hear and determine any and all issues raised by the pleadings other than the issue of compensation*, *including but not limited to*, the condemnors' authority to take, questions of necessary and proper parties, *title to the land*, interest taken, and area taken. (emphasis added.)

In an action for inverse condemnation by a public condemnor, the court must determine all issues as to the ownership of the property and the interest and area taken. *See id.* Indeed, instead of a summary judgment hearing, the trial court should have been holding a hearing pursuant to N.C. Gen. Stat. § 40A-47 to determine issues other than damages. For this reason, even if the trial court had considered the affidavits submitted by Defendant, the trial court could properly have determined any issues regarding the property interest taken under N.C. Gen. Stat. § 40A-47. Only just compensation can be a jury issue, assuming that compensation is not determined by commissioners

appointed pursuant to N.C. Gen. Stat. § 40A-48 (2007). Chapter 40A, Article 4 governs "the determination of compensation to be awarded to the owner by the condemnor for the taking of his property." N.C. Gen. Stat. § 40A-62 (2007).

Therefore, the trial court's order granting summary judgment for Plaintiff was correct and should be affirmed, although for different reasons. *See State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 ("A correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable." (citation omitted)), *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987). While this Court must address the issues actually raised by the parties in this appeal, we are compelled to point out that it would be inappropriate for any future litigants to rely upon this opinion for the proposition that a landowner can bring a claim for inverse condemnation against a public condemnor without compliance with the requirements of Chapter 40A.

AFFIRMED.

Judge STEPHENS concurs.

Judge BEASLEY dissents by separate opinion.

BEASLEY, Judge, dissenting.

Because I believe that the trial court abused its discretion by striking the affidavits of Costa's tendered expert witnesses in their entirety, rather than striking only the final paragraph of each, and consideration of the admissible portions thereof creates a genuine issue of material fact as to whether the map in question pertains to Costa's property, I respectfully dissent.

The majority relies on *Williams v. Sapp*, 83 N.C. App. 116, 349 S.E.2d 304 (1986), to support its conclusion that the final paragraph of each affidavit submitted by Costa is inadmissible. Where the final statement in each of Costa's experts' affidavits reaches a naked conclusion analogous to the inadmissible conclusory testimony in *Williams* that an easement by implication existed—comparable to whether T had capacity to make a will—I agree with the majority that paragraph 8 "invades the province of the court" and was correctly stricken from the evidence. I believe, however, that the remaining

statements are distinguishable from *Williams* in that they do not amount to an instruction to the jury regarding what result to reach. Rather, paragraphs 4-7 of the affidavits are more akin to testimony regarding T's "mental capacity to know the nature and extent of his property and the natural objects of his bounty." N.C. Gen. Stat. § 8C-1, Rule 704 (Commentary). Moreover, I believe that these statements denying that the map includes Costa's property (and not reaching any decision reserved for the trial court as to the existence of an easement) aid the jury in understanding the plat and discerning its meaning. Therefore, I disagree with the majority's conclusion that paragraphs 4-7 are not helpful to the trier of fact because "they merely describe the obvious physical features of the map," as the jury is most likely unfamiliar with reading and making sense of these types of surveys.

In several cases, this Court has allowed surveyors to express their opinions, which not only supports a conclusion that paragraphs 4-7 do not invade the province of the jury but also implicitly deems such testimony helpful. *See, e.g.*, *Beam v. Kerlee*, 120 N.C. App. 203, 215, 461 S.E.2d 911, 920-21 (1995) (allowing expert land surveyor to testify to conclusions he had drawn from old survey maps, despite embracing an ultimate issue to be decided by the trier of fact, because he "was an expert in land survey and his testimony may have helped the jury understand conclusions which could be drawn [therefrom]"); *Wellborn v. Roberts*, 83 N.C. App. 340, 341, 349 S.E.2d 886, 886 (1986) (reasoning that Rule 704 superseded the previous rule that "a surveyor could not state his opinion as to the location of a boundary" and finding expert surveyor and lay testimony as to where they believed the boundary line was located unobjectionable merely because it related to an ultimate issue in the case); *Green Hi-Win Farm, Inc. v. Neal*, 83 N.C. App. 201, 203-05, 349 S.E.2d 614, 616-17 (1986) (allowing expert witness surveyor to testify "to the location of the beginning point of defendant's property"). Paragraphs 4-7 of the affidavits at issue, testifying that a particular map does not pertain to a particular piece of property, are substantially similar to testimony as to the location of the beginning point of a deed, where a property boundary lies, and conclusions drawn from a survey.

The majority's failure to consider these Rule 704 cases that deal specifically with survey map testimony has resulted in a holding that I believe is contrary to North Carolina case law. In conclusion, I believe that only paragraph 8 amounts to an instruction on whether Costa's parcel is subject to the easements, and where paragraphs 1-3

merely address affidavit formalities and paragraphs 4-7 would indeed assist the jury to comprehend the evidence, the trial court abused its discretion in striking anything but the final statement of each affidavit. Accordingly, the admission of Costa's affidavits into evidence, when compared with the affidavit submitted by the Authority, would create a genuine issue of material fact as to whether the easement in question includes Costa's property.

Additionally, I do not believe that Costa's failure to comply with the requirements of Chapter 40A is dispositive of this entire action. While I agree that the statutory procedure issues recognized by the majority dispose of Costa's *counterclaims*, the Authority's allegation that the easement crossed Costa's property would have remained for resolution even if the trial court had dismissed Costa's counterclaims for inverse condemnation, trespass, and declaratory judgment. Where the Authority's claims for declaratory and injunctive relief are not controlled by Chapter 40A or subject to dismissal for failure to comply therewith, the Authority's action would have survived. As such, Costa would still have been able to present his defense thereof, and his affidavits were admissible, excluding paragraph 8, to dispute the Authority's allegation that his property is subject to the easement at issue. Thus, I would qualify the majority's approval of the order—for the reasons addressed sua sponte under Chapter 40A—by limiting the grant of summary judgment to Costa's counterclaims. As such, I would reverse the trial court's order striking paragraphs 1-7 of Costa's affidavits and entering summary judgment in favor of Authority and remand for consideration of the affidavits, as admissible, and for dismissal of Costa's counterclaims, as consistent with the latter part of the majority's opinion. Therefore, I respectfully dissent.

MARCIA WRIGHT, AS ADMINISTRATOR OF THE ESTATE OF MATTHEW DILLON BOWSER, AND NICHOLE MCQUEARY, PLAINTIFFS V. GASTON COUNTY, SHANNON SALEET, MELANIE DUNCAN, CHRISTY GANTT, AND ANN PUTNAM, DEFENDANTS

No. COA09-792

(Filed 20 July 2010)

1. Immunity— governmental function—911 call center

The trial court did not err by holding that the Gaston County 911 call center performs a governmental function. The center was created to provide for the health and welfare of its citizens and is

a governmental function regardless of the fee charged in order to defray costs. The focus is on the nature of the service, not the provider; the fact that a private company could have operated a similar center does not transform the activity into a proprietary function.

2. Immunity— governmental—purchase of insurance—governmental liability limitation

The trial court did not err by granting summary judgment for Gaston County in a wrongful death action involving the 911 call center where an insurance policy had been purchased but the policy contained a governmental liability limitation.

3. Immunity—governmental— 911 operators—official capacities

Wrongful death claims against 911 operators in their official capacities were properly dismissed.

4. Immunity— governmental—911 operators—individual capacities

Dismissals of wrongful death claims against 911 operators in their individual capacities were reversed and remanded where the dismissals were granted solely on the grounds of governmental immunity. Although plaintiffs did not list capacity in the caption of the amended complaint, the 911 operators were put on notice that they were being sued individually.

Appeal by plaintiffs from order entered 23 December 2008 by Judge Timothy S. Kincaid in Gaston County Superior Court. Heard in the Court of Appeals 13 January 2010.

Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., by William E. Moore, Jr. and Michael L. Carpenter, for plaintiff-appellants.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson, and Aaron C. Low, for defendant-appellants.

STEELMAN, Judge.

Where the Gaston County 911 call center provided for the health and welfare of the citizens of the county, the trial court properly held as a matter of law that the 911 call center performs a governmental function. Where defendants' insurance policy contains a provision that expressly states that it does not waive the defense of govern-

mental immunity, the trial court did not err by granting Gaston County's motion for summary judgment and granting the 911 operators' motion to dismiss plaintiffs' claims against them in their official capacities. Plaintiffs' complaint also alleges claims against the 911 operators in their individual capacities, for which governmental immunity is not applicable. This case is remanded for further proceedings as to the 911 operators in their individual capacities.

I. Factual and Procedural Background

On 29 January 2008, plaintiffs filed a complaint that alleged the following: on 12 August 2006, the minor child Matthew Dillon Bowser (Matthew) was in the custody of his father while his mother Nichole McQueary (Nichole) and grandmother Marcia Wright (Marcia) went shopping. At approximately 9:00 p.m., they returned to Matthew's father's residence and found Matthew awake, but crying. At approximately 9:20 p.m., Matthew was sitting in Nichole's lap, facing her, eating an "ice pop." Matthew fell backwards and Nichole caught him, preventing him from hitting his head. When Nichole lifted Matthew up, he was not breathing. Matthew's grandfather immediately put him on the floor and began administering cardiopulmonary resuscitation (CPR). Marcia called 911 and informed Shannon Saleet (Saleet), a 911 operator, that Matthew had stopped breathing. The first 911 call was received at 9:36 p.m. and Saleet designated the call as "general sickness." At 9:40 p.m., 911 was advised that Matthew was possibly running a fever and may have had a seizure. At 9:41 p.m., Paramedic Unit #E56P (Gaston Emergency Medical Services) and Basic EMT Unit #G156 (Gaston Lifesaving and First Aid Crew, Inc.) were dispatched simultaneously. Eleven seconds later, Melanie Duncan (Duncan), also a 911 operator, cleared the primary paramedic unit from the call and only the basic EMT unit was sent to the residence. The basic EMT unit arrived at the residence at 9:53 p.m. and was advised by persons on the scene that Matthew had been resuscitated. Matthew was loaded into the ambulance with Nichole to be transported to Gaston Memorial Hospital. The basic EMT unit requested assistance from the paramedic unit. Matthew was alert during transport and no oxygen was administered.

At 9:59 p.m., Duncan dispatched the paramedic unit to assist the basic EMT unit, and advised the basic EMT unit to meet the paramedic unit at the Gaston County Library. At that time, the basic EMT unit had already passed the library so the ambulance driver pulled into the Wachovia parking lot located less than two miles from Gaston Memorial Hospital to wait for the paramedic unit. Ten minutes

later, the paramedic unit arrived on the scene. As they arrived, Matthew stopped breathing for a second time. Matthew was placed on oxygen and intubation was attempted, but was unsuccessful. The paramedic unit left the parking lot at approximately 10:25 p.m. and arrived at the hospital five minutes later. All subsequent CPR efforts were futile. The autopsy of Matthew showed a slight to moderate edema of the left cerebral hemisphere, moderate chronic esophagitis, mild chronic portal triaditis in the liver, and mild to moderate amount of gastric contents in both lungs. Matthew died from a lack of oxygen to the brain.

Plaintiffs initially filed this action against Gaston County, Gaston Emergency Medical Services, and Gaston Lifesaving and First Aid Crew, Inc., and alleged claims for wrongful death, medical malpractice, reckless infliction of emotional distress, negligent infliction of emotional distress, *res ispa loquitur*, and punitive damages. Gaston County filed an answer, which denied the material allegations of plaintiffs' complaint and asserted several affirmative defenses, including governmental immunity.

On 12 August 2008, plaintiffs moved to amend their complaint to add 911 operators Saleet, Duncan, Christy Gantt, and Ann Putnam (911 operators) in their individual and official capacities. On 15 August 2008, Gaston County filed a motion for summary judgment on the basis of governmental immunity. Plaintiffs' motion to amend their complaint was granted on 4 September 2008. On 12 September 2008, plaintiffs voluntarily dismissed their claims against Gaston Emergency Medical Services and Gaston Lifesaving and First Aid Crew, Inc. based upon a settlement agreement. On 12 November 2008, Gaston County and the 911 operators filed an amended answer, which contained a motion to dismiss pursuant to Rule 12(b)(1), (2), and (6) on the basis that the claims were barred by governmental immunity. On 8 December 2008, a hearing was held on Gaston County's motion for summary judgment and on the remaining defendants' motion to dismiss. The trial court granted these motions on the basis of governmental immunity and dismissed plaintiffs' action. Plaintiffs appeal.

III. The Doctrine of Governmental Immunity

> In North Carolina the law on governmental immunity is clear. In the absence of some statute that subjects them to liability, the state and its governmental subsidiaries are immune from tort liability when discharging a duty imposed for the public benefit. . . . [C]ounties have governmental immunity when engaging in activ-

> ity that is clearly governmental in nature and not proprietary. One cannot recover for personal injury against a government entity for negligent acts of agents or servants while they are engaged in government functions. However, the county may waive its governmental immunity by purchasing liability insurance for specific claim amounts or certain actions.

McIver v. Smith, 134 N.C. App. 583, 585, 518 S.E.2d 522, 524 (1999) (internal citations omitted), *disc. review improvidently allowed*, 351 N.C. 344, 525 S.E.2d 173 (2000). Counties only waive immunity to the extent that the county is indemnified by the insurance contract from liability for the acts alleged. N.C. Gen. Stat. § 153A-435 (2007); *Dawes v. Nash Cty.*, 357 N.C. 442, 446, 584 S.E.2d 760, 763, *reh'g denied*, 357 N.C. 511, 587 S.E.2d 417 (2003). "Governmental immunity protects not only the county, but also its officers and employees when they are sued in their official capacities." *Childs v. Johnson*, 155 N.C. App. 381, 386, 573 S.E.2d 662, 665 (2002) (citation omitted).

IV. Governmental Function v. Proprietary Function

[1] In their first argument, plaintiffs contend that the trial court erred by holding as a matter of law that the Gaston County 911 call center performs a governmental function. We disagree.

"Governmental immunity depends on the nature of the power the entity is exercising." *McIver*, 134 N.C. App. at 586, 518 S.E.2d at 525. "[I]f the governmental entity was acting in a government function, there can be no recovery unless the county waives its governmental immunity; but if the operations were proprietary rather than governmental, the county is not protected." *Id.* (citation omitted).

> Any activity . . . which is discretionary, political, legislative, or public in nature and performed for the public good [on] behalf of the State rather than for itself comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

Britt v. Wilmington, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952) (citation omitted). "Providing for the health and welfare of the citizens of the county is a legitimate and traditional function of county government." *McIver*, 134 N.C. App. at 586, 518 S.E.2d at 525 (quotation omitted). Because the responsibility for preserving the health and welfare of its citizens is "a traditional function of government, it follows that the county may operate government functions that ensure the health and welfare of its citizens." *Id.* (citation omitted).

In *McIver v. Smith*, *supra*, this Court addressed whether the Forsyth County ambulance service was entitled to governmental immunity. One of the main contentions between the parties was whether providing the ambulance service was a government or proprietary function. *Id.* at 586, 518 S.E.2d at 525. In *McIver*, the plaintiffs argued that it was proprietary based upon, *inter alia*, the fact that the ambulance service charged the public a fee for its operation, and that the ambulance service was not historically a government function and was providing a service that a private individual, corporation or company could provide. This Court found no merit in either of these contentions. The arguments made by plaintiffs in the instant case are virtually identical to those made in *McIver*. We hold the reasoning of *McIver* is applicable to this case.

As to the service fee charged, this Court stated in *McIver*:

> The fact that Forsyth County charged a fee for its ambulance service does not alone make it a proprietary operation. The test to determine if an activity is governmental in nature is "whether the act is for the common good of all without the element of . . . pecuniary profit." As determined above, the establishment of the ambulance service is a government function. Under the provisions of N.C.G.S. § 153A-250(b), Forsyth County has the authority to charge a fee for the ambulance service. While it charged a flat fee of $225 for the service, Forsyth County operated the ambulance service at losses averaging nearly two million dollars annually over a ten year span. The governmental nature of the ambulance service, to provide for the health and care of its citizens, is not altered by the charging of a fee; the fee is assessed only to help defray the costs of operating the system.

Id. at 587, 518 S.E.2d at 525-26 (internal citations and quotation omitted) (ellipses original).

In the instant case, Gaston County does not operate the 911 call center for profit. All of the funds from the Emergency Telephone System Funds are "permitted by [N.C. Gen. Stat.] § 62A-8[1] solely for the lease, purchase, or maintenance of emergency telephone equipment,

1. N.C. Gen. Stat. § 62A-8 was repealed by 2007 N.C. Sess. Laws ch. 383, § 2(a) effective 1 January 2008. A service charge for 911 service is now imposed pursuant to N.C. Gen. Stat. § 62A-43 ("A monthly 911 service charge is imposed on each active voice communications service connection that is capable of accessing the 911 system. The service charge is seventy cents (70 cent(s)) or a lower amount set by the 911 Board under subsection (d) of this section. The service charge is payable by the subscriber to the voice communications service provider.").

including necessary computer hardware, software and database provisioning, addressing, and nonrecurring costs of establishing a 911 system, and the rates associated with the service supplier's 911 service and other service supplier charges." Based upon the reasoning in *McIver*, plaintiffs' first contention fails. The 911 call center was established to provide for "the health and welfare of its citizens" and is a governmental function regardless of the fee charged in order to defray operating costs.

Plaintiffs next argue that the 911 call center was providing a service that a private individual, corporation, or company could provide. However, the focus is on the nature of the service itself, not the provider of the service. *See McIver*, 134 N.C. App. at 586, 518 S.E.2d at 525. Because a private company *could* have operated a similar call center, that does not transform the county's into a proprietary function. *Id.* at 587, 518 S.E.2d at 526. We note that in North Carolina, 911 call centers are uniformly run by local governmental agencies.

The Gaston County 911 call center operated to "ensure the health and welfare of its citizens." The trial court did not err by holding as a matter of law that the Gaston County 911 call center performs a governmental function. This argument is without merit.

V. Purchase of Insurance Coverage

[2] In their second argument, plaintiffs contend that the trial court erred by granting Gaston County's motion for summary judgment because the county waived governmental immunity through the purchase of insurance. We disagree.

"A county may waive sovereign immunity by purchasing liability insurance, but only to the extent of coverage provided." *Cunningham v. Riley*, 169 N.C. App. 600, 602, 611 S.E.2d 423, 424 (2005) (citations omitted), *disc. review denied and appeal dismissed*, 359 N.C. 850, 619 S.E.2d 405 (2005), *cert. denied*, 546 U.S. 1142, 163 L. Ed. 2d 1008 (2006). "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." *Guthrie v. State Ports Authority*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983) (citations omitted); *see also Orange County v. Heath*, 282 N.C. 292, 296, 192 S.E.2d 308, 310 (1972) ("The State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a clear waiver by the lawmaking body."). A plaintiff that has brought claims against a governmental entity and its employees acting in their

official capacities must allege and prove that the officials have waived their immunity or otherwise consented to suit. *Sellers v. Rodriguez*, 149 N.C. App. 619, 623, 561 S.E.2d 336, 339 (2002).

In the instant case, it is undisputed that a liability insurance policy for Gaston County was in effect on 12 August 2006. However, the insurance policy contains the following provision listed in Section V—Conditions:

> P. Governmental Liability Limitation
>
> By accepting coverage under this policy, neither the *insured* nor States waive any of the *insured's* statutory or common law immunities and limits of liability and/or monetary damages (including what are commonly referred to as liability damages caps), and States shall not be liable for any *claim* or *damages* in excess of such immunities and/or limits. . . . .

The dispositive issue is whether this provision bars plaintiffs' action. In *Patrick v. Wake Cty. Dep't of Human Servs.*, 188 N.C. App. 592, 655 S.E.2d 920 (2008), this Court examined a similar exclusion in a liability insurance policy. In *Patrick*, the plaintiff filed a complaint against the defendants in their official capacities as supervisors of the Child Protective Services of the Wake County Department of Human Services. *Id.* at 593, 655 S.E.2d at 922. The defendants acknowledged the purchase of liability insurance, but argued that the policy excluded coverage for claims for which sovereign immunity was a defense. *Id.* at 596, 655 S.E.2d at 922. The insurance policy at issue contained the following exclusion: "this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defense[] is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable." *Id.* at 596, 655 S.E.2d at 923 (emphasis omitted).

> "If the language in an exclusionary clause contained in a policy is ambiguous, the clause is 'to be strictly construed in favor of coverage.' " *Daniel v. City of Morganton*, 125 N.C. App. 47, 53, 479 S.E.2d 263, 267 (1997) (quoting *State Auto. Mut. Ins. Co. v. Hoyle*, 106 N.C. App. 199, 201-02, 415 S.E.2d 764, 765, *disc. rev. denied*, 331 N.C. 557, 417 S.E.2d 803 (1992)). "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."

Id. at 596-97, 655 S.E.2d at 924. We held that the exclusionary provision in *Patrick* was clear and unambiguous, and that based upon that provision the defendants had not waived sovereign immunity through the purchase of the policy. *Id.* at 597, 655 S.E.2d at 924.

Recently, in *Estate of Earley v. Haywood Cty. Dep't of Soc. Servs.*, this Court followed the holding and analysis in *Patrick*, and upheld a similar exclusionary clause:

> We acknowledge the arguably circular nature of the logic employed in *Patrick*. The facts are that the legislature explicitly provided that governmental immunity is waived to the extent of insurance coverage, but the subject insurance contract eliminates any potential waiver by excluding from coverage claims that would be barred by sovereign immunity. Thus, the logic in *Patrick* boils down to: Defendant retains immunity because the policy doesn't cover his actions and the policy doesn't cover his actions because he explicitly retains immunity. Nonetheless in this case, as in *Patrick*, where the language of both the applicable statute and the exclusion clause in the insurance contract are clear, we must decline Plaintiff's invitation to implement "policy" in this matter. Any such policy implementation is best left to the wisdom of our legislature.

204 N.C. App. 338, 343, 694 S.E.2d 405, 409-10 (June 1, 2010) (No. COA09-1558).

The provision in the instant case is materially indistinguishable from the provisions in *Patrick* and *Estate of Early*. We are therefore bound by this Court's prior holdings. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Plaintiffs' claims against Gaston County are barred. *See Patrick*, 188 N.C. App. at 596, 655 S.E.2d at 923 ("A governmental entity does not waive sovereign immunity if the action brought against them is excluded from coverage under their insurance policy."). The trial court properly granted Gaston County's motion for summary judgment on the basis of governmental immunity.

VI. 911 Operators

In their third argument, plaintiffs contend that the trial court erred by granting the 911 operators motion to dismiss based upon governmental immunity. We agree in part.

A. Official Capacity

[3] It is well-established that "official-capacity suits are merely another way of pleading an action against the governmental entity." *Mullis v. Seacrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 725 (1998) (citation omitted); *see also Reid v. Town of Madison*, 137 N.C. App. 168, 170-71, 527 S.E.2d 87, 89 (2000) ("[A] suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent. The term 'official capacity' is not synonymous with the term 'official duties.' " Indeed, the performance of an employee's 'duties' is irrelevant to the determination of whether a defendant is being sued in an official or individual capacity." (internal quotations omitted)). Based upon the above analysis, the claims against the 911 operators in their official capacities were properly dismissed.

B. Individual Capacity

[4] Defendants argue that the 911 operators were sued in their official capacities only, and not individually. Defendants point to plaintiffs' failure to specify in the caption whether plaintiffs were suing the 911 operators in their official or individual capacity. In *Mullis v. Seacrest*, *supra*, our Supreme Court set forth the test employed where a complaint does not clearly specify whether the defendants are being sued in their individual or official capacities:

> where the complaint does not clearly specify whether the defendants are being sued in their individual or official capacities, "the 'course of proceedi gs' . . . typically will indicate the nature of the liability sought to be imposed."
>
> . . . .
>
> The crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.

Id. at 552, 495 S.E.2d at 723 (quotations and alteration omitted).

In the instant case, plaintiffs filed a motion to amend their complaint on 12 August 2008 to join additional parties and specifically requested that the 911 operators be added to the action "in their individual and official capacities." The proposed amended complaint's caption listed the 911 operators as being sued in their individual and official capacities. The trial court granted the motion to amend. However, in plaintiffs' filed amended complaint, they failed to state in the caption the capacity in which the 911 operators were being sued. The allegations against the 911 operators in the body of the complaint were identical:

> Upon information and belief, [911 operator] is a citizen and resident of Gaston County, North Carolina and at the times of the events alleged hereto, was a 911 dispatcher, employed by Gaston County. [911 operator] was at all times relevant hereto *acting individually*, and within the course and scope of her employment, duties and authority on behalf of Gaston County.

(Emphasis added).

In addition, plaintiffs prayed for the following relief: "Compensatory damages of and from the 911 Defendants jointly and severally as their liabilities may appear for medical malpractice[.]"

The purpose of alleging the capacity in which each individual is being sued "will allow defendants to have an opportunity to prepare for a proper defense and eliminate the unnecessary litigation that arises when parties fail to specify the capacity." *Reid*, 137 N.C. App. at 171-72, 527 S.E.2d at 90 (citations omitted). In the instant case, the 911 operators were put on notice that they were being sued individually, both in plaintiffs' motion to amend and the amended complaint; despite plaintiffs' failure to list capacity in the caption. We reiterate the guidance given by our Supreme Court on this issue:

> It is a simple matter for attorneys to clarify the capacity in which a defendant is being sued. Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a defendant liable. For example, including the words "in his official capacity" or "in his individual capacity" after a defendant's name obviously clarifies the defendant's status. In addition, the allegations as to the extent of liability claimed should provide further evidence of capacity. Finally, in the prayer for relief, plaintiffs should indicate whether they seek to recover damages from the defendant individually or as an agent of the governmental entity. These

simple steps will allow future litigants to avoid problems such as the one presented to us by this appeal.

Mullis, 347 N.C. at 554, 495 S.E.2d 724-25.

The trial court granted the motion to dismiss as to the 911 operators solely on the grounds of governmental immunity. *See Meyers v. Wall*, 347 N.C. 97, 113, 489 S.E.2d 880, 888 (1997) ("The authorities generally hold the employee individually liable for negligence in the performance of his duties, notwithstanding the immunity of his employer . . . ." (quotation omitted)). The trial court's granting of plaintiffs' motion to dismiss is reversed as to the claims against the 911 operators individually and this case is remanded for further proceedings regarding only these claims. We express no opinion as to the merits of any claim against the 911 operators in their individual capacities.

AFFIRMED IN PART; REVERSED IN PART.

Judges McGEE and STROUD concur.

IN RE THE ADOPTION OF K.A.R., A MINOR CHILD

No. COA09-1544

(Filed 20 July 2010)

1. Adoption— father's consent—reasonable and consistent support

The trial court did not err in determining that respondent father's consent was necessary for petitioners' proposed adoption of his minor child. Respondent father provided the reasonable and consistent support required to make his consent to the adoption necessary under N.C.G.S. § 48-3-601(2)(b)(4)(II).

2. Adoption— petition dismissed—jurisdiction—pending appeal—harmless error

The trial court did not err in dismissing petitioners' petition for adoption. Although the trial court was without jurisdiction to enter the order dismissing the adoption petition because petitioners' appeal from the order concluding that respondent father's consent to the adoption was required was pending, the

error was harmless and the matter was remanded for proper dismissal of the adoption petition.

Appeal by petitioners from orders entered 3 September 2009, 10 September 2009, and 7 October 2009 by Judge William A. Marsh, III in Durham County District Court. Heard in the Court of Appeals 29 April 2009.

Sandlin & Davidian, P.A., by Deborah Sandlin and Lisa Kamarchik, for petitioner-appellants.

Cheri Patrick for respondent-appellee.

BRYANT, Judge.

Petitioners Katy and Erik Larson appeal from orders entered 3 September 2009, 10 September 2009, and 7 October 2009 in Durham County District Court concluding that respondent Roberto Alvarez, Jr.'s consent was required before any petition for adoption of K.A.R. could be granted. For the reasons stated herein, we affirm in part and remand.

On 28 February 2009, Kelley Ann Richardson gave birth to K.A.R. At the time of K.A.R.'s birth, Richardson was eighteen years old and resided in Durham. Alvarez was twenty years old. The two were not married.

On 2 March 2009, Richardson placed K.A.R. with petitioners. Petitioner Katy Larson, who resided in Georgia, is a relative of Richardson. On 6 March 2009, an adoption petition for K.A.R. was filed in Durham County. On 31 March 2009, petitioners served Alvarez with notice of the proceedings and indicated their belief that his consent to the adoption was not necessary. On 1 April, Alvarez filed an answer stating that his consent was necessary and that he did not consent.

After a hearing held on 10 August 2009 in Durham County District Court, the trial court entered an order on 3 September and amended it for a clerical error on 10 September 2009. In the amended order, the trial court found that Richardson and Alvarez had, since the time Richardson's pregnancy was confirmed, acknowledged Alvarez as the child's biological father. Additionally, Alvarez filed a petition for custody (09 CVD 262) and a petition to legitimate the child (09 SP 803). At the time of K.A.R.'s conception, Alvarez had not completed high school or obtained his G.E.D.; he resided with his mother and step-

father; and he was unemployed. During Richardson's pregnancy, Alvarez attended pre-natal classes and accompanied Richardson to doctor's visits until she requested that he stop. Richardson failed to notify Alvarez that she had gone into labor so that he could be present at the time of birth. Despite this, the two remained in contact. Throughout the pregnancy and after the birth of K.A.R., Alvarez repeatedly stated that he would not consent to an adoption and that he was prepared to raise the minor child with or without Richardson. In November 2008, Alvarez obtained employment earning an initial rate of $8.00 per hour. As soon as Alvarez had an income, he began purchasing equipment and supplies for the child, such as: a car seat, a baby crib mattress, and clothing worth over $200.00. The trial court concluded that Alvarez provided reasonable and consistent support for his minor child in accordance with his financial means, acknowledged paternity, and attempted to communicate with the biological mother; therefore, his consent to the adoption of K.A.R. was required. Petitioners appeal.

On appeal, petitioners raise the following questions: did the trial court err in (I) concluding that Alvarez's consent was necessary for the proposed adoption of K.A.R. and (II) dismissing petitioners' action for adoption.

I

[1] First, petitioners argue that the trial court erred in determining Alvarez's consent was necessary for the proposed adoption. Specifically, petitioners contend that Alvarez failed to provide the reasonable and consistent support required to make his consent to the adoption necessary under North Carolina General Statutes, section 48-3-601(2)(b)(4)(II). We disagree.

Adoption proceedings are "heard by the court without a jury." N.C. Gen. Stat. § 48-2-202 (2009).

> " 'Our scope of review, when the Court plays such a dual role, is to determine whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts.' " *In re Adoption of Cunningham*, 151 N.C. App. 410, 412-13, 567 S.E.2d 153, 155 (2002) (quoting *In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983), *cert. denied*, 310 N.C. 744, 315 S.E.2d 703 (1984)). This Court is bound to uphold the trial court's findings of fact if they are supported by competent evidence, even if there is evidence to the contrary. *In*

> *re Adoption of Byrd*, 137 N.C. App. 623, 529 S.E.2d 465 (2000), *aff'd on other grounds*, 354 N.C. 188, 552 S.E.2d 142 (2001). Finally, in reviewing the evidence, we defer to the trial court's determination of [sic] witnesses' credibility and the weight to be given their testimony. *Leak v. Leak*, 129 N.C. App. 142, 150, 497 S.E.2d 702, 706, *disc. review denied*, 348 N.C. 498, 510 S.E.2d 385 (1998).

In re Adoption of Shuler, 162 N.C. App. 328, 330-31, 590 S.E.2d 458, 460 (2004).

The primary purpose of North Carolina General Statutes, Chapter 48, Adoptions, is "to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents . . . ." N.C. Gen. Stat. § 48-1-100 (b)(1)(i) (2009). Furthermore, the chapter is to "be liberally construed and applied to promote its underlying purposes and policies." N.C.G.S. § 48-1-100(d) (2009). Under General Statutes, section 48-3-601, the consent of certain individuals is mandatory before a trial court may grant an adoption petition. *See In re Anderson*, 360 N.C. 271, 624 S.E.2d 626 (2006). In circumstances such as these in the instant case, "[t]he consent of an unwed putative father . . . is not obligatory unless he has assumed some of the burdens of parenthood." *Id.* at 276, 624 S.E.2d at 629.

> [A] petition to adopt a minor may be granted only if consent to the adoption has been executed by:
>
> . . .
>
> (2) In a direct placement, by:
>
> . . .
>
> b. Any man who may or may not be the biological father of the minor but who:
>
> . . .
>
> 4. Before the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206, has acknowledged his paternity of the minor and
>
> . . .
>
> II. Has provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of

> medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both . . . .

N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) (2009).

Our Supreme Court has stated that "the General Assembly did not intend to place the mother in total control of the adoption to the exclusion of any inherent rights of the biological father." *In re Byrd*, 354 N.C. 188, 196, 552 S.E.2d 142, 148 (2001). In codifying N.C.G.S. § 48-3-601(2)(b)(4)(II), the General Assembly sought "to protect the interests and rights of men who have demonstrated paternal responsibility and to facilitate the adoption process in situations where a putative father for all intents and purposes has walked away from his responsibilities to mother and child . . . ." *Id.* at 194, 552 S.E.2d at 146.

In *In re Byrd*, our Supreme Court made clear that when a putative father seeks to protect his parental interests under N.C.G.S. § 48-3-601(2)(b)(4)(II), "[a]ll requirements of the statute must be met in order for a father to require his consent to an adoption." *Id.* at 198, 552 S.E.2d at 149. "[A]n objective test that requires unconditional acknowledgment and tangible support" best serves the interests of all parties as well as the child. *Id.*

In *In re Byrd*, the respondent—an unwed seventeen year old boy—dated the biological mother while in high school from April to June 1997. In September, three months after the relationship ended, the biological mother informed the respondent that she was pregnant and that he was the father. However, in November the biological mother disclosed to the respondent an uncertainty as to paternity. During the pregnancy, the respondent had held a part-time job earning approximately $80 to $90 dollars per week. He eventually acquired two full-time jobs and retained $50 per week after paying his expenses. On 31 December, the respondent was notified by letter that the biological mother intended to place the child for private adoption, and she requested that the respondent relinquish any parental rights he may have as a putative father. The respondent refused. On 4 March 1998, the mother gave birth to a girl; on 5 March 1998, petitioners filed an adoption petition. In his answer to the adoption petition, the respondent requested custody of the minor child provided he was determined to be the biological father. Blood test results indicated a 99.99% probability that the respondent was the child's biological father. After the adoption petition was filed, the respondent mailed to the biological mother a money order for $100.00 and some baby cloth-

ing. However, from late December 1997 thru the birth of the child the respondent had made no offers of support to the biological mother or the minor child. The trial court concluded that the respondent's consent to the adoption was not required as he had not satisfied all the criteria under N.C.G.S. § 48-3-601(2)(b)(4)(II). In affirming the trial court and the Court of Appeals, our Supreme Court reasoned that, despite the uncertainty as to the child's paternity, the respondent's failure to provide any tangible support to the biological mother prior to the filing of the adoption petition left the tangible support requirement in N.C.G.S. § 48-3-601(2)(b)(4)(II) unsatisfied; therefore, the respondent's consent to the adoption was not required. *Id.* at 196-97, 552 S.E.2d at 149.

In *In re Anderson*, 360 N.C. 271, 624 S.E.2d 626, our Supreme Court held that the putative father's consent to the adoption of his biological daughter was not required because he had failed to provide support within the meaning of N.C.G.S. § 48-3-601(2)(b)(4)(II). *Id.* at 279, 624 S.E.2d at 630-31. The putative father, the respondent—an unwed high school student, earned approximately $240 per week and paid no other expenses other than $100 a month in car insurance at the time he learned the biological mother, Anderson, was pregnant. The Supreme Court acknowledged the trial court's finding that the respondent may have offered Anderson support on a few occasions towards the end of her pregnancy, and that in December of 2002, the respondent tried unsuccessfully to deliver a $100.00 check and a letter declaring his willingness to provide financial assistance to Anderson and the baby. Nevertheless, at no time during the term of pregnancy did the respondent provide any actual support for the mother despite the respondent's purchase of a car for $1,000.00 during that time frame. Three days after the child was born, the respondent received notice that a petition for adoption had been filed. The Supreme Court, in upholding the trial court's conclusion that the respondent's consent was not necessary pursuant to N.C.G.S. § 48-3-601(2)(b)(4)(II), held that the respondent's sporadic and rebuffed offers of support failed to meet the support criteria required under the statute and left the respondent without standing to obstruct the adoption process. *Id.* at 274, 624 S.E.2d at 628.

The *Anderson* Court opined that the respondent could have opened a bank account or established a trust fund for the benefit of the mother or the minor child, thereby establishing a regular and consistent deposit record in accordance with his financial resources. *Id.* In doing so, he would have satisfied the support criteria under

N.C.G.S. § 48-3-601(2)(b)(4)(II). The Court reasoned that N.C.G.S. § 48-3-601(2)(b)(4)(II) "obliges putative fathers to demonstrate parental responsibility with reasonable and consistent payments '*for* the support of the biological mother [. . . or the support of the minor, or both, which may include . . . other tangible means of support].' " *Id.* (citing N.C.G.S. § 48-3-601(2)(b)(4)(II)). The deliberate use of the word "for" rather than "to" suggests the legislature wanted to ensure that a putative father, who makes reasonable, consistent payments of support, could preserve his parental rights even where the biological mother refuses direct assistance. *Id.*

In the instant case, Alvarez, as distinguished from the respondents in *In re Byrd* and *In re Anderson*, independently provided items of support for the child, even after his efforts to provide support and assistance directly to the mother were rebuffed. The *Byrd* Court held that the respondent failed to provide any support within the relevant time frame. *In re Byrd*, 354 N.C. at 197-98, 552 S.E.2d at 149. The *Anderson* Court said the "respondent could have supplied the requisite support [by] . . . opening a bank account or establishing a trust fund . . . in accordance with his financial resources." *In re Anderson*, 360 N.C. at 279, 624 S.E.2d at 630-31. Here, Alvarez did what the trial court found to be reasonable given his means and financial resources; he obtained items—a baby car seat, a baby crib mattress, and baby clothing—that could be used only for the support of the minor child. There are few options available to a young unmarried biological father who has shown in many ways his strong desire to keep his child, and whose efforts to provide direct support to the mother have been rebuffed. Our Court in *In re Anderson* suggested one way a father could provide support independently of the mother; the father in the instant case, as determined by the trial court, has shown another.

While the facts and procedural histories in *In re Byrd* and *In re Anderson* are in many ways similar to the instant case, the bright-line requirement—that the support contemplated by the statute must be provided prior to the filing of the petition—found to be absent in *Byrd* and *Anderson*, distinguishes this case. Here, the trial court found the putative father provided reasonable and consistent support prior to the filing of the petition.

The trial court made the following unchallenged finding of fact:

10. As soon as he had an income, Mr. Alvarez began purchasing equipment and supplies necessary for the care and support of

> the minor child. These include a car seat, a mattress, clothing and miscellaneous baby paraphernalia. These purchases continued until approximately two weeks after [K.A.R.'s] birth, when Mr. Alvarez learned of the adoption proceedings.

The trial court also made the following challenged findings of fact:

> 18. The supplies and equipment purchased for the minor child by Mr. Alvarez over the four months he was employed and prior to the filing of the adoption petition total more than $200, and are therefore a reasonable amount of support provided to the minor child in accordance with Mr. Alvarez's financial means.
>
> 19. The purchases on behalf of the minor child began shortly after Mr. Alvarez obtained employment and continued until after [K.A.R.] was born, a consistent showing of Mr. Alvarez's support of his son.

These findings are supported by evidence in the record showing that Alvarez demonstrated parental responsibility prior to the filing of the petition by providing tangible support for the minor child, K.A.R.

The trial court's finding that Alvarez provided reasonable and consistent support in accordance with his financial means is also supported by the record. In *Miller v. Lillich*, 167 N.C. App. 643, 606 S.E.2d 181 (2004), the Court of Appeals upheld the trial court, noting that, notwithstanding the father's lack of employment, he provided financial support to the mother and child by paying medical bills, purchasing items for the future use of the child, and after the birth of the child, provided medicine, diapers, and money on a monthly basis for support of the child. We also held that it was within the trial court's discretion to use the statutory child support guidelines to calculate the father's support requirement in making its determination as to whether the support payments were reasonable and consistent. *Id.* at 647, 606 S.E.2d at 183.

Here, the trial court found that after being informed of the pregnancy, Alvarez obtained employment in November 2008 earning $8.00 per hour for a work week ranging between 30 and 40 hours. Alvarez's monthly gross income was $1,212.40, which the trial court estimated would set the child support obligation at no more than $50.00 a month. Valuing the items purchased by Alvarez at more than $200.00, the trial court concluded that Alvarez provided a reasonable amount of support to the minor child in accordance with his financial means. The trial court also found that because Alvarez' support began shortly

after he obtained employment and continued until after K.A.R. was born, Alvarez's support was consistent. We determine these findings to be supported by the record and therefore binding on appeal. *See In Re Shuler*, 162 N.C. App. at 330-31, 590 S.E.2d 460.

As the Court said in *In re Byrd*, "[w]e [] recognize the importance of fixing parental responsibility as early as possible for the benefit of the child. Yet, fundamental fairness dictates that a man should not be held to a standard that produces unreasonable or illogical results." *In re Byrd*, 354 N.C. at 196, 552 S.E.2d at 147-48. We hold that the trial court's determination that Alvarez's support was reasonable and consistent in accordance with his financial means is supported by evidence in the record, as well as our statutory and case law. Therefore, the trial court did not err in concluding that Alvarez's consent was required before the petition for adoption of K.A.R. could be granted. Accordingly, petitioners' argument is overruled.

II

[2] Next, petitioners argue that the trial court erred in entering an order denying petitioners' petition to adopt K.A.R. after petitioners appealed from the trial court order concluding that Alvarez's consent was required for an adoption to proceed. We agree and hold the error harmless but remand for entry of a proper order.

"When an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein . . . ." N.C. Gen. Stat. § 1-294 (2009). "The general rule has been that a timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court. Pending appeal, the trial judge is generally *functus officio*, subject to two exceptions and one qualification . . . ." *McClure v. County of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007) (internal citations, quotations, and brackets omitted).

> The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned and thereby regain jurisdiction of the cause.

Kirby Bldg. Systems, Inc. v. McNiel, 327 N.C. 234, 240, 393 S.E.2d 827, 831 (1990) (citations and internal quotations omitted).

Here, on 3 September 2009, the trial court entered an order concluding that Alvarez's consent to the adoption of K.A.R. was required. The order was amended to correct a clerical error on 10 September 2009. Petitioners filed a notice of appeal from the 10 September 2009 order on 15 September 2009. Prior to the entry of the order requiring Alvarez's consent to the adoption, Alvarez filed motions to dismiss the adoption proceeding. A hearing on the motions was held 15 September 2009, and the trial court entered an order dismissing the adoption petition on 7 October 2009, concluding that Alvarez's consent to the adoption was required. Because petitioners timely filed a notice of appeal from the order entered 10 September 2009, the trial court was without jurisdiction to dismiss the adoption petition. *See* N.C. Gen. Stat. § 1-294. However, due to our holding as to issue *I*, this error is essentially harmless. Nevertheless, we remand this case to the trial court for proper dismissal of the adoption petition.

Affirmed in part; Remanded.

Judges ELMORE and BEASLEY concur.

MAUREEN SHAY, EMPLOYEE, PLAINTIFF v. ROWAN SALISBURY SCHOOLS, EMPLOYER; SELF-INSURED, (CORVELL, THIRD PARTY ADMINISTRATOR), DEFENDANT

No. COA09-1587

(Filed 20 July 2010)

Workers' Compensation— injury by accident—elevator inoperable—climbing stairs—knee injury

A workers' compensation plaintiff did not suffer an injury by accident in the course of her employment when she injured her knee while walking up stairs because the elevator was not working. Plaintiff had been walking up the stairs for four weeks by the time the injury occurred, so that the stairs had become a part of plaintiff's normal work routine.

Judge WYNN dissenting.

Appeal by defendant from Opinion and Award of the North Carolina Industrial Commission entered 27 August 2009. Heard in the Court of Appeals 11 May 2010.

Doran, Shelby, Pethel & Hudson, P.A., by David A. Shelby, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Jennifer M. Jones, for defendant-appellant.

CALABRIA, Judge.

Rowan Salisbury Schools ("defendant") appeals an Opinion and Award of the North Carolina Industrial Commission ("the Commission") concluding that Maureen Shay ("plaintiff") suffered a compensable injury due to "accident" while in the course of her employment. We reverse.

I. BACKGROUND

Plaintiff has been employed by defendant for more than fifteen years as a teacher. Plaintiff's classroom was located on the second floor of Salisbury High School. Prior to November 2006, plaintiff normally used the school's elevator to reach the second floor because "it was difficult for [her] to walk up the stairs." On 3 November 2006, the elevator stopped working and remained inoperable for six weeks. During this time, plaintiff used the stairs to reach the second floor. On 4 December 2006, as plaintiff was ascending the stairs to her classroom, her left knee "gave out."

Plaintiff's knee pain increased, and on 5 December 2006, she reported the incident to Shawnee Holmes ("Holmes"), the school secretary. Holmes instructed plaintiff to complete a Workers' Compensation form. On the form, plaintiff indicated that as she was going up the stairs at school, her knee popped and that by the end of the day, she could not walk. Holmes also instructed plaintiff to seek treatment at Pro-Med—Salisbury ("Pro-Med"), a medical clinic. On 5 December 2006, Dr. David N. Russell ("Dr. Russell") evaluated plaintiff at Pro-Med. Plaintiff told Dr. Russell that she injured her left knee while climbing the stairs at work, and that she had pre-existing, nondisabling degenerative arthritis in her knees. Dr. Russell diagnosed plaintiff with a knee sprain and assigned climbing restrictions.

On 9 January 2007, plaintiff returned to Pro-Med and reported no improvement in the condition of her knee. Dr. Epifanio Rivera ("Dr. Rivera") ordered an MRI which revealed a medial meniscus tear in plaintiff's left knee. After reviewing the MRI results with plaintiff during a follow-up visit on 31 January 2007, Dr. Rivera referred plaintiff to an orthopaedist. Pro-Med contacted defendant's insurance carrier and learned that defendant would not pay for orthopaedic treatment.

After defendant denied plaintiff's claim, plaintiff sought treatment from Dr. William Stephen Furr ("Dr. Furr"), an orthopaedic surgeon at Centralina Orthopaedic and Sports Medicine, on 7 March 2007. Dr. Furr reviewed plaintiff's MRI and diagnosed a "left knee strain with medial meniscus tear." On 22 May 2007, Dr. Furr performed arthroscopic surgery on plaintiff's left knee. Dr. Furr medically excused plaintiff from work for the period of 22 March 2007 to 9 May 2007; however, plaintiff returned to work on 24 April 2007.

On 14 August 2007, plaintiff filed an Industrial Commission Form 18 ("Form 18") with the Commission alleging that she had suffered an injury which entitled her to workers' compensation. On the Form 18, plaintiff stated that the injury she sustained was to her "left knee and any other injuries causally related" and that the injury occurred because she "[d]id not normally use stairs; elevator was broken; went up stairs to get to classroom injuring left knee." Plaintiff sought workers' compensation benefits for the period from 23 March 2007 through 23 April 2007. Defendant denied compensability on the ground that "[p]laintiff did not suffer an injury [by] accident arising out of or in the course and scope of her employment pursuant to N.C. G.S. []97-2[(6)]." On 14 August 2007, plaintiff filed a Form 33 in which she requested a hearing before the Commission.

On 21 May 2008, a hearing was held before Deputy Commissioner Myra L. Griffin ("Deputy Commissioner Griffin"). In an Opinion and Award filed 30 December 2008, Deputy Commissioner Griffin found, *inter alia*:

> By December 4, 2006, climbing the stairwell had become part of plaintiff's normal work routine. There was nothing unusual or out of the ordinary in the way plaintiff was performing her job duties, nor was there an interruption of her normal work routine. Plaintiff did not sustain an injury as the result of any accident arising out of and in the course of her employment with defendant.

Deputy Commissioner Griffin concluded that plaintiff's injury was not the result of an "accident" and plaintiff was not entitled to compensation for her injury.

On 7 January 2009, plaintiff appealed to the Full Commission. In an Opinion and Award filed 27 August 2009, the Full Commission concluded, by a 2-1 decision, that "the act of climbing the stairs as opposed to using the elevator was an interruption of plaintiff's normal work routine and introduced new conditions to plaintiff's

employment." The Full Commission further concluded that "[t]he period of time during which plaintiff had to break from her normal routine of using the elevator was insufficient for the act of climbing the stairs to become part of her normal work routine." Ultimately, the Full Commission concluded that plaintiff had "sustained an injury by accident arising out of and in the course of her employment with defendant-employer" and accordingly awarded her compensation.

Commissioner Bernadine S. Ballance ("Commissioner Ballance") filed a dissenting opinion in which she stated:

> I do not believe that plaintiff has proven that she sustained an injury by accident. Plaintiff felt a pop in her knee while climbing the stairwell to her classroom. Plaintiff is contending that the "out of service" elevator was the interruption of her normal work routine and that having to climb stairs to get to her classroom introduced new conditions to her employment. At the time of her injury the elevator had been "out of service" for four weeks and climbing stairs had become part of her normal work routine.

Commissioner Ballance then concluded that "plaintiff did not establish an accident under N.C. Gen. Stat. § 97[-]2(6)." Defendant appeals.

II. STANDARD OF REVIEW

Our review of a decision of the Commission is limited to a determination of "whether there was any competent evidence before the Commission to support its findings of fact and whether the findings of fact justify its legal conclusions and decision." *Buchanan v. Mitchell County*, 38 N.C. App. 596, 599, 248 S.E.2d 399, 401 (1978). "The findings of fact by the Industrial Commission are conclusive on appeal, if there is any competent evidence to support them, and even if there is evidence that would support contrary findings." *Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 118 (1988). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

III. "ACCIDENT"

Defendant argues that the Commission erred by concluding that plaintiff's injury was an injury by accident. Specifically, defendant argues that the Commission erred by concluding, despite the fact that plaintiff had been climbing the stairs for a month prior to her injury, that the activity had not become part of plaintiff's normal work routine. We agree.

Under the Workers' Compensation Act, a plaintiff is entitled to compensation for an injury "only if (1) it is caused by an 'accident,' and (2) the accident arises out of and in the course of employment." *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 645, 566 S.E.2d 807, 811 (2002); *see* N.C. Gen. Stat. § 97-2(6) (2009). The parties do not dispute that plaintiff's injury was sustained in the course of her employment. However, defendant contends that the Commission erred in concluding that plaintiff was injured as a result of the "interruption of the regular work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences."

Chapter 97 defines "injury" to mean "only injury by accident arising out of and in the course of the employment[.]" N.C. Gen. Stat. § 97-2(6) (2008).

> Our Supreme Court has defined the term 'accident' as used in the Workers' Compensation Act as 'an unlooked for and untoward event which is not expected or designed by the person who suffers the injury[;]' [t]he elements of an 'accident' are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences.

Poe v. Acme Builders, 69 N.C. App. 147, 149, 316 S.E.2d 338, 340 (1984) (quoting *Adams v. Burlington Industries*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983) (internal quotations omitted)). However, "once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an 'injury by accident' under the Workers' Compensation Act." *Bowles v. CTS of Asheville*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985).

In the instant case, plaintiff was injured when she was climbing stairs going to her second-floor classroom. Plaintiff did not stumble, fall, trip, slip, or twist her knee causing her injury. Therefore, plaintiff did not suffer an "accident" in the routine sense of workers' compensation analysis. *See Chambers v. Transit Mgmt.*, 360 N.C. 609, 618-19, 636 S.E.2d 553, 559 (2006) ("The statute defines an 'injury by accident' . . . to be an injury that is 'the direct result of a specific traumatic incident' and 'causally related to such incident.' " (quoting N.C. Gen. Stat. § 97-2(6)). We are thus left with whether the climbing of the stairs was an interruption of her work routine.

> " 'New conditions of employment to which an employee is introduced and expected to perform regularly do not become a part of an employee's work routine until . . . the employee has gained proficiency performing in the new employment and becomes accustomed to the conditions it entails.' " *Church v. Baxter Travenol Laboratories*, 104 N.C. App. 411, 414, 409 S.E.2d 715, 716 (1991) (citation omitted). However, "once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an 'injury by accident.' " *Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985).

Dye v. Shippers Freight Lines, 118 N.C. App. 280, 282-83, 454 S.E.2d 845, 847 (1995).

In *Trudell v. Heating & Air Conditioning Co.*, 55 N.C. App. 89, 284 S.E.2d 538 (1981), the employee installed heating and air conditioning units and duct work. *Id.* at 89, 284 S.E.2d at 539. This required working in the restrictive areas of crawl spaces underneath buildings. *Id.* After working in an unusually low crawl space for two weeks, the employee began experiencing back pain, and was diagnosed with an acute lumbosacral strain. *Id.* This Court held:

> Plaintiff worked for at least one week and possibly two weeks under such conditions before experiencing the pain of which he presently complains. We agree with the Commission that by that time, the low crawl space had become part of plaintiff's normal work routine. There was, therefore, no accident causing his back injury. The award order is affirmed.

Id. at 91, 284 S.E.2d at 540.

The dissent attempts to distinguish *Trudell* from the instant case. If anything, *Trudell* is a much stronger case for compensability than the instant case. In *Trudell*, the employee was required, as a condition of his employment to work in an unusually confined crawl space to install equipment. After one to two weeks, this understandably resulted in back pain. However, this Court ruled that this short period of time was sufficient for the activity to become part of the employee's "normal work routine." *Id.* In the instant case, the elevator was not operable for a period of more than a month, a time period two to four times longer than that in *Trudell*. We hold that, in the instant case, climbing the stairs for a period of more than one month

became a part of plaintiff's "normal work routine" and that she did not suffer an injury that was compensable under the Workers' Compensation Act.

Furthermore, the use of the stairs was not a "new condition of employment" giving rise to a workers' compensation claim. It is reasonable to infer that the stairs were not newly added to the building when the elevator broke down, and had been there from the initial construction of the building. It is clear from the Commission's findings of fact that prior to the elevator breaking down, plaintiff chose to use the elevator. Defendant did not compel plaintiff to use either the elevator or the stairs.

IV. CONCLUSION

Because climbing the stairs became a part of plaintiff's normal work routine and was not a new condition of her employment, the Commission erred by concluding plaintiff sustained an injury by accident arising out of and in the course of her employment and awarding her workers' compensation benefits. The Commission's opinion and award must be reversed.

Reversed.

Judge STEELMAN concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge, dissenting.

Under the Workers' Compensation Act, an accidental cause of an employee's injury will be inferred when the employee's normal work routine is interrupted thereby introducing unusual conditions likely to result in unexpected consequences.[1] In the instant case, the interruption of Plaintiff's work routine required her to repeatedly engage in physical activity in a manner not required during her usual employment, thus exposing her to unforeseen outcomes. Because Plaintiff's injury was therefore caused by an accident, I would affirm the Full Commission's award entitling Plaintiff to workers' compensation.

It is undisputed that Plaintiff injured her knee while climbing the stairs to reach her classroom. Notably, the Full Commission concluded that "the act of climbing the stairs as opposed to using the ele-

1. *Gunter v. Dayco Corp.*, 317 N.C. 670, 673, 346 S.E.2d 395, 397 (1986).

vator was an interruption of plaintiff's normal work routine and introduced new conditions to plaintiff's employment." Providing support for this conclusion were the Commission's following findings of fact:

> 2. . . . Prior to the incident giving rise to this claim, plaintiff's normal method of accessing her second floor classroom was to use the school's elevator. . . .
>
> 3. On November 3, 2006, the elevator at plaintiff's school broke, and was then non-operational for a period of six (6) weeks. Therefore, during this period of maintenance, plaintiff had to break from her normal routine of using the elevator and instead, alter the manner in which she reached her second floor classroom by using the staircase.

Plaintiff testified that she had worked for Defendant in the same position for fifteen years and that, prior to December 4th, she normally used the elevator to reach her classroom on the second floor. Plaintiff's testimony serves as competent evidence supporting the Full Commission's finding that climbing the stairs constituted a departure from her normal method of reporting to her classroom. The Commission's findings in turn support the conclusion that the act of climbing the stairs constituted an interruption of Plaintiff's normal work routine.

However, the majority holds that in light of the fact that Plaintiff had been climbing the stairs for more than a month prior to her injury, the Commission erred by concluding that

> [t]he period of time during which plaintiff had to break from her normal routine of using the elevator was insufficient for the act of climbing the stairs to become part of her normal work routine.

I recognize that this Court has found an interval of time significantly shorter than one month sufficient for changed employment circumstances to become part of an employee's normal work routine. *See Trudell v. Heating & Air Conditioning Co.*, 55 N.C. App. 89, 91, 284 S.E.2d 538, 540 (1981) (denying workers' compensation because after working for "at least one week and possibly two weeks" under changed conditions, the conditions became part of plaintiff's normal work routine). However, *Trudell* is distinguishable from the case at bar based on the nature of the change at issue.

In *Trudell*, the plaintiff worked for two and a half years doing air conditioning duct work which required him to operate in the crawl space beneath various buildings. *Id.* at 89-91, 284 S.E.2d at 539-40.

After working for two weeks under a building with a crawl space that "was lower than any other under which plaintiff had previously worked," plaintiff "began to feel pain in his lower back." *Id.* at 89, 284 S.E.2d at 539. In affirming the Full Commission's decision to deny compensation, this Court focused on the fact that the plaintiff had long performed similar work and there was no evidence that the type of work plaintiff was performing when injured required "unusual exertion or twisting" of any sort. *Id.* at 91, 284 S.E.2d at 540. Indeed, we stated that the plaintiff's "location underneath the building was normal for air duct installation." *Id.* Additionally, we noted that, "[a]t times [plaintiff] was required to lie on his back but there is no finding that that position was an unusually cramped one from which to work." *Id.*

In contrast, Plaintiff in the instant case was required, as a result of the elevator malfunction, to engage in physical activity different than that to which she had become accustomed. The Full Commission found as fact that "the use of stairs introduced new conditions to plaintiff's employment, i.e., carrying books up stairs as opposed to riding on the elevator as she had done for fifteen years prior to November 3, 2006." Thus, the case *sub judice* presents a different set of factual circumstances than that before us in *Trudell*, where the plaintiff's ordinary work activity was merely performed in a smaller space.

Nonetheless, Defendant further cites *Gunter v. Dayco Corp.*, 317 N.C. 670, 346 S.E.2d 395 (1986), to support the contention that a month provided sufficient time for climbing stairs to become part of Plaintiff's work routine. In *Gunter*, an employee was reassigned by his employer to a new position entailing different work duties. *Id.* at 671, 346 S.E.2d at 396. The Court held that the plaintiff's new duties could not become part of his normal work routine until he had become proficient in, and accustomed to, his new job requirements. *Id.* at 675-76, 346 S.E.2d at 398 (awarding compensation where plaintiff worked in the new position for only "two days and a few hours" prior to sustaining the injury and had not become proficient in, nor accustomed to, the new job). However, *Gunter* did not address the issue of when an abnormal activity could become routine. Instead, the issue in that case was how long it took before a regularly performed activity which was part of the plaintiff's normal duties could be considered part of his work routine. Importantly, in *Gunter*, the nature of the employee's job changed such that new activities were expected to be "regularly" performed. *Id.* at 675, 346 S.E.2d at 398.

Contrastingly, in the case at bar, Plaintiff was performing a job wherein she had never been "regularly expected" to walk up the stairs. Indeed, her testimony established that her standard practice, observed for fifteen years, was to ride the elevator to the second floor. Furthermore, witness testimony established that it was uncommon for the elevator to be broken for prolonged periods of time. The school's Assistant Maintenance Director testified that the majority of the times when the elevator broke, service repairs were conducted on the same day as the reported malfunction. Thus, while Plaintiff was regularly expected to report to her second floor classroom, there is no evidence that she was regularly expected to use the stairs to do so.

In sum, I would hold that the factual findings of the Full Commission, establishing Plaintiff's regular practice of using the elevator, supported its conclusion that climbing the stairs had not, by the time she was injured, become part of Plaintiff's normal work routine. Accordingly, I would affirm the Full Commission's determination that Plaintiff suffered her injury as the result of an accident arising out of and in the course of employment.[2] *See* N.C. Gen. Stat. § 97-2(6) (2009).

STATE OF NORTH CAROLINA v. DECARLOS MONTE MOSES

No. COA09-1468

(Filed 20 July 2010)

1. Constitutional Law— right to counsel—defendant initiated contact—motion to suppress statement

The trial court did not err in a robbery and assault case by denying defendant's motion to suppress his statement to a police officer because defendant initiated contact with the officer after he had asserted his *Miranda* right to counsel.

---

2. The Industrial Commission, by virtue of its experience and expertise in administering the Workers' Compensation Act, deserves a degree of deference in its determinations as to what constitute interruptions of an employee's work routine sufficient to infer an accidental cause of a plaintiff's injury. *Cf. County of Durham v. N.C. Dep't of Env't & Natural Resources*, 131 N.C. App. 395, 396, 507 S.E.2d 310, 311 (1998) ("[E]ven when reviewing a case de novo, courts recognize the long-standing tradition of according deference to the agency's interpretation" of a statute it administers.), *disc. review denied*, 350 N.C. 92, 528 S.E.2d 361 (1999). Indeed, in both *Trudell* and *Gunter*, the Court affirmed the decision of the Industrial Commission as to this issue.

2. Evidence— striking a witness's testimony—failure to raise constitutional issues at trial—no prejudice

The trial court did not err in a robbery and assault case by not striking a witness's testimony upon his refusal to answer further questions or submit himself to cross-examination. Defendant did not raise any constitutional objections to the witness's testimony at trial and failed to make a motion to strike the witness's entire testimony. Even assuming *arguendo*, that the trial court erred in failing to strike the State's final question, defendant failed to show prejudice.

3. Appeal and Error— preservation of issues—sufficiency of the evidence—failure to move to dismiss

Defendant's argument that there was insufficient evidence to support the charges of robbery or conspiracy to commit robbery was not preserved for appellate review where defendant's trial counsel did not move to dismiss any charges against defendant at trial.

4. Constitutional Law— effective assistance of counsel—motion to dismiss—no reasonable probability of different outcome

Defendant did not receive ineffective assistance of counsel in a robbery and assault case where his trial counsel did not move to dismiss for insufficient evidence of the charges against him. There was no reasonable probability that defense counsel's failure to move for dismissal resulted in a different outcome.

5. Sentencing— robbery and possession of stolen goods—proceeds of the same robbery—error to sentence for both convictions

The trial court erred by sentencing defendant for both robbery and possession of stolen property as the Legislature did not intend to subject a defendant to multiple punishments for both charges where the stolen goods possessed were the proceeds of the same robbery.

Appeal by defendant from judgments entered 19 March 2009 by Judge J.B. Allen, Jr. in Durham County Superior Court. Heard in the Court of Appeals 11 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General David D. Lennon, for the State.

Richard E. Jester, for defendant-appellant.

CALABRIA, Judge.

Decarlos Monte Moses ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of robbery with a dangerous weapon, conspiracy to commit robbery, assault by pointing a gun and possession of stolen goods. We find no error at trial, but vacate defendant's judgment for possession of stolen goods.

I. Background

Shortly after midnight on 2 July 2008, Kimberly Delores ("Ms. Delores") and Victor Manuel ("Manuel") (collectively "the victims") had just completed their shifts at a Hardee's restaurant in Durham, North Carolina. While the victims were in the Hardee's parking lot, they were approached by a red and white pickup truck occupied by two males. While the driver of the pickup truck exited the truck and asked the victims for directions, the passenger also exited the truck, pulled out a gun, and demanded money. Manuel surrendered his cellular telephone and his wallet, which contained immigration papers and some amount of cash.

After the robbery, Ms. Dolores called the cell phone that was stolen from Manuel. Ms. Dolores talked to the person who answered and asked for Manuel's immigration papers to be returned. Later, she also sent a text message to the cell phone making the same request. Ms. Dolores received a response agreeing to return the stolen property for $200. She then contacted the Durham Police Department ("the DPD").

The DPD, with the cooperation of Ms. Dolores, set up an operation to retrieve the stolen items. Ms. Dolores arranged for a meeting in front of a Target store in Durham on 15 July 2008 to pay money for the return of Manuel's phone and papers. When defendant and another man (later determined to be defendant's cousin) arrived at the prearranged time, the DPD placed both men under arrest. After defendant was arrested, Manuel's cell phone was recovered during a subsequent search of defendant's apartment.

Defendant was taken to DPD headquarters. Investigator David Anthony ("Investigator Anthony") advised defendant of his *Miranda* rights at 12:45 p.m. At that time, defendant indicated on a *Miranda* rights form that he did not wish to speak to the DPD unless he had an attorney present. As a result, Investigator Anthony ceased questioning defendant.

Defendant was then transferred to DPD Substation 3 for processing. At that time, defendant reinitiated contact with Investigator Anthony and indicated a desire to discuss the case. At 3:55 p.m., Investigator Anthony again advised defendant of his *Miranda* rights, and defendant waived these rights in writing. Defendant then provided Investigator Anthony with a detailed statement about his involvement with the robbery.

The DPD had previously arrested defendant's alleged partner, Donnelle Wilkerson ("Wilkerson"), on 3 July 2008. Wilkerson was driving a red and white pickup truck at the time of his arrest. A search of the pickup truck yielded a .38 caliber Smith and Wesson handgun hidden in a boxing glove. The handgun was later identified by Ms. Delores as the one used during the robbery.

Defendant was indicted for the offenses of robbery with a dangerous weapon, conspiracy to commit robbery, assault by pointing a gun, and possession of stolen property. Beginning 17 March 2009, he was tried by a jury in Durham County Superior Court. At trial, defendant made a motion to suppress his statement to the DPD. After a *voir dire* hearing, the trial court orally made findings of fact and conclusions of law denying defendant's motion.

Wilkerson was called to testify during the trial. Wilkerson was testifying as part of a plea agreement under which he would receive a reduced sentence in exchange for his testimony against defendant. However, Wilkerson refused to answer any of the State's questions regarding defendant's involvement with the robbery. As a result, the trial court excused Wilkerson from further testimony.

On 19 March 2009, the jury returned verdicts of guilty to all charges. For the conviction for robbery with a dangerous weapon, defendant was sentenced to a minimum of 77 months to a maximum of 102 months. For the conviction for conspiracy to commit robbery, defendant was sentenced to a minimum of 29 months to a maximum of 44 months. These sentences were to be served consecutively in the North Carolina Department of Correction.

For the conviction for assault by pointing a gun, defendant was sentenced to 75 days imprisonment. This sentence was suspended and defendant was placed on probation for a period of 36 months. Defendant's probation would begin at the expiration of his active sentences.

Finally, for the conviction for possession of stolen property, defendant was sentenced to a minimum of 8 months to a maximum of

10 months in the North Carolina Department of Correction. This sentence was also suspended and defendant was placed on probation for a period of 36 months, to begin at the expiration of all other sentences. Defendant appeals.

II. Motion to Suppress

[1] Defendant argues that the trial court erred by denying his motion to suppress his statement to the DPD because defendant did not initiate conversation with Investigator Anthony after he asserted his *Miranda* right to counsel. We disagree.

> Our review of a denial of a motion to suppress by the trial court is "limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law."

State v. Barden, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). "If no exceptions are taken to findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal." *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (internal quotations and citation omitted).

Defendant has not challenged any of the trial court's oral findings of fact. As a result, our review of the trial court's denial of defendant's motion to suppress is limited to whether the unchallenged findings of fact ultimately support the trial court's conclusions of law.

The trial court found as fact that defendant initially had invoked his *Miranda* right to counsel. "Once an accused invokes his right to counsel during a custodial interrogation, the interrogation must cease and cannot be resumed without an attorney being present *unless the accused himself initiates further communication, exchanges, or conversations with the police.*" *State v. Fisher*, 158 N.C. App. 133, 142, 580 S.E.2d 405, 413 (2003) (internal quotations and citations omitted). When a defendant initiates conduct after asserting his *Miranda* right to counsel during interrogation, our Courts have required

> (1) "a finding of fact as to who initiated the communication between the defendant and the officers which resulted in his inculpatory statement while in custody and after he had invoked the right to have counsel present during interrogation[;]" and (2)

> "findings and conclusions establishing whether the defendant validly waived the right to counsel and to silence under the totality of the circumstances . . . ."

Id. at 144, 580 S.E.2d at 414 (internal citation omitted) (quoting *State v. Lang*, 309 N.C. 512, 521-22, 308 S.E.2d 317, 321-22 (1983)).

In the instant case, the trial court orally found "that the Defendant reinitiated conversation with Anthony and said he wanted to talk to him." The trial court also found that defendant was not under the influence of any controlled substances, that defendant was not promised or threatened in any way and that defendant was again fully advised again of his *Miranda* rights before he provided a statement to the DPD. Finally, the Court found that

> the Defendant signed a yes when [Investigator Anthony] said do you understand these rights explained to you. Signed yes. Stated yes when [Investigator Anthony] said do you have in mind do you wish to answer any questions. Do you wish to answer any questions without a lawyer present, yes. And the Court finds that he did give a statement at this time.

These unchallenged findings of fact, which are binding on appeal, fully support the trial court's conclusion that "considering the totality of the circumstances . . . that [defendant] freely, voluntarily and knowingly reinitiated his statement and made a statement and it will come in over the objections of the Defendant." After reviewing the trial court's oral findings of fact and conclusions of law, we determine that the trial court properly denied defendant's motion to suppress. This assignment of error is overruled.

III. Wilkerson's Testimony

[2] Defendant argues that the trial court erred by not striking Wilkerson's testimony upon his refusal to answer questions and not submit himself to cross-examination violating defendant's constitutional right to cross-examine witnesses against him. We disagree.

Wilkerson acknowledged that he knew defendant and that Wilkerson had been arrested for participation in the robbery. However, Wilkerson refused to answer any questions regarding defendant's involvement in the robbery. As a result, the State requested to treat Wilkerson as a hostile witness. In response, defendant's counsel stated, "Your Honor, I'm going to object as to the questioning. . . . I'm just, again, afraid of the prejudicial value of having him here and

how they're going to, the jury's going to[.]" In response, the trial court, cognizant of the State's arrangement with Wilkerson, opted to give the State "a little leeway." When Wilkerson still refused to answer questions regarding defendant's involvement in the robbery, the trial court excused him. Defendant's counsel then moved to strike only the State's final question, "Sir, isn't it true that Monte—Decarlos Monte Moses, held a gun on the victims—while you were standing there[.]" The trial court denied the motion to strike because Wilkerson did not answer the question.

Defendant did not raise any constitutional objections to Wilkerson's testimony at trial. Additionally, defendant did not make a motion to strike Wilkerson's entire testimony at trial. "[I]n order for an appellant to assert a constitutional or statutory right on appeal, the right must have been asserted and the issue raised before the trial court. In addition, it must affirmatively appear on the record that the issue was passed upon by the trial court." *State v. McDowell*, 301 N.C. 279, 291, 271 S.E.2d 286, 294 (1980) (internal citation omitted); *see also* N.C.R. App. P. 10(b)(1) (2008) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion . . . [and] to obtain a ruling upon the party's request, objection or motion."). Therefore, we limit our review to the specific question that defendant moved to strike.

The trial court's denial of a motion to strike will not be disturbed on appeal absent an abuse of discretion. *State v. Smith*, 291 N.C. 505, 518, 231 S.E.2d 663, 672 (1977). An abuse of discretion is defined as a ruling that "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006) (internal quotations and citation omitted). In the instant case, we discern no abuse of discretion by the trial court. Wilkerson's refusal to answer the State's question regarding defendant's participation in the robbery did not implicate defendant in the crime referred to in the question.

Furthermore, assuming *arguendo* that the trial court should have struck the State's question, defendant has failed to show any prejudice. Defendant's statement to Investigator Anthony, properly admitted into evidence, clearly indicated that defendant did in fact hold a gun on the victims. This assignment of error is overruled.

III. Motion to Dismiss

[3] Defendant argues that there is insufficient evidence of either robbery or conspiracy to commit robbery to support submitting the

charges to the jury. As defendant failed to preserve this issue for appellate review by making a motion to dismiss at trial, we dismiss this argument.

Defendant concedes that his trial counsel failed to make a motion to dismiss the charges at trial. "A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . at trial." N.C.R. App. P. 10(b)(3) (2008). Because defendant's trial counsel failed to make a motion to dismiss any of the charges at trial, we dismiss this assignment of error as not preserved for appellate review.

IV. Ineffective Assistance of Counsel

[4] In the alternative, defendant argues that trial counsel's failure to make a motion to dismiss the charges of robbery and conspiracy to commit robbery constitutes ineffective assistance of counsel. We disagree.

> 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. In order to establish prejudice, [t]he 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.

State v. Tanner, 193 N.C. App. 150, 154, 666 S.E.2d 845, 849 (2008), *rev'd on other grounds*, ___ N.C. ___, ___ S.E.2d (2010) (internal quotations and citations omitted). In the instant case, we examine the merits of defendant's motion to dismiss claims to determine whether there is a reasonable probability that defendant's trial counsel's failure to move for dismissal of the charges would have resulted in a different outcome.

"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. Wright*, ___ N.C. App. ___, ___, 685 S.E.2d 109, 115 (2009) (internal quotations and citation omitted). "Substantial evidence is evidence that a reasonable mind might find adequate to support a conclusion." *State v. Coleman*, ___ N.C. App. ___, ___, 684 S.E.2d 513, 516 (2009) (internal

quotations and citation omitted). A trial court's ruling on a motion to dismiss is reviewed *de novo*. *Id.*

"The elements of robbery with a dangerous weapon are: '(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of the person is endangered or threatened.' " *State v. Hussey*, 194 N.C. App. 516, 520, 669 S.E.2d 864, 866 (2008) (quoting *State v. Mann*, 355 N.C. 294, 303, 560 S.E.2d 776, 782 (2002)).

"A criminal conspiracy is an agreement, express or implied, between two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Clark*, 137 N.C. App. 90, 95, 527 S.E.2d 319, 322 (2000) (internal quotations and citation omitted).

> In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice. Nor is it necessary that the unlawful act be completed. A conspiracy may be shown by circumstantial evidence, or by a defendant's behavior. Conspiracy may also be inferred from the conduct of the other parties to the conspiracy. [P]roof of a conspiracy [is generally] established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.

State v. Jenkins, 167 N.C. App. 696, 699-700, 606 S.E.2d 430, 432-33 (2005) (internal quotations and citations omitted).

In the instant case, the details of defendant's statements to the DPD provide sufficient evidence to submit these charges to the jury. Defendant's statement indicated that he and Wilkerson drove together to the Hardee's parking lot, where they passed a Hispanic male and a white female. The two men then turned around and Wilkerson exited the truck and spoke to Manuel and Ms. Dolores. Defendant removed a silver revolver from inside of a boxing glove that was in the truck, approached the victims and raised the revolver. Wilkerson took the revolver and demanded money from the victims. Defendant and Wilkerson then took two cell phones and a wallet, returned to Wilkerson's truck and fled. The revolver was later recovered from a boxing glove in Wilkerson's truck, and Manuel's cell phone was later recovered from defendant's apartment. This evidence, taken in the light most favorable to the State, is sufficient for

a jury to infer that defendant and Wilkerson conspired to commit and did actually commit the offense of robbery with a dangerous weapon. Therefore, the trial court properly submitted the charges of conspiracy to commit robbery and robbery with a dangerous weapon to the jury. This assignment of error is overruled.

V. Sentencing

[5] Defendant argues that the trial court erred by sentencing defendant for both robbery and possession of stolen property, in violation of his constitutional double jeopardy right. We agree.

Defendant did not object to his sentencing at trial. However, N.C. Gen. Stat. § 15A-1446(d)(18) provides:

> Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division . . . (18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

N.C. Gen. Stat. § 15A-1446(d)(18) (2009). Therefore, we address the merits of defendant's argument.

"The intent of the Legislature controls the interpretation of a statute." *State v. Perry*, 305 N.C. 225, 235, 287 S.E.2d 810, 816 (1982).

> [O]ur case law favors the imposition of a single punishment unless otherwise clearly provided by statute. In construing a criminal statute, the presumption is against multiple punishments in the absence of a contrary legislative intent. The rule of lenity forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention.

State v. Garris, 191 N.C. App. 276, 284, 663 S.E.2d 340, 347 (2008) (internal quotations and citations omitted).

Defendant relies upon *Perry* and its progeny for the proposition that imposing a sentence for both robbery and possession of property taken during the commission of the robbery violates double jeopardy principles. While defendant misstates the basis of the holding in *Perry*, he is correct that the reasoning in *Perry* is applicable to the instant case.

In *Perry*, our Supreme Court determined that larceny and the possession of stolen goods were separate and distinct crimes because "[e]ach crime 'requires proof of an additional fact which the other does not.' " 305 N.C. at 234, 287 S.E.2d at 815 (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 184, 76 L. Ed. 306, 309 (1932)). As a result, the Court held that prosecuting a defendant for both offenses did not violate the constitutional protections against double jeopardy. *Id.* at 233-34, 287 S.E.2d at 815-16.

However, the *Perry* Court then analyzed the legislative intent of the recently enacted possession of stolen goods statute, N.C. Gen. Stat. § 14-71.1, to determine whether the Legislature intended to punish a defendant for both the common law offense of larceny and the statutory offense of possession of stolen goods obtained from that same larceny. *Id.* at 234-35, 287 S.E.2d at 815-16. The Court explained the impetus for the possession of stolen goods statute as follows:

> Prior to the enactment of our statutes creating the statutory offense of possession of stolen property, the mere possession of such property was not a crime. Then, as now, upon evidence *only* that an individual was found to be in possession of stolen property, if the State could not prove possession so recent after the larceny as to raise the presumption that that individual stole it, he could not be convicted of larceny. If the State could not prove that someone else stole it, he likewise could not be convicted of receiving stolen property as our Court decisions had established that recent possession did not permit a presumption of receiving. In that situation, many individuals found in possession of stolen property, including known dealers in such goods, were going unprosecuted. We believe it was with this background in mind that the Legislature enacted our possession statutes.

Id. at 235, 287 S.E.2d at 816. As a result, the *Perry* Court concluded that,

> having determined that the crimes of larceny, receiving, and possession of stolen property are separate and distinct offenses, but having concluded that the Legislature did not intend to punish an individual for receiving or possession of the same goods that he stole, we hold that, though a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses.

Id. at 236-37, 287 S.E.2d at 817.

In the nearly thirty years since *Perry* was decided, the Legislature has made no substantive changes to N.C. Gen. Stat. § 14-71.1 that would indicate its disfavor with the *Perry* Court's interpretation of that statute. As a result, we find the statutory interpretation in *Perry* instructive in the instant case, as "[l]arceny is a lesser included offense of armed robbery." *State v. Beamer*, 339 N.C. 477, 485, 451 S.E.2d 190, 194 (1994). As stated in *Perry*, the Legislature created the statutory offense of possession of stolen goods as a substitute for the common law offense of larceny in those situations in which the State could not provide sufficient evidence that the defendant stole the property at issue. *Perry*, 305 N.C. at 235, 287 S.E.2d at 816. Considering this enactment background, we conclude that the Legislature also did not intend to subject a defendant to multiple punishments for both robbery and the possession of stolen goods that were the proceeds of the same robbery. Thus, it was improper for the trial court to sentence defendant to separate and consecutive punishments for these two offenses, and we arrest judgment on defendant's conviction for felony possession of stolen goods.

VI. Conclusion

Defendant has failed to bring forth any argument regarding his remaining assignments of error. As such, we deem these assignments of error abandoned pursuant to N.C.R. App. P. 28(b)(6) (2008). Defendant received a fair trial, free from error. However, defendant was improperly sentenced for both robbery with a dangerous weapon and possession of stolen goods; consequently, we vacate defendant's judgment for felony possession of stolen goods.

No error at trial; judgment vacated in part.

Judges WYNN and STEELMAN concur.

IN THE MATTER OF THE ESTATE OF FRANCES FAISON JOHNSON, DECEASED

No. COA09-993

(Filed 20 July 2010)

1. Discovery— sanctions—allegations in caveat deemed to be true—prior will admitted to probate

The trial court did not abuse its discretion by ordering as a discovery sanction that the matters in a verified caveat were deemed to be true, annulling the probate of a subsequent will, and ordering that the prior will and codicil be admitted to probate.

2. Discovery— caveat proceedings—sanctions

The Court of Appeals rejected the argument of a propounder that a caveat proceeding must be allowed to go to a jury if a party alleges an issue of fact and refuses to support his allegations in discovery responses. The Court also rejected the argument that sanctions under N.C.G.S. § 1A-1, Rule 37 should only be applicable to a caveator.

3. Appeal and Error— notice of appeal—required

Discovery sanctions against three propounders of a will for the failure of one to comply with an order were upheld where the other two propounders did not give notice of appeal.

Appeal by propounder from an order entered on or about 11 February 2009 by Judge W. Allen Cobb, Jr. in Superior Court, Sampson County. Heard in the Court of Appeals 3 December 2009.

Ward and Smith, P.A., by Jenna Fruechtenicht Butler, for caveator-appellee.

Everett & Everett, Attorneys at Law, by Lewis M. "Luke" Everett, for propounder-appellant.

STROUD, Judge.

Propounder appeals from a trial court's order imposing discovery sanctions pursuant to Rule 37. For the following reasons, we affirm.

I. Background

On 30 September 2007, Frances Faison Johnson ("decedent"), a resident of Sampson County died, survived by her two children Mary Lily Johnson Nuckolls ("caveator") and Jefferson Deems Johnson, III

("propounder Jefferson") On 23 August 1991, decedent executed a "Last Will and Testament[.]" On or about 17 November 1994, decedent executed a handwritten codicil to this will. On or about 4 October 2007, propounder Jefferson presented to the Clerk of Superior Court, Sampson County a handwritten document dated 19 December 2003, ("2003 document") which propounder Jefferson alleged was the last will and testament of decedent. On 30 January 2008, caveator filed a verified caveat contesting the validity of the 2003 document on the grounds that decedent lacked capacity at the time the 2003 document was written, and that propounder Jefferson procured the 2003 document by undue influence, duress, and fraud. On 11 February 2008, Jefferson Johnson and his daughters, Ellen B. Johnson and Susan Johnson Fordham (referred to collectively as "propounders"), filed with the trial court an "Election to be Propounder." On 10 March 2008, propounders filed their response to the verified caveat and amended that response on 2 April 2008.

On or about 9 April 2008, caveator served her first set of interrogatories and requests for production of documents on propounder Jefferson. On or about 14 April 2008, caveator served her second set of interrogatories and requests for production of documents on propounder Jefferson. On 9 July 2009, propounder's trial counsel filed a motion to withdraw as counsel for propounders and for payment of attorney's fees. On 7 August 2008, the trial court entered two orders. The first order allowed propounders' trial counsel to withdraw and provided for payment of his attorney fees "upon completion of the trial[.]" The second order stayed discovery for three weeks, from 4 August 2008 until 25 August 2008, to allow for propounders to "retain new counsel as they deem fit" and required that by 26 August 2008 each party should make available to the other party "copies of documents properly responsive to the Requests for Production of documents served on each party by the other." The trial court also ordered that "all counsel shall cooperate in an expeditious resumption of discovery."

On 19 August 2008, propounder Jefferson, acting *pro se*, filed a handwritten "Notice of Appeal with Exceptions and Statement of Facts and Reasons on Petition for Writ of Certiorari" with the Sampson County, Clerk of Superior Court. On or about 2 December 2008, caveator filed a motion to dismiss propounder Jefferson's appeal, compel discovery, and for sanctions. On 9 December 2008, propounder Jefferson filed his responses to caveator's first and second sets of interrogatories and requests for production of docu-

ments. On 23 December 2008, the trial court entered an order dismissing propounder Jefferson's "Notice of Appeal" and granting caveator's motion to compel. The trial court noted in its order that, "[a]lthough Propounder responded to Caveator's discovery, Propounder's Responses were not timely and included numerous objections[,]" and "[c]aveator provided documents in accordance with the Court's August 2008 Order [but] Propounder did not provide documents in accordance with the Court's August 2008 Order[.]" The trial court ordered propounder Jefferson to "provide full and complete answers and responses to Caveator's First and Second Discovery, without objection, on or before January 15, 2009[,]" and for him to "make available for inspection all documents responsive to Caveator's First and Second Discovery." The trial court ordered that "[f]ailure to make such production shall subject Propounder to a $2,500.00 fine and Caveator also may seek other appropriate relief." The trial court denied caveator's motion for sanctions.

On 30 December 2008, acting *pro se*, propounder Jefferson filed another handwritten "Notice of Appeal and Stay Request" with the Sampson County Clerk of Superior Court. On or about 21 January 2009, caveator filed a second motion for sanctions requesting, *inter alia*, that the trial court (1) set aside, annul, and adjudicate the 2003 document "not to be the Last Will and Testament of the Decedent;" (2) deem the facts set forth in caveator's verified caveat to be "established for the purposes of the action;" (3) subject propounder Jefferson to a $2,500.00 fine as required by the court's 23 December 2008 order; and (4) award caveator her costs and legal fees associated with the violated orders. On 5 February 2009, propounder Jefferson, acting *pro se*, filed a petition for writ of supersedeas with this Court, which included a motion for temporary stay. This Court denied propounder Jefferson's motion for temporary stay on 9 February 2009 and denied his petition for writ of supersedeas on 19 February 2009. By order dated 12 February 2008, the trial court granted caveator's second motion for sanctions. The trial court noted that "[p]ropounder has had numerous opportunities to properly respond to Caveator's First and Second Discovery, to produce responsive documents, and to comply with the Court's August 11, 2008 and December 23, 2008 Orders" but "has exhibited continued recalcitrance and repeated disobedience of the Orders of this Court." After considering lesser sanctions, the trial court ordered that "[t]he matters asserted in the Verified Caveat are accepted as true and shall be taken to be established for purposes of this action[;]" annulled the probate of the 2003 document dated 19 December 2003; adjudged it "not to be the Last

Will and Testament of the Decedent[;]" and ordered the clerk of court to accept for probate "the Last Will and Testament of the Decedent dated August 23, 1991, as modified by the codicil dated November 17, 1994." The trial court also ordered propounder Jefferson to pay caveator $2,500.00 in accordance with the Court's 23 December 2008 Order[,]" and awarded caveator $4,500.00 in attorney's fees. On 13 February 2009, propounder Jefferson filed notice of appeal to this Court. Propounders Ellen B. Johnson and Susan Johnson Fordham did not appeal.

II. Rule 37 Sanctions and Caveat Proceedings

Propounder Jefferson challenges the trial court's order imposing sanctions pursuant to Rule 37. Rule 37(b)(2) of the North Carolina Rules of Civil Procedure provides that, "if a party . . . fails to obey an order to provide or permit discovery[,]" a trial court is permitted to enter a default judgment against the disobedient party, strike pleadings or parts of pleadings, and require the disobedient party to pay reasonable expenses, including attorney's fees caused by the disobedient party's failure to comply with the order. N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2007). "[B]efore dismissing a party's claim with prejudice pursuant to Rule 37, the trial court must consider less severe sanctions." *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 507 (1995) (citation omitted). "Sanctions under Rule 37 are within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of that discretion." *Id.* at 177, 464 S.E.2d at 505 (citation omitted).

[1] Propounder Jefferson first argues that the trial court erred in imposing sanctions pursuant to Rule 37, as the factual question of *devisavit vel non* remained at issue in this caveat proceeding and this factual issue should have been decided by a jury, not by the trial court's Rule 37 sanction which resulted in a default judgment. Propounder Jefferson also contends that "Rule 37 sanctions may not be used to determine the validity of a will, as caveat proceedings are *in rem* and must be treated accordingly." Propounder Jefferson argues that "[a] caveat proceeding is unique in nature as it is not a civil action, but is a special proceeding *in rem*" and is treated "differently under the North Carolina Rules of Civil Procedure."

In *In re Vestal*, 104 N.C. App. 739, 745-46, 411 S.E.2d 167, 170-71 (1991), *disc. review denied*, 331 N.C. 117, 414 S.E.2d 767 (1992), this Court addressed the issue of whether Rule 37 sanctions that struck the pleadings and dismissed the action with prejudice were appropri-

ate in a caveat proceeding. In *Vestal*, the caveators filed a caveat contending that the paper writing submitted by the propounder was not the decedent's last will and testament. *Id.* at 740, 411 S.E.2d at 168. The propounder subsequently filed an answer and a request for interrogatories. *Id.* After waiting over a year for the caveators to answer the interrogatories, the propounder filed a motion to compel. *Id.* The trial court granted the propounder's motion to compel and ordered the caveators to answer the propounder's interrogatories within two weeks. *Id.* Because the caveators had not responded within two weeks as ordered, the propounder filed a second motion to compel. *Id.* The trial court granted the propounder's motion, concluding that the caveators had "wilfully and blatantly ignored and refused to comply" with the trial court's order and pursuant to N.C. Gen. Stat. § 1A-1, Rule 37, "struck the caveators' pleadings and dismissed the proceeding with prejudice." *Id.* On appeal, the caveators, relying on *In re Redding*, 216 N.C. 497, 498, 5 S.E.2d 544, 545 (1939), argued that (1) "the trial court lack[ed] the authority to dismiss a caveat proceeding with prejudice as a sanction pursuant to Rule 37 for violation of an order compelling discovery[;]" (2) "[t]he proceedings to caveat a will are *in rem* without regard to particular persons, and must proceed to judgment, and motions as of nonsuit, or requests for direction of a verdict on the issues, will be disallowed[;]" and (3) "[o]nce a will has been propounded for probate in solemn form, the proceedings must continue until the issue of *devisavit vel non* is appropriately answered, and no nonsuit can be taken either by the propounders or caveators." *Id.* at 745, 411 S.E.2d at 170-71. In affirming the trial court's sanctions, this Court expressly rejected these arguments. *Id.* at 745, 411 S.E.2d at 171. In addressing whether a trial court can summarily adjudicate a caveat proceeding, this Court stated that "[t]he caveator's reading of *Redding* is overbroad and overlooks cases allowing dismissal such as *In re Mucci*, 287 N.C. 26, 213 S.E.2d 207 (1975) [(affirming the trial court's grant of a motion for entry of a directed verdict)] and *In re Edgerton*, 29 N.C. App. 60, 223 S.E.2d 524, *disc. rev. denied*, 290 N.C. 308, 225 S.E.2d 832 (1976) [(affirming the trial court's grant of summary judgment)]." *Id.* Further, this Court noted that "the caveator's argument overlooks the express power of a trial court to enforce its order compelling discovery by dismissal" as Rule 37(b)(2) "provides that upon a party's failure to comply with the court's order, 'the judge may make such orders in respect to the failure to answer as are just[,]' " including an order dismissing the action, and "we may not overturn the court's decision unless an abuse of that discretion is shown." *Id.* at 745-46, 411 S.E.2d

at 171. (citation omitted). "After careful review of the record," this Court found "no abuse of discretion." *Id.* at 746, 411 S.E.2d at 171.

As propounder Jefferson raises the same issues as the caveators in *Vestal*, we hold that *Vestal* is controlling. Here, on 7 August 2008 and again on 23 December 2008, propounder Jefferson was ordered by the trial court to produce answers to caveator's requests for discovery. By its 12 February 2009 order, the trial court found that "[p]ropounder has had numerous opportunities to properly respond to Caveator's First and Second Discovery, to produce responsive documents, and to comply with the Court's August 11, 2008 and December 23, 2008 Orders[,]" but had "exhibited continued recalcitrance and repeated disobedience of the Orders of this Court." Before entry of a default judgment as a sanction, the trial court considered lesser sanctions, *Hursey*, 121 N.C. App. at 179, 464 S.E.2d at 507, but "conclude[d] that less drastic sanctions than those ordered below will not suffice nor are they appropriate under the facts of this case." We note that propounder Jefferson makes no argument claiming that the trial court abused its discretion in its selection of sanctions. After careful review of the record, we find no abuse of discretion. Accordingly, the trial court did not err in ordering as a sanction that the matters alleged in the verified caveat were deemed to be true and established; annuling the probate of the 2003 document submitted by propounder Jefferson and adjudicating it not to be the last will and testament of the decedent; and ordering that the clerk of court admit to probate "the Last Will and Testament of the Decedent dated August 23, 1991, as modified by the codicil dated November 17, 1994." *See Harrison v. Harrison*, 180 N.C. App. 452, 456-57, 637 S.E.2d 284, 288 (2006) (reaffirming the rule that the trial court has power to sanction parties for failure to comply with discovery orders and that dismissal of defenses or counterclaims is an appropriate sanction within the province of the trial court); *Atlantic Veneer Corp. v. Robbins*, 133 N.C. App. 594, 598-99, 516 S.E.2d 169, 172-73 (1999) (holding that the trial court did not abuse its discretion in striking the defendant's answer and entering default judgment as a sanction for failing to comply with the trial court's orders to make discovery).

[2] Propounder Jefferson, in an attempt to distinguish *Vestal*, argues that *Vestal* relied on *In re Mucci*, 287 N.C. 26, 213 S.E.2d 207 (1975), where the trial court issued a directed verdict because there were no outstanding factual issues and thus no question of *devisavit vel non.* Thus, summary adjudication, such as entry of default judgment, is available only if there are no issues of fact. Propounder Jefferson

concludes that, since there were still disputed factual issues in this case, the trial court's application of Rule 37, which summarily adjudicated this proceeding, was in error. In addition to citing *Mucci*, propounder Jefferson also cites to *In re Jarvis*, 107 N.C. App. 34, 418 S.E.2d 520 (1992), *aff'd in part*, *reversed in part*, 334 N.C. 140, 430 S.E.2d 922 (1993), and *In re Smith*, 159 N.C. App. 651, 583 S.E.2d 615 (2003) in further support of his argument. None of the cases cited by propounder Jefferson address the application of Rule 37 sanctions in a caveat proceeding when a party had repeatedly ignored a trial court's order to comply with discovery; they merely reaffirm the rule in *Mucci* that summary adjudication is available for caveat proceedings. 287 N.C. at 36, 213 S.E.2d at 214. We also note that even though propounder Jefferson argues that summary adjudication was in error because the issue of *devisavit vel non* was unresolved, the record clearly reflects that it was propounder Jefferson's repeated disobedience of the trial court's orders to comply with discovery that prevented the investigation and development of those issues. In essence, propounder Jefferson argues that, as long as a party in a caveat proceeding alleges an issue of fact in his pleadings but refuses to support his allegations by discovery responses, even to the extent of disobedience of a court order, the caveat proceeding must be allowed to go to a jury on those factual issues. This result would clearly contravene our rules of discovery. As stated in *Vestal*, propounder Jefferson's argument "overlooks the express power of a trial court to enforce its order compelling discovery by dismissal[,]" *Vestal*, 104 N.C. App. at 745, 411 S.E.2d at 171, pursuant to Rule 37(b)(2); *see Green v. Maness*, 69 N.C. App. 292, 299, 316 S.E.2d 917, 922 (noting that "[o]ur courts and the federal courts have held consistently that the purpose and intent of [the discovery rules] is to prevent a party who has discoverable information from making evasive, incomplete, or untimely responses to requests for discovery[,]" and "the trial court has express authority under G.S. 1A-1, Rule 37, to impose sanctions on a party who balks at discovery requests"), *disc. review denied*, 312 N.C. 622, 323 S.E.2d 922 (1984). Therefore, we are not persuaded by propounder Jefferson's attempt to circumvent our discovery rules. Propounder Jefferson next contends that "*In Re Vestal* should be overruled[.]" Propounder Jefferson argues that *Vestal* "does not distinguish between caveat proceedings in which all questions of fact have been settled and those in which the issue of *devisavit vel non* remains unanswered." Propounder Jefferson further contends that "[t]he failure to draw such a distinction renders *Vestal* exceedingly broad, and its logic completely swallows a 'body of very well settled

law.' " In the alternative, propounder Jefferson argues that "*In Re Vestal* is distinguishable from [this] claim as it deals with a case of sanctions against a caveator as opposed to a propounder."

Our Supreme Court has held that, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Therefore, the opinion in *Vestal* is binding on this Court. As to propounder Jefferson's argument in the alternative, he cites no case in support of his contention that Rule 37 sanctions should only be applicable to a caveator, as opposed to a propounder and nothing in *Vestal* indicates any distinction should be drawn between sanctions against caveators or against propounders. In fact, N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) states that sanctions may be imposed against any party who "fails to obey an order to provide or permit discovery[.]" As the Court in *Vestal* issued Rule 37(b)(2) discovery sanctions against the caveator for "wilfully and blatantly ignor[ing] and refus[ing] to comply" with the trial court's order, 104 N.C. App. at 740, 411 S.E.2d at 167, the trial court here could also issue discovery sanctions pursuant to Rule 37(b)(2) for propounder Jefferson's "continued recalcitrance and repeated disobedience of the Orders of [the] Court." Therefore, propounder Jefferson's arguments are overruled.

[3] Finally propounder Jefferson, citing *Baker v. Rosner*, ___ N.C. App. ___, 677 S.E.2d 887 (2009), argues that "it is unjust to sanction three propounders for a single propounder's failure to comply with a discovery order." Propounder Jefferson argues that sanctions against the other propounders in this case, Ellen Johnson and Susan Fordham, were not "just" because the sanctions that dismissed the whole case were levied against propounder Jefferson only, but the effect of those sanctions was to dismiss the claims of these other propounders who had never been found to be in violation of a discovery order. In *Baker*, the trial court ordered that all four defendants' answers be stricken and entered default judgment as a sanction pursuant to Rule 37 for failure to comply with the trial court's order. *Id.* at ___, 677 S.E.2d at 889. This Court reversed the Rule 37 sanctions against one of the individual defendants as that individual defendant was not in violation of the trial court's order. *Id.* at ___, 677 S.E.2d at 890. The individual defendant in *Baker* was a party to the appeal. *Id.* at ___, 677 S.E.2d at 888. Contrary to *Baker*, propounders Ellen

Johnson and Susan Fordham are not parties to this appeal. The record does not contain any notice of appeal for either Ellen Johnson or Susan Fordham from the trial court's 12 February 2009 order granting caveator's second motion for sanctions, even though the record shows that Ellen Johnson and Susan Fordham were given notice by caveator of all the hearings related to this caveat. In contrast to propounder Jefferson's current argument, in his *pro se* "Notice of Appeal with Exceptions and Statement of Facts and Reasons on Petition for Writ of Certiorari[,]" he states that his

> two daughters [propounders Ellen Johnson and Susan Fordham] are technically 'propounders' having been aligned as such of record herein by [their former attorney] at the outset of this proceeding. They are mere passive parties to it since I, not they, are the real party-propounder in interest. They take nothing, under the Will and did not even need to be made parties-propounder . . . . There is no need to have my daughters available for his or Mr. Jones' depositions . . . .

Our Supreme Court has stated that "[a]ppellate courts do not generally vindicate the rights of parties aggrieved at trial who could appeal but choose not to do so." *Henderson v. Matthews*, 290 N.C. 87, 89, 224 S.E.2d 612, 614 (1976) (holding that the "plaintiffs, by failing to appeal, are bound by the judgments against them and in favor of defendant . . . although there might have been error in the trial leading to these judgments"). As propounders Ellen Johnson and Susan Fordham did not file a notice of appeal, the 12 February 2008 order granting caveator's second motion for sanctions is a final judgment against those parties. Therefore, we are not persuaded by propounder Jefferson's argument.

III. Conclusion

As the trial court did not abuse its discretion in imposing sanctions pursuant to Rule 37, we affirm the trial court's order.

AFFIRMED.

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

STATE OF NORTH CAROLINA v. LO-REN ROBERT ELLIS

No. COA09-869

(Filed 20 July 2010)

1. Appeal and Error— preservation of issues—constitutional arguments not raised at trial

Defendant in a robbery with a dangerous weapon case did not preserve for appellate review his argument that the trial court violated his constitutional rights by denying his motion to continue. Defendant failed to raise at trial the arguments that he was denied due process and effective assistance of counsel by the trial court's denial.

2. Continuances— discovery violations—no abuse of discretion

The trial court in a robbery with a dangerous weapon case did not abuse its discretion by denying defendant's motion to continue based on grounds that the State failed to comply with discovery statutes by not providing defendant with notice of a witness's identification of defendant. The trial court's ruling was not so arbitrary that it could not have been the result of a reasoned decision. Furthermore, based upon abundant other admissible evidence of defendant's identity as the robber, defendant was unable to show that he was prejudiced by the admission of the witness's in-court identification.

3. Discovery— notice of new evidence—motion for mistrial denied—no abuse of discretion

The trial court in a robbery with a dangerous weapon case did not abuse its discretion in denying defendant's motion for a mistrial based on grounds that the State failed to comply with discovery statutes by not providing defendant with notice of a witness's identification of defendant. The State offered abundant other admissible evidence of defendant's identity as the robber and defendant was unable to show that he was prejudiced by the admission of the witness's identification.

4. Identification of Defendants— in-court identification—motion to strike—argument waived

Defendant waived his argument in a robbery with a dangerous weapon case that the trial court erred in denying his motion to strike a witness's in-court identification of defendant as the

robber. Defendant failed to make a motion to strike the in-court identification during the witness's testimony.

Appeal by defendant from judgment entered 7 January 2009 by Judge D. Jack Hooks, Jr. in Moore County Superior Court. Heard in the Court of Appeals 9 December 2009.

Attorney General Roy Cooper, by Assistant Attorney General Kimberley A. D'Arruda, for the State.

Paul F. Herzog for the defendant-appellant.

STEELMAN, Judge.

Constitutional issues, which are not raised and ruled upon at trial, will not be considered for the first time on appeal. Thus, defendant has not preserved the issue of whether the denial of his motion to continue violated his constitutional rights. The trial court did not abuse its discretion in denying defendant's motion to continue the trial of the case. Defendant is unable to show that he was substantially and irreparably prejudiced by the admission of Walls' in-court identification; thus, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. When a defendant seeks to challenge an in-court identification, a motion to strike must be made when the answer is given or the motion to strike will be deemed untimely.

I. Factual and Procedural Background

On 22 March 2006, Kristin Walls (Walls) was working as a cashier at Foxfire General Store (Store) in Moore County, North Carolina. At about ten minutes before 8:00 p.m., a young, African-American male (the "robber") entered the Store, pointed a gun, and asked for money. Walls had previously taken the money out of the cash register so she pointed in the direction of the office. The robber pushed Walls toward the office while pointing the gun at her head. Walls handed him a wooden box, which contained coin rolls and a gray metal box, which contained currency. The robber told Walls to open the back door. She unlocked the door, and the robber left. Walls locked the door and called 911. The entire incident lasted about five minutes.

When the police arrived, Walls described the robber as wearing a gray and black camouflage bandanna over his mouth, a black knit cap, a black shirt, and baggy blue jeans. She further advised that the robber had a silver pistol. He was approximately six feet tall. On 23

March 2006, Walls gave police a written statement, in which she reiterated her description of the robber but added that he was "soft spoken" and "skinny."

On 26 March 2006, William Talley found the stolen metal cash box near Foxfire and Tie Roads, and returned it to the Store. The metal box was still locked and contained $72.00. Police searched the area but found nothing further. On 27 March 2006, police conducted another search of the area with the Store owners. They found the wooden box, a black knit cap, a gray and black camouflage bandanna, and a pink lighter. On 29 March 2006, all the items were sent to the State Bureau of Investigations (SBI) Lab for analysis.

On 6 April 2006, Walls met with Chief of Police for Foxfire Village, Michael Campbell (Chief Campbell), and helped him develop a composite sketch of the robber. Approximately one year later, Chief Campbell received a letter from the SBI Lab, stating "there was a possible match of DNA that had been located on the black knit cap." In July 2007, a search warrant was served on Lo-Ren Robert Ellis (defendant) to obtain a DNA sample.

On 4 February 2008, defendant was indicted for robbery with a dangerous weapon. Defendant was tried before a jury at the 5 January 2009 Criminal Session of Moore County Superior Court.

On the morning of trial, Walls saw defendant enter the courtroom and informed the prosecutor that she recognized defendant as the robber. Walls testified that the Store was very well-lit, and she had no difficulty seeing the person who robbed the Store. She further testified that she saw the same person in the courtroom. Defendant objected, and the trial court conducted a *voir dire* hearing. Defendant argued that the identification was suggestive, subjective, and prejudicial. The trial court overruled defendant's objection. Walls then identified defendant as the robber before the jury.

Following a lunch recess, defendant made a motion to continue the trial of the case in order to obtain an expert witness on identification. The trial court denied the motion.

Special SBI Agent Michelle Hannon (Agent Hannon), who performs DNA analysis at the SBI Lab, testified that the predominant DNA profile obtained from the black nylon cap matched the DNA profile of defendant. Agent Hannon testified that defendant's DNA was compared with SBI's population database, which consists of approximately one thousand North Carolina residents who have classified

themselves as being either Caucasian, African-American, Lumbee Indian, or Hispanic. The purpose of the database is to determine how common or rare a genetic profile is "in the population or the likelihood of finding somebody else with that genetic profile." The purpose is not to prove guilt or innocence, but it "gives a statistical weight to the evidence at hand."

Agent Hannon testified that the DNA obtained from the black nylon cap was 3.29 thousand trillion times more likely to be that of defendant than an unrelated Caucasian individual; 16.6 thousand trillion times more likely to be that of defendant than an unrelated African-American individual; 1.01 thousand trillion times more likely to be that of defendant than an unrelated Lumbee Indian individual; and 82.6 thousand trillion times more likely to be that of defendant than an unrelated Hispanic individual. Agent Hannon further testified that defendant's DNA could be excluded as a contributor to the DNA obtained from the bandanna.

At the close of the State's evidence, defendant made a motion for a mistrial and moved to strike Walls' in-court identification of defendant as the robber. The trial court denied both motions. The jury found defendant guilty as charged. The trial court found defendant to be a prior record level IV for felony sentencing purposes and sentenced defendant to an active prison term of 117 to 150 months.

Defendant appeals.

II. Motion to Continue

[1] In his first argument, defendant contends that the trial court erred by denying his motion to continue the trial of the case. Defendant argues that he was denied due process and effective assistance of counsel, and that the State violated discovery statutes. We disagree.

A. Standard of Review

This Court reviews a trial court's denial of a motion to continue for abuse of discretion. *State v. Russell*, 188 N.C. App. 625, 627, 655 S.E.2d 887, 889 (2008). A trial court abuses its discretion when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision. *State v. Moore*, 152 N.C. App. 156, 161, 566 S.E.2d 713, 716 (2002) (citations and quotations omitted).

B. Constitutional Violations

We first address whether defendant properly preserved this issue for appellate review. Defendant argued at trial that the State had not

given him notice that Walls would be able to identify defendant as the robber, and he asked for a continuance to obtain an expert witness on identification.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (2010). Constitutional issues, which are not raised and ruled upon at trial, will not be considered for the first time on appeal. *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). In *State v. Sharpe*, our Supreme Court recognized "that where a 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 in the [reviewing court].' " 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

In support of his motion to continue, defense counsel stated:

> And Ms. Walls told the district attorney's office that she would be able to identify whoever it was and the fact that we had never gotten notice that she had made that statement, we would ask for a continuance in order to obtain an expert on cross racial identification, identification under stress, et cetera.

Defense counsel further referred to an objection, which he had previously made during an in-chambers conference. The trial court clarified for the record that the in-chambers conference concerned whether Walls had previously identified defendant in any photographs or line-ups. The trial court then ruled that the "motion to continue for the purpose of seeking experts is denied."

Defendant's argument to the trial court was limited to the issue of obtaining an expert witness on identification. Nowhere in his motion to continue did defendant contend that his constitutional rights were violated or implicated. Pursuant to our Rules of Appellate Procedure, defendant has not preserved the issue of whether the denial of his motion to continue violated his constitutional rights.

This argument is dismissed.

C. Discovery Violations

[2] Defendant next argues that the trial court erred by denying his motion to continue on the grounds that the State failed to comply

with N.C. Gen. Stat. §§ 15-903 and 15-907 by not providing defense counsel with notice of new evidence.

Defendant's rights to discovery are statutory. Constitutional rights are not implicated in determining whether the State complied with these discovery statutes. "There is no general constitutional or common law right to discovery in criminal cases." *State v. Haselden*, 357 N.C. 1, 12, 577 S.E.2d 594, 602 (citations omitted), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003). Discovery in a criminal case is governed by Chapter 15A, Article 48 of the North Carolina General Statutes. "[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990) (citations omitted), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991). "[O]nce a party, or the State has provided discovery there is a continuing duty to provide discovery and disclosure." *State v. Blankenship*, 178 N.C. App. 351, 354, 631 S.E.2d 208, 210 (2006) (citing N.C. Gen. Stat. § 15A-907).

In the instant case, defendant requested voluntary discovery pursuant to N.C. Gen. Stat. § 15A-903. The State provided voluntary discovery and filed a Discovery Disclosure Certificate. Defendant acknowledges that the State provided him with a copy of Walls' pretrial written statement. However, defendant argues that the State violated its continuing duty to disclose additional evidence because the prosecutor never informed defense counsel of Walls' statement on the morning of trial that she recognized defendant as the robber.

N.C. Gen. Stat. § 15A-910 governs the regulation of discovery in criminal cases and empowers a trial court to apply sanctions for noncompliance, including granting a continuance, upon a party's failure to comply with this Article. *State v. Hodge*, 118 N.C. App. 655, 657, 456 S.E.2d 855, 856 (1995) (citing N.C. Gen. Stat. § 15A-910). "Although the court has the authority to impose such discovery violation sanctions, it is not required to do so." *Id.*, 456 S.E.2d at 856-57. (citations omitted). " 'The sanction for failure to make discovery when required is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion.' " *Id.*, 456 S.E.2d at 857 (quoting *State v. Herring*, 322 N.C. 733, 747-48, 370 S.E.2d 363, 372 (1988)). "N.C. Gen. Stat. § 15A-910 . . . does not require the trial court to make specific findings on the record that it considered sanctions before determining not to impose sanctions." *State v. Jones*, 151 N.C. App. 317, 325, 566 S.E.2d 112, 117 (2002), *appeal dismissed and*

disc. review denied, 356 N.C. 687, 578 S.E.2d 320, *cert. denied*, 540 U.S. 842, 157 L. Ed. 2d 76 (2003).

In the instant case, the transcript demonstrates the trial court properly considered the circumstances surrounding Walls' in-court identification. After Walls testified that she saw the robber in the courtroom, the trial court conducted a *voir dire* hearing to determine the admissibility of Walls' in-court identification. When defendant later moved for a continuance, the trial court reiterated part of the in-chambers discussion:

> I asked whether there was anything in discovery that had addressed this issue other than what had been testified to, that she had not I.D.'d from any lineups or photographs, as I recall the discussion, and asked if there was anything further, and I think [the prosecutor] indicated that she told him this morning that she would be able to identify him.

The above statements indicate that the trial court did not make an arbitrary decision in denying defendant's motion to continue. The trial court inquired as to when the prosecutor learned that Walls would identify defendant and as to what discovery was given to defendant. The prosecutor only learned that Walls recognized defendant as the robber on the morning of trial. Defendant was provided with copies of Walls' pre-trial written statement and the composite sketch, which showed the robber's eyes and nose.

Based on the pre-trial written statement and the composite sketch, defendant could have anticipated that Walls would be able to identify him as the robber. Walls testified that her identification was based on her recollection of the robbery, and she had not seen defendant, or any pictures of defendant, since the night of the robbery. Walls further testified that the Store was very well-lit on the night of the robbery, and she was able to observe defendant for about five minutes. On the night of the robbery, she gave police a description of the robber and later gave the same description in her pre-trial written statement. There is no evidence that anyone improperly suggested to Walls that defendant was the robber. Walls testified, "I am one hundred percent positive that that is him, yes."

We also note that defendant had a full opportunity at trial to cross-examine Walls concerning her description of the robber. Defense counsel questioned Walls on the number of times the bandanna slipped, her state of fear during the robbery, her ability

to recognize the robber's face, and her desire to "get even." When defense counsel asked Walls if there were other African-American males in the courtroom that Walls could have confused defendant with, she responded:

> In the courtroom, no. There were probably—what, two or three dozen sitting outside before we came in. I knew none of them were him. I didn't know if he would be brought in afterwards; I didn't know if he would be waiting outside. I know without a doubt, as soon as I saw him sitting there, that that was the gentleman, though, yes.

Defense counsel further questioned Walls as to the accuracy of the composite sketch and whether she had any difficulty in identifying defendant as the robber. *See State v. Jaaber*, 176 N.C. App. 752, 627 S.E.2d 312 (2006) (holding the trial court did not abuse its discretion in denying defendant's request for discovery sanctions given that defendant was able to cross-examine the witnesses, and in light of other evidence presented by the State).

We cannot say that the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision. We hold that the trial court did not abuse its discretion in denying defendant's motion to continue the trial of the case.

Even in the absence of Walls' in-court identification of defendant, the State had abundant other admissible evidence of defendant's identity as the robber. The DNA evidence obtained from the black knit cap was an extremely high match to defendant's DNA. Agent Hannon testified that the DNA obtained from the cap was over a thousand trillion times more likely to be that of defendant than another individual. During her testimony, Walls again described the robber and testified without objection that his bandanna slipped down entirely so she "could see the entire face and he kept pulling it back up with one hand." The State also submitted Walls' pre-trial written statement describing the robber and the composite sketch of the robber's likeness. Chief Campbell testified that Walls "picked out the certain nose that she had remembered seeing," and the sketch showed "some type of bandanna . . . or covering over the *mouth* area." The composite sketch thus included both the robber's eyes and nose.

"A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been com-

mitted, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443 (2009); *see State v. Banks*, 322 N.C. 753, 762, 370 S.E.2d 398, 404 (1988). Based upon the abundant other admissible evidence of defendant's identity as the robber, defendant is unable to show that he was prejudiced by the admission of Walls' in-court identification, or that a different result would have occurred at trial absent Walls' in-court identification.

This argument is without merit.

III. Motion for Mistrial/Request to Strike Testimony

In his second argument, defendant contends that the trial court erred by denying his motion to declare a mistrial and to strike Walls' in-court identification of defendant as the robber. We disagree.

A. Motion for Mistrial

[3] Defendant moved for a mistrial at the close of the State's evidence. A trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2009). "Whether or not to declare a mistrial is a matter within the sound discretion of the trial court, and its ruling will not be disturbed on appeal absent a gross abuse of such discretion." *State v. Bidgood*, 144 N.C. App. 267, 273, 550 S.E.2d 198, 202 (2001) (citing *State v. Lyons*, 77 N.C. App. 565, 335 S.E.2d 532 (1985)), *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001).

Defendant argues that he "suffered substantial and irreparable prejudice" due "to the prosecutor's non-disclosure of critical new information." The basis of this argument is that the State violated statutory discovery rules, which is the same as the argument made by defendant in Section II(C), *supra*. In his brief, defendant incorporates the same arguments and authorities set forth in his previous argument. As noted previously in Section II(C)(2), *supra*, the State had abundant other admissible evidence of defendant's identity as the robber. Defendant is thus unable to show that he was substantially and irreparably prejudiced by the admission of Walls' in-court identification, or that a different result would have occurred at trial absent Walls' in-court identification. We hold that the trial court did not abuse its discretion in denying defendant's motion for mistrial.

This argument is without merit.

B. Motion to Strike

[4] "Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike appears of record." N.C. Gen. Stat. § 8C-1, Rule 103(a)(1) (2009). "Where the defendant seeks to challenge an in-court identification, a motion to strike an incompetent answer must be made when the answer is given." *State v. McCray*, 342 N.C. 123, 127, 463 S.E.2d 176, 179 (1995) (citations omitted). "A motion to strike will therefore be deemed untimely if the witness answers the question and the opposing party does not move to strike the response until after further questions are asked of the witness." *Id.* (citing *State v. Lewis*, 281 N.C. 564, 569, 189 S.E.2d 216, 219, *cert. denied*, 409 U.S. 1046, 34 L. Ed. 2d 498 (1972)).

In the instant case, defendant did not make a motion to strike the in-court identification during any portion of Walls' testimony. Defendant's motion to strike at the close of the State's evidence was untimely, and this argument is deemed waived. *Stimpson Hosiery Mills v. Pam Trading Corporation*, 98 N.C. App. 543, 550, 392 S.E.2d 128, 132, *disc. review denied*, 327 N.C. 144, 393 S.E.2d 909 (1990).

This argument is dismissed.

NO ERROR.

Judges McGEE and STEPHENS concur.

DA DAI MAI, Plaintiff v. CAROLINA HOLDINGS, INC. and R. GREGORY TOMCHIN, Substitute Trustee, Defendants

No. COA09-1685

(Filed 20 July 2010)

1. Constitutional Law— due process—municipal assessment foreclosure—notice

N.C.G.S. § 105-375 (pre-2006), which applied here to a municipal lien foreclosure, was not unconstitutional in its notice provisions. The statute requires notice by a registered or certified letter to lienholders well in advance of the execution sale and affords an opportunity to object to the sale. The fact that personal

service of notice of the date fixed for the sale was not required did not obviate the prior notice.

2. Liens— municipal assessment—execution sale—extinguishment of deed of trust—language in notice of sale

The trial court did not err by granting summary judgment for plaintiff in an action in which plaintiff sought a declaratory judgment that defendant's deed of trust had been extinguished by an execution sale. Notwithstanding language in the notice of sale, plaintiff took the property free and clear of defendant's lien. N.C.G.S. § 105-375.

3. Liens— municipal assessment and sale—free of other liens

The trial court did not err by granting summary judgment for plaintiff in a declaratory judgment action to determine whether an execution sale was free of defendant's lien. The uncontested facts show that the city sent defendant notice at least 30 days prior to docketing a judgment for tearing down the apartment building, then waited at least 3 months following the indexing of the judgment to execute a sale of the property. Issues concerning the caption of the underlying judgment and notice as well as the final price were not raised in the trial court and were not addressed.

Appeal by defendants from order entered 9 September 2009 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 June 2010.

Bradley Arant Boult Cummings, L.L.P., by Michael C. Griffin, for plaintiff-appellee.

John E. Hodge, Jr., for defendant-appellant Carolina Holdings, Inc.

BRYANT, Judge.

On 12 September 2008, plaintiff Da Dai Mai filed a complaint for declaratory judgment and injunctive relief against defendants Carolina Holdings, Inc., and R. Gregory Tomchin, substitute trustee, under a deed of trust granted in favor of Carolina Holdings. Plaintiff sought a declaration that the deed of trust had been extinguished and an injunction to prevent Carolina Holdings from foreclosing under the deed of trust. Carolina Holdings answered, denying plaintiff's claims and asserting various defenses and counterclaims. Both par-

ties moved for summary judgment. On 9 September 2009, the trial court denied Carolina Holdings' motion and granted summary judgment in favor of plaintiff. Carolina Holdings appeals. As discussed below, we affirm.

Facts

Carolina Holdings owned and managed Eastway Apartments ("the property"), an apartment complex in Charlotte. On 8 July 2002, Carolina Holdings conveyed the property to Lucky Seven, Inc., taking back a first lien purchase money deed of trust to secure a promissory note in the amount of $830,000.00. The purchase money deed of trust was recorded on 12 July 2002. On 30 July 2002, Lucky Seven conveyed the property to Li Cardwell, a relative of Lucky Seven's president, and on 31 March 2003, Li Cardwell conveyed the property to Anna Cardwell, a minor for whom Li Cardwell was custodian.

In 2004, the City of Charlotte began proceedings to demolish the apartments on the property. After the city condemned the property, Lucky Seven advised Carolina Holdings that it could not make note payments. Carolina Holdings gave Lucky Seven a delay on the payments. On 9 September 2004, Carolina Holdings sent the city a letter advising that it held a mortgage on the property and that Lucky Seven had agreed to turn the property over to Carolina Holdings if Lucky Seven could not find another new owner. Carolina Holdings advised that, if this occurred, Carolina Holdings would repair or demolish the property. By letter dated 17 September 2004, the city advised Carolina Holdings that its demolition order had been upheld by the Housing Appeals Board and that Anna Cardwell, the current owner, had had until 15 September 2004 to appeal to superior court.

On 7 January 2005, the city filed nine notices of lien for the net costs of removing or demolishing the apartments on the property, work which occurred between 20 December 2004 and 7 January 2005. On 5 July 2005, the city sent letters to the property owner and Carolina Holdings, as a lienholder of record, notifying them that if the liens were not paid within thirty days, the city would docket a judgment against the property. The city also published notice of intent to docket judgment in a local paper during July 2005. On 8 August 2005, the city filed a certificate of lien and judgment and execution issued upon the judgment for sale of the property. The notice of sale specified that it was offered to the highest bidder subject to any mortgages, liens, or taxes owed. The notice of sale was published but was not served on Carolina Holdings. The city was the high bidder at the exe-

cution sale, but plaintiff Mai filed an upset bid and purchased the property, a sale confirmed on 7 February 2006. Mai conducted a title search and discovered Carolina Holdings' deed of trust. Mai recorded his deed to the property on 15 March 2006. Carolina Holdings discovered the sale of the property in March 2007 and contacted Mai. Carolina Holdings began foreclosure proceedings on 11 July 2008. In response, on 12 September 2008, Mai filed his complaint for declaratory judgment and injunctive relief in this case.

On appeal, Carolina Holdings makes three arguments: that the trial court erred in granting Mai's motion for summary judgment because (I) N.C. Gen. Stat. § 105-375 is unconstitutional in that in fails to provide due process to lienholders of record; (II) the property was conveyed subject to a recorded deed of trust lien; and (III) there were irregularities in the execution sale and the price paid was inadequate.

I

[1] Carolina Holdings first argues that the trial court erred in granting Mai's motion for summary judgment because N.C. Gen. Stat. § 105-375[1] violates the due process clauses of the United States and North Carolina Constitutions by providing insufficient notice of sale to lienholders of record. We disagree.

Summary judgment is proper when there is no genuine issue of material fact and any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009); *Hardy v. Moore County*, 133 N.C. App. 321, 323, 515 S.E.2d 84, 85 (1999). "[P]rior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide 'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795, 77 L. Ed. 2d 180, 185 (1983) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950)). We now turn to the relevant statutory procedures.

Our North Carolina General Statutes provide that a city may file a lien against real property for costs associated with its demolition of a dwelling on the property because the dwelling was "unfit for human habitation." N.C. Gen. Stat. § 160A-443(5)-(6) (2009). The lien should

---

1. N.C.G.S. § 105-375 was amended in 2006. The prior version of the statute applied to the instant case and is therefore cited and quoted herein.

"be filed, have the same priority, and be collected as the lien for special assessment[.]" N.C.G.S. § 160A-443(6)(a). "Assessment liens may be foreclosed under any procedure prescribed by law for the foreclosure of property tax liens." N.C. Gen. Stat. § 160A-233(c) (2009). The relevant tax lien foreclosure procedures are set forth below:

> [t]he tax collector filing the certificate [showing the name of the taxpayer for each parcel on which the taxing unit has a lien for unpaid taxes, together with the amount of taxes, penalties, interest, and costs that are a lien thereon; the year or years for which the taxes are due; and a description of the property] shall, at least 30 days prior to docketing the judgment, send a registered or certified letter, return receipt requested, to . . . all lienholders of record who have a lien against the listing taxpayer or against any subsequent owner of the property . . . *stating that the judgment will be docketed and the execution will be issued thereon in the manner provided by law.*

N.C. Gen. Stat. § 105-375(c) (2005) (emphasis added). Subsection (d) provides that

> [i]mmediately upon the docketing and indexing of a certificate . . . the taxes, penalties, interest, and costs shall constitute a valid judgment against the real property described therein[.]

N.C.G.S. § 105-375(d)[2]. In addition, subsection (f) provides that

> [a]t any time prior to the issuance of execution, any person having an interest in the real property to be foreclosed may appear before the clerk of superior court and move to set aside the judgment on the ground that the tax has been paid or that the tax lien on which the judgment is based is invalid.

N.C.G.S. § 105-375(f). Finally, subsection (i) provides that

> [a]t any time after three months and before two years from the indexing of the judgment . . . execution shall be issued at the request of the tax collector . . . [and] [i]n lieu of personal service of notice on the owner of the property, registered or certified mail notice shall be mailed to the listing owner at the listing owner's last known address at least 30 days prior to the day fixed for the sale. The notice must also be mailed to the current owner by reg-

---

2. General Statute § 7A-109 requires "that all documents received for docketing shall be immediately indexed either on a permanent or temporary index. The rules may prescribe any technological process deemed appropriate for the economical and efficient indexing, storage and retrieval of information." N.C. Gen. Stat. § 7A-109(c) (2009).

istered or certified mail if notice was required to be mailed to the current owner pursuant to subsection (c) of this section.

N.C.G.S. § 105-375(i), (i)(2) (2005).

We believe that the notice to lienholders of record required by § 105-375 is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mennonite*, 462 U.S. at 795, 77 L. Ed. 2d at 185 (citation and internal quotation marks omitted). First, § 105-375 requires mailing a letter to lienholders of record by registered or certified mail which states "that the judgment will be docketed and the execution will be issued thereon in the manner provided by law." N.C.G.S. § 105-375(c). Furthermore, the notice apprising them of a pending execution is sent well in advance of the execution sale: the letter shall be sent "at least 30 days prior to docketing the judgment[,]" N.C.G.S. § 105-375(c), and the execution sale shall not occur until at least three months following the indexing of the judgment. N.C.G.S. § 105-375(i). Second, § 105-375 affords lienholders of record an opportunity to present their objections. Following notice of the docketing of the judgment and before the issuance of the execution, § 105-375(f) provides that "any person having an interest in the real property . . . may appear before the clerk of superior court and move to set aside the judgment on the ground that the tax has been paid or that the tax lien on which the judgment is based is invalid." N.C.G.S. § 105-375(f). We therefore believe that § 105-375 comports with due process requirements.

Carolina Holdings relies on *Mennonite* for the proposition that § 105-375 deprives lienholders of record of their property without due process of law. This reliance is misplaced. In *Mennonite*, the United States Supreme Court invalidated an Indiana statute on due process grounds because the statute required only that the city publish notice and post notice in the county courthouse of a pending tax sale. The Court held that, by failing to require notice by mail or personal service of the sale to mortgagees of the property, the statute failed to require notice "reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 795, 77 L. Ed. 2d at 185.

As discussed above, unlike the Indiana statute at issue in *Mennonite*, N.C.G.S. § 105-375 requires notice by a registered or certified letter to lienholders of record well in advance of the execution

sale that the judgment will be docketed and that execution will be issued, and affords them an opportunity to object to the sale. The fact that subsection (i) does not require personal service of notice of the date fixed for the sale does not obviate the prior notice. Carolina Holdings received notice that its lien might be extinguished as required by subsection (c). *See* N.C.G.S. § 105-375 (c) ("The tax collector . . ., shall, at least 30 days prior to docketing the judgment, send a registered or certified letter, return receipt requested, to . . . *all lienholders of record*") (emphasis added). The notice sent alerted Carolina Holdings "that the judgment will be docketed and *the execution will be issued thereon in the manner provided by law*." N.C.G.S. § 105-375 (c) (emphasis added). Carolina Holdings received due process by way of notice that a judgment had been docketed against real property on which it held a lien, and that execution would be issued as provided by our General Statutes. Therefore, the intent of N.C.G.S. § 105-375 as set out in subsection (a)—"that all persons owning interests in real property know or should know that the tax lien on their real property may be foreclosed and the property sold for failure to pay taxes"—was clearly carried out in the instant case.

Moreover, the North Carolina Supreme Court has previously suggested in *dicta* that the notice provisions of § 105-375 are constitutional and protect due process rights under both the federal and State constitutions. *See Henderson County v. Osteen*, 292 N.C. 692, 708, 235 S.E.2d 166, 176 (1977) ("[N]otice [under N.C.G.S. § 105-392 (now N.C.G.S. § 105-375)], . . . would, in our opinion, be sufficient to satisfy the fundamental concept of due process of law and, therefore, to comply with Article 1, § 19, of the Constitution of North Carolina and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States."). Thus, we see no basis for defendants' argument that § 105-375 violates due process by failing to provide notice to lienholders of record. Defendants' argument that N.C.G.S. § 105-375 is unconstitutional is overruled.

II

[2] Carolina Holdings next argues the trial court erred in granting summary judgment because the property was conveyed to plaintiff subject to its lien. We disagree.

"The purchaser at the execution sale shall acquire title to the property in fee simple free and clear of all claims, rights, interests, and liens except the liens of other taxes or special assessments not paid from the purchase price and not included in the judgment."

N.C.G.S. § 105-375(i). "[T]he effect of a judgment foreclosing a tax lien on real property is to extinguish all rights, title and interests in the real property subject to foreclosure . . . ." *Overstreet v. City of Raleigh*, 75 N.C. App. 351, 353, 330 S.E.2d 643, 645 (1985).

Here, the notice of sale offered the property to the highest bidder "SUBJECT TO ANY MORTGAGES, LIENS OR TAXES" that might be owed on the property, and the sheriff's deed specified that the property was conveyed to plaintiff "subject to all prior liens and encumbrances." Carolina Holdings contends that this language means that the property was conveyed to plaintiff subject to its lien. However, notwithstanding the language in the notice of sale, the statute makes clear that a purchaser at an execution sale takes the property "in fee simple free and clear of all claims, rights, interests, and liens except the liens of other taxes or special assessments not paid from the purchase price and not included in the judgment." N.C.G.S. § 105-375(i). Thus, only "liens of other taxes or special assessments not paid from the purchase price and not included in the judgment" survive a judgment foreclosing a tax lien on real property. Thus, when plaintiff purchased the property at the execution sale, he took the property free and clear of Carolina Holdings' lien. This argument is overruled.

III

[3] Carolina Holdings also argues the trial court erred in granting summary judgment because there were irregularities in the execution sale and the price paid was inadequate. We disagree.

Carolina Holdings first contends that it did not receive proper notice of intent to docket judgment. However, § 105-375(c) requires

> the tax collector . . . shall, at least 30 days prior to docketing the judgment, send a registered or certified letter, return receipt requested, to the listing taxpayer at his last known address, and to all lienholders of record who have a lien against the listing taxpayer or against any subsequent owner of the property . . . stating that the judgment will be docketed and the execution will be issued thereon in the manner provided by law.

N.C.G.S. § 105-375(c). The record indicates that the city fully complied with the provisions of § 105-375. On 7 January 2005, the city filed notice of statutory liens in the amounts of $25,051.00; $20,212.00; $20,448.00; $6,500.00; $14,027.00; $18,303.00; $10,025.00; $4,550.00; and $16,009.00, for a total of $135,125.00, in addition to interest on that amount and a $450.00 administrative fee. On 5 July 2005, the city

sent a letter by certified mail to Carolina Holdings' address at 408 W. Roosevelt Blvd., Monroe, North Carolina, 28110. The letter contained a description of the property, and stated

> [b]y copy of this letter, we are . . . giving notice to all lienholders of record[,] [and] [i]f the liens plus accumulated interest, along with a[n] . . . administrative fee . . . are not paid within thirty (30) days after the date of this letter . . . the City of Charlotte will docket a judgment against the property for the full amount of the liens, any accumulated interest, and the administrative fees. An execution will be issued upon the judgment as provided by law.

On 8 August 2005, the city docketed a judgment against the property, and on 9 January 2006, the city held a public auction. In sum, the uncontested facts show that the city sent notice to Carolina Holdings at least 30 days prior to docketing a judgment, and then waited at least three months following the indexing of the judgment on 8 August 2005 to execute a sale of the property on 9 January 2006. We see no irregularity in the city's actions. Carolina Holdings' argument on this point is overruled.

In its brief to this Court, Carolina Holdings also contends that there were irregularities in the caption of the underlying judgment and notice, and that the final price was inadequate. However, our review of the record indicates that these issues were not raised in the trial court, either in the parties' pleadings or motions for summary judgment. "A contention not raised in the trial court may not be raised for the first time on appeal." *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 159-60, 394 S.E.2d 698, 700 (1990). Thus, we do not address these contentions by Carolina Holdings.

Affirmed.

Chief Judge MARTIN and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. JOHNNY HENRY PETERSON, JR., DEFENDANT

No. COA09-365

(Filed 20 July 2010)

1. Pretrial Proceedings— joinder of criminal offenses—no abuse of discretion

The trial court did not abuse its discretion in joining for trial the charge of assault with a deadly weapon with intent to kill inflicting serious injury with the charges of two counts of possession of stolen firearms. The offenses shared a transactional connection and their joinder did not prejudicially hinder defendant's ability to receive a fair trial.

2. Evidence— relevancy—probative value—no error

The trial court did not err in an assault and possession of stolen firearms case by allowing into evidence testimony from a detective as to what defendant had told him about the events leading up to the argument with the victim. The testimony was necessary to complete the story of the assault for the jury and was, therefore, relevant and the probative value of the evidence was not outweighed by its prejudicial effect.

Appeal by defendant from judgments entered 3 October 2008 by Judge James E. Hardin, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 16 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for the State.

J. Clark Fischer for defendant-appellant.

GEER, Judge.

Defendant Johnny Henry Peterson, Jr. appeals his convictions for assault with a deadly weapon inflicting serious injury ("AWDWISI") and two counts of possession of stolen firearms. Defendant was originally indicted for assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"). On appeal, defendant primarily contends the trial court erred in joining for trial that charge with the charges of possession of stolen firearms. We hold that the trial court did not abuse its discretion in joining the charges because (1) they share a transactional connection and (2) their joinder did not prejudicially hinder defendant's ability to receive a fair trial.

Facts

At trial, the State's evidence tended to show the following facts. Defendant and Alice Taylor were in a romantic relationship and lived together. The couple often fought. Previously, Ms. Taylor had threatened defendant with a knife, while defendant had pointed a gun at her. On 17 May 2008, the couple got into an argument while each was under the influence of drugs and alcohol. Ms. Taylor called her friend, Diane Jackson, to come pick her up.

As Ms. Taylor and Ms. Jackson were leaving the house, Ms. Taylor and defendant began to physically struggle. According to Ms. Taylor, defendant grabbed her first. When Ms. Jackson came over to try to help Ms. Taylor, defendant slapped Ms. Taylor in the face. Ms. Taylor then threw pictures, food, and a chair.[1] Defendant said, "I'll be right back" and walked down the hall. When he returned a few minutes later, he was holding a gun, which he used to shoot Ms. Taylor. The bullet entered Ms. Taylor's left side and exited through her back. Ms. Jackson testified that Ms. Taylor was unarmed at the time of the shooting.

When officers responded to the residence and handcuffed defendant, he said: "I wasn't trying to kill her." Officer J.A. Pennington, who transported defendant to the police station, testified that defendant told him a knife had been involved in the fight. According to Officer Pennington, defendant said, "[T]hat's the reason why I shot her, cause she had a knife." Defendant asked, "[I]s it not self-defense when someone has a knife[?]" Defendant told the officer that the abrasion on his head was caused by Ms. Taylor hitting him with something.

Detective Jim Schwochow interviewed defendant when he arrived at the police station. Defendant told the detective that he and Ms. Taylor had gotten into an argument the previous weekend and that Ms. Taylor had stabbed him. Defendant said that Ms. Taylor always kept two knives beside her bed in their room and that he would "be damned if [he] was going to let her come at [him] with a knife again." He told the detective that Ms. Taylor had a knife in her hand when he shot her.

Defendant told the detective he shot Ms. Taylor with a Ruger .357 magnum. He also admitted that he had a .45 caliber handgun in a

1. When officers later investigated the residence, they observed an overturned table, plants, stereo equipment, utensils, and frozen vegetables strewn about, a drawer pulled out of one of the cabinets, and a chair lying in the hallway.

safe in the residence and a .38 caliber revolver in his car parked in the driveway. Defendant said both the .357 and the .45 were "hot" or, in other words, stolen. Defendant had gotten them when he ran a night club in Durham. Both the .357 and the .45 seized from defendant were identified at trial by their owners as being the weapons that were stolen from them.

On 7 July 2008, defendant was indicted for one count of AWDWIKISI and two counts of possession of stolen firearms. At trial, defendant testified that Ms. Taylor was the one who started the physical fight. He testified that during the argument, Ms. Taylor began trashing the house and threw a picture at him. He heard the silverware drawer open and could see her reflection in a picture in the hallway "scrambling for something which [he was] sure was a knife." Defendant grabbed a gun because he wanted to scare Ms. Taylor out of the house. He did not intend to shoot her, but he panicked when he saw her coming towards him with a knife, because she had attacked him with a knife the week before. On cross-examination, defendant admitted that, although he thought Ms. Taylor had a knife, he did not know whether she did or did not.

The jury found defendant guilty of AWDWISI rather than AWDWIKISI, and guilty of two counts of possession of stolen firearms. The trial court sentenced defendant to a presumptive-range term of 23 to 37 months imprisonment for the AWDWISI conviction. It sentenced defendant to two consecutive presumptive-range terms of eight to 10 months imprisonment for the possession of stolen firearms convictions, but suspended those sentences and placed defendant on supervised probation for 48 months. Defendant timely appealed to this Court.

I

[1] Defendant first contends the trial court erred in joining the charges of AWDWIKISI and possession of stolen firearms. The State moved to join the charges pursuant to N.C. Gen. Stat. § 15A-926(a) (2009), which provides that "[t]wo or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." Defendant objected to joinder and moved to sever the offenses pursuant to N.C. Gen. Stat. § 15A-927(b)(1) (2009), which requires the trial court to sever offenses upon a finding that severance is "necessary to promote a fair determination of the defendant's guilt or innocence of each offense." The trial court

granted the State's motion to join the charges and denied defendant's motion for severance.

N.C. Gen. Stat. § 15A-927(a)(2) provides that "[i]f a defendant's pretrial motion for severance is overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Any right to severance is waived by failure to renew the motion." Defendant failed to renew his motion to sever and, therefore, waived the right to severance. *See State v. Spivey*, 102 N.C. App. 640, 648, 404 S.E.2d 23, 27 (1991) ("The record and transcript indicate that defendant failed to renew his motion to sever offenses at any time after his pretrial motion for same was denied. By statute he has, therefore, waived any right to severance of offenses.").

In *State v. Wood*, 185 N.C. App. 227, 230, 647 S.E.2d 679, 683, *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007), however, this Court held that although the defendant waived his right to severance by failing to renew his motion to sever, the Court could still review the trial court's decision to join the offenses. The Court explained: "Where a defendant has waived any right to severance, on appeal this 'Court is limited to reviewing whether the trial court abused its discretion in ordering joinder at the time of the trial court's decision to join.' " *Id.* (quoting *State v. McDonald*, 163 N.C. App. 458, 463-64, 593 S.E.2d 793, 797, *disc. review denied*, 358 N.C. 548, 599 S.E.2d 910 (2004)).

The State argues that because defendant focused only on the denial of the motion to sever and failed to assign error or make arguments in his appellate brief about the decision to join the offenses, this Court is precluded from reviewing this issue. We believe, however, that defendant's assignments of error are sufficient to permit our review. *See State v. Agubata*, 92 N.C. App. 651, 660-61, 375 S.E.2d 702, 708 (1989) (reviewing issue whether trial court abused discretion in permitting joinder despite fact that defendant only assigned error to denial of motion to sever). Although the State asks us to disavow *Wood*, *McDonald*, and *Agubata*, only the Supreme Court has authority to overrule those decisions. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

This Court has explained that "[t]wo or more offenses may be properly joined when 'the offenses charged are part of the same act or transaction or are so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.' " *Wood*, 185 N.C. App. at 230-31, 647 S.E.2d at 683 (quoting *State v. Lundy*, 135 N.C. App. 13, 16, 519 S.E.2d 73, 77

(1999), *appeal dismissed and disc. review denied*, 351 N.C. 365, 542 S.E.2d 651 (2000)). In deciding whether to join or sever offenses, a court should consider "(1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case." *State v. Montford*, 137 N.C. App. 495, 498-99, 529 S.E.2d 247, 250, *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000).

In *State v. Hardy*, 67 N.C. App. 122, 126, 312 S.E.2d 699, 702 (1984), this Court held that a trial court could properly join for trial a possession of a firearm charge with charges for offenses committed using the firearm that was the subject of the possession charge. In *Hardy*, the police, after searching the defendant's car, found a firearm that had been stolen in the course of a breaking and entering. *Id.* at 123-24, 312 S.E.2d at 701. In this case, similarly, the firearm that was the basis of one of the possession of a stolen firearm charges was the same firearm used to assault Ms. Taylor. Because there was a sufficient transactional connection between these two charges, the trial court did not abuse its discretion in granting the State's motion to join the charges and denying defendant's pretrial motion to sever. *See State v. Silva*, 304 N.C. 122, 127, 282 S.E.2d 449, 453 (1981) ("Because at the time the consolidation order was entered there appeared to be a sufficient transactional connection among the three offenses, we hold that the trial judge committed no abuse of discretion.").

In *Silva*, however, the Supreme Court also emphasized:

> A mere finding of the transactional connection required by the statute is not enough, however. In ruling on a motion to consolidate, the trial judge must consider whether the accused can receive a fair hearing on more than one charge at the same trial; if consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated.

Id. at 126, 282 S.E.2d at 452. This Court has held that "[t]he test on review is are the offenses so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant." *State v. Floyd*, 115 N.C. App. 412, 417, 445 S.E.2d 54, 58 (1994) (internal quotation marks omitted), *disc. review denied*, 339 N.C. 740, 454 S.E.2d 658 (1995), *aff'd*, 343 N.C. 101, 468 S.E.2d 46, *cert. denied*, 519 U.S. 896, 136 L. Ed. 2d 170, 117 S. Ct. 241 (1996).

Defendant has not pointed to any specific way in which consolidation hindered or deprived him of the ability to present his defense.

Further, given that defendant used one of the stolen guns in the course of the assault and admitted to the officers during the investigation of the assault that he knew the gun was stolen, defendant has not shown that the offenses were separate in time and place or distinct in circumstances.

Defendant argues that he was prejudiced by the joinder because "there was a significant risk that the jury concluded that a person who would obtain stolen handguns would have been likely to commit an unjustified shooting." In *State v. Cromartie*, 177 N.C. App. 73, 78, 627 S.E.2d 677, 681, *disc. review denied*, 360 N.C. 539, 634 S.E.2d 538 (2006), however, this Court concluded that insufficient prejudice existed when the defendant had used a firearm in an assault, and the trial court then joined a charge of AWDWIKISI with a charge of possession of a firearm by a felon. Even though the joinder resulted in possible admission of evidence not otherwise admissible—the fact the defendant had a prior felony conviction—the Court held that the joinder did not unjustly or prejudicially hinder the defense, especially when "the evidence was not complicated and the trial court's instruction to the jury clearly separated the two offenses." *Id.*

Likewise, in this case, the evidence was not complicated. Ms. Taylor, Ms. Jackson, and defendant all gave similar testimony regarding the events leading up to the assault and the assault itself. The only significant issues were whether defendant had an intent to kill Ms. Taylor and whether he acted in self defense. As for the possession charges, defendant admitted he possessed two weapons that he believed were stolen. The trial court also gave instructions to the jury that clearly separated the offenses.

We, therefore, hold the trial court did not abuse its discretion in joining the offenses of AWDWIKISI and the charge of possession of a stolen firearm based on the firearm used in the assault. Since there was no error in the joinder of those two offenses, defendant cannot demonstrate prejudice by the additional joinder of the second charge of possession of a stolen firearm. Defendant has identified no prejudice other than prejudice from the jury's knowing that he was someone who possessed a stolen firearm, a fact that was before the jury based on the properly-joined first possession charge.

II

[2] Defendant also argues that the trial court should have excluded as irrelevant testimony from Detective Schwochow as to what defendant had told him about the events leading up to the argument.

Relevant evidence is "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. " '[E]ven though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.' " *State v. Miller*, 197 N.C. App. 78, 86-87, 676 S.E.2d 546, 552 (quoting *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *appeal dismissed and disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241, 113 S. Ct. 321 (1992)), *disc. review denied*, 363 N.C. 586, 683 S.E.2d 216 (2009).

The prosecutor asked Detective Schwochow what precipitated the argument between the couple. The detective said that defendant told him that Ms. Taylor was angry with him because a week earlier, he had told a visiting friend that the friend could "take her, meaning [Ms. Taylor], to the back and fuck her." Detective Schwochow also said that defendant told him Ms. Taylor had caught him cheating on her and always brought that up when they argued.

"[E]vidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *State v. Arnold*, 284 N.C. 41, 48, 199 S.E.2d 423, 427 (1973). Our Supreme Court has held that ' "[e]vidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.' " *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)).

Evidence of what precipitated the argument between Ms. Taylor and defendant and what the argument was about is part of the account of the assault on Ms. Taylor and is necessary to complete the story of that assault for the jury. *See State v. Beal*, 181 N.C. App. 100, 107, 638 S.E.2d 541, 546 (2007) (holding victim's testimony about the reason for their dispute and that he asked defendant to leave house because he feared defendant would become violent based on past similar encounters was relevant because it "served to provide context for the ensuing fight"). This evidence was, therefore, relevant.

Defendant contends that, nonetheless, the prejudicial effect of the reasons for Ms. Taylor's anger outweighed the evidence's probative value in violation of Rule 403 of the Rules of Evidence. "Whether to exclude evidence [under Rule 403] is a decision within the trial court's discretion." *State v. Al-Bayyinah*, 359 N.C. 741, 747, 616 S.E.2d 500, 506 (2005), *cert. denied*, 547 U.S. 1076, 164 L. Ed. 2d 528, 126 S. Ct. 1784 (2006). "This Court will find an abuse of discretion only where a trial court's ruling 'is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Theer*, 181 N.C. App. 349, 360, 639 S.E.2d 655, 662-63 (quoting *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523, 126 S. Ct. 1773 (2006)), *appeal dismissed*, 361 N.C. 702, 653 S.E.2d 159 (2007), *cert. denied*, 553 U.S. 1055, 171 L. Ed. 2d 769, 128 S. Ct. 2473 (2008).

Defendant has not persuaded us that the trial court abused its discretion. The evidence explained the reasons for the physical fight. Those reasons—defendant's infidelity and his offering of Ms. Taylor to his friend a week earlier—while certainly casting defendant in a negative light, also were supportive of defendant's claim of self defense. The evidence showed that there was a reason for Ms. Taylor to be very angry with defendant, a fact necessary to defendant's self-defense theory. It also made more credible defendant's claim that they had physically fought a week earlier. Given how the evidence provided support for the claim of self defense, we cannot conclude that the trial court erred in determining that the probative value of the evidence outweighed any unfair prejudice. *See Theer*, 181 N.C. App. at 362, 639 S.E.2d at 664 (holding that admission of evidence of defendant's sexual promiscuity and affairs during her marriage to victim, which defendant argued suggested she was immoral and degenerate, was not manifestly unreasonable under Rule 403).

No error.

Judges STROUD and ERVIN concur.

STATE OF NORTH CAROLINA v. RANDALL EUGENE CLINE, JR.

No. COA10-7

(Filed 20 July 2010)

Search and Seizure— warrantless entry into home—exigent circumstances—motion to suppress correctly denied

The trial court did not err in a controlled substances case by denying defendant's motion to suppress evidence seized from his home as the result of a warrantless entry of his residence. The police officer could have reasonably believed that an individual inside defendant's home was in need of immediate assistance, justifying warrantless entry into the home.

Appeal by Defendant from judgment entered 4 August 2009 by Judge Jesse B. Caldwell in Superior Court, Gaston County. Heard in the Court of Appeals 26 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Winifred H. Dillon for Defendant.

STEPHENS, Judge.

I. Procedural History

On 2 August 2008, Randall Eugene Cline, Jr. ("Defendant"), was indicted for possession of marijuana, felony manufacturing marijuana, possession with intent to use drug paraphernalia to cultivate, grow, harvest, and produce a controlled substance, and maintaining a dwelling for controlled substances. On 30 January 2009, Defendant filed a motion to suppress all evidence including marijuana and drug paraphernalia seized by Gaston County police officers from Defendant's person, home, and automobile and statements made by Defendant to police officers pursuant to a warrantless entry of his residence.

A hearing on Defendant's motion was held before the Honorable Richard Boner in Gaston County Superior Court on 20 April 2009. In an order entered 27 April 2009, Judge Boner denied Defendant's motion to suppress.

On 4 August 2009, Defendant pled guilty to possession of drug paraphernalia and felony manufacturing marijuana, reserving his

right to appeal the denial of his motion to suppress evidence. The charges of maintaining a dwelling for a controlled substance and felony possession of marijuana were dismissed pursuant to Defendant's plea.

On 4 August 2009, the trial court entered judgment on Defendant's guilty plea, consolidating the charges and sentencing Defendant to a term of 36 months supervised probation. From this judgment, Defendant appeals.

II. Factual Background

The evidence presented at the 23 April 2009 hearing tended to show the following:

On the afternoon of 2 August 2008, Russell Herman Weiss ("Weiss") and his wife were traveling on U.S. Highway 321 in Gaston County, North Carolina. They observed a small, naked child, waving his arms on the side of the road. They pulled over, picked him up, and summoned the driver behind them who called 911. Weiss estimated that the child was between two and three years old and indicated that he was unable to tell them where he lived. The child was uninjured. Gaston County Police Officer Rob Henninger ("Henninger") was on patrol nearby, received a call, and reported to the scene. Henninger observed the child who was unable to provide the officer with any information regarding his identity or residence. Henninger proceeded to the adjacent Davis Heights neighborhood. Weiss and his wife waited with the child until the child's identity was verified and his mother arrived on the scene and took custody of him. Gaston County police officers later determined that the child was Defendant's son.

Henninger went to the first mobile home in the Davis Heights neighborhood, a few hundred yards south of where the child was discovered. He spoke with the resident, Cathy Belk ("Belk"). Belk indicated that the child described sounded like Defendant's son; she pointed Henninger to Defendant's residence at 712 Davis Heights Drive. Henninger approached Defendant's home, knocked on the door two to three times, and then beat on the door two to three times. No one responded. Henninger observed a child seat on the sidewalk. Henninger saw a vehicle without a license plate parked in front of the mobile home and observed a picture on the floor board that appeared to be of the child found on the highway. He opened the door and looked through the vehicle, including the registration in the glove box, in an attempt to locate the parent of this child. Henninger con-

tacted an officer from the precinct of the address listed on the vehicle registration[1] and was informed by the officer that the subject no longer lived at that address.

Henninger approached the back of the residence and observed that the door was ajar a few feet and there was a diaper lying on the top step. Henninger felt that the situation "just wasn't right" even though he "didn't know exactly what [he] had" and he "assume[d] that it was either a dead body or something" based on his observations and the circumstances. He did not detect an odor of a dead body, did not observe any signs of criminal activity, did not hear any noises from within Defendant's residence, and did not observe any blood or weapons. Henninger entered the open door without a warrant or consent of an occupant and performed a cursory sweep of the mobile home. Henninger walked into the bathroom through the open door and observed plants in the bathtub that were later determined to be marijuana. He observed Defendant sleeping in a bedroom adjacent to the living room through an open door. Henninger called for back up before waking Defendant. Gaston County police officers Bonnie Nache and Officer Totten[2] came to Defendant's mobile home. Henninger awakened Defendant with some difficulty. Henninger questioned Defendant about his son and the plants found in the bathroom. Defendant indicated that the plants belonged to him and claimed that they were hydroponic tomatoes. Officers seized the plants. Officers left Defendant at his residence. Defendant was arrested on 7 September 2008 when lab results confirmed that the seized plants were marijuana.

III. Discussion

A. Motion to Suppress

In reviewing a trial judge's ruling on a motion to suppress, we determine only whether the trial court's findings of fact are supported by competent evidence and whether those findings support the trial court's conclusions of law. *State v. Pulliam*, 139 N.C. App. 437, 440, 533 S.E.2d 280, 282 (2000) (citing *State v. Rhyne*, 124 N.C. App. 84, 88-89, 478 S.E.2d 789, 791 (1996)).

Defendant argues that the trial court erred in denying his motion to suppress the evidence seized from his home. Defendant contends

1. The address listed on the vehicle registration was for a residence in Bessemer City, North Carolina.

2. The record does not establish Officer Totten's first name.

that Henninger's warrantless entry into Defendant's home was not justified by exigent circumstances and was therefore unconstitutional. We disagree.

The Fourth Amendment prohibits all "unreasonable searches and seizures." U.S. Const. amend. IV. Searches conducted without a warrant are "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Mincey v. Arizona*, 437 U.S. 385, 390, 57 L. Ed. 2d 290, 298 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967)). "The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (citing *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994)). Our Supreme Court has held that "[a] governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances." *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982). The North Carolina Constitution forbids general warrants "whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence." N.C. Const. Art. 1, § 20. The North Carolina Constitution requires that evidence discovered pursuant to an unreasonable search or seizure be excluded. *See State v. Carter*, 322 N.C. 709, 712, 370 S.E.2d 553, 555 (1988) (holding that blood evidence drawn from the defendant without a warrant and in the absence of probable cause or exigent circumstances should have been excluded and refusing to adopt a good faith exception to the exclusionary rule under the North Carolina Constitution).

A law enforcement officer's action is reasonable and therefore constitutional as long as the circumstances objectively justify the officer's behavior. See *Brigham City v. Stuart*, 547 U.S. 398, 404, 164 L. Ed. 2d 650, 658 (2006) (citing *Scott v. United States*, 436 U.S. 128, 138, 56 L. Ed. 2d 168, 178 (1978)). An objectively reasonable basis for believing either that a party has been injured and may need assistance or that further violence is about to ensue is sufficient to permit warrantless entry into a home based on that exigency. *Id.* at 406, 164 L. Ed. 2d at 659. The existence of exigent circumstances and the reasonableness of a search are factual determinations that must be made on a case-by-case basis. *State v. Johnson*, 64 N.C. App. 256, 262, 307 S.E.2d 188, 191 (1983).

In *State v. Scott*, 343 N.C. 313, 471 S.E.2d 605 (1996), our Supreme Court held that a warrantless search of the crawl space under the defendant's home was not unreasonable where the officer was summoned to the scene to investigate a missing person report, his knocks on the door went unanswered, he observed large green flies indicative of a decaying corpse, and smelled what he believed to be rotting flesh. *Id.* at 329, 471 S.E.2d at 614. The Court held that in assessing the constitutionality of a warrantless entry and evidence seized pursuant to plain view therein, the reviewing court must determine whether the action was reasonable under the circumstances, as viewed through "the eyes of a reasonable and cautious police officer on the scene, guided by . . . experience and training." *Id.* at 329, 471 S.E.2d at 615.

In *State v. China*, 150 N.C. App. 469, 564 S.E.2d 64 (2002), this Court held that an officer's warrantless entry into the defendant's home did not violate the Fourth Amendment where the trial court found that the officer arrived at the front door after receiving a call for a burglary in progress; heard a violent argument in the apartment; knocked on an open door and walked inside. This Court stated that "[o]fficers may enter a house for emergency purposes without a warrant when they believe a person in the house is in need of immediate aid or assistance in order to avoid serious injury." *Id.* at 479, 564 S.E.2d at 71 (citing *State v. Woods*, 136 N.C. App. 386, 391-92, 524 S.E.2d 363, 366 (2000)).

Although this Court has not been presented with a fact pattern similar to the instant case, the reasonableness of a warrantless search is determined on a case-by-case basis, under the totality of the circumstances. Here, Henninger, a police officer with more than ten years of experience, was summoned to the scene after motorists discovered a young, unattended toddler on the side of a major highway, near several residences. Henninger was able to ascertain the identity and residence of the child, Defendant's son, with reasonable certainty. Henninger proceeded to Defendant's mobile home where he knocked and then banged on the front door several times, without response. Henninger also observed a vehicle parked in front of the mobile home, discovered a photo inside the vehicle that appeared to be of the child, searched the glove box for a vehicle registration card, and phoned another officer who was unable to locate the child's parents based on the address on the registration. Henninger then walked to the rear of the mobile home where he observed a diaper lying on the top step and noticed that the back door was ajar. Although a sub-

jective inquiry is not relevant to the determination of the reasonableness of a search, Henninger testified that

> I knew at that point in time I had made several attempts at knocking on that door. I knew anybody that was inside would obviously have had to hear it, so I didn't know if I was dealing with a dead body, a hostage situation. I didn't know exactly what I had.

Henninger indicated that it would have taken him 15 minutes to drive to the magistrate's office and another hour and a half to two hours to obtain a search warrant to enter the premises.

Even though Henninger did not hear any sounds from within the residence, nor did he observe any blood or other signs suggesting criminal activity, a reasonable officer in Henninger's position could have believed that a party was in need of immediate assistance inside the mobile home, such that entering without obtaining a warrant was justified.

In denying Defendant's motion to suppress, Judge Boner made the following relevant findings and conclusions:

> 4. Officer Henninger went to the mobile home, where he knocked on the door two to three times and then banged on the door several times. There was no response to the knocking or banging. Officer Henninger noticed a child's seat sitting outside the mobile home. . . .
>
> 5. Officer Henninger walked to the rear of the mobile home, where he observed that the back door was ajar. He also observed a diaper lying on the top step of the mobile home. At that point, Officer Henninger became concerned that there might be a dead body or other emergency situation inside the trailer. Officer Henninger testified, "I didn't know what I had." Officer Henninger entered the trailer. As he walked through the trailer, he glanced into a bathroom. The door to the bathroom was open. When he glanced into the bathroom, Officer Henninger observed plants growing under a grow light in the bathtub. Officer Henninger immediately recognized the plants as marijuana plants.
>
> . . . .
>
> 10. Officer Henninger also asked the defendant about the marijuana plants he observed in the bathroom. The defendant stated that they were his plants and that they were tomato plants.

Based upon the foregoing findings of fact, Judge Boner concluded that:

> 1. On August 2, 2008, Officer Henninger's warrantless entry into the defendant's mobile home at 712 Davis Heights Drive, Gastonia, was justified by exigent circumstances under the totality of the circumstances. At the time of the entry, the parents of the child had not been located, and the circumstances existing at the mobile home justified a reasonable concern that a parent or other individual might be dead or otherwise in need of medical attention in the mobile home.
>
> . . . .
>
> 4. The entry of the Gaston County police officers into the mobile home on August 2nd, 2008, the seizure of the suspected marijuana plants, and the obtaining of defendant's admission of ownership of the suspected marijuana plants did not violate any of the defendant's rights under the Constitution of the United States of America or the Constitution of the State of North Carolina.

A thorough review of the record reveals the trial court's findings of fact are supported by competent evidence, and thus are conclusive on appeal. Based on (1) the presence of an unattended child on the side of a major highway, (2) Henninger's level of certainty that Defendant was the child's father and that the mobile home at 712 Davis Heights Drive was the child's residence, (3) the absence of a response to repeated knocks on the front door, (4) the fact that the back door was ajar, and (5) the fact that obtaining a search warrant would have necessitated two hours, we hold that exigent circumstances existed for Henninger to make an immediate warrantless entry into Defendant's mobile home to ascertain whether someone in Defendant's home was in need of immediate assistance or under threat of serious injury. Accordingly, Henninger had the authority to make a warrantless entry into Defendant's home. Further, Henninger had the authority to seize suspected marijuana plants in plain view pursuant to that entry. We conclude that the uncontested findings of fact are sufficient to support the court's conclusion of law that Henninger's warrantless entry into Defendant's home was justified by exigent circumstances under the totality of the circumstances. Accordingly, Defendant's motion to suppress was properly denied.

AFFIRMED.

Judges STEELMAN and HUNTER, JR. concur.

STATE OF NORTH CAROLINA v. JOSE FERNANDO MEDINA, DEFENDANT

No. COA10-71

(Filed 20 July 2010)

1. Search and Seizure— consent—non-English speaking defendant

The trial court did not err by not suppressing a warrantless search based on an involuntary or equivocal consent where defendant did not speak English and the officer had studied Spanish but was not fluent. Defendant gave logical, intelligent and detailed answers to the officer's questions; under the totality of the circumstances, there was competent evidence to support the court's findings, which supported the court's conclusions that defendant voluntarily consented to the search and did not withdraw that consent.

2. Confessions and Incriminating Statements— Miranda rights—waiver—non-English speaker

Defendant knowingly waived his *Miranda* rights and consented to speak with detectives where he did not speak English and the officer had studied Spanish but was not fluent. The evidence shows that the officer and defendant communicated effectively and that defendant gave coherent, logical, and appropriate answers. Moreover, the record reflects that defendant read the rights in Spanish, initialed each one, and signed the form.

3. Appeal and Error— probable cause to search—not considered—decided elsewhere

A discussion of whether the police had probable cause to search defendant's vehicle was not necessary where it was determined elsewhere in the opinion that defendant had consented.

Appeal by defendant from order entered 29 May 2008 by Judge Calvin Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 June 2010.

Roy Cooper, *Attorney General*, *by Jay L. Osborne*, *Assistant Attorney General*, *for the State.*

M. Alexander Charns, *for defendant-appellant.*

MARTIN, Chief Judge.

Defendant was charged in bills of indictment with two counts of trafficking in heroin in violation of N.C.G.S. § 90-95(h)(4), and possession with intent to sell or deliver cocaine in violation of N.C.G.S. § 90-95(a)(1). Defendant moved to suppress evidence seized from the 13 April 2007 search of his vehicle and any statements made by him on the same day.

The evidence presented at the motion to suppress hearing tended to show that on 13 April 2007, Charlotte-Mecklenburg Police Department ("CMPD") established surveillance of the Burger King parking lot located at the intersection of Brookshire Boulevard and Hoskins Road. CMPD was acting on information received from a "confidential source" that a Hispanic male driving a burgundy Mitsubishi with chrome wheels would arrive at approximately 8:30 a.m. and would be in possession of narcotics. Defendant arrived in the parking lot at approximately 9:10 a.m. driving a 2001 burgundy Mitsubishi with chrome wheels. After defendant parked his car, he was approached by uniformed CMPD Officers Nicholson and Williamson. Officer Nicholson addressed defendant in English, and defendant, who does not speak English, was non-responsive. Officer Williamson, who had taken four semesters of Spanish in high school and an additional four semesters of Spanish in college but was not fluent in the language, addressed defendant in Spanish. Officer Williamson asked if defendant had any guns, weapons, or drugs in the vehicle and defendant said no. Officer Williamson then pointed to defendant's car and asked if he could "look." Defendant nodded his head affirmatively. A search of defendant's car revealed heroin and cocaine hidden in the arm rest and in a can of WD-40 with a false bottom.

Defendant was arrested and taken to the Charlotte-Mecklenburg Law Enforcement Center. When CMPD Vice Detectives Lackey and Davis arrived, they asked Officer Williamson if he felt that he could Mirandize defendant and translate their questions. Officer Williamson indicated that he could. Officer Williamson and defendant began filling out a "Renuncia a Derechos (Adultos)/Adult Waiver of Rights" form written in Spanish. Defendant responded to Officer Williamson's questions about his age, date of birth, and education level. When

Officer Williamson questioned defendant about his address and Officer Williamson was unfamiliar with the location, he asked defendant to write the address down, which defendant did. Officer Williamson then read aloud the Spanish language waiver of rights form while defendant read along and initialed next to each *Miranda* right, which was written in Spanish.

Subsequently, Officer Williamson began translating Vice Detectives Lackey and Davis' questions into Spanish and translating defendant's answers into English. Defendant indicated that he had gone to Burger King to get a hamburger and had gotten the drugs from someone named "Luis" at a restaurant called "Acapulco." Defendant was in the interrogation room for approximately 20-30 minutes and gave coherent and appropriate answers to the questions asked.

On 5 December 2007, defendant made a motion to suppress all evidence seized from his vehicle and any statements made to the police on the grounds that the consent to search and waiver of *Miranda* rights were not made knowingly, voluntarily, or understandingly, and that the police lacked reasonable suspicion or probable cause to approach and search his vehicle. Following a 23 April 2008 hearing, the trial court denied defendant's motion to suppress. Defendant entered an *Alford* plea and was sentenced to 90-117 months in jail and ordered to pay a $100,000 fine. The record on appeal affirmatively reflects that defendant properly reserved his right to appeal the denial of his motion to suppress by giving timely notice in open court.

The standard of review for a trial court's order denying a motion to suppress is "whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). If a defendant does not challenge a particular finding of fact, "such findings are presumed to be supported by competent evidence and are binding on appeal." *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (internal quotation marks omitted). "The trial court's conclusions of law, however, are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

[1] Defendant contends the trial court erred by not suppressing evidence obtained from the warrantless search of defendant's car be-

cause his consent to search was not given voluntarily or unequivocally. Specifically, defendant maintains the consent was rendered involuntary or equivocal by Officer Williamson's lack of fluency in Spanish coupled with his wearing of a sidearm while seeking the consent. Similarly, defendant contends the trial court also erred by not suppressing his statement when his *Miranda* warnings were given by an officer who was not fluent in Spanish. Defendant claims that Officer Williamson's non-fluent *Miranda* warnings prevented defendant from knowingly waiving his rights, and thus contends "[w]ithout a finding of fact that Officer Williamson was fluent in Spanish and that [defendant] understood Williamson, there can be no valid . . . waiver of Miranda rights."

"Evidence seized during a warrantless search is admissible if the State proves that the defendant freely and voluntarily, without coercion, duress, or fraud, consented to the search." *State v. Williams*, 314 N.C. 337, 344, 333 S.E.2d 708, 714 (1985). Whether consent to a search was given voluntarily is a question of fact determined from the totality of the circumstances. *State v. Brown*, 306 N.C. 151, 170, 293 S.E.2d 569, 582 (1982). However, "voluntariness" does not require proof that defendant knew he had the right to refuse to consent to the search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 234, 36 L. Ed. 2d 854, 867 (1973).

Likewise, for a valid waiver of *Miranda* rights, the State must prove, by a preponderance of the evidence, *see State v. Johnson*, 304 N.C. 680, 685, 285 S.E.2d 792, 795 (1982), that the defendant waived his rights "voluntarily, knowingly and intelligently." *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 707 (1966). "Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused." *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 59 (1985) (citing *Edwards v. Arizona*, 451 U.S. 477, 482, 68 L. Ed. 2d 378, 385, *reh'g denied*, 452 U.S. 973, 69 L. Ed. 2d 984 (1981)). As with a consent to search, when the voluntariness of a waiver of rights is at issue, we consider the same totality of the circumstances. *State v. Wallace*, 351 N.C. 481, 520, 528 S.E.2d 326, 350 (2000).

After carefully examining the record and weighing the totality of the circumstances, we conclude defendant's argument that his consent was not voluntarily given is without merit. Defendant was nonresponsive to Officer Nicholson's initial communications in English, but responded appropriately to Officer Williamson's questions in

Spanish. Officer Williamson testified that he asked defendant simple questions in Spanish about whether defendant had any weapons or drugs in the vehicle. Defendant responded in the negative. Immediately thereafter, Officer Williamson gestured to the car and asked to "look." Defendant nodded his head affirmatively. As this Court has previously stated, consent need not be given verbally to be effective; nonverbal conduct may suffice. *State v. Graham*, 149 N.C. App. 215, 219, 562 S.E.2d 286, 288 (2002).

In addition, while Officer Williamson was not fluent in Spanish, the record shows he had extensive instruction and experience speaking Spanish, both in high school and college. The record reflects that defendant and Officer Williamson conversed entirely in Spanish throughout defendant's encounter and subsequent arrest by CMPD, for periods of up to 30 minutes. The record also reflects that defendant and Officer Williamson communicated at length and in-depth with Officer Williamson asking open-ended questions and defendant answering appropriately with complete phrases that extended beyond yes or no responses. Defendant answered questions about his age, date of birth, and education level. At Officer Williamson's request, defendant wrote down his address. Defendant answered open-ended questions about why he was at Burger King, as well as questions about where and from whom he had gotten the drugs. The record does not reflect that defendant ever indicated that he did not understand a question or that he gave an inappropriate response to a question asked. Moreover, defendant cites no authority requiring or even suggesting that Officer Williamson need be fluent in Spanish before communicating with defendant in the context of a waiver of rights. Conversely, in a situation where a language barrier existed between a defendant and a police officer, our Supreme Court held a voluntary waiver of rights existed when defendant simply gave "logical responses to the questions asked." *State v. Mlo*, 335 N.C. 353, 366, 440 S.E.2d 98, 104 (1994). Moreover, while not binding authority, several United States Circuit Courts have considered language barriers between defendants and police with similar results. *See*, *e.g.*, *United States v. Querubin*, 150 Fed. App. 233, 234-35 (4th Cir. 2005) (holding that a waiver of rights was valid when defendant "answered the questions . . . with detail"); *United States v. Zapata*, 180 F.3d 1237, 1242 (11th Cir. 1999) (holding voluntary consent may be found by examining defendant's "ability to interact intelligently with the police"); *United States v. Alvardo*, 898 F.2d 987, 991 (5th Cir. 1990) (finding voluntary consent where there was "adequate understanding of [the language] to fully comprehend the situation"). Here, the record shows

that defendant gave logical, intelligent, and detailed answers to Officer Williamson's questions, demonstrating full comprehension of the situation.

Finally, the record shows that defendant was not intimidated, threatened, or promised anything in order to gain his consent for the search, nor was he handcuffed or restrained in any way while the search took place. Defendant was free to withdraw his consent at anytime, but he did not. Additionally, the officers' firearms were never drawn, and the mere presence of a holstered sidearm does not serve to coerce defendant or render consent involuntary. *See State v. Sokolowski*, 344 N.C. 428, 433, 474 S.E.2d 333, 336 (1996) (finding voluntary consent to search when the facts indicate that eight deputies yelled at and drew their sidearms on defendant).

Considering the totality of the circumstances, we conclude there is competent evidence to support the findings of fact that defendant was properly queried for permission to search and that defendant consented to the search by nodding his head affirmatively. Those findings of fact in turn support the trial court's ultimate conclusions of law that defendant voluntarily consented to the search of his vehicle and at no time did defendant withdraw his consent. Accordingly, defendant's assignment of error concerning consent is overruled.

[2] Likewise, defendant's assignment of error concerning his *Miranda* waiver is without merit. As previously discussed, the evidence shows that Officer Williamson and defendant communicated effectively, despite Officer Williamson's lack of fluency. Again, the record indicates that defendant gave coherent, logical, and appropriate answers to the questions asked. Moreover, we note that when Officer Williamson informed defendant of his *Miranda* rights, he was not even translating English into Spanish, but rather reading aloud in Spanish from a Spanish version of a *Miranda* waiver of rights form.

Even assuming, *arguendo*, that defendant did not understand Officer Williamson when he read the *Miranda* warning to defendant, this alone would not frustrate a valid waiver. The record reflects that defendant appeared to read each *Miranda* right which was written in Spanish, initialed next to each *Miranda* right, and signed the form indicating he understood his rights. Officers are not required to orally apprise a defendant of his or her *Miranda* rights to effectuate a valid waiver. *State v. Strobel*, 164 N.C. App. 310, 314, 596 S.E.2d 249, 253

(2004). A signed written waiver may suffice. *Id.* We also note our decision in *State v. Ortez*, 178 N.C. App. 236, 631 S.E.2d 188 (2006), where this Court held that a Spanish-speaker who was read a flawed translation of his *Miranda* rights still validly waived his rights because "the warnings given to defendant were sufficient to reasonably convey to defendant each of his *Miranda* rights . . . ." *Id.* at 246, 631 S.E.2d at 196.

In considering the totality of the circumstances, we hold that there was competent evidence to support findings of fact and conclusions of law that defendant "understood his rights, knowingly waived those rights, and consented to speak with Detectives." Accordingly, defendant's assignment of error concerning his *Miranda* waiver is overruled.

[3] Finally, defendant contends the evidence does not support a finding that the "confidential source" was reliable under the confidential informant analysis, or that the source provided sufficiently detailed information under the anonymous tipster analysis, and contends the trial court erred when it concluded as a matter of law that, "[f]rom the totality of the circumstances, there was probable cause for the search based on both the confidential informant analysis and the tipster analysis." Because we have determined that the defendant consented to the search, it renders unnecessary any discussion of whether the police had probable cause to search the vehicle.

Affirmed.

Judges BRYANT and ELMORE concur.

TINA A. CARLTON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ADAM WAYNE CARLTON, AND ROBERT BRENT CARLTON AND TINA A. CARLTON, INDIVIDUALLY, PLAINTIFFS V. TERESA B. MELVIN, M.D.; LAKE NORMAN OB-GYN, L.L.P.; RAJAL M. PATEL, M.D.; MICHAELA RENICH, M.D.; THOMAS E. GROSS, M.D.; MICHELLE STOWE ONG, M.D., DAVID L. JAROSZEWSKI, M.D., PRIMARY CARE ASSOCIATES, A PARTNERSHIP, KIMBERLY GLASS RAMSDELL, M.D.; GROWING UP PEDIATRICS, PLLC; WILLIAM JOHNSTON EDMISTON, JR., M.D.; LAKE NORMAN ANESTHESIA ASSOCIATES, P.A.; ERNEST GROSS, CRNA; LAKE NORMAN REGIONAL MEDICAL CENTER; HEALTH MANAGEMENT ASSOCIATES, INC.; HEALTH MANAGEMENT ASSOCIATES, INC. OF DELAWARE; MOORESVILLE HOSPITAL MANAGEMENT ASSOCIATES, INC.; AND HOSPITAL MANAGEMENT ASSOCIATES OF MOORESVILLE, INC., DEFENDANTS

No. COA09-930

(Filed 20 July 2010)

Medical Malpractice— wrongful death—Rule 9(j) certification—Rule 3

The trial court did not err in dismissing plaintiff's wrongful death claim because the action was not commenced before the expiration of the statute of limitations. Although the statute of limitations had been extended for 120 days under Rule 9(j) of the Rules of Civil Procedure, plaintiff was required to commence the action within the 120 days and was not entitled to further extend the statute of limitations for an additional 20 days under Rule 3.

Appeal by Plaintiff Tina A. Carlton, as Personal Representative of the Estate of Adam Wayne Carlton, from Order entered 10 July 2006 by Judge David S. Cayer in Superior Court, Catawba County. Heard in the Court of Appeals 2 December 2009.

Grant Richman, PLLC, by Robert M. Grant, Jr., for Plaintiff-Appellant.

Carruthers & Bailey, P.A., by J. Dennis Bailey, for Defendants-Appellees.

STEPHENS, Judge.

I. Procedural Background

This case concerns the death of Adam W. Carlton on 6 June 2003. Adam was the second of twins born to Tina A. Carlton on 2 June 2003. Pursuant to N.C. Gen. Stat. § 1-53(4), the statute of limitations for a

wrongful death action expires two years after the date of death.[1] Thus, the statute of limitations in this matter would have expired on 6 June 2005. On 1 June 2005, Plaintiffs filed a motion pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure to extend the statute of limitations to allow compliance with the special pleading requirements of Rule 9(j). Rule 9(j), which governs pleading procedures in medical malpractice actions, requires that a plaintiff certify in the complaint that the care rendered by the defendants has been reviewed by experts who are qualified under Rule 702 or Rule 702(e) of the North Carolina Rules of Evidence, and that such experts are willing to testify that the care rendered was not in accordance with the standard of care applicable to the defendants. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2009). On 2 June 2005, the trial court entered an order granting Plaintiffs' motion, thereby extending the statute of limitations by 120 days. Thus, to satisfy the statute of limitations, Plaintiffs had to file a complaint on or before 4 October 2005.

On 4 October 2005, Plaintiffs did not file a complaint, but instead issued a summons and filed an application for extension of time to file a complaint pursuant to Rule 3 of the North Carolina Rules of Civil Procedure. This application was granted by an Assistant Clerk of Superior Court, purporting to allow Plaintiffs to file a complaint within 20 days, by 24 October 2005. On 24 October 2005, Plaintiffs filed a complaint asserting a wrongful death claim and claims for negligent infliction of emotional distress against Appellees and other Defendants not parties to this appeal.

On 3 January 2006, Defendants filed a motion to dismiss the complaint pursuant to Rule 12(b) and (c) due to Plaintiffs' failure to file the complaint within the 120-day extension of the statute of limitations granted pursuant to Rule 9(j). On 10 July 2006, the trial court entered an order granting Defendants' motion to dismiss with respect to the wrongful death claim, and denying Defendants' motion as to the claims for negligent infliction of emotional distress.[2] Plaintiff

1. N.C. Gen. Stat. § 1-53(4) provides that the prescribed period of limitations is within two years for "[a]ctions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another under G.S. 28A-18-2; the cause of action shall not accrue until the date of death." N.C. Gen. Stat. § 1-53(4) (2009).

2. Thereafter, Plaintiffs voluntarily dismissed their remaining claims against Defendants, thereby rendering the trial court's order of dismissal final and subject to immediate appellate review. *See Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 367, 555 S.E.2d 634, 638 (2001) (Plaintiff's voluntary dismissal of remaining claim rendered trial court's order of summary judgment final and immediately appealable.).

Tina A. Carlton, in her representative capacity, appeals from the trial court's order.

II. Standard of Review

"[A] plaintiff's compliance with Rule 9(j) requirements clearly presents a question of law to be decided by a court, not a jury. A question of law is reviewable by this Court *de novo*." *Phillips v. Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 376, 573 S.E.2d 600, 603 (2002) (citations omitted), *aff'd per curiam and disc. review improvidently allowed*, 357 N.C. 576, 597 S.E.2d 669 (2003).

III. Discussion

Plaintiff contends that the statute of limitations was extended for 120 days by Rule 9(j) and extended for an additional 20 days by Rule 3. Therefore, Plaintiff argues that the trial court erred in dismissing the wrongful death claim because the action was commenced before the extended statute of limitations expired. We disagree.

Pursuant to N.C. Gen. Stat. § 1-53(4), the prescribed period for the commencement of actions for damages on account of the death of a person caused by the wrongful act of another is within two years of the date of death. N.C. Gen. Stat. § 1-53(4) (2009); *see also* N.C. Gen. Stat. § 1-46 ("The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this Article."). Thus, the prescribed period for bringing a wrongful death action in the present matter was within two years of 6 June 2003, or on or before 6 June 2005.

However, Rule 9(j) permits an extension of the applicable statute of limitations. Rule 9(j) provides in pertinent part that

> [u]pon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court for a judicial district in which venue for the cause of action is appropriate under G.S. 1-82 or, if no resident judge for that judicial district is physically present in that judicial district, otherwise available, or able or willing to consider the motion, then any presiding judge of the superior court for that judicial district may allow a motion to extend the statute of limitations for a period not to exceed 120 days *to file a complaint* in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2009) (emphasis added). Similarly, Rule 3 allows for a 20-day extension of the statute of limitations where an action is commenced by the issuance of a summons when

> (1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and
>
> (2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

N.C. Gen. Stat. § 1A-1, Rule 3 (2009).

In the present case, Plaintiff attempted to extend the statute of limitations by a total of 140 days, using both Rule 9(j) and Rule 3. Plaintiff contends that Rule 9(j) and Rule 3 should be construed *in para materia* "as together constituting one law." *Williams v. Williams*, 299 N.C. 174, 180-81, 261 S.E.2d 849, 854 (1980).

> The cardinal principle in the process is to ensure accomplishment of legislative intent. To achieve this end, the court should consider the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish. In ascertaining the intent of the legislature, the presumption is that it acted with full knowledge of prior and existing laws.

Williams v. Alexander Cty. Bd. of Educ., 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998) (internal citations and quotation marks omitted). Plaintiff contends that the General Assembly enacted Rule 9(j) in 1995 with full knowledge of the existing language of Rule 3, including the alternative method provided by Rule 3 for commencing a civil action, and that the legislature's failure to explicitly restrict the application of Rule 3 in the language of Rule 9(j) means that both statutes should be given full effect and construed harmoniously.

Plaintiff cites *Sink v. Easter*, 284 N.C. 555, 202 S.E.2d 138 (1974), in support of her argument that the statute of limitations for filing a wrongful death action is tolled when the action is "commenced" by either the issuance of a summons or the filing of a complaint. In *Sink*, our Supreme Court found that an action was properly commenced within the statute of limitations as of the date on which the plaintiff had a summons issued, "made application to the court stating the nature and purpose of his action, and obtained the requisite court order granting permission to file the complaint within twenty days." *Id.* at 558, 202 S.E.2d at 140-41. Plaintiff also points out that in

Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986), *superseded by statute as stated in Turner v. Duke Univ.*, 325 N.C. 152, 381 S.E.2d 706 (1989), our Supreme Court "specifically endorsed" the use of Rule 3 for additional time to file a complaint, holding that "[i]f plaintiff needed more time to investigate his potential claims against the defendant before filing a well-pled complaint, Rule 3 provides for the commencement of an action by the issuance of a summons and application to the court for permission to file a complaint within twenty days." *Id.* at 326, 341 S.E.2d at 544; *see Wooten v. Warren by Gilmer*, 117 N.C. App. 350, 352-53, 451 S.E.2d 342, 344 (1994) (This Court held that the plaintiff commenced the action within the statute of limitations by filing an application and order stating the nature and purpose of the action and requesting that the time for filing the complaint be extended by 20 days.).

Sink, *Estrada*, and *Wooten* are readily distinguishable from the present case, however. *Sink* and *Wooten* both involved automobile accidents and did not concern medical malpractice actions which are subject to Rule 9(j). *Estrada* involved a medical malpractice claim, but was decided before Rule 9(j) was enacted in 1995, and thus did not address the extension of the statute of limitations under that rule.

The plain language of Rule 9(j) requires a plaintiff to "file a complaint" within a period not to exceed 120 days beyond the applicable statute of limitations. It is well established that "[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988). Appellees contend that the phrase, "file a complaint[,]" in Rule 9(j) is clear and unambiguous, such that it does not permit a plaintiff to file an application pursuant to Rule 3 after an extension of the statute of limitations has already been obtained under Rule 9(j). We find Appellees' argument persuasive.

In *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002), the plaintiff sought to assert a medical malpractice claim arising from an event in June 1996. *Id.* at 199, 558 S.E.2d at 163. "On 8 June 1999, before the three-year statute of limitations was to expire, plaintiff filed a motion to extend the statute of limitations 120 days to file a medical malpractice complaint against defendants." *Id.* Pursuant to Rule 9(j), the trial court granted plaintiff's motion, extending the statute of limitations through 6 October 1999. *Id.* at 199, 558 S.E.2d at 164. On 6 October 1999, the plaintiff filed a medical malpractice complaint. *Id.*

at 200, 558 S.E.2d at 164. The complaint, however, did not contain the certification required by Rule 9(j). *Id.* "On 12 October 1999, six days after the statute of limitations expired, plaintiff filed an amended complaint including a certification that the 'medical care has been reviewed' by someone who would qualify as an expert." *Id.* The defendants filed motions to dismiss because the plaintiff's amended complaint was not filed prior to the court-extended statute of limitations. *Id.* The trial court granted the defendants' motions and dismissed the plaintiff's complaint with prejudice. *Id.*

On appeal, this Court reversed the trial court's order and reinstated the plaintiff's cause of action, holding that "plaintiff was entitled to amend her initial complaint to include the necessary Rule 9(j) certification." *Thigpen v. Ngo*, 143 N.C. App. 209, 219-20, 545 S.E.2d 477, 483 (2001). The Supreme Court reversed this Court's decision, however, holding that dismissal of the plaintiff's complaint was mandatory under Rule 9(j). *Thigpen*, 355 N.C. at 201, 558 S.E.2d at 164. In particular, the Court held that

> [t]he legislature specifically drafted Rule 9(j) to govern the *initiation* of medical malpractice actions and to require physician review as a condition for filing the action. The legislature's intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert certification prior to the filing of a complaint.

Id. at 203-04, 558 S.E.2d at 166 (emphasis added). Furthermore, our Supreme Court has noted that

> [w]here there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute . . . unless it appears that the legislature intended to make the general act controlling[.]

Nat'l Food Stores v. N.C. Bd. of Alcoholic Control, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966). It is clear that the legislature intended Rule 9(j) to provide a comprehensive framework for the "initiation" of medical malpractice actions and that the use of the

clause "to file a complaint in a medical malpractice action" was purposeful. *Accord* 1 G. Gray Wilson, North Carolina Civil Procedure, § 9-11, at 9-18 (3d Ed. 2007) ("The specific requirement of a complaint forecloses the delayed service of complaint provision of Rule 3."). Accordingly, we hold that Rule 9(j) prevails over Rule 3 in this instance.

Thus, in order to comply with the statute of limitations, Plaintiffs were required to file a complaint on or before 4 October 2005, and could not toll or further extend the statute of limitations under Rule 3. On 4 October 2005, Plaintiffs did not file a complaint. Plaintiffs filed an application to file a complaint. Accordingly, Plaintiffs failed to file a complaint within the prescribed period. The order of the trial court is

AFFIRMED.

Judges McGEE and STEELMAN concur.

STACY M. MYERS AND KENNY W. MYERS, PLAINTIFFS V. STEPHANIE BALDWIN AND LEONARD PRESTON BAKER, III, DEFENDANTS

No. COA10-97

(Filed 20 July 2010)

Child Custody and Support— unrelated third parties seeking custody—standing—brief relationship

Plaintiffs lacked standing, and the trial court lacked subject matter jurisdiction, to hear plaintiffs' claim seeking custody of a child from the natural parent, where plaintiffs' contact with the child began only two months before the complaint was filed. Those two months cannot be said to be the significant amount of time necessary for plaintiffs to have established a parent-child relationship with the child. Moreover, the alleged unfitness of defendant as a parent cannot be raised independently by plaintiffs, who are unrelated third parties.

Appeal by defendant from order entered 6 August 2009 by Judge Denise S. Hartsfield in Forsyth County District Court. Heard in the Court of Appeals 8 June 2010.

Theodore M. Molitoris, for plaintiff-appellees.

Dawson Law Firm, PLLC, by Clint E. Dorman, for defendant-appellant Leonard Preston Baker, III.

CALABRIA, Judge.

Leonard Preston Baker, III ("defendant") appeals the trial court's order granting primary custody of his minor child to Stacy M. Myers ("Ms. Myers") and Kenny W. Myers (collectively "plaintiffs"). We reverse.

I. Background

Defendant and Stephanie Baldwin ("Ms. Baldwin") are the natural parents of the minor child "Nathaniel[1]", who was born 9 May 2006. Defendant resides with his girlfriend, Tracey Garrison ("Ms. Garrison"). Ms. Garrison is the natural mother of one child, "Alice", and she shares legal and physical custody of Alice with David and Julie Green ("the Greens").

Until 26 September 2008, the Greens assisted defendant by providing informal care for Nathaniel. On 26 September 2008, Ms. Myers expressed an interest in assisting the Greens by providing child care for Nathaniel during that weekend. At that time, plaintiffs were completely unknown to defendant.

For the next two months, plaintiffs provided Nathaniel with the vast majority of his care, including medical care. Specifically, Nathaniel needed treatment for pink eye, sinusitis, and ear infections. Plaintiffs paid for all medical care and all prescriptions Nathaniel needed to treat these illnesses. Defendant only visited with Nathaniel for short periods of time during the two months Nathaniel was in plaintiffs' primary care.

On 26 November 2008, plaintiffs filed a complaint in Surry County District Court, seeking both temporary and permanent primary physical custody of Nathaniel. Pending a full and final custody hearing, the trial court entered an ex-parte Temporary Custody Order awarding temporary custody to plaintiffs that same day. Venue was transferred to Stokes County on 6 January 2009, *nunc pro tunc* 17 December 2009, and then transferred again to Forsyth County on 23 March 2009. Custody remained with plaintiffs during this time.

---

1. Minor children are referred to by pseudonyms throughout this opinion.

On 24 April 2009, the trial court modified the Temporary Custody Order and granted the parties alternating weeks of temporary custody with the minor child pending a full hearing on custody. In addition, the parties were ordered to attend custody mediation. The custody hearing was conducted from 21-22 July 2009. Ms. Baldwin was unable to be located, and as a result, was not served with process and did not appear at the custody hearing. On 6 August 2009, the trial court entered an order granting primary custody to plaintiffs and secondary custody to defendant. The trial court retained jurisdiction for the limited purpose of ruling on attorney's fees, pending the filing of a fee affidavit. Defendant appeals.

II. Standing

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). While the issue of standing was not raised by defendant in his brief, "issues pertaining to standing may be raised for the first time on appeal, including *sua sponte* by the Court." *Id.* at 324, 560 S.E.2d at 879. "[P]laintiffs have the burden of proving that standing exists." *Am. Woodland Indus., Inc. v. Tolson*, 155 N.C. App. 624, 627, 574 S.E.2d 55, 57 (2002) (citation omitted).

Pursuant to N.C. Gen. Stat. § 50-13.1(a), "[a]ny 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." N.C. Gen. Stat. § 50-13.1(a) (2009). However, "our Supreme Court has indicated that there are limits on the 'other persons' who can bring such an action. A conclusion otherwise would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children." *Mason v. Dwinnell*, 190 N.C. App. 209, 219, 660 S.E.2d 58, 65 (2008) (internal quotations and citation omitted).

In a situation involving a third party characterized as an "other person" under N.C. Gen. Stat. § 50-13.1(a), this Court has held that "the relationship between the third party and the child is the relevant consideration for the standing determination." *Ellison v. Ramos*, 130 N.C. App. 389, 394, 502 S.E.2d 891, 894 (1998). Although the *Ellison* Court acknowledged that "a third party who has no relationship with a child does not have standing under N.C. Gen. Stat. § 50-13.1 to seek custody of a child from a natural parent," the Court ultimately determined that "where a third party and a child have an established relationship in the nature of a parent-child relationship, the third party

does have standing as an 'other person' under N.C. Gen. Stat. § 50-13.1(a) to seek custody." *Id.* at 394-95, 502 S.E.2d at 894-95.

> No appellate court in North Carolina has attempted to draw any bright lines for how long the period of time needs to be or how many parental obligations the person must have assumed in order to trigger standing against a parent, but the existence of a *significant relationship for a significant time should suffice.*

3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.4d, at 13-24 (5th ed. 2002) (emphasis added).

Previous cases in which this Court has held that a third party had standing to seek custody against a natural parent involved significant relationships over extensive periods of time. In *Ellison*, this Court held that a woman with no biological ties to the child had standing to seek a custody determination when she had lived with the child during a five-year period while she was in a relationship with the child's biological father. 130 N.C. App. at 396, 502 S.E.2d at 895. The *Ellison* Court noted that the plaintiff alleged that she was the "only mother the minor child has known" and that she

> was the responsible parent in the rearing and caring for the minor child, as she was the adult who took the minor child to her medical appointments, to school, attended teacher conferences, took the minor child for diabetic treatment and counseling, provided in-home medical care and treatment for her diabetes, taught her about caring [for] her diabetes, and bought all the child's necessities, including clothing, school supplies, medical supplies, toys, books, etc.

Id.

In *Seyboth v. Seyboth*, this Court held that a stepfather had standing to seek visitation rights when he had lived with the child for three years prior to divorcing the child's natural mother. 147 N.C. App. 63, 65-66, 554 S.E.2d 378, 380-81 (2001). The *Seyboth* Court noted the trial court's finding that the plaintiff stepfather

> has taken on the role of father to the child. The Defendant has allowed and encouraged the Plaintiff to assume the position of father to the child and at no time told him that it was a temporary position. On recent occasions when the child was in distress, he called for "Daddy" along with other relatives to whom he is strongly bonded.

Id. at 64, 554 S.E.2d at 380.

Finally, in *Mason*, this Court held that a woman with no biological ties to the child had standing to seek a custody determination when she had lived with the child for four years while in a relationship with the child's biological mother and then shared custody with the child's biological mother for more than two years after the couple separated. 190 N.C. App. at 212-14; 220-21, 660 S.E.2d at 60-62; 65-66. The *Mason* Court held that the plaintiff had standing because the plaintiff and the defendant had

> jointly raised the child; they entered into an agreement in which they each acknowledged that Mason was a *de facto* parent and had "formed a psychological parenting relationship with the parties' child;" and "[t]he minor child has lived all his life enjoying the equal participation of both [Mason] and [Dwinnell] in his emotional and financial care and support, guidance and decision-making."

Id. at 220, 660 S.E.2d at 65.

The facts of the instant case stand in stark contrast to *Ellison*, *Seyboth*, and *Mason*. Plaintiffs' own counsel acknowledged the tenuous relationship between plaintiffs and Nathaniel when he attempted to explain the relationship to the trial court.

> MR. MOLITORIS: Of course I represent Ms. Myers and her husband Kenny who are seated here. They have the status of third parties.
>
> THE COURT: Third-party interven[o]rs?
>
> MR. MOLITORIS: No, they are the plaintiffs.
>
> THE COURT: All right.
>
> MR. MOLITORIS: But in the custody realm of parent—
>
> THE COURT: —Right.
>
> MR. MOLITORIS: —Versus third parties, they are third parties.
>
> THE COURT: By way of being grandparents?
>
> MR. MOLITORIS: No.
>
> MS. MYERS: No.
>
> THE COURT: All right.
>
> MR. MOLITORIS: Strangers.
>
> THE COURT: All right.

Plaintiffs filed their complaint seeking custody of Nathaniel on 26 November 2008. The allegations in plaintiffs' complaint acknowledge that plaintiffs first had contact with Nathaniel on 26 September 2008, a mere two months prior to the filing of the complaint. Even taking into account the fact that Nathaniel was only two-and-a-half years old when plaintiffs sought custody, it is simply impossible under the facts of the instant case to characterize those two months as the significant amount of time necessary for plaintiffs to have established a parent-child relationship with Nathaniel. This is especially true when considering that Nathaniel had contact with defendant for short periods of time during these two months.

Moreover, the facts alleged in plaintiffs' complaint fall short of establishing a significant relationship between plaintiffs and Nathaniel in comparison to the significant relationships that existed in *Ellison*, *Seyboth*, and *Mason*. Plaintiffs' complaint only alleges (1) that plaintiffs cared for Nathaniel for a two-month period between 26 September 2008 and 26 November 2008; and (2) that plaintiffs provided, at their own expense, needed medical care for Nathaniel, including vaccinations. Plaintiffs' actions during the two months they cared for Nathaniel were admirable, and we do not intend to minimize the importance of the care that plaintiffs provided to Nathaniel. However, the care provided cannot be characterized as rising to the level of establishing a parent-child relationship.

The remainder of plaintiffs' complaint contains allegations about the unfitness of Nathaniel's natural parents. If the defendant is truly unable to provide adequate and necessary supervision, care and control for Nathaniel, the Department of Social Services could provide those services. The alleged unfitness of defendant cannot be raised independently by plaintiffs, because the Constitution protects the relationship between a natural parent and a child from interference by unrelated third parties. *Mason*, 190 N.C. App. at 219, 660 S.E.2d at 65.

Plaintiffs have failed to present facts sufficient to establish a significant relationship for a significant time between themselves and Nathaniel. Therefore, we determine that plaintiffs lacked standing to seek custody under N.C. Gen. Stat. § 50-13.4(a). Since plaintiffs lacked standing to pursue custody of Nathaniel, the trial court lacked subject matter jurisdiction to hear plaintiffs' claims and its order must be reversed.

IV. Conclusion

Defendant did not raise the issue of standing in his brief. However, pursuant to *Aubin*, we raise the issue *sua sponte* and determine that plaintiffs failed to establish standing to seek custody of Nathaniel from defendant, the natural parent of Nathaniel. Therefore, the trial court lacked subject matter jurisdiction to hear plaintiffs' claim, and as a result, the trial court's order must be reversed.

Reversed.

Judges WYNN and HUNTER, Robert C. concur.

IN THE MATTER OF: H.N.D.

No. COA10-291

(Filed 20 July 2010)

Child Abuse, Dependency, or Neglect— neglect—no finding of risk of injury

The trial court's findings of fact did not support its conclusion that a child was neglected where the evidence was capable of more than one inference and the court did not make a finding regarding the substantial risk of impairment. To sustain an adjudication of neglect, the alleged conditions must cause the juvenile some physical, mental, or emotional impairment, or create a substantial risk of such impairment.

Judge WYNN dissenting.

Appeal by respondent mother from adjudication and disposition orders entered 25 November 2009, *nunc pro tunc* 29 October 2009, by Judge Carol A. Jones-Wilson in Sampson County District Court. Heard in the Court of Appeals 28 June 2010.

Warrick, Railey, and Bradshaw, P.A., by Frank L. Bradshaw, for petitioner-appellee Sampson County Department of Social Services.

Ryan McKaig, for respondent-appellant mother. Pamela Newell, for Guardian Ad Litem.

ELMORE, Judge.

Respondent mother appeals from orders adjudicating H.N.D. a neglected juvenile. We reverse and remand.

On 31 August 2009, the Sampson County Department of Social Services (DSS) filed a petition alleging that H.N.D. was a neglected juvenile. DSS alleged that on 30 August 2009, H.N.D.'s seventeen-month-old sibling

> drowned while under the care and supervision of Katherine and Travis Highsmith. [H.N.D.] has also been in the care of the Highsmith's [*sic*] for the past three to four weeks. The Highsmith's [*sic*] are of no relation to [H.N.D.]
>
> [DSS] has received 4 calls since 2006 regarding the Highsmith's [*sic*] lack of supervision of their own children. One assessment included an account of one of the children being hit by a car while chasing his younger brother who had run into the road in front of the house. That report alleged that one of the children was lying in the middle of the road and had to be removed by an unrelated adult. The family was last investigated in 2009 and a substantiation of neglect was made. DSS In-Home Services were provided to the family subsequent to the substantiation of neglect. Our agency received another call of inappropriate supervision while DSS was attempting to provide In-Home Services to the family. [Respondent] was present during a home visit to the Highsmith home during DSS['s] recent involvement and she was aware of the supervision issues. [Respondent] continued to allow [H.N.D.] to live there and [H.N.D.'s sibling] to spend a lot of time under the Highsmith's [*sic*] care.
>
> [Respondent] admits to needing to get her life together. She has recently moved into a new place and does not have a crib for [H.N.D.] She admits to drug use and collaterals accuse her of using cocaine. Her boyfriend was arrested by officers due to a near brawl at the emergency room on August 30th. To place a child with [respondent] until her situation can be investigated would be injurious to the welfare of this two month old.

DSS obtained custody of H.N.D. by nonsecure custody order.

An adjudicatory hearing on the petition was held on 29 October 2009. On 25 November 2009, *nunc pro tunc* 29 October 2009, the district court entered an order adjudicating H.N.D. a neglected juvenile. The trial court found as fact that DSS

> previously investigated allegations of abuse, neglect, or dependency at the home of Travis and Nadine Highsmith. That Respondent Mother was present at the home of the Highsmiths on one occasion when [DSS] was present to investigate certain allegations. Respondent Mother also was aware of the large number of children at the home of the Highsmiths as well as the presence of an above-ground pool. That Respondent Mother also uses marijuana and tested positive twice. Respondent Mother has had unstable living arrangements and has resided in five different residences in the past two-three months. Respondent Mother admitted to testing positive for marijuana, once on September 4, 2009, and once on September 29, 2009. Respondent Mother expressed concerns to [DSS] over the Highsmiths. Specifically, Respondent Mother was concerned that there were 10 children in the care of the Highsmiths; that some of the other children were playing rough with Respondent Mother's children; and the children were being left in the care of a 15 year old. That the home of the Highsmiths is a three bedroom mobile home with several pit bulls on the premises. That the above-ground pool did not have a fence or other obstructions to prevent children from accessing it. That the Respondent Mother's other child . . . drowned in the pool at the Highsmith home on August 30, 2009.

Based on this finding, the trial court concluded that H.N.D. was a neglected juvenile. At disposition, the trial court ordered that custody remain with DSS, concluded that the plan for the juvenile should be reunification, and provided for visitation between respondent and the juvenile. Respondent now appeals.

Respondent's sole argument on appeal is that the trial court erred by adjudicating H.N.D. neglected. In an abuse, neglect and dependency case, review is limited to the issue of whether the conclusion of neglect is supported by adequate findings of fact. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). A "neglected juvenile" is defined in N.C. Gen. Stat. § 7B-101(15) as:

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2009). Section 7B-101(15) affords "the trial court some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside." *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999) (citation omitted). To sustain an adjudication of neglect, the alleged conditions must cause the juvenile some physical, mental, or emotional impairment, or create a substantial risk of such impairment. *See In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993).

In the instant case, the trial court made no finding that H.N.D. sustained injury or impairment as a consequence of respondent-mother's failure to provide proper care, supervision, or discipline, or that the juvenile was at risk of injury or impairment. *See In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) ("The trial court's factual findings must be more than a recitation of allegations. They must be the specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.") (quotations and citation omitted). There are cases in which the evidence is so substantial that a finding of substantial risk is not necessary. *See Safriet* at 753, 436 S.E.2d at 902 (citing *Harris v. N.C. Farm Bureau Mutual Ins. Co.*, 91 N.C. App. 147, 150, 370 S.E.2d 700, 702 (1998) ("remand because of inadequate findings of fact unnecessary where facts are disputed"). However, the evidence here is capable of more than one inference; as such, the trial court must make a finding regarding the substantial risk of impairment. We consequently conclude the trial court's findings of fact do not support its conclusion of law that H.N.D. was neglected. Accordingly, we reverse the trial court's adjudication of neglect and remand to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

Judge HUNTER, JR., Robert N., concurs.

Judge WYNN dissents by separate opinion.

WYNN, Judge, dissenting.

The majority recites the rule that to sustain an adjudication of neglect, the alleged conditions must cause the juvenile some physical, mental, or emotional impairment, or create a substantial risk of such

impairment, citing *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993). Here, the trial court did not make such a finding. The majority holds that in the absence of such a finding, the trial court's order must be reversed.

However, our precedent reveals that the order *affirmed* in *Safriet* contained no such finding either. As we noted in that case, "[a]lthough the trial court failed to make any findings of fact concerning the detrimental effect of Ms. Safriet's improper care on [the juvenile's] physical, mental, or emotional well-being, *all the evidence supports such a finding*." *Id.* at 753, 436 S.E.2d at 902 (emphasis added).

"A proper review of a trial court's finding of neglect entails a determination of (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations and quotations omitted). Indeed, we defined our standard of review in abuse, neglect, and dependency cases by stating "[o]ur review of a trial court's *conclusions of law* is limited to whether they are supported by the findings of fact." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (emphasis added).

In the present case, Respondent argues that the trial court erred in basing its adjudication of neglect *solely* on the fact that Respondent's other child died in her custody. Respondent does not, however, contest the trial court's finding that she tested positive for marijuana use; had unstable living arrangements; and willfully left both of her children in the care of a family (1) that was responsible for supervising ten children, (2) that Respondent knew had been investigated by DSS before, and (3) that owned the unfenced above-ground pool where Respondent's other child drowned. As in *Safriet*, the evidence supports these findings and these findings support the trial court's adjudication of neglect. *See Helms*, 127 N.C. App. at 511-12, 491 S.E.2d at 676 (unstable living arrangements and exposure to dangerous people support adjudication of neglect); *In re Nicholson and Ford*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994) (recognizing trial court's discretion in weighing evidence of another child's death as a relevant factor in neglect proceedings).

THE STATE OF NORTH CAROLINA v. EDWARD JASON STANLEY, DEFENDANT

No. COA09-1263

(Filed 20 July 2010)

Sexual Offenders— registry—parental exemption—stepfather

The trial court erred by ordering that defendant's name be removed from the Sexual Offender and Public Protection Registry where defendant had been convicted of three counts of abducting children after taking an out-of-state trip with his wife and her three children in contravention of a custody order. Defendant was the father of two of the children and the stepparent but not the adoptive parent of the third. There was no allegation of sexual misconduct, but the definition of parent as a biological or adoptive parent best fits the intent of N.C.G.S. § 14-208.6(1i). As defendant was not a "parent" of the child at issue and has been convicted of a reportable conviction, the trial court erred by concluding that defendant was not subject to registry requirements.

Appeal by plaintiff from order entered on or about 20 May 2009 by Judge William R. Pittman in Superior Court, Guilford County. Heard in the Court of Appeals 25 February 2010.

Attorney General Roy A. Cooper, III by Special Deputy Attorney General John J. Aldridge, III and Assistant Attorney General Ernest Michael Heavner, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellee.

STROUD, Judge.

Defendant was convicted of three counts of abduction of children. Due to defendant's convictions, he was required to register on the Sexual Offender and Public Protection Registry. The trial court concluded that defendant did not have to register. As the trial court's order is in plain contravention of the law, we reverse and remand.

I. Background

On 30 April 2002, defendant was convicted for three counts of abduction of children pursuant to N.C. Gen. Stat. § 14-41; these convictions are not the subject of this appeal. However, the facts which

led to defendant's abduction convictions are relevant to an understanding of the issues raised in this appeal. According to the attorneys' arguments before the trial court in the case before us, it was undisputed that defendant and his wife took her three children on a trip out of North Carolina in contravention of a custody order which granted custody to the children's maternal grandmother. Defendant considered all three children to be his, but was technically only the father of two of the children; defendant was not the biological or adoptive father of one of the children, though he was her stepparent at the time of the abduction. It appears that there was no allegation of any sexual misconduct by defendant against any of the three children during the abduction or at any other time. Despite his convictions for abduction, defendant failed to register on the Sexual Offender and Public Protection Registry ("registry").

On or about 1 October 2007, defendant was indicted for failing to register. On 10 December 2008, defendant filed a petition for removal from the registry and a motion to dismiss the criminal charge against him. On or about 20 May 2009, in response to defendant's petition and motion, the trial court dismissed the criminal charge against defendant and ordered that defendant's name be removed from the registry. The trial court based its order on its conclusion that two of the convictions for abduction of children stemmed from defendant's own children and defendant had "acted as" a parent to the third child, so defendant was not required to register. The State appeals.

II. Registration

The State first contends that defendant "is subject to the requirements of the North Carolina Sex Offender and Public Protection Registration Programs." (Original in all caps.) The State argues that the fact that defendant "acted as" a parent to a child, as the trial court found, is not enough to exempt him from registration; the State contends defendant could only be exempt if he was actually a parent to his stepchild.

We review questions of statutory interpretation *de novo*. *See Downs v. State*, 159 N.C. App. 220, 222, 582 S.E.2d 638, 639 (2003), *aff'd per curiam*, 358 N.C. 213, 593 S.E.2d 763 (2004).

> Statutory interpretation begins with the cardinal principle of statutory construction that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it

> seeks to accomplish. Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.

State v. McCravey, ––– N.C. App. –––, –––, 692 S.E.2d 409, 418 (2010) (citations, quotation marks, ellipses, and brackets omitted). N.C. Gen. Stat. § 14-208.7 provides that "[a] person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides." N.C. Gen. Stat. § 14-208.7(a) (2007). A "[r]eportable conviction" includes "[a] final conviction for an offense against a minor[.]" N.C. Gen. Stat. § 14-208.6(4)(a) (2007). An "[o]ffense against a minor" includes abduction of children pursuant to N.C. Gen. Stat. § 14-41, "if the offense is committed against a minor, and the person committing the offense *is not the minor's parent*[.]" N.C. Gen. Stat. § 14-208.6(1i) (2007) (emphasis added).

Although the term "parent" is not necessarily ambiguous or unclear, it is true that "parent" is not defined in Chapter 14 of our General Statutes and that there are varying definitions of "parent" for various purposes within the General Statutes, some of which even include "parent" as part of the definition of a person who may be considered as a "parent."[1] Thus, we must seek the definition of "parent" which is in accord with the General Assembly's intent and purpose for N.C. Gen. Stat. § 14-208.6(1i).

> If the language is ambiguous or unclear, the reviewing court must construe the statute in an attempt not to defeat or impair the object of the statute if that can reasonably be done without doing violence to the legislative language. In so doing,
>
> > a court may look to other indicia of legislative will, including: the purposes appearing from the statute taken as a whole, the

1. *See*, *e.g.*, N.C. Gen. Stat. §§ 115C-391(d5) (2009) (identifying the persons who must receive notice of a student's recommended suspension or expulsion from school: "For the purposes of this subsection, the word 'parent' shall mean parent, guardian, caregiver, or other person legally responsible for the student"); 115C-106.3(14) (2007) (regarding education of children with disabilities: "The following definitions apply in this Article . . . 'Parent' means: a. A natural, adoptive, or foster parent; b. A guardian, but not the State if the child is a ward of the State; c. An individual acting in the place of a natural or adoptive parent, including a grandparent, stepparent, or other relative, and with whom the child lives; d. An individual who is legally responsible for the child's welfare; or e. A surrogate if one is appointed under G.S. 115C-109.2"); 130A-440.1(h) (2007) (dealing with early childhood vision care: "As used in this section, the term 'parent' means the parent, guardian, or person standing in loco parentis").

> phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in pari materia, the preamble, the title, and other like means. Statutory provisions must be read in context, and those dealing with the same subject matter must be construed in pari materia, as together constituting one law, and harmonized to give effect to each.

Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 123, 619 S.E.2d 862, 865 (2005) (citations, quotation marks, ellipses, and brackets omitted), *aff'd per curiam*, 360 N.C. 396, 627 S.E.2d 462 (2006).

Black's Law Dictionary defines a "parent" as "[t]he lawful father or mother of someone." Black's Law Dictionary 1222 (9th ed. 2004). "Parent" has also been defined in essentially the same way in various statutes. *See*, *e.g.*, N.C. Gen. Stat. §§ 51-2.2 (2007) (As used in this Article, the terms " 'parent,' 'father,' or 'mother' includes one who has become a parent, father, or mother, respectively, by adoption."); 108A-24(4b) (2007) (" 'Parent' means biological parent or adoptive parent[.]"). Thus, a "parent" pursuant to N.C. Gen. Stat. §§ 51-2.2 and 108A-24(4b) is a biological or adoptive parent, mother or father, of a child. *See* N.C. Gen. Stat. §§ 51-2.2; 108A-24(4b); *see also* Black's Law Dictionary 1222. We believe that the definition of a parent as a biological or adoptive parent best fits the intent and purposes of N.C. Gen. Stat. § 14-208.6(1i) (2007). Defendant was not a "parent" of the child at issue because he was not the biological father or the adoptive father of the child.

Although we fully appreciate the logic and common sense of defendant's argument, that taking his stepchild, along with his wife, the stepchild's mother, should not be considered as a "reportable offense" leading to registration, we are unable to interpret N.C. Gen. Stat. § 14-208.6(1i) in any other way based upon the plain language of the statute and its history. *See* N.C. Gen. Stat. § 14-208.6(1i). The legislative history of N.C. Gen. Stat. § 14-208.6(1i) indicates an intent to limit the exemption from registration strictly to a parent only and not to permit the exemption even for one who has legal custody of a child. *Compare* N.C. Gen. Stat. §§ 14-208.6(1d) (1997), (1999). Although N.C. Gen. Stat. § 14-208.6 once permitted an exception from registration for the "legal custodian" of a child, the General Assembly later eliminated this exception.[2] *See id.* In 1997, N.C. Gen.

2. "Legal custodian" also has no definition within Chapter 14. The only statutory definition of "legal custodian" we are aware of is in Chapter 115C of the General Statutes, dealing with admission and assignment of elementary and secondary stu-

Stat. § 14-208.6(1d) provided that an "[o]ffense against a minor" included an "offense . . . committed against a minor, and the person committing the offense is not the minor's parent or legal custodian[.]" *See* N.C. Gen. Stat. § 14-208.6(1d) (1997). However, by 1999, the General Assembly had amended N.C. Gen. Stat. § 14-208.6(1d), removing the words "or legal custodian" and leaving status as a "parent" as the only basis for exception under this statute. *See* N.C. Gen. Stat. § 14-208.6(1d) (1999). As noted above, we also are aware that throughout our General Statutes, the term "parent" has been defined in different ways for various purposes, and the definition is often limited to the purpose of the particular statute, *see*, *e.g.*, N.C. Gen. Stat. §§ 115C-391(d5) (2009); -106.3(14) (2007); 130A-440.1(h) (2007); however, due to the Legislature's decision to remove "legal custodian" from the language of N.C. Gen. Stat. § 14-208.6(1d), currently N.C. Gen. Stat. § 14-208.6(1i), which narrowed the exception to only a "parent[,]" we cannot adopt a broad interpretation of the term "parent" which could include legal custodians such as guardians or foster parents. If we cannot include a person with legally sanctioned custody of a child within the definition of "parent," we certainly cannot include a person with an informal status such as caregiver or one standing *in loco parentis*.

As defendant was not a "parent" of the child at issue and has been convicted of a reportable conviction, the trial court erred in concluding defendant's name should be removed from the registry and that defendant is not subject to the registry requirements. *See* N.C. Gen. Stat. § 14-208.7(a). Although we understand the trial court's rationale and agree that the plain reading of the statute creates a result in this case which we would hope was probably not intended by the General Assembly, we are constrained to reverse the trial court's order.

III. Conclusion

In conclusion, we reverse the trial court order removing defendant's name from the registry, declaring that defendant is not subject to registry requirements, and dismissing the criminal charge against defendant for failure to register. We remand this case for further proceedings in accordance with this opinion.

---

dents, where "legal custodian" means "[t]he person or agency that has been awarded legal custody of the student by a court." N.C. Gen. Stat. § 115C-366(h)(6) (2007). A "legal custodian" of a child would almost certainly be "act[ing] as" a parent to a child, with legal sanction of the court's authority.

REVERSED AND REMANDED.

Judges ELMORE and JACKSON concur.

MIGUEL MORALES-RODRIGUEZ, EMPLOYEE, PLAINTIFF v. CAROLINA QUALITY EXTERIORS, INC. AND/OR BILL VINSON D/B/A 3-D AESTHETIC HOUSE ART, EMPLOYERS, NONINSURED AND WILLIAM F. VINSON, III, INDIVIDUALLY AND CYNTHIA VINSON, INDIVIDUALLY, DEFENDANTS

No. COA07-1389

(Filed 20 July 2010)

1. Workers' Compensation— jurisdiction—employee—not independent contractor

The Industrial Commission had jurisdiction in a workers' compensation case to award plaintiff benefits because plaintiff was defendants' employee, and not an independent contractor, at the time of his alleged injury.

2. Workers' Compensation— temporary total disability benefits—late fee

The Industrial Commission erred in a workers' compensation case in assessing defendant a ten percent late fee on accrued temporary total disability benefits awarded to plaintiff. Defendants timely appealed from the opinion and award and, therefore, no payment had become due at the time the opinion and award was rendered.

Appeal by defendants from Opinion and Award entered 10 July 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 May 2010.

No brief for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Jacob H. Wellman, for defendants-appellants.

MARTIN, Chief Judge.

Plaintiff sought benefits for injuries allegedly sustained on 10 September 2004 when he fell from a building at Nags Head, North Carolina while applying stucco siding. He testified that he was using

a rope and harness to hang from the side of the building when the rope came loose from a roof-mounted fan to which it was attached, causing him to fall. Defendants denied that an employer-employee relationship existed on the date of the alleged injury, and further denied that plaintiff suffered an accident arising out of the course and scope of his employment.

By an Opinion and Award entered 10 July 2007, the Full Commission found and concluded that plaintiff was an employee of defendant Carolina Quality Exteriors, Inc. and was injured in the course and scope of that employment. The Commission awarded plaintiff temporary total disability benefits and medical expenses, assessing a ten percent late penalty for late payment of compensation, assessing penalties for failing to secure workers' compensation insurance, assessing a civil penalty against defendants for failing to comply with N.C.G.S. § 97-93, and assessing an additional civil penalty against Cynthia Vinson, vice-president of Carolina Quality Exteriors, Inc., for failure to comply with N.C.G.S. § 97-93.

On 9 August 2007, defendants appealed to this Court. These proceedings were stayed on 23 January 2008 pursuant to 11 U.S.C. § 362 by reason of a bankruptcy proceeding filed by individual defendant, Cynthia Vinson. By order of this Court entered 12 February 2010, these proceedings were resumed after it was made to appear to the Court that Cynthia Vinson has been discharged in bankruptcy and the bankruptcy proceeding had been closed.

---

[1] On appeal, defendants first challenge the Commission's jurisdiction to award benefits because they contend plaintiff was not an employee of Carolina Quality Exteriors, Inc. at the time of his alleged injury. In order for a claimant to maintain a proceeding for worker's compensation benefits, it is required that the claimant be an employee, in law and in fact, of the party from whom the compensation is claimed. *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437, *reh'g denied*, 322 N.C. 116, 367 S.E.2d 923 (1988). Defendants contend plaintiff was an independent contractor.

An independent contractor is not covered by the Worker's Compensation Act and does not come within the jurisdiction of the Industrial Commission. *See id.* The burden is upon the claimant to prove the existence of the employer-employee relationship at the time the injury occurred. *Ramey v. Sherwin-Williams Co.*, 92 N.C. App. 341, 343, 374 S.E.2d 472, 473 (1988).

The issue of whether an employer-employee relationship existed at the time of the injury, then, is a jurisdictional fact. *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976).

> [T]he finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.

Id. Because defendants challenge the Commission's jurisdiction, we have examined the entire record *de novo*, as we are required to do, and, for the reasons explained below, hold that plaintiff was defendants' employee at the time of his alleged injury. Therefore, the Commission did have jurisdiction to award him benefits.

In determining whether the relationship of employer-employee, or that of independent contractor, exists, our Supreme Court has stated, "The vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details." *Hayes v. Elon Coll.*, 224 N.C. 11, 15, 29 S.E.2d 137, 140 (1944). Factors to be considered are that

> [t]he person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Id. at 16, 29 S.E.2d at 140. However,

> [t]he presence of no particular one of these *indicia* is controlling. Nor is the presence of all required. They are considered along with all other circumstances to determine whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee.

Id.

In performing our task to review the record *de novo* and make jurisdictional findings independent of those made by the Commission, we are necessarily charged with the duty to assess the credibility of the witnesses and the weight to be given to their testimony, using the same tests as would be employed by any fact-finder in a judicial or quasi-judicial proceeding. In the present case, only two witnesses, plaintiff and defendant Bill Vinson, provided evidence with respect to the plaintiff's status at the time of this injury.

Plaintiff testified through an interpreter. His testimony tended to show that he had been employed by defendant as a plasterer for eight or nine months on the date of the accident. He was required to complete an application and, when he was hired, defendant Vinson agreed to pay him "by the hour." He testified that defendant Vinson assigned the jobs on which he was required to work. After about four months, he was made a supervisor of other workers, but those workers were hired by defendant Vinson, rather than plaintiff. Defendant Vinson would prepare time sheets for the workers each week and give them to plaintiff, who would fill in his time and the other workers' time, and return them to defendant Vinson. Defendant Vinson would then pay the workers directly, by check. Plaintiff offered into evidence some of the time sheets he had filled out while he was employed, and a wage statement for 2004, showing the amount he had been paid and also showing various amounts defendants had deducted from his pay for various items, including workers' compensation insurance.

On the morning of the accident, plaintiff testified that defendant Vinson was present at the job site and gave him instructions as to what needed to be done that day and how to do it. He testified that defendant tied the rope to the roof and instructed him to use it and the harness to complete stucco work near the roof. Later the same afternoon, while plaintiff was working as defendant Vinson had instructed him, he fell and sustained his injury.

Defendant Vinson testified that although plaintiff had initially been paid by the hour, he had approached plaintiff sometime before beginning work on the Nags Head project and requested that he be paid based on the work performed rather than hourly. Defendant Vinson testified that he agreed with plaintiff's request, but offered no evidence to support his contention that he ever paid plaintiff "by the foot" rather than "by the hour." He denied that he had been on the job site on the date of plaintiff's injury, that he did not give plaintiff directions on how to do the work or how long it should take him, and that

he did not supervise plaintiff and did not even intend to inspect plaintiff's work as long as he got paid for it. Finally, defendant Vinson testified that he did not believe plaintiff was injured in the manner in which plaintiff testified.

In their brief, defendants point to various inconsistencies which they contend exist in plaintiff's testimony, and argue that we should, therefore, afford no credibility to his testimony concerning the relationship which he had with defendants. We have considered their contentions carefully and conclude that some of the alleged inconsistencies appear to be due to difficulties encountered by the interpreter in phrasing plaintiff's testimony. Others have to do with the manner in which the accident occurred and the manner in which plaintiff described the accident and his injuries to various medical providers, which have no bearing on the employment relationship. Moreover, the Commission found the facts relating to the manner in which the accident occurred and the injuries sustained by plaintiff consistent with plaintiff's testimony, and defendants have brought forward no exceptions to those findings. Since they have no bearing on the issue of jurisdiction and are supported by plaintiff's testimony, they are binding upon us.

On the other hand, we believe defendant Vinson was evasive in his testimony and asserted no recollection of various facts which bear on the jurisdictional issue. Based on the totality of the evidence, and after assessing the weight and credibility to be given to the testimony of each of the two witnesses, we conclude the evidence shows that none of the *Hayes* factors indicative of an independent contractor relationship are present here, and that defendant Vinson retained "the right of control and superintendence" over plaintiff so that plaintiff was defendants' employee. Therefore, we hold that plaintiff was an employee of defendants on the date of his injury, and that defendants regularly employed three or more employees on the date of the accident so as to be subject to the provisions of the Workers' Compensation Act.

[2] Defendants' only remaining argument is that the Commission erred in assessing a ten percent late fee on accrued temporary total disability benefits. We agree.

N.C.G.S. § 97-18(g) states that, "[i]f any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition

to, such installment . . . ." N.C. Gen. Stat. § 97-18(g) (2009). The first installment of plaintiff's compensation "shall become due 10 days from the day following expiration of the time for appeal from the award or judgment." N.C. Gen. Stat. § 97-18(e). A party has fifteen days from notice of the Deputy Commissioner's award to appeal to the Full Commission. N.C. Gen. Stat. § 97-85 (2009). Defendants, who gave notice of appeal from the deputy commissioner's 13 December 2006 Opinion and Award on 21 December 2006, timely appealed from this Opinion and Award. A party has an additional thirty days from the date of or notice of the Full Commission's award to appeal to this Court. *See* N.C. Gen. Stat. § 97-86 (2009). Defendants, who gave notice of appeal from the full Commission's 10 July 2007 Opinion and Award on 7 August 2007, also timely appealed from this Opinion and Award. Therefore, no payment had become due at the time of the Full Commission's Opinion and Award and the assessment of the late penalty was error.

Affirmed in part, vacated in part.

Judges BRYANT and ELMORE concur.

KATHERINE M. McCRAW ET AL., PLAINTIFFS v. GEORGE W. AUX, JR., INDIVIDUALLY, AND GEORGE W. AUX, JR. TRUST DATED NOVEMBER 8, 2006, DEFENDANTS

No. COA09-1238

(Filed 20 July 2010)

Parties— failure to join necessary party—order vacated

Plaintiffs' action to enforce protective covenants against defendants was vacated and remanded where plaintiffs' requested remedy was dependent upon determinations to be made by the Architectural Control Committee (Committee), making the Committee a necessary party to the action, but the Committee was not joined in the action.

Appeal by defendants from order entered 12 June 2009 by Judge Paul Ridgeway in Superior Court, Wake County. Heard in the Court of Appeals 10 February 2010.

Jordan Price Wall Gray Jones & Carlton, by Brian S. Edlin, for plaintiff-appellees.

Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr., for defendant-appellants.

STROUD, Judge.

Defendants appeal a summary judgment order which grants summary judgment in favor of plaintiffs. As a necessary party was not joined in this case, we vacate and remand the order.

I. Background

Plaintiffs and defendants are homeowners within Crenshaw Manor Subdivision. On 23 October 2008, plaintiffs filed a verified complaint against defendants to enforce protective covenants. Plaintiffs alleged that the protective covenants of Crenshaw Manor Subdivision required that defendants apply to the Architectural Control Committee ("Committee") to get approval to change the existing roof on their home. Defendants did apply with the Committee to replace their cedar roof with a metal roof, and their request was denied. Defendants nonetheless had the metal roof installed on their house. Plaintiffs sued because defendants installed their roof in violation of the protective covenants. Plaintiffs requested a preliminary injunction and a permanent mandatory injunction, requiring, *inter alia*, that defendants remove the new non-compliant roof and replace it with a roof that does comply with the protective covenants.

On or about 19 March 2009, plaintiffs filed a motion for summary judgment. On 15 May 2009, plaintiffs filed an amended motion for summary judgment. On 12 June 2009, the trial court granted summary judgment in favor of plaintiffs. The trial court ordered defendants to apply to the Committee regarding modifying the roof at issue within thirty days. The trial court further ordered that if the Committee denied defendants' modification, defendants had sixty days from the Committee's decision to "restore the previous split western red cedar shake roof[.]" Defendants appeal.[1]

II. Joinder

We first note that plaintiffs' requested remedy is dependent upon determinations to be made by the Committee, but the Committee is

1. Although the record contains assignments of error on behalf of plaintiffs, plaintiffs failed to file a notice of appeal. Due to our determination that a necessary party was not properly added, we do not address either plaintiffs' or defendants' contentions.

not a party to this suit. "[W]hen a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action." N.C. Gen. Stat. § 1A-1, Rule 19(b); *see Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E.2d 360, 366 (1978) ("When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in." (citations omitted)). Even though the parties here have failed to address the need for the Committee to be a party, the trial court should have raised this issue *ex mero motu*. *See In re Foreclosure of a Lien by HCTCHA*, —— N.C. App. ——, ——, 683 S.E.2d 450, 453 (2009) ("When there is an absence of necessary parties, the trial court should correct the defect *ex mero motu* upon failure of a competent person to make a proper motion." (citation and quotation marks omitted)). Therefore, we must *ex mero motu* consider whether the Committee is a necessary party, because this issue affects the trial court's jurisdiction to enter a judgment and our review of it. *See id.* at ——, 683 S.E.2d at 452 ("The necessary joinder rules of N.C.G.S. Sec. 1A-1, Rule 19 place a mandatory duty on the court to protect its own jurisdiction to enter valid and binding judgments." (citation, brackets, and quotation marks omitted)); *Xiong v. Marks*, 193 N.C. App. 644, 652, 668 S.E.2d 594, 599 (2008) ("[A]n appellate court has the power to inquire into jurisdiction in a case before it at any time, even sua sponte." (citation omitted)); *see also Inland Greens HOA v. Dallas Harris Real Estate-Construction*, 127 N.C. App. 610, 613, 492 S.E.2d 359, 361 (1997) ("[O]ur Courts have held that notice and an opportunity to be heard are prerequisites of jurisdiction and jurisdiction is a prerequisite of a valid judgment." (citations, quotation marks, ellipses, and brackets omitted)).

Rule 19 of our Rules of Civil Procedure provides that "those who are united in interest must be joined as plaintiffs or defendants[.]" N.C. Gen. Stat. § 1A-1, Rule 19(a). "Necessary parties must be joined in an action." *In re Foreclosure of a Lien by HCTCHA* at ——, 683 S.E.2d at 452 (citation and quotation marks omitted). "A necessary party is one whose presence is required for a complete determination of the claim, and is one whose interest is such that no decree can be rendered without affecting the party." *Begley v. Employment Security Comm.*, 50 N.C. App. 432, 438, 274 S.E.2d 370, 375 (1981) (citations and quotation marks omitted). "[A] necessary party is one whose interest will be directly affected by the outcome of the litigation." *Id.* (citation and quotation marks omitted). "A person is united in interest [,pursuant to Rule 19 of the Rules of Civil Procedure,] with another party when that person's presence is necessary in order for

the court to determine the claim before it without prejudicing the rights of a party before it or the rights of others not before the court." *Ludwig v. Hart*, 40 N.C. App. 188, 190, 252 S.E.2d 270, 272 (quotation marks omitted), *disc. review denied*, 297 N.C. 454, 256 S.E.2d 807 (1979).

Here, the protective covenants provide:

> 4. There shall be an Architectural Control Committee that shall have full responsibility for regulating any requirement of these restrictive covenants. . . . no . . . structure shall be erected, altered, placed or allowed to remain on any premises in the subdivision unless approval in writing has been given by the Architectural Control Committee. . . .
>
> 5. The roof of each dwelling and its garage must be either cedar shake, cedar shingle, or stand-in-seam metal roofing of copper, tin or other metal material of similar quality, approved by the Architectural Control Committee. . . .

Thus, pursuant to the protective covenants plaintiffs are seeking to enforce, the Committee has "full responsibility for regulating any requirement of these restrictive covenants" and is the only entity that can "alter[], place[] or allow[the roof] to remain[.]" In other words, any changes to be made to the newly-installed metal roof to bring it into compliance with the protective covenants must be approved by the Committee. As a practical matter, defendants cannot remove the roof from the home without first getting approval from the Committee for the new roof. We are unable to conceive of a way in which plaintiff could receive its requested remedy, removal of the non-compliant roof and replacement with a compliant roof, without the involvement and approval of the Committee. In fact, although the trial court failed to join the Committee as a party, it apparently recognized that the Committee's participation was necessary, as the order directs that

> within thirty days (30) of this Order, *the Defendant[s] may apply to the Architectural Control Committee ("ACC")* for a plan on changing, painting or otherwise modifying the current metal Patina Green roof on the property at 1529 Crenshaw Point, Wake Forest, North Carolina 27587 ("Lot") so as to comply with the Protective Covenants recorded at book 4513, page 804 of the Wake County Register of Deeds. *The ACC shall be under no obligation to accept the proposed change to the current roof*,

> *however, will in good faith consider any such proposed change by the Defendants.*
>
> IT IS FURTHER ORDERED ADJUDGED AND DECREED that in the event the ACC does not approve the proposed plan from the Defendants on changing, painting or otherwise modifying the current metal Pa[]tina Green roof on the property, *after good faith deliberation by the ACC*, then the Defendants shall within sixty days (60) *of the ACC's decision*, remove the current roof on the property and restore the previous split western red cedar shake roof on the home on the Lot as prayed for in the Verified Complaint in this case.

(Emphasis added.) Thus the order itself notes that the Committee is a party "whose presence is required for a complete determination of the claim." *Begley* at 438, 274 S.E.2d at 375.

As the Committee was not joined as a party, the trial court should not have addressed the merits of the case and its judgment is "null and void." *Rice v. Randolph*, 96 N.C. App. 112, 113, 384 S.E.2d 295, 297 (1989) ("A judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void." (citation omitted)); *see White v. Pate*, 308 N.C. 759, 764, 304 S.E.2d 199, 202-03 (1983) ("When the absence of a necessary party is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action." (footnote omitted)). As a necessary party was not properly joined we "refuse to deal with the merits of the action until the necessary party is brought into the action." *Id.* We therefore, vacate the trial court's order and remand this case for further proceedings after joinder of the Committee.

Although we are not addressing the substantive issues raised by the defendants, for purposes of guidance to the trial court on remand we note that defendants' brief argues that the Committee's "rights, privileges and obligations[,]" (original in all caps), were transferred to the Crenshaw Manor Homeowners Association, Inc. ("HOA"). If this were true, the HOA may also be a necessary party. Also, plaintiffs' prayer for relief in their verified complaint, the protective covenants, and the trial court order granting summary judgment all address only the authority and obligations of the Committee and not the HOA. On remand, the trial court should consider all of the evidence and arguments of the parties regarding necessary parties and should join any and all necessary parties. If the trial court should determine that the

HOA is also a necessary party, this opinion should not be construed as preventing its joinder.

III. Conclusion

We vacate the trial court's judgment and remand for joinder of all necessary parties.

VACATED AND REMANDED.

Judges BRYANT and ELMORE concur.

JOHN HODGES, PLAINTIFF v. DAVID MOORE, DEFENDANT

No. COA10-69

(Filed 20 July 2010)

Civil Procedure— summary judgment—Rule 56—no findings of fact required—Rule 52 inapplicable

The trial court did not err by refusing to enter findings of fact pursuant to Rule 52 of the Rules of Civil Procedure in an order granting defendant's motion for summary judgment as the provisions of Rule 52 do not apply to orders granting summary judgment pursuant to Rule 56.

Appeal by plaintiff from order entered 15 October 2009 by Judge Judson D. DeRamus, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 9 June 2010.

Steven A. McCloskey, Attorney at Law, by Steven A. McCloskey, for plaintiff-appellant.

Ellis B. Drew, III and R. Michael Wells, Jr., for defendant-appellant.

STEELMAN, Judge.

The trial court did not err by refusing to enter findings of fact pursuant to Rule 52 of the Rules of Civil Procedure in an order granting defendant's motion for summary judgment.

I. Factual and Procedural Background

On 18 March 2009, John Hodges (plaintiff) filed this action against David Moore (defendant). The complaint alleged that plaintiff contracted with Street Styles, Inc. to customize his Nissan Sentra motor vehicle. Plaintiff paid Street Styles, Inc. monies for the work, which was not performed. Defendant's son was convicted in criminal court for failing to complete the work after being paid, and was ordered to pay restitution. Defendant's son paid only $400.00 of the restitution.

This action seeks recovery of monetary damages from defendant, who was a shareholder in the corporation. Plaintiff's complaint seeks to "pierce the corporate veil" in order to recover from defendant individually. On 15 October 2009, Judge DeRamus granted defendant's motion for summary judgment and dismissed plaintiff's action. Plaintiff appeals.

II. Refusal of Trial Court to Enter Findings of Fact

In his only argument on appeal, plaintiff contends that the trial court erred in failing to make findings of fact and conclusions of law after a request by plaintiff's counsel that they be included in the order. We disagree.

Judge DeRamus's order stated that the trial court "finds and concludes that there is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law." We hold this order to be sufficient and that the provisions of Rule 52 of the Rules of Civil Procedure do not apply to orders granting summary judgment pursuant to Rule 56.

"Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 33-34, 588 S.E.2d 20, 30 (2003) (quoting *Mosley v. National Finance Co.*, 36 N.C. App. 109, 111, 243 S.E.2d 145, 147 (1978), *overruled on other grounds by Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 279-80, 354 S.E.2d 459, 464 (1987)). "There is no necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact." *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975).

The case cited by plaintiff, *Agbemavor v. Keteku*, 177 N.C. App. 546, 629 S.E.2d 337 (2006), specifically acknowledged the above-cited holding in *Broughton*, and held that it was not applicable because the trial court's rulings appealed from were made pursuant to Rules 12(b)(2), (b)(3), and (b)(5), and not pursuant to Rule 56. *Id.* at 550, 629 S.E.2d at 241.

Plaintiff does not argue the merits of the trial court's ruling.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

STATE OF NORTH CAROLINA v. CHARLES THOMAS MILLER

No. COA09-927

(Filed 20 July 2010)

Appeal and Error— jurisdiction of appellate court—denial of motion to suppress evidence—appeal from judgment required

The Court of Appeals did not have jurisdiction to hear defendant's appeal from the denial of his motion to dismiss evidence seized after a search, which was followed by a guilty plea, where defendant gave written notice of his intent to appeal the denial of his motion but did not appeal from his judgment of conviction. Defendant preserved his right to appeal, but did not appeal from the final judgment as required by statute.

Appeal by Defendant from order entered 5 March 2009 by Judge C. Phillip Ginn in Superior Court, Buncombe County. Heard in the Court of Appeals 23 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General J. Aldean Webster III, for the State.

Irving Joyner for Defendant-Appellant.

McGEE, Judge.

Charles Thomas Miller (Defendant) was indicted on 1 December 2008 for possession of cocaine with the intent to sell or deliver.

Defendant filed a pre-trial motion to suppress all evidence obtained after an allegedly illegal search and seizure. A suppression hearing was held on 3 March 2009 and the trial court denied Defendant's motion to suppress in an order signed 3 March 2009 and filed 5 March 2009. Defendant gave written notice of his intent to appeal the denial of his motion to suppress. Defendant then entered a guilty plea to a charge of possession of cocaine with the intent to distribute. Defendant did not give oral notice of appeal in open court at the time of his guilty plea. Defendant did file on 5 March 2009 a written notice of appeal "from the denial of Defendant's motion to suppress," but Defendant did not appeal from his judgment of conviction.

N.C. Gen. Stat. § 15A-979(b) (2009) states that: "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." Defendant has failed to appeal from the judgment of conviction and our Court does not have jurisdiction to consider Defendant's appeal. *State v. Taylor*, ––– N.C. App. –––, –––, S.E.2d –––, –––, 2010 WL 1960851 (2010) (unpublished opinion) (dismissing appeal where the defendant preserved his right to appeal from denial of his motion to suppress but did not appeal from his judgment of conviction, holding "[a]s defendant has only appealed from the denial of his motion to suppress, and not from his final judgment, we have no jurisdiction to hear this appeal."); *accord State v. Turner*, 305 N.C. 356, 289 S.E.2d 368 (1982); and *State v. Tate*, 300 N.C. 180, 265 S.E.2d 223 (1980). "In North Carolina, a defendant's right to pursue an appeal from a criminal conviction is a creation of state statute." *State v. McBride*, 120 N.C. App. 623, 624, 463 S.E.2d 403, 404 (1995); *see* N.C. Gen. Stat. § 15A-1444 (2009). "Notice of *intent* to appeal prior to plea bargain finalization is a rule designed to promote a 'fair posture for appeal from a guilty plea.' Notice of Appeal is a procedural appellate rule, required in order to give 'this Court jurisdiction to hear and decide a case.' " *McBride*, 120 N.C. App. at 625, 463 S.E.2d at 405 (internal citations omitted) (emphasis in original); *see also State v. Brown*, 142 N.C. App. 491, 543 S.E.2d 192 (2001). Although Defendant preserved his right to appeal by filing his written notice of intent to appeal from the denial of his motion to suppress, he failed to appeal from his final judgment, as required by N.C.G.S. § 15A-979(b). "The two forms of notice serve different functions, and performance of one does not substitute for completion of the other." *McBride*, 120 N.C. App. at 626, 463 S.E.2d at 405.

Our Court therefore does not have jurisdiction to hear Defendant's appeal, and his appeal must be dismissed.

Dismissed.

Judges GEER and ERVIN concur.

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CRIMINAL LAW—Continued

SEXUAL OFFENDERS—Continued

not a "parent" of the child at issue and has been convicted of a reportable conviction, the trial court erred by concluding that defendant was not subject to registry requirements. **State v. Stanley, 707.**

STATUTE OF FRAUDS

Specific terms of agreement—not found—The trial court correctly entered judgment for defendants in an action arising from a failed real estate closing where the trial court relied on the statute of frauds in arguments concerning an agreement to extend the closing date. The record and transcript do not reveal the terms of the agreement or that the parties ever came to a meeting of the minds. Without an agreement there could be no contract, and without a contract the statute of frauds issue was not reached. **Hanson v. Legasus of N.C., LLC, 296.**

STATUTES OF LIMITATION AND REPOSE

Recovery of costs of Medicaid assistance—doctrine of nullum tempus occurritt regi—The trial court did not err by awarding summary judgment in favor of plaintiff Department of Health and Human Services in the amount of $52,575.14 for Medicaid assistance in connection with decedent's nursing home and hospital expenses based upon application of the doctrine of *nullum tempus occurritt regi*, which exempts the State and its political subdivisions from the running of time limitations on claims unless the pertinent statute expressly includes the State. The General Assembly failed to explicitly subject the State to the bar created by N.C.G.S. § 28A-19-3(a). **N.C. Dep't of Health & Human Servs. v. Thompkins, 285.**

TERMINATION OF PARENTAL RIGHTS

Appointment of guardian ad litem—no error—In a termination of parental rights case, the trial court did not err by failing to enter an order appointing a guardian *ad litem* (GAL) for the minor children when respondent mother answered the petition to terminate her parental rights. Although the record did not disclose GAL appointment papers, the record disclosed that a GAL report was filed and the trial court specifically found that a GAL attended the termination of parental rights hearing on the minor children's behalf. **In re D.W.C., 266.**

Best interests of child—abuse of discretion standard—The trial court did not abuse its discretion by concluding that it was in the best interest of the minor child that respondent father's parental rights be terminated. Respondent failed to acknowledge why his child was placed in the custody of the Department of Social Services and also failed to exhibit changed behavior. Further, compliance with the case plan was not one of the factors the trial court was required to consider in making the best interest determination under N.C.G.S. § 7B-1110(a). **In re Y.Y.E.T., 120.**

Best interests of child—statutory factors—The trial court did not abuse its discretion by concluding that it would be in the child's best interest to terminate respondent father's parental rights based on the trial court's consideration of the factors required by N.C.G.S. § 7B-1110(a). Respondent father admitted that he had not written letters or sent gifts to the minor child throughout the term of his imprisonment, nor had he financially supported the child since the parents divorced in 2004. **In re A.J.M.P., 144.**

ZONING

Conditional use permit—new parking deck—amendment required—The trial court did not err by upholding the Wrightsville Beach Board of Adjustment's decision that petitioner could not build a proposed parking deck without seeking and obtaining an amendment to its conditional use permit. Neither the ordinance nor the decisions upon which petitioner relied supported the argument that accessory structures are permitted as a matter of right regardless of the nature or size of the structure. **Four Seasons Mgmt. Servs., Inc. v. Town of Wrightsville Beach, 65.**

New parking deck—non-conforming use—expansion—The trial court did not err by upholding the Wrightsville Beach Board of Adjustment's conclusion that the Town had properly denied petitioner's request to build a multi-story parking deck because the deck would constitute expansion of a non-conforming use. **Four Seasons Mgmt. Servs., Inc. v. Town of Wrightsville Beach, 65.**